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EU | BREXIT | LEGAL UPDATE

MAY 2017

BREXIT ARTICLE: THE GREAT REPEAL BILL WHITE PAPER

The UK Government has published a white paper on the legislative process for the UK's withdrawal from the European Union, which provides some guidance on what will be a lengthy process to extricate England and Wales, Scotland and Northern Ireland from the EU framework which has been an intrinsic part of those legal systems since the UK passed the European Communities Act (ECA) upon its accession to the EEC in 1972.

THE GREAT REPEAL BILL

The term "Great Repeal Bill" was first used in October last year when the Prime Minister, Theresa May, made her first major speech on her approach to Brexit at the Conservative Party conference in Birmingham. The term is designed to bring to mind the Great Reform Act, the name commonly given to the Representation of the People Act of 1832, a landmark piece of legislation that started the reform of parliamentary democracy in the UK. The Great Repeal Bill is seen as a crucial part of the recovery of the sovereignty of the UK from the EU - the much discussed "taking back control".

Now the White Paper has indicated in more detail how the Bill will operate.

It will do three main things:

- First, repeal the ECA and return power to UK institutions;
- Second, convert the "acquis" - the entire body of EU legislation then in force - into UK law on the stroke of midnight on the last day of our membership of the Union; and
- Third, create powers to make secondary legislation to enable 'corrections' to be made to laws that would otherwise no longer operate appropriately after the UK's departure from the Union.

REPEALING THE ECA

The ECA gives effect in UK law to the EU treaties; it incorporates EU law into UK law and provides for the supremacy of EU law. It also requires UK courts to follow the rulings of the Court of Justice of the European Union (CJEU). Upon its repeal, all the secondary legislation that has been passed in the UK under section 2(2) of the Act to give effect to EU directives would fall away. Accordingly the Bill will preserve that legislation.

The Bill will also address the status of the CJEU; the court will cease to have jurisdiction in the UK. It will not provide any role for the CJEU in the interpretation of the EU derived legislation which becomes part of UK domestic legislation and it will not require the domestic courts to consider the CJEU's case law. But it will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day the UK leaves. Whilst this approach has the virtue of clarity, it runs the risk of fossilising past decisions of the CJEU forever. The UK would be stuck with decisions of the CJEU that are subsequently overruled, a situation that could persist for centuries. The Government is aware of this danger, and proposes that the Bill will provide that historical CJEU case law will be given the same binding status in the UK courts as decisions of the UK Supreme Court. It is very rare for the Supreme Court to depart from one of its own decisions, or that of its predecessor, the House of Lords. Since 1966, the practice has been that the court will treat its former decisions as normally binding, and only depart from them "when it appears right to do so". The Supreme Court will, accordingly, be able to depart from CJEU case law only on rare occasions "when it appears right to do so".

The ECA provides that EU law has supremacy over national law, which must be disapplied by domestic courts to the extent it is inconsistent with EU law. The Bill will provide that where a conflict arises between EU-derived law and new primary legislation passed by the UK Parliament after Brexit, the newer legislation will take precedence over the EU-derived law.

It is worth noting that the White Paper specifically states that Brexit will not change the UK's participation in the European Convention on Human Rights, and there are no plans to withdraw from the ECHR. Thus the UK will continue to be under the jurisdiction of the European Court of Human Rights in Strasbourg.

CONVERTING THE ACQUIS

This approach was first described in the Birmingham speech and has the virtue of creating a measure of certainty, allowing the UK a de facto transition period domestically, even if none is agreed with the rest of the EU. It will then be up to the UK Parliament (or the devolved assemblies) to amend, repeal or improve any piece of EU law which has been imported into domestic law once the UK has left the Union. We can expect considerable debate as to which imported matters are properly for Westminster or the devolved legislatures to consider.

THE POWER TO CORRECT THE STATUE BOOK BY SECONDARY LEGISLATION

Whilst some on the extreme hard Brexit side struggle to understand why the UK can't simply repeal the ECA and walk away, the Government does acknowledge that the UK's statute book would contain significant gaps if no other steps were taken. Simply incorporating the acquis into UK law is not enough; for example, legislation may refer to the involvement of an EU institution or be predicated on UK membership of, or access to, an EU regime or system. It is not proposed that the Great Repeal Bill itself will affect all the changes needed to domestic law, for a number of reasons: the nature and timing of many of the necessary changes are not suitable subjects for primary legislation, and some of the changes will fall within the remit of the devolved institutions. Accordingly, the Great Repeal Bill will contain a power to correct the statute book where necessary, to rectify problems occurring as a consequence of leaving the EU, by secondary legislation. It is anticipated that this "correction" process will take place while the negotiations are being held.

It is acknowledged that where Government policies are delivered by secondary legislation, the case for the decision to use secondary rather than primary legislation must be justified. The White Paper indicates that relevant reasons include:

- matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for the progress of negotiations;
- adjustments to policy that are directly consequential on Brexit; and
- providing a level of detail not thought appropriate for primary legislation.

The level of subjectivity in all these criteria brings with it a level of risk. The Government acknowledges that the purposes for which delegated power can be used must be limited and has committed to ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU derived law arising out of Brexit. As ever the devil will be in the detail and we can expect accusations of the Government misusing the wide powers it has delegated to itself in order to "legislate by the back door", and deprive Westminster of its right to scrutinise Government and call it to account.

The draft Great Reform Bill is expected to be laid before Parliament in the Autumn of this year.



Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

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