

BREXIT UPDATE | 6 OCTOBER 2016

Triggering Article 50 and the Great Repeal Bill

By **Margaret Boswell**, partner, Banking & Finance, Gide London.

On 2nd October, the Prime Minister, Theresa May, made two important announcements, the first tangible developments since the flurry of activity in the immediate aftermath of her appointment. First, she has undertaken to notify the Council of the EU of the UK's intention to withdraw from the EU pursuant to the Article 50 of the Lisbon Treaty, before the end of March next year. Secondly, she has promised legislation, to be called the Great Repeal Bill, to repeal the European Communities Act 1972 ("ECA"), the legislation which enshrined the UK's membership of the EU in UK law.



Margaret Boswell
Partner
Gide London

Triggering Article 50 of the Lisbon Treaty

The announcement of a deadline for activating the process has reignited debate both on the political wisdom of submitting to the two year period for withdrawal imposed by Article 50 in terms of the UK's bargaining position, and on the legality of the Prime Minister triggering Article 50 without at the very least a vote of the House of Commons. There are three separate pieces of litigation before the UK Courts challenging the right of the Government to proceed without an Act of the UK Parliament. These have been consolidated and will be heard together on 13 and 17 October. The arguments against the Government rely on a fundamental principle of UK constitutional law, established by a court decision during the reign of King James VI and I, the Case of Proclamations (1610). This case established that the Monarch could make laws only through Parliament. The argument runs that since the ECA (and other EU related legislation) operates as a source of rights for individuals, Her Majesty's Government cannot use its prerogative to remove those rights.

Legal opinion is divided on the strength of the argument against the Government but on balance most commentators consider that the cases are unlikely to be successful; apart from anything else, triggering Article 50 of itself does not effect any change in the rights of individuals.

The Great Repeal Bill

The legislation to repeal the ECA has been given the name "Great Repeal Bill" in order to bring to mind the Great Reform Act, the name given to the Representation of the People Act of 1832, a hugely significant piece of legislation at the heart of UK parliamentary democracy, which paved the way for the eventual introduction of universal suffrage. It is no coincidence that the announcement of the legislation was made on the opening day of

the annual Conservative Party conference in Birmingham. Ardent Brexiteers were beginning to resent the lack of any tangible progress towards Brexit, and the announcement of the proposed legislation and the end-March deadline were greeted with great enthusiasm. Other commentators have described the proposed legislation as merely an unavoidable administrative step which has been dressed up for political effect.

The intention is that the Great Repeal Bill (or Act, as it will become once passed) will come into effect at midnight on the last day of the UK's membership of the EU. At that point the ECA will be repealed, but simultaneously all the EU sourced legislation and regulation which is then applicable to the UK will be "domesticated" - it will be deemed to be incorporated into domestic UK legislation. This has the advantage of certainty, and will also be useful for the purposes of establishing equivalence if the UK does not stay part of the single market. But it will come with built-in obsolescence: the Great Repeal Act will take a "snapshot" of the legislation at the moment the UK leaves the EU, and no amendment of existing legislation or introduction of new legislation will be incorporated into UK legislation after that date. Another disadvantage of this approach is that it does not deal with the rights that accrue to UK based parties by reason of their being in an EU member state. For example, the Brussels Recast Regulation will be incorporated into UK legislation, so the UK courts will continue to give effect to the judgements of EU courts but that will not operate to create reciprocal obligations on other member states to recognize UK judgements.

We also understand that the Great Repeal Act will empower the Government to repeal EU sourced legislation on a piecemeal basis after Brexit, without Parliament having to approve (or being able to reject) each individual measure. It is impossible to imagine how the gargantuan task of sifting through the entire EU legislative canon could be achieved without such a power, but it comes with the risk of another challenge to the Government's use of secondary legislation to remove the rights of citizens, after Brexit, even if the current Article 50 litigation is unsuccessful.

