

## EU law has been effective in the UK for over 40 years...what will happen to it when we leave?

The approach to dealing the extensive body of EU law currently in effect in the UK has been a topic of considerable debate amongst lawyers and politicians alike. On 30 March 2017, a day after triggering Article 50, the UK government outlined its proposal to introduce a "Great Repeal Bill" (**GRB**) in its White Paper on exiting the European Union.

The government proposes that the GRB will come into force upon withdrawal from the EU and will:

1. repeal the European Communities Act 1972 (the **ECA**);
2. convert EU law into UK law as at the date of exit from the EU; and
3. delegate powers to the government to make secondary legislation that will make the necessary "corrections" and other amendments to domestic primary and secondary legislation.

Whilst the principal purpose of repealing the ECA, which currently gives effect and supremacy to EU law in the UK, is relatively straightforward, the processes and mechanics involved in the domestication and "correction" of EU law present considerable challenges. Notably the White Paper does not include a draft bill, which makes it difficult to assess effectively how the complex proposals might work upon being reduced into law.

There are currently over 25,000 legislative acts of EU law currently in force in the UK, but it is impossible to quantify exactly how far EU law has permeated the UK legal system. What is clear, however, is that it is firmly embedded in our legal system.

The domestication of EU law is necessary to avoid the risk of creating a very large hole in UK law upon the repeal of the ECA. The pragmatic approach to preservation through one legislative act would appear rather straightforward as a matter of drafting, however, due to the complexity and sheer volume of EU law, the task of "correcting the statute book" to ensure that domesticised EU law is workable raises numerous questions that may only be clarified in time. For example, the White Paper suggests that where EU law no longer 'makes sense' government Ministers would be given the power to "correct the statute book" and ensure that it is workable. The scope of this proposed power is unclear but it is likely to rise questions of concern from a constitutional perspective if wide sweeping legislative role for the executive emerges, circumventing conventional parliamentary scrutiny.

The alternative course, and indeed the "ideal" approach would be for the UK parliament (and where applicable the devolved institutions) to scrutinise each piece of EU law and pass primary legislation to retain, amend or remove EU law as it sees fit. Although this might provide a preferable result in terms of creating workable legislation, given that parliament passes in the region of 30 public acts in a calendar year, it is simply not an option given the volume of legislation that would be required.

The White Paper also provides that the devolved governments will also be given the power to take steps to "correct the statute book" in areas which are within their devolved responsibilities. This poses the same questions raised in relation to analogous powers being exercisable by central government. Notably, there is no commitment to permitting the devolved institutions to exercise their discretion on addressing the impact of EU law on

devolved matters, rather the White Paper provides a clear indication that the government intends to create a “common UK framework” to accommodate the “effective function of a UK single market”.

The White Paper is silent on the approach to powers intended for the Northern Ireland Executive should a period of direct rule arise. This is not surprising given the risk that to do otherwise might prejudice the current talks process, however, it would seem likely that this responsibility would rest with the Secretary of State for Northern Ireland.

The White Paper says that the ex-EU law should be interpreted post-Brexit “in the same way as it is at the moment”. It is assumed that this approach will be secured through the inclusion of appropriate wording in the GRB, and would mean that pre- Brexit decisions of the Court of Justice of the European Union (**CJEU**) will continue to bind UK courts to the extent the supremacy of the EU law in question will be retained, at least for an interim period. However, the White Paper is not clear on the extent to which new decisions of the CJEU on preserved EU law will have a binding effect or a persuasive role in interpretation by the UK courts.

The White Paper sets out the principles underpinning the UK government’s approach to dealing with EU law post-Brexit, however, the absence of a draft bill in particular, means that many questions remain unanswered.

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