

# United Kingdom

## Preparing for Brexit: A Note on the European Union (Withdrawal) Bill

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This note addresses what the United Kingdom's laws will look like after withdrawal from the European Union. In particular, the author summarizes the main points of the EU (Withdrawal) Bill, which sets out how EU law will operate in the United Kingdom after Brexit takes place.

### 1. Introduction

Of all the questions arising from the United Kingdom's planned exit from the European Union, this is perhaps the most pertinent: what happens to the entire body of EU and case law currently applying in the United Kingdom?

The European Union (Withdrawal) Bill (informally referred to as the "Great Repeal Bill") was published on 13 July 2017, and received its First Reading in Parliament on that day. The Bill passed its Second Reading on 11 September 2017. Its progress through Parliament has thus far not been smooth; the Bill has been dogged by sustained debate all through, resulting in over 100 proposed amendments to date.<sup>[1]</sup>

The Bill makes provision for the United Kingdom's legislative framework in its post-Brexit world. The Bill takes, as its starting point, the fact that EU law has formed a significant part of the UK's legislative and judicial framework. It recognizes that a significant part of EU law will continue to apply in the United Kingdom, but, given the new legal order post-Brexit, such laws will need to be expressly saved and incorporated within the UK's domestic legal framework. Put quite simply, they will need to be "converted" into domestic law.

The intent of the Bill is to create a new statutory basis for these converted and retained provisions. The European Communities Act 1972 (ECA 1972) – the current basis upon which such laws have force in the United Kingdom – can no longer serve. This Act, predicated as it is upon the principle of supremacy of EU law, will have no further place upon the United Kingdom's exit from the European Union.

The Bill does not stop at repealing the ECA 1972. It proceeds to incorporate relevant parts of EU law into domestic law. Among other things, it covers "direct EU legislation", and UK domestic law inspired by EU law. The Bill also addresses the status of ECJ cases; those in place before the United Kingdom's withdrawal from the European Union, as well as those made after that time.

The Bill further provides for rule-making powers to implement the United Kingdom's withdrawal from the European Union, as well as powers to repair any deficiencies arising from the incorporation or saving of EU law into UK law.

This Bill cuts across every area of UK domestic law that has been touched by EU law. Although there is scant reference in the Bill to the field of taxation,<sup>[2]</sup> this is, of course, an important area, given the huge impact that EU law has had on UK tax legislation and case law.<sup>[3]</sup> This Note summarizes the main provisions of the Bill.

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1. Some of the main proposed amendments include the following:

- proposed amendments aimed at increasing Parliamentary scrutiny of secondary legislation made by Ministers in the exercise of the powers granted them under the Bill (for these powers, see, for example, [sec. 3.1.](#));
- proposed amendments aimed at curtailing the powers of Ministers to use delegated legislation to amend "retained EU law" (for more on "retained EU law", see [secs. 2.2.](#) and [2.3.](#));
- proposed amendments aimed at granting more powers to the devolved parliaments of the United Kingdom; these amendments were put forward in response to criticism that the Bill had granted wide-ranging legislation-making powers to government ministers at the expense of those parliaments (for a discussion of the original Bill provisions on this point, see [sec. 4.](#)); and
- proposed amendments relating to the United Kingdom's continued membership of the Customs Union.

Although it was not clear, at time of writing, which amendments will actually be adopted, one thing is clear: this Bill will be hotly debated, all the way to Royal Assent.

2. Tax references are sparse in the Bill. A notable one is the statement that "Minister of the Crown" also includes "Commissioners of Her Majesty's Revenue and Customs"; see [sec. 3.1.](#)

3. For an analysis of the tax issues arising upon withdrawal from the United Kingdom, see L. Ambagtsheer-Pakarinen et al., "[God Save the Brexit](#)": *Tax Implications of Leave Vote*, 56 *Eur. Taxn.* 11 (2016), *Journals IBFD*.

## 2. Brexit and Its Impact on Existing UK Law

### 2.1. Repeal of the European Communities Act 1972

In line with the United Kingdom's dualist approach, EU law can have effect in the United Kingdom only if implemented through domestic law. This also applies to EU law provisions that are treated under EU law as being directly applicable, and therefore do not need domestic implementing measures.<sup>[4]</sup>

EU law has effect in the United Kingdom by virtue of the ECA 1972. This Act also provides for the supremacy<sup>[5]</sup> of EU law over UK domestic law.

Clause 1 of the EU (Withdrawal) Bill provides that the ECA 1972 will be repealed effective "Exit Day". "Exit Day" is the day on which the United Kingdom formally leaves the European Union, and this date will be appointed by regulations<sup>[6]</sup> enacted by a Minister of the Crown.<sup>[7]</sup>

### 2.2. Status of EU law in the United Kingdom on and after Exit Day

This section addresses the status of EU law in the United Kingdom on and after Exit Day. It covers three main categories:

- EU-derived domestic legislation, i.e. domestic law that has been derived from EU law (see [section 2.2.1.](#));
- "Direct EU legislation", covering EU regulations, decisions and secondary legislation, as well as relevant parts of the European Economic Area Agreement (1992)<sup>[8]</sup> (see [section 2.2.2.](#)); and
- UK domestic legislation relating to rights, powers, liabilities, obligations, restrictions, remedies and procedures recognized under the ECA 1972 (see [section 2.2.3.](#)).

The EU (Withdrawal) Bill contains provisions for incorporating, converting and saving (as applicable) these provisions into UK domestic law. This is subject, however, to two main exceptions, namely:

- provisions relating to the supremacy of EU law (see [section 2.3.](#)); and
- provisions relating to the Charter of Fundamental Rights (see [section 2.4.](#)).

#### 2.2.1. Saving for EU-derived domestic legislation

The Bill addresses the status of UK domestic law that is "derived from" EU law. All such laws will continue to have the same effect on and after Exit Day as they had before that date.<sup>[9]</sup>

This category covers certain secondary legislation made under the ECA 1972,<sup>[10]</sup> as well as legislation made for the purpose of implementing EU obligations. Also included are domestic provisions that are linked to EU law, or which implement EU law.<sup>[11]</sup> The Bill further includes a residual category, covering domestic legislation that relates in some way to the European Union or the European Economic Area.

#### 2.2.2. Incorporation of direct EU legislation

The Bill addresses the status of "direct EU legislation", which broadly covers:

- (a) EU Regulations, Decisions<sup>[12]</sup> and secondary legislation having effect immediately before Exit Day;<sup>[13]</sup>
- (b) Any Annex to the [EEA Agreement](#) (1992) having effect on EU law immediately before Exit Day, insofar as it refers to, or contains adaptations of anything falling within (a) above. Excluded from this category are annexes the effect of which is already reproduced under UK domestic law; and
- (c) Protocol 1 of the [EEA Agreement](#) as it has effect on EU law immediately before Exit Day.

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4. See the Explanatory Notes to the European Union (Withdrawal) Bill, p. 16.

5. See UK: *R. v. Secretary of State for Transport, ex p. Factortame (No. 2)*, [1991] 1 All ER 70 and UK: ECJ, 25 July 1991, Case C-221/89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others*.

6. Clause 14(1) EU (Withdrawal) Bill.

7. Where the Bill makes reference to "Exit Day" without specifying a time during that day, the measure being proposed would take effect from the beginning of Exit Day. Where the Bill makes reference to a particular time on Exit Day, the measure would take effect at that time: Clause 14(2) EU (Withdrawal) Bill.

8. [Agreement on the European Economic Area \(EEA Agreement\)](#), 2 May 1992, EU Law IBFD.

9. Clause 2 EU (Withdrawal) Bill.

10. Which, under normal principles, should lapse upon the repeal of that Act. In addition to the express repeal of the European Communities Act (see [sec. 2.1.](#)), the Bill also excludes it from the list of legislation to be saved.

11. The point of this is to ensure that, where the United Kingdom had, in respect of a particular domestic law provision, gone beyond the minimum standard required by the European Union, this "gold plated" provision is not treated as excluded from the scope of "EU derived legislation": see Explanatory Notes to the EU (Withdrawal) Bill.

12. Except those addressed only to a Member State other than the United Kingdom: see clause 3(2)(ii) EU (Withdrawal) Bill.

13. Excluding exempt instruments and legislation the effect of which is reproduced in UK domestic legislation: see clause 3(2)(i), (iii) EU (Withdrawal) Bill.

The Bill brings such “direct EU legislation” into UK domestic law, but only in the form of the English language version of that legislation. Thus, there will be no such incorporation for any “direct EU legislation” for which there is no English language version, although such foreign language versions may be used by the courts as aids to interpretation.<sup>[14]</sup> The conversion applies only to such legislation as has effect immediately before Exit Day.

This provision is necessary because, upon repeal of the ECA 1972, direct EU legislation would no longer have force in the United Kingdom.<sup>[15]</sup> Such legislation derives its authority from the ECA 1972. As such, express provision is necessary in order to keep these laws in force.

### 2.2.3. Saving for rights, powers, liabilities, etc. under the ECA 1972

The Bill provides for the saving of any rights, powers, liabilities, obligations, restrictions, remedies and procedures that, immediately before Exit Day:

- (a) were recognized and available under domestic law by virtue of the ECA 1972; and
- (b) were enforced, allowed and followed accordingly.

This provision ensures the preservation, for example, of directly effective EU rights granted under the EU treaties.<sup>[16]</sup> Settled ECJ case law has established these to be those rights that are “sufficiently, clear, precise and unconditional”, the implementation of which must not depend on domestic measures.<sup>[17]</sup> Other relevant treaties under which such rights might arise would include the [EEA Agreement](#) and the Euratom treaty.

The saving provision permits such rights, obligations, etc. to continue to be enforced, allowed and followed on and after Exit Day.

Exclusions apply in two instances. The first is if these rights, obligations, etc. form part of domestic law by virtue of being “direct EU legislation”, in which case they will be expressly saved under provisions elsewhere in the Bill.<sup>[18]</sup> The second is if they arise under an EU directive, and are not of a kind recognized by the ECJ, or any UK court or tribunal, in a case decided before Exit Day. This second instance concerns a situation in which a directive was not implemented, or not properly implemented, under domestic law, and where neither the ECJ nor a UK court or tribunal held that the rights conferred by the directive must, in any event, be protected by the national courts. Where no such recognition (by the ECJ or UK courts or tribunals) has taken place before Exit Day, those particular directly effective provisions will not be brought into domestic law.<sup>[19]</sup>

## 2.3. The principle of supremacy of EU law

Upon the United Kingdom’s exit from the European Union, there will be no wholesale application of the principle of supremacy of EU law.

First, there will be no supremacy of EU law in relation to any domestic laws passed on or after Exit Day.<sup>[20]</sup> So, if on or after Exit Day, the United Kingdom passes a law that conflicts with EU law that has been saved and converted to domestic law (see [section 2.2.](#)), the subsequent law will prevail.

An issue also arises regarding UK domestic law that was in place before Exit Day, and that conflicts with retained EU law. The Bill provides that, in such instances, the principle of the supremacy of EU law will continue to apply (on or after Exit Day) with the effect that the retained EU law would prevail over the domestic law provision. Thus EU law will remain relevant for the interpretation, disapplication or quashing of such laws. This rule, however, does not apply to a domestic provision enacted in preparation for the United Kingdom’s withdrawal from the European Union.

Where there is an amendment, on and after Exit Day, of a domestic law provision that was in force before Exit Day, the principle of supremacy of EU law will apply to the extent that this is in line with the intent of the amendment.

## 2.4. The Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union does not form part of UK domestic law after Exit Day. There is, however, a saving for any fundamental rights or principles existing in UK law.<sup>[21]</sup>

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14. See the Explanatory Notes to EU (Withdrawal) Bill.

15. As explained in [sec. 2.1.](#), the dualist nature of the UK tax system required that these provisions be given effect through domestic law, which is the ECA 1972.

16. The Explanatory Notes to the Bill provide a non-exhaustive list of articles from the [Treaty on the Functioning of the European Union of 13 December 2007](#), OJ C115 (2008), EU Law IBFD, which the government considers contains directly effective rights that would be brought into domestic law by virtue of the EU (Withdrawal) Bill.

17. See the decision of the ECJ in NL: ECJ, 5 Feb. 1963, [Case 26/62, Van Gend & Loos v. Nederlandse Administratie der Belastingen](#), ECJ Case Law IBFD and BE: ECJ, 8 Apr. 1976, [Case 43/75, Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena](#), ECJ Case Law IBFD.

18. See [sec. 2.2.2.](#)

19. See the Explanatory Notes to EU (Withdrawal) Bill.

20. This point is reinforced by the EU (Withdrawal) Bill; see clause 5(1) thereof.

21. See further clause 6(4)-(6) EU (Withdrawal) Bill.

## 2.5. Status of ECJ decisions

### 2.5.1. ECJ principles and decisions made on and after Exit Day

With effect from Exit Day, no UK court or tribunal will be bound by any principles laid down, or decisions made, by the ECJ on or after Exit Day.<sup>[22]</sup>

Also with effect from Exit Day, no UK court or tribunal may refer any matter to the ECJ.<sup>[23]</sup>

UK courts and tribunals will also not be required to have regard to anything done (on or after Exit Day) by the ECJ, by any other EU entity, or by the European Union itself. If, however, a court or tribunal finds it appropriate to take such matters into account, it may do so.<sup>[24]</sup>

### 2.5.2. ECJ principles and decisions having effect immediately before Exit Day

The EU (Withdrawal) Bill provides for the retention of ECJ case law, and domestic case law based on EU law principles, insofar as these have effect immediately before Exit Day. The Bill refers to these as “retained case law”, encompassing both “retained domestic case law” and “retained EU case law”.<sup>[25]</sup>

Where questions arise concerning the validity, meaning or effect of any retained EU law,<sup>[26]</sup> such questions are to be decided in accordance with any relevant retained case law, and any retained general EU law principles.<sup>[27]</sup> In such instances, regard must be had to the limits, immediately before Exit Day, of EU competences. The above applies insofar as the law under question was not modified on or after Exit Day;<sup>[28]</sup> even so, modification of such a law should not prevent the question<sup>[29]</sup> from being decided, if this is consistent with the intention of the modifications.<sup>[30]</sup>

On the issue of binding precedent, the Bill provides that the Supreme Court will not be bound by any retained EU law.<sup>[31]</sup> The Scottish High Court of Justiciary<sup>[32]</sup> is also not so bound, except in narrow, prescribed circumstances.<sup>[33]</sup> If either court considers departing from any retained EU case law, it should apply the same test that it would normally apply in deciding whether or not to depart from its own case law.<sup>[34]</sup>

The Bill also provides that no UK court or tribunal will be bound by any retained domestic case law that would not otherwise have bound that court or tribunal.

## 3. Withdrawal from the European Union

### 3.1. Implementing the Withdrawal Agreement

The Withdrawal Agreement is the agreement to be made between the United Kingdom and the European Union,<sup>[35]</sup> containing the terms of the withdrawal by the United Kingdom from the European Union.

The EU (Withdrawal) Bill empowers Ministers of the Crown<sup>[36]</sup> to make secondary legislation to implement the Withdrawal Agreement, if the Minister deems that such legislation should be in force on or before Exit Day.<sup>[37]</sup> This rule-making power expires on Exit Day.<sup>[38]</sup> Significantly, the Bill provides that the Minister may make regulations that could be made under an Act of Parliament. The Bill provides for safeguards in the exercise of this rule-making power.<sup>[39]</sup> Even so, this provision has caused much debate. The Bill has been heavily attacked in Parliament for granting (as some critics see it) untrammelled powers to Ministers to make wide-ranging laws, using secondary legislation, and without the safeguard of Parliamentary scrutiny.

The term “Minister of the Crown”, wherever used in the Bill,<sup>[40]</sup> includes Commissioners of Her Majesty’s Revenue and Customs (HMRC).

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22. Clause 6(1)(a) EU (Withdrawal) Bill.

23. Clause 6(1)(b) EU (Withdrawal) Bill.

24. Clause 6(2) EU (Withdrawal) Bill.

25. See clause 6(7) EU (Withdrawal) Bill.

26. Clause 6(3) EU (Withdrawal) Bill.

27. I.e. the general principles of EU law (as modified by the EU Withdrawal Bill, or by any other domestic law, from time to time), as they have effect under EU law immediately before Exit Day, and where they relate to relevant provisions of the EU (Withdrawal) Bill, and are not excluded by the Bill from application: see clause 6(7) EU (Withdrawal) Bill.

28. Clause 6(3) EU (Withdrawal) Bill.

29. As to the validity, meaning or effect of any retained EU law.

30. Clause 6(6) EU (Withdrawal) Bill.

31. Clause 6(4) EU (Withdrawal) Bill.

32. This is Scotland’s highest criminal court. Appeals may be made from the High Court of Justiciary to the UK Supreme Court, but only in very narrow circumstances.

33. Clause 6(4) EU (Withdrawal) Bill.

34. Clause 6(5) EU (Withdrawal) Bill.

35. Under art. 50(2) of the [Treaty on European Union of 13 December 2007](#), OJ C 306 (2007), EU Law IBFD.

36. The Bill grants corresponding powers to the relevant office-holders in the devolved regions of the United Kingdom.

37. The Minister is also empowered to incur relevant expenditure in connection therewith: clause 12 EU (Withdrawal) Bill.

38. Clause 9(4) EU (Withdrawal) Bill.

39. The Minister is barred from making regulations that (i) impose or increase taxation; (ii) make retrospective provision; (iii) create a relevant criminal offence; (iv) or amend, repeal, or revoke the Human Rights Act 1998 and any subordinate legislation under it.

40. Clause 14(1) EU (Withdrawal) Bill.

## 3.2. Preventing and repairing unintended consequences

The EU (Withdrawal) Bill empowers Ministers of the Crown to enact secondary legislation<sup>[41]</sup> to prevent, remedy or mitigate prescribed failures or deficiencies arising from the withdrawal of the United Kingdom from the European Union. This provision concerns retained EU law, and would apply where there has been a failure in its operation, or a deficiency<sup>[42]</sup> within the law. The power to make regulations expires 2 years after Exit Day.<sup>[43]</sup>

The Minister of the Crown<sup>[44]</sup> may also make such regulations as he considers appropriate to prevent or remedy any breach of the United Kingdom's international obligations, where such breach arises from the withdrawal of the United Kingdom from the European Union.<sup>[45]</sup>

Similar to the rule-making power (granted to Ministers) to implement the Withdrawal Agreement,<sup>[46]</sup> the regulations mentioned above may contain provisions that could be made under an Act of Parliament. This far-reaching power is, however, also balanced by safeguards.<sup>[47]</sup>

The Minister may also incur relevant expenditure in connection with his rule-making power.<sup>[48]</sup>

## 4. Matters Relating to Devolution

The EU (Withdrawal) Bill also addresses the competence of the devolved authorities regarding retained EU law.<sup>[49]</sup> The devolved authorities are the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly. Under UK law, these bodies have competence to make laws that apply within their regions, subject to certain restrictions that reserve the power (to make certain laws) to the UK Parliament.

The Bill prevents these devolved authorities from modifying any retained EU law in a manner that would not have been compatible with EU law as it stood immediately before Exit Day. They may also not provide for such powers to be modified by means of secondary legislation. In addition to legislative competence, corresponding rules also apply to executive competence.<sup>[50]</sup>

These provisions have met with much criticism from the devolved Parliaments. In particular, they take against the restriction of their own rule-making powers. Both the Scottish and Welsh Governments have submitted amendments to the Bill with the aim of shoring up their own rule-making powers in the withdrawal process.

## 5. Conclusion

The EU (Withdrawal) Bill addresses much of the uncertainty regarding the status of EU law within the United Kingdom when the United Kingdom finally leaves the European Union. These are, however, unprecedented times, and it remains to be seen whether the resulting Act will answer all questions. While the Bill grants rule-making powers to government Ministers to smooth the path of withdrawal, the prevailing uncertainty must surely mean that not every eventuality has been anticipated. Add to that the widespread concern about sweeping Ministerial powers to make certain rules. The United Kingdom is set for interesting times ahead.

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41. The Bill grants corresponding powers to the relevant office-holders in the devolved regions of the United Kingdom.
42. For a non-exhaustive list of possible examples of such deficiencies, see clause 7(2), (3) EU (Withdrawal) Bill. These include provisions that have no practical application for the United Kingdom upon its exit from the European Union; and arrangements and rights that no longer have relevance.
43. See clause 8(7) EU (Withdrawal) Bill.
44. The Bill grants corresponding powers to the relevant office-holders in the devolved regions of the United Kingdom.
45. See clause 8 EU (Withdrawal) Bill.
46. See [sec. 3.1](#).
47. See clauses 7(6) and 8(3) EU (Withdrawal) Bill. For example, with regard to regulations to address failures and deficiencies, these limitations bar the Minister from making provisions that would impose or increase taxation, or create a relevant criminal offence. The limitations also ensure that existing human rights provisions are not amended or repealed. In addition, they bar the Minister from making regulations to implement the Withdrawal Agreement. Similar provisions apply in respect of regulations to prevent or remedy breaches of the United Kingdom's international obligations, although, significantly, in that instance, the Minister is not barred from making regulations to impose or increase taxation.
48. Clause 12 EU (Withdrawal) Bill.
49. Generally, any EU law provision that, on or after Exit Day, continues to form part of UK domestic law: see Clause 6(7) EU (Withdrawal) Bill.
50. See Schedule 3 EU (Withdrawal) Bill.