

### A busy week on the road to Brexit

7 April 2017

#### The journey begins

Last week was a busy week on the road to Brexit. The EU 27 and the UK both gave broad indications of how they plan to approach the Brexit negotiations, via the publication of three documents: the UK's Article 50 notice, a draft of the European Parliament's motion for a resolution on the negotiations and a draft of the European Council's negotiation guidelines. Whilst it is still far from clear what the end destination will be, the direction of travel is becoming marginally clearer.

We also heard more about how the UK Government plans to plug the huge gap that would appear in the UK statute book if EU laws were allowed to fall away on Brexit, via the publication of the Government's White Paper on its proposed Great Repeal Bill, with its striking focus on the importance of maintaining legal certainty.

In this paper we consider what these documents tell us about how the negotiations will progress and about how the UK Government will manage the "momentous" task ahead, identifying the potholes we see along the way, and highlighting the key implications for commercial parties.

#### The approach to the negotiations

The UK's Article 50 notification letter did not tell us much that we didn't already know about the UK Government's current negotiating priorities. The focus of the relatively short letter was on the UK's desire to deliver Brexit in an orderly way and to put in place a

"bold and ambitious" free trade agreement, which should be of greater scope and ambition than any such agreement before it, "so that it covers sectors crucial to our linked economies such as financial services and network industries." The letter confirmed that the UK would not be seeking membership of the single market or the customs union.

Unsurprisingly, the letter also expressed the view that UK and EU businesses and citizens would benefit from agreeing implementation periods to avoid a "cliff edge" on the day the UK leaves the EU and that it would minimise unnecessary disruption if this principle could be agreed early in the process. In terms of sequencing, the letter stated that it would be necessary to agree the terms of the future partnership between the UK and the EU alongside those of the UK's withdrawal.

The publications on the EU 27 side were perhaps more informative, between them setting out a series of general principles for the negotiations, including that:

- the negotiations must be conducted "in good faith and full transparency";
- no leaving Member State may enjoy similar benefits to those enjoyed by remaining Member States;
- negotiation by the UK of possible trade agreements with third countries before its withdrawal would be contrary to EU law and the principle of sincere cooperation laid down in the Treaties. Such conduct would result in the exclusion of the UK from EU trade negotiation procedures. The same principle applies to attempts by the UK to shape EU legislation, actions or strategies in other policy areas in a way that favours its own interests;
- transitional arrangements may be put in place but the CJEU must be responsible for settling any legal

challenges and the arrangements must be limited in time (with the draft motion suggesting that they should not exceed three years in duration) and in scope;

- arrangements dealing with the position of cases before the CJEU involving the UK or UK parties should be put in place (potentially including arrangement covering proceedings dealing with facts that occurred before the withdrawal date); and
- the withdrawal agreement should designate the CJEU as the competent authority for the interpretation and enforcement of the withdrawal agreement and arrangements should be put in place allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement.

In terms of the sequencing of the negotiations, the Council's draft guidelines state that:

- the first phase of the negotiations will settle the disentanglement of the UK from the EU and provide as much clarity as possible as to the immediate effects;
- an agreement on a future relationship can only be concluded once the UK has become a third country;
- Article 50 requires that any withdrawal agreement between the UK and the EU 27 takes into account the framework of the future relationship between them, such that an overall understanding on that framework could be identified during a second phase of negotiations;
- the EU and the Member States are ready to engage in "preliminary and preparatory discussions" to this end as soon as sufficient progress has been made in the first phase; and
- the Council "stands ready" to initiate work towards a "balanced, ambitious and wide-ranging" free trade agreement between the UK and the EU, to be finalised and concluded post-Brexit. However, that agreement could not amount to participation in the single market or parts thereof and must ensure a level playing field on competition and state aid, among other things.

The draft motion also proposes that negotiations should begin as soon as possible to ensure that any withdrawal agreement and any possible transitional arrangements are in force well before the May 2019 European

elections. It also appears to acknowledge that the UK's Article 50 notification may be revoked (albeit with the unanimous approval of the EU 27).

## Steering the passage of the Great Repeal Bill

### Overarching aims

The Government's White Paper on how it will legislate for Brexit<sup>1</sup> confirms that a Great Repeal Bill will be introduced at the start of the next Parliamentary session (likely to be in May 2017). As indicated above, the central theme of the Paper was the need to maintain legal certainty and continuity.

In terms of key aims, the White Paper says that the Bill will seek to:

- (a) repeal the European Communities Act 1972 (the Act that gives direct effect to all EU law in the UK);
- (b) convert EU law as it stands at the moment of exit into UK law, to ensure there are no significant gaps in UK law post-Brexit, to provide certainty to businesses and fairness to individuals and to allow Parliament to amend, repeal or improve EU laws at an appropriate time after Brexit;
- (c) create powers to make changes to the statute book by secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately post-Brexit and to enable domestic law to reflect the content of any withdrawal agreement; and
- (d) end the jurisdiction of the European Court of Justice.

The White Paper also:

- recognises that there are rights in the EU Treaties that can be relied upon directly by individuals and that these rights will be incorporated directly into UK law via the Great Repeal Act;
- proposes that the Charter of Fundamental Rights will fall away on Brexit, although the White Paper suggests that this will not affect the substantive

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<sup>1</sup> "Legislating for the United Kingdom's withdrawal from the European Union"

rights that individuals already benefit from in the UK; and

- accepts that some contentious areas that will inevitably change following Brexit, notably immigration and customs, will require separate substantive primary legislation.

Most of this is not new and none of it is surprising. The White Paper does, however, provide a bit more detail on how the transposition will operate in practice and on the procedural measures to be put in place with a view to maintaining legal certainty.

### A cut and paste job?

The White Paper makes it clear that EU Regulations will not be copied out into UK law Regulation by Regulation. Instead there will be a bulk transposition of the EU *acquis* onto the statute book. The Bill will simply provide that Regulations as they applied in the UK at the moment before Brexit will be converted into domestic law and will continue to apply until the UK legislature decides otherwise.

The White Paper also acknowledges that a simple cut and paste of EU law into English law is not possible, as in some cases the law will no longer work or will be redundant and in others there may no longer be reciprocity, which may mean it is no longer in the national interest, or workable, for that law to continue to apply. The White Paper cites as examples: (i) references to EU law; (ii) references to the involvement of EU institutions; and (iii) information sharing with EU institutions.

The Paper confirms that Government departments have been analysing UK and EU law in their areas of expertise to assess the scale of the changes needed, and that “It is clear that a very significant proportion of EU-derived law for which Government departments are responsible contains some provisions that will not function appropriately if EU law is simply preserved”.

### Procedural measures aimed at legal certainty for businesses

As indicated above, there are a series of helpful procedural clarifications proposed in the White Paper. Whilst at first blush these are of most interest to lawyers,

the legal certainty that they are likely to provide will be of real benefit to commercial parties. For example, the White Paper makes it clear that:

- the UK’s courts will continue to be able to look to EU Treaty provisions in interpreting EU laws that are preserved;
- whilst the CJEU will have no role in the interpretation of UK law post-Brexit and the UK courts will no longer be required to consider the CJEU’s jurisprudence:
  - “for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximise certainty, therefore, the Bill 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 we leave the EU.”; and
  - CJEU authority as it exists on the day the UK leaves the EU will have the same precedent value as decisions of the UK Supreme Court, and the Supreme Court will be able to depart from that authority in the same way as it is able to depart from its own previous decisions. The White Paper states that it is anticipated that the Supreme Court will take a similarly sparing approach in this regard to that taken in relation to its own decisions but that the Government is examining whether it would be desirable to take steps to give further clarity about when a departure from previous CJEU authority might occur; and
- EU law will no longer have primacy over UK law post-Brexit, so where a conflict arises between EU-derived law and new primary legislation passed by Parliament after Brexit, the new (UK) legislation will take precedence over the preserved EU law. However, if a conflict arises between two pre-existing laws, one of which is EU-derived and the other not, the EU-derived law will continue to take precedence.

This suggests (although the White Paper does not expressly address the point) that existing UK case law interpreting domestic legislation consistently with EU law (in compliance with the principle of the primacy of EU law) would also remain binding.

These provisions are well-considered and helpful and are likely to reduce the prospect of disputes as to how UK laws derived from EU law should be interpreted post-Brexit.

## Dealing with the scale of the task – the use of delegated legislation

The White Paper notes that there are currently an estimated 12,000 directly effective EU Regulations in force in the UK, as well as around 7,900 UK statutory instruments which incorporate other EU laws into UK law and hundreds of statutes which are in some form or other influenced by EU law.

The White Paper suggests that to achieve the transposition of EU law into UK law within the two year timeframe, the Bill will contain wide ranging delegated powers to allow the Government to “rectify” legislative anomalies.

It appears that these will range from powers to make essentially textual changes (eg the references to “EU law” discussed above) to powers to make more substantive changes, for example where functions are currently carried out by EU institutions, or where laws are premised on reciprocity with other Member States. There may also be changes required to implement any withdrawal agreement. The Government anticipates up to 1000 pieces of delegated legislation will be required.

The White Paper proposes that the Great Repeal Act will include powers for delegated legislation to be passed using both negative and affirmative resolution procedures (see the discussion box), with the former expected to be used for more minor procedural changes and the latter for more substantive or contentious amendments (as it will involve a greater degree of Parliamentary oversight).

Delegated legislation can be passed much more quickly than primary legislation, but it is at the expense of a degree of scrutiny. That means there is a greater risk of mistakes and unintended consequences, and less scope to obtain input from stakeholders. Also, unlike primary legislation, secondary legislation can be struck down by the courts if it is found to fall outside the powers in the parent Act.

Delegated powers are the legal mechanisms included in an Act of Parliament that enable Government ministers to make legislation (known as secondary or delegated legislation) without a new Act of Parliament (primary legislation).

This does not mean that Parliament is not involved in the legislative process, however. Delegated legislation passed by the “**affirmative resolution**” procedure only becomes law once Parliament has voted to approve it. This procedure is generally used for legislation that is likely to contain more substantive or contentious provisions.

Delegated legislation passed under the “**negative resolution**” procedure becomes law when it is laid before Parliament and remains law unless a motion is passed to strike it down. This type of delegated legislation is subject to the least scrutiny. Even here, however, a degree of scrutiny comes from the involvement of a number of Parliamentary committees which are tasked with reviewing all delegated legislation and which draw attention to such legislation in appropriate circumstances eg where it may be politically or legally important or inappropriate.

**Henry VIII clauses** may also be used. These are statutory provisions that allow ministers to use secondary legislation to amend primary legislation. They are controversial as they are seen by their critics as allowing Government to circumvent the legislative process.

The White Paper recognises these difficulties and expressly states that there is a balance to be struck between the need for speed (to ensure there is not a hole in the UK statute book on the day of Brexit) and the importance of proper scrutiny in the legislative process. The White Paper also expressly recognises that limits will have to be placed on the scope and purpose of these powers and the timeframe within which they can be used.

The White Paper does not spell out at this stage what constraints will be placed on these powers. It will be important to get those constraints right, but the scale of the task and the importance of achieving legal certainty for commercial parties means the Government has no

realistic alternative approach. Continuity is key. A scheme that involves the use of delegated legislation will in our view be the only practical way to smooth the legal transition and ensure a coherent legal regime in the time available.

### What is missing?

There are significant gaps in the White Paper in terms of the detail of how the Government plans to deal with some of the issues to which the Paper refers. For example, there is no clarity as to which (if any) UK institutions will replace the role currently played by certain EU institutions post-Brexit.

Nor is there any discussion of how policy decisions will be made in relation to changes that are likely to be necessary across a raft of different instruments so as to ensure consistency of approach.

Finally, the White Paper does not put forward any proposals which seek to deal with the possible impact of Brexit on private law contractual rights and obligations. For example, there is no suggestion that there will be any attempt to impose a statutory presumption that English law contracts which refer to the territory of the EU will be construed post-Brexit as including or excluding the UK. However, there is room to debate whether such a presumption would in any event be helpful in practice.

### A note on timing

As indicated above, it appears that the Bill will be put forward in May. It will then presumably progress through the legislative process in the normal way.

It is unclear from the White Paper precisely when the Bill is expected to be passed into law, but it is clear that the European Communities Act 1972 will be repealed on the day the UK leaves the EU.

## What does this mean for commercial parties?

Whilst we still don't have the detail, we now have some indication of where the two sides are heading. There are clear areas of common ground at a principled level, although it is the detail (and of course the politics) that will ultimately dictate what deal, if any, is reached.

In relation to the White Paper, businesses should take heart that the Government has committed to an approach that seeks to maintain legal certainty as quickly and pragmatically as possible.

However, they should also be alert to potential pitfalls of hastily drafted legislative changes. Given the enormity of the task and the time pressure that the Government will be under, it seems likely that mistakes will be made.

Regulated entities in particular will need to identify and scrutinise proposed legislative changes to assess the practical implications for their businesses and, where necessary, to seek amendments or swift rectification of any errors. We anticipate many parties will work with their industry bodies in this regard.

Given the EU 27's assertion that nothing is agreed until everything is agreed, it is likely that many legislative changes will have to be pushed through in the final stages of the negotiations. This period (perhaps from November 2018 to March 2019) is therefore likely to be particularly demanding for regulated commercial parties (and UK Parliamentarians).

The White Paper confirms that the Government welcomes feedback, requesting that comments are sent to [repeal-bill@dexeu.gov.uk](mailto:repeal-bill@dexeu.gov.uk).

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If you would like to discuss the issues raised in this paper in more detail, please contact Karen Birch, Sarah Garvey, Sophie Nettleton or your usual Allen & Overy contact.

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