European Union (Withdrawal) Bill 2017

BRIEFING PAPER

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Summary of Key Provisions

The European Union (Withdrawal) Bill will be a statute of major constitutional significance. It is the centrepiece of the legislative programme required to prepare the UK legal system for exiting the EU. The Bill would have the following key substantive effects:

* Repealing the European Communities Act 1972 (and associated legislation) and thereby creating a need for new legislation to describe the scope, status and effects of (ex-)EU law within the UK legal system (clause 1).
* Preserving the legal validity of domestic law which is derived from EU law and is already operable within the UK legal system (clause 2).
* Establishing the domestic legal force of EU legislation and other norms which have existing effects in the UK legal system (clauses 3 and 4).
* Creating a new domestic category of those legal rules which have been preserved or incorporated by the Bill – ‘retained EU law’ – and establishing the continuing, but displaceable, supremacy of those rules over all other pre-exit domestic law (clause 5).
* Establishing the framework in which the meaning and effects of retained EU law is to be interpreted by the courts, including the legal status of both pre- and post-exit judgments of the Court of Justice of the European Union (clause 6).
* Creating secondary legislative powers for the UK government to enable the alteration of domestic law in order: to address failures of or deficiencies in the operation of retained EU law (clause 7); to prevent any breach of the UK’s international obligations (clause 8); and to implement any withdrawal agreement reached under Article 50 TEU (clause 9).
* Creating parallel secondary legislative powers for the involvement of the devolved institutions in Scotland, Wales and Northern Ireland in amending domestic law within their devolved legal competences (clause 10).
* Altering restrictions on legislative competence in the scheme of devolution legislation applicable to Scotland, Wales and Northern Ireland – replacing existing restrictions on the devolved legislatures and executives derived from EU law with those derived from the new domestic category of ‘retained EU law’ (clause 11).

The Act further provides for: the UK government to incur necessary financial costs associated with EU exit (clause 12); the publication by the Queen’s printer of copies of retained EU legislation (clause 13); the definition of key legal terms (clauses 14 and 15); the scrutiny arrangements to which delegated legislation produced under the Bill will be subject (clause 16); powers for the UK government to make necessary legislation in consequence of, or in association with the coming into force of, the Bill (clause 17).

Overall Observations

The purpose of the Bill is to prepare the UK legal system for some of the immediate internal constitutional effects of UK withdrawal from the EU. In particular, the Bill seeks to guarantee a basic degree of legal certainty and continuity: first, by identifying those norms derived from EU law which should continue to have certain legal effects in the UK legal system after exit from the EU; and secondly, by creating powers for the modification of retained EU law, to ensure those rules are drafted and will operate in an effective and coherent way within a state which will no longer be a member of the EU itself.

If the UK is to leave the EU without inflicting serious disruption and uncertainty upon its own citizens and businesses, those should be understood as essential tasks, made all the more pressing by the limited time available in which to complete the necessary work. Moreover, judged against the Government’s stated aims of providing legal certainty and continuity, the Bill has surely been designed to fulfil its essential purpose – albeit through a highly complex process and subject to a range of outstanding technical queries, e.g. concerning the judicial interpretation and precise legal status of ‘retained EU law’ within the UK legal system.

Nevertheless, judged against other fundamental constitutional criteria, the Bill can be seen as the source of significant problems. The scheme set out in the Bill is based on an extensive centralisation of power to the UK government, as against the devolved institutions; as well as a massive delegation of power to the UK government, flowing from Parliament. As such, the Bill’s approach generates considerable costs and risks: for the relationships between the UK government and those in Scotland, Wales and Northern Ireland; for the quality of scrutiny and oversight that can be applied to delegated law-making by Parliament; and for the transparency and inclusiveness of the re-shaping of the UK legal system necessitated by EU exit. In that sense, the Bill has clear potential to destabilise key constitutional relationships, or infringe key constitutional values, not least those relating to democracy and legitimacy.

Some of those risks could well be mitigated as the Bill progresses through Parliament. But it is difficult to envisage any fundamentally different approach to that proposed by the Government, in order to deliver the necessary aims of legal certainty and continuity within the limited timescale available. As such, the Bill demonstrates the inevitable and high price to be paid for the Government’s strategic choices: protecting our economy and society from significant disruption and uncertainty will require us to sacrifice other constitutional values of at least equal (if not greater) importance.

Selected Key Issues

Against that broader backdrop, one can identify a range of specific difficulties or challenges presented by the Bill. The following are especially noteworthy.

1. Until recently, the Government had repeatedly promised that any ‘significant policy changes’ would be made through substantive primary legislation rather than under delegated powers created through this Bill. However, it is now clear that the Government has adopted only a minimalist approach to what counts as ‘significant policy change’ for those purposes. Primary legislation will be proposed only for certain high level issues which effectively require the re-regulation of entire policy sectors, e.g. agriculture, customs, trade. Yet the delegated power to address failures and deficiencies in the functioning of EU law, contained in clause 7 of the Bill, will still clearly involve making a wide range of policy choices of potentially considerable significance in their own right.
2. In that regard, the definition and scope of the delegated legislative powers contained in clauses 7-10 is very extensive indeed. They can be used for purposes which are not exhaustively specified, are subject to only standard limitations, can be sub-delegated by the government to other public authorities, and in some cases (clause 9) can explicitly be used even to amend this enabling Bill itself. Thus, across an indeterminate but potentially very large number of situations, the delegated powers proposed in the Bill could be used to change or terminate individual rights and obligations; amend the criteria for / considerations relevant to / purposes of the exercise of various statutory powers; substitute existing decision-makers and / or change their decision-making processes; and indeed establish entirely new regulatory standards (e.g. to prevent a legislative vacuum in situations where existing EU provisions would be effectively unworkable).
3. Given such exceptional delegated powers, one would expect a correspondingly rigorous and effective system of Parliamentary scrutiny and control. The Bill indeed proposes heightened parliamentary oversight of certain delegated legislation through an affirmative scrutiny process. However, the Bill’s definition of the measures deserving such heightened scrutiny is highly selective: there is a particular focus on secondary legislation which creates new public bodies or functions; but little provision in respect of other delegated legislation that could lead to significant regulatory changes. That is besides the sheer scale and complexity of the task facing Parliament, to sift and scrutinise such large volumes of draft measures, the importance or implications of which may not be immediately obvious, within such restricted timescales.
4. The use of ‘retained EU law’ as a limit on legislative competence in relation to the devolved institutions has a strong centralising effect, concentrating decision-making power in areas of competence returning from the EU in the hands of the UK government. The criteria according to which powers / competence will then be repatriated to the devolved institutions are not specified in the Bill. However, those that have thus far been suggested by the Government would have a further centralising tendency, in so far as they focus on inherently vague and contestable concepts such as securing the UK single market or enhancing the possibilities for UK-wide trade deals – and do so without any countervailing principles such as a domestic equivalent to the principle of subsidiarity.
5. The amendments to the devolution statutes included on the face of the Bill in clause 11 make it clear that, as a matter of constitutional convention, legislative consent will be required from the devolved assemblies for the Bill to proceed. As the Supreme Court confirmed in *Miller* (2017), this is not a legal obligation that can be enforced in the courts, yet it does impose a strong constitutional imperative on the UK government to engage constructively with the devolved institutions. To avoid a constitutional crisis, the government should state in advance how it intends to negotiate over the consent requirement, and what the consequences of a failure to give consent would be (e.g. whether the government would legislate without consent, or instead limit the extent and applicability of the Bill).
6. Given the open texture of the delegated legislative powers, and their capacity to alter a wide range of individual rights and obligations, the potential for judicial review of measures provided for under the Bill appears significant. Even if those powers are used sensitively and with restraint, one should still anticipate the likelihood of extensive litigation. That could have the paradoxical effect of undermining, at least in part, the goal of legal certainty which it is the very purpose of the Bill to promote.

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