



LEGISLATING FOR THE UK'S WITHDRAWAL FROM THE EU – THE GOVERNMENT'S WHITE PAPER ON THE GREAT REPEAL BILL

On 30 March 2017 the Government published its **White Paper** on the Great Repeal Bill: Legislating for the United Kingdom's withdrawal from the European Union.

The principal purpose of the Great Repeal Bill will be to repeal the European Communities Act 1972 (the "ECA"), which gives effect and priority to EU law in the UK – thereby formally reasserting the sovereignty and independence of domestic law from the EU.

In order to avoid the risk of a large vacuum in UK law when EU law ceases to apply, the Bill will also preserve and convert into domestic law the whole body of EU law applying to the UK at the time it leaves the EU (to the extent it has not already been implemented domestically). The Bill will also create powers for the Government to make secondary legislation in order to adjust EU-derived law that would otherwise no longer operate appropriately once the UK has left the EU (for example because it refers to the involvement of an EU institution or is predicated on access to an EU regime or system). These powers will not be available for policy changes not designed to deal with such deficiencies.

The European Communities Act – key features

The ECA was enacted in 1972 to provide for the UK's accession to what is now the EU. It provides the legal basis on which EU law has effect as national law in the UK. Section 2(1) provides for any rights and obligations created by the EU Treaties, and all directly applicable EU law (typically EU Regulations), to be given legal effect in the UK without the need for any further legislative measures by the UK Parliament.

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TABLE OF CONTENTS

The European Communities Act – key features	1
Implications of the repeal of the European Communities Act	2
Effect of repeal without replacement	2
What the Great Repeal Bill will do	2
Transposition of EU law into domestic law	2
Supremacy of EU law	3
Challenges for the transposition process	3
Delegated powers	4
The Statutory Instrument procedure	4
Interaction with the devolution settlements	5
Timing	5
Rest of the Brexit Legislative Programme	5
Contacts	5

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Section 2(2) introduces a broad statutory power that enables ministers to enact statutory instruments giving effect to EU law that is not directly applicable. Those powers are the source of the implementing legislation necessary to give legal effect to EU Directives, which are addressed to Member States requiring that their national laws have specified effects. Some EU Directives are implemented by Acts of Parliament but the majority are given effect to through secondary legislation based on Section 2(2) and/or under other UK legislation.

The ECA also gives priority to EU law over UK law (Section 2(4)) and requires UK courts to follow the Court of Justice of the EU's ("CJEU") interpretation of EU law (Section 3(1)).

Implications of the repeal of the European Communities Act

The Government's intention to introduce a 'Great Repeal Bill' was first announced in October 2016, in order to give effect to the referendum result of 23 June 2016 and "return sovereignty to the sovereign institutions of the UK". The Bill's primary effect of repealing the ECA will be a powerful symbolic step towards achieving this, because the ECA is the piece of legislation that first brought the UK into what is now the EU.

Effect of repeal without replacement

In isolation, the legal consequence of repeal would be that all EU legislation currently applying in the UK by virtue of the ECA (under Section 2(1) or 2(2)) would cease to have effect. EU law would also cease to have supremacy over UK law and the UK courts would no longer be bound by rulings of the CJEU when dealing with questions of EU law. Repealing the ECA would not, however, affect every aspect of domestic law derived from the EU. For example, the validity of any EU legislation enacted by Parliament independently from the ECA would not be affected. Examples include parts of the Financial Services and Markets Act 2000 (as amended) and related subsidiary legislation and parts of the Companies Act 2006. The effect of a simple repeal would therefore be very patchy in its effect.

What the Great Repeal Bill will do

To avoid the sweeping effects of simple repeal, giving rise to a significant risk of unforeseen consequences and major gaps in the law, and because of the short legislative timeframe before Brexit, the Government has chosen to preserve EU rules as part of UK law. It is proposing that the Bill should not only repeal the ECA with effect from the date that the UK leaves the EU, but also preserve and convert into domestic law the whole body of EU law applying to the UK immediately before the UK leaves the EU (to the extent it has not already been implemented domestically). Over time, it anticipates these rules will be replaced with purely domestic law.

Transposition of EU law into domestic law

EU law operates in the UK in a number of different ways and the White Paper explains how the Government proposes to deal with several categories of EU law via the Great Repeal Bill:

EU Treaties

The EU Treaties are the primary source of EU law. Much of the content of the Treaties will become irrelevant once the UK leaves the EU. Those Treaty rights that can be relied on in court by individuals will be incorporated into UK law by the Bill but not the Charter of Fundamental Rights. This is largely because it duplicates the rights under UK law arising from the UK's adoption of the European Convention on Human Rights, to which the UK remains committed. The White Paper also proposes that Treaties may assist in the interpretation of those EU laws that are being preserved in UK law.

EU Regulations

Some types of legislation, such as EU Regulations, have effect under the national laws of the Member States without the need for specific implementing legislation. The Government estimates that there are currently around 12,000 EU Regulations in force. Once the UK leaves the EU they will cease to have effect in the UK, but to avoid large gaps in the UK statute book the Great Repeal Bill will convert these directly applicable EU laws into UK law. EU Regulations will not be copied out into UK law, but the Bill will make it clear that they will be converted into

domestic law in the form that they are in at the time that the UK leaves, and will continue to apply until the UK legislators decide otherwise.

EU Directives

EU Directives require national implementing legislation in order to be given effect. In the UK this is often done under section 2(2) ECA which provides ministers with powers to make secondary legislation to implement EU obligations. All this secondary legislation made under the ECA would ordinarily fall away at the point that the ECA is repealed, but the Bill will preserve these laws until the UK legislators decide otherwise. The House of Commons Library estimates there are just under 8000 UK statutory instruments implementing EU law.

EU Decisions

Decisions are EU measures taken by the Council or the Commission and some other EU bodies, addressed to individual states or parties (e.g. state aid and Competition law decisions) or if more general, another form of delegated legislation. The White Paper does not address how these will be dealt with. If not dealt with, decisions to the UK as a Member State of the EU will probably fall away. This may also be the effect for behavioural decisions addressed to private parties in relation to conduct in the UK, unless saved by UK legislation, and the position on unpaid fines might be uncertain. It seems likely that the Article 50 agreement will address transition, but in any event EU decisions on fining will remain enforceable in the rest of the EU and, in practice, this means fines are likely to be paid.

Case law of the CJEU

The White Paper proposes that UK courts will be required to treat EU case law that pre-dates Brexit as being equivalent to decisions of the Supreme Court. This case law will therefore be binding on all courts below the Supreme Court and the Supreme Court will rarely depart from those prior precedents. It would be for Parliament to amend interpretations based on such case law if it wished to do so after Brexit.

For post-Brexit EU case law the White Paper provides that the Bill will not require the domestic courts to consider the CJEU's jurisprudence, although it states that, for as long as EU-derived law remains on the UK statute book, it is essential that there is common understanding of what that law means. It will be important to achieving this goal that UK courts can continue to review relevant decisions of the CJEU and EU national courts as an aid to interpretation of EU derived law, even though not bound by these decisions.

Supremacy of EU law

The Great Repeal Bill will end the general supremacy of EU law. Where a conflict arises between EU-derived law and new UK legislation adopted after Brexit, the newer legislation will take precedence over the EU-derived law. But where after Brexit a conflict arises between two pre-Brexit laws, of which one is an EU-derived law, that EU-derived law will take precedence. Parliament will however have the power to change these laws if considered desirable.

Challenges for the transposition process

Transposition of EU law into domestic law may seem a simple and neat solution to the immediate risk of major gaps in UK law, but it raises a number of challenges:

- A range of measures relate to the UK's membership of the EU and therefore cannot be transposed (for example the laws relating to European Parliament elections).
- Many laws make reference or assign roles to EU bodies and depend upon those bodies in order to be effective (for example the European Medicines Agency which is responsible for evaluating medicinal products). Assuming a departure from the EU Single Market, the Government will need to decide how it will deal with such legislation. Options would be for the UK to continue to be bound by the decisions of such bodies or to make changes. These changes, which the White Paper indicates are likely, would involve transfer of powers to existing UK regulators (e.g. EBA powers to the PRA or FCA) or, if there is no suitable UK body, creation of a new equivalent national body (with or without recognition of decisions in order to reduce the cost and burden on affected businesses).

- In the case of legislation that is cross-border or international in nature, it will not be possible for the UK unilaterally to preserve the effects of these frameworks without the cooperation and consent of other Member States and the EU (for example the Treaty provisions on free movement). The extent to which such frameworks will remain relevant, and the way they will operate, depends on the final deal negotiated between the UK and the EU.

It is clear that a large proportion of EU-derived law will not function effectively once the UK has left the EU unless the necessary measures are taken to address these challenges.

Delegated powers

The Government recognises that substantial changes will need to be made to a significant proportion of EU-derived law in order to make it work and provide legal clarity and certainty in a post-Brexit environment. The current estimate is that the necessary corrections to EU-derived law will require between 800 and 1,000 statutory instruments, and we think that may be a substantial underestimate.

The Government proposes to deal with this challenge through delegated powers which will allow ministers to make the necessary amendments by secondary legislation. Such powers may prove controversial, particularly as they will include so-called 'Henry VIII' powers, under which ministers are able to amend primary legislation through secondary legislation.

The White Paper recognises that although these powers must be sufficiently wide to be workable, there will be limits as to when they can legitimately be used. Relevant reasons for using secondary legislation are cited as:

- Matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations
- Adjustments to policy that are directly consequential on our exiting the EU; and
- To provide a level of detail not thought appropriate for primary legislation.

The House of Lords Select Committee on the Constitution (which recently considered the extent of secondary legislation that may be needed under the Bill) identified the need to ensure that there are clear limitations on the use of secondary legislation in the context of the EU exit. The Committee distinguished between:

- The more mechanical act of converting EU law into UK law, where secondary legislation is legitimate, and
- The discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence, which should be done through primary legislation.

The White Paper recognises this distinction stating "Crucially, we will ensure the power will not be available when Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU."

The line between the categories will not, however, always be clear and this is something that will be a focus for debate during the Bill's passage through Parliament. The Government's commitment that the power will be time-limited will be welcomed by Parliamentarians.

The Statutory Instrument procedure

A number of procedures exist under which Parliament is able to play a role in the making of statutory instruments, with different levels of scrutiny according to the significance of the subject matter. The negative procedure (which does not require debate) will be used to deal with the mechanistic issues of converting EU law to workable UK law, whereas the affirmative procedure (which does require debate and approval by both Houses) is seen as more appropriate for the more substantive changes.

It remains to be seen whether Parliament will support this approach. Henry VIII powers are generally subject to greater scrutiny by Parliament than is offered under the standard affirmative procedure, (for example, the "two bites of the cherry" process under the Legislation and Regulatory Reform Act 2006) although the typical safeguards may be unworkable in the context of Brexit, where ministers will need to employ these powers on an unprecedented scale in a limited time.

Interaction with the devolution settlements

As the devolution settlements for Scotland, Northern Ireland and Wales are all premised on UK membership of the EU, the devolved administrations and legislatures are competent to make laws implementing common frameworks of EU policy that apply to devolved matters. It is therefore important to consider how the repatriation of powers from the EU will interact with the devolution settlements.

The White Paper briefly addresses this, outlining a process of "intensive discussions" where the Government will "work closely" with the devolved administrations to identify the areas where EU common frameworks should be retained and to "determine the level best placed to take decisions on these issues" after the UK leaves the EU. While the Government's expectation is that these discussions will result in a "significant increase in the decision making power of each devolved administration" the White Paper is silent on which repatriated EU powers will be devolved and which will be reserved to Westminster (even in relation to currently devolved matters).

Timing

The Great Repeal Bill is expected to feature in the Queen's speech in May 2017. Repeal of the ECA will only take effect on the day the UK leaves the EU, but the Government intends that the delegated powers to amend the EU-derived legislation will come into force as soon as the Bill receives royal assent, to allow for the process of correcting the relevant legislation before the UK leaves so that it can take effect from the moment of departure.

As most of these changes will need to be made before or at the same time as the UK leaves the EU, these powers will not need to exist indefinitely and the Government has made it clear that it will make sure they are limited in time to such period as is necessary to make the required changes.

Rest of the Brexit Legislative Programme

The Government will also need to adopt a number of new bills in areas where entirely new domestic regulatory regimes will need to be created. A full list is not yet available, but they will cover potentially controversial areas such as immigration, customs, agriculture, fisheries, and data protection. This legislation will be adopted alongside the Great Repeal Bill but falls outside the scope of the Bill.

The White Paper does not mention the important task of providing UK rights for holders of EU intellectual property rights (e.g. EU Trademark) which will cease to apply in the UK when it leaves the EU. This will require at least amendment to the UK's existing law in these areas. Other affected rights include EU design rights and EU plant variety rights.

Contacts



Dorothy Livingston, Consultant

T +44 20 7466 2061
M +44 7785 254975
dorothy.livingston@hsf.com



Gavin Williams, Partner

T +44 20 7466 2153
M +44 7580 709435
gavin.williams@hsf.com



Andrew Lidbetter, Partner

T +44 20 7466 2066
M +44 7785 255021
andrew.lidbetter@hsf.com



Nicholas Wrightson, Senior Associate

T +44 20 7466 7588
M +44 7841 816 397
nicholas.wrightson@hsf.com



Kristien Geeurickx, Professional Support Lawyer

T +44 20 7466 2544
M +44 7595 967301
kristien.geeurickx@hsf.com



Carol Shutkever

T +44 20 7466 2013
M +44 7825 363634
carol.shutkever@hsf.com

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BANGKOK

Herbert Smith Freehills (Thailand) Ltd
T +66 2657 3888
F +66 2636 0657

BEIJING

Herbert Smith Freehills LLP Beijing
Representative Office (UK)
T +86 10 6535 5000
F +86 10 6535 5055

BELFAST

Herbert Smith Freehills LLP
T +44 28 9025 8200
F +44 28 9025 8201

BERLIN

Herbert Smith Freehills Germany LLP
T +49 30 2215 10400
F +49 30 2215 10499

BRISBANE

Herbert Smith Freehills
T +61 7 3258 6666
F +61 7 3258 6444

BRUSSELS

Herbert Smith Freehills LLP
T +32 2 511 7450
F +32 2 511 7772

DOHA

Herbert Smith Freehills Middle East LLP
T +974 4429 4000
F +974 4429 4001

DUBAI

Herbert Smith Freehills LLP
T +971 4 428 6300
F +971 4 365 3171

DÜSSELDORF

Herbert Smith Freehills Germany LLP
T +49 211 975 59000
F +49 211 975 59099

FRANKFURT

Herbert Smith Freehills Germany LLP
T +49 69 2222 82400
F +49 69 2222 82499

HONG KONG

Herbert Smith Freehills
T +852 2845 6639
F +852 2845 9099

JAKARTA

Hiswara Bunjamin and Tandjung
Herbert Smith Freehills LLP associated firm
T +62 21 574 4010
F +62 21 574 4670

JOHANNESBURG

Herbert Smith Freehills South Africa LLP
T +27 10 500 2600
F +27 11 327 6230

LONDON

Herbert Smith Freehills LLP
T +44 20 7374 8000
F +44 20 7374 0888

MADRID

Herbert Smith Freehills Spain LLP
T +34 91 423 4000
F +34 91 423 4001

MELBOURNE

Herbert Smith Freehills
T +61 3 9288 1234
F +61 3 9288 1567

MOSCOW

Herbert Smith Freehills CIS LLP
T +7 495 363 6500
F +7 495 363 6501

NEW YORK

Herbert Smith Freehills New York LLP
T +1 917 542 7600
F +1 917 542 7601

PARIS

Herbert Smith Freehills Paris LLP
T +33 1 53 57 70 70
F +33 1 53 57 70 80

PERTH

Herbert Smith Freehills
T +61 8 9211 7777
F +61 8 9211 7878

RIYADH

The Law Office of Nasser Al-Hamdan
Herbert Smith Freehills LLP associated firm
T +966 11 211 8120
F +966 11 211 8173

SEOUL

Herbert Smith Freehills LLP
Foreign Legal Consultant Office
T +82 2 6321 5600
F +82 2 6321 5601

SHANGHAI

Herbert Smith Freehills LLP Shanghai
Representative Office (UK)
T +86 21 2322 2000
F +86 21 2322 2322

SINGAPORE

Herbert Smith Freehills LLP
T +65 6868 8000
F +65 6868 8001

SYDNEY

Herbert Smith Freehills
T +61 2 9225 5000
F +61 2 9322 4000

TOKYO

Herbert Smith Freehills
T +81 3 5412 5412
F +81 3 5412 5413