
# LEGISLATING FOR THE UNITED KINGDOM'S WITHDRAWAL FROM THE EU

## WHITE PAPER ON THE GREAT REPEAL BILL (MARCH 2017)

## SUBMISSION BY HERBERT SMITH FREEHILLS LLP

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Herbert Smith Freehills formed its Brexit team of experts from all parts of the firm's practice to advise our clients well before the 2016 Referendum and have been one of the leading law firms in analysing the issues raised by the Referendum result and sharing our analyses with clients, regulators and government, as well as giving advice on specific situations which our clients face.

The purpose of this submission is to offer the UK Government some thoughts on issues discussed in the Great Repeal Bill White Paper (March 2017) and on some matters not raised in the White Paper which we believe it will be necessary to address by legislation. We hope that

this submission will be helpful to Government in formulating the Bill and other legislation being passed in order to prepare the UK for leaving the EU.

## Chapter 1. Delivering the Referendum Result

We welcome the decision of the Government to provide continuity in respect of the law applicable in the United Kingdom by converting the body of existing EU law into domestic law, so that, as a general rule, the same rules and laws will apply after the UK leaves the EU as applied before.

We agree with the view that additional legislation will be needed beside the Great Repeal Bill in order for the UK to operate effectively. In addition to customs law and related matters of international trade, such as sanctions, the following seem to us to be needed, not all of which are mentioned in the Queen's speech:

- **Value Added Tax** - a code that will operate independently of the EU unified scheme, in which the UK will no longer play a part: this will, at least, require significant changes to existing UK law which implements the EU VAT Directives which set out that unified scheme. UK rules will need to work effectively when the UK is a third country from the EU perspective so that imports and exports of goods and supplies of services between the UK and the continuing EU countries will be treated as those transactions currently as between the UK and non-EU member countries. We also anticipate that the UK would wish to be free of EU restraints on rates of tax and the application of exemptions on sales within the UK. We note from the more detailed briefing on the Queen's speech that legislation on VAT will be included in the Customs Bill.
- **Immigration** – We anticipate that changes will be needed to immigration law to accommodate the rights of EU citizens already in the UK and to address any other adjustments needed to meet the UK's requirements after Brexit: eg if needed, in relation to temporary workers in agriculture where there is a scarcity of suitable employees.
- **Agriculture and Fisheries** – Legislation to replace EU legislation in this area, on the assumption that the UK will be operating outside of the CAP and the Common Fisheries Policy after Brexit.
- **Energy, particularly Nuclear Energy** – While the precise content of this bill will depend on what is agreed with the EU, the UK's decision to leave EURATOM means that it will need to establish an independent nuclear safeguards regime and obtain all necessary recognitions of its regulatory regime and safety body for the purposes of international treaties applicable to this industry.
- **Intellectual property** - At present businesses can be protected in the UK by EU trademarks, Community registered and unregistered design rights and EU plant breeders' rights. The scope of these rights is limited by the extent of the EU from time to time. The UK needs to provide a system to “grandfather” holders of these rights so that, where they have no parallel UK domestic rights but are using their EU rights to obtain intellectual property protection in the UK currently, rights holders can obtain or be automatically granted UK rights giving, so far as possible, equivalent protection in the UK. The rights identified above are each different in nature and of different durations, so that legislation amending the current UK law in each area will be needed. Without such provision, the rights of the holders of EU rights would be lost wholly in the UK. The ability of holders to obtain equivalent rights under UK intellectual property laws is variable and in some instances does not exist. This would cause damage to UK businesses in relation to their UK activities undertaken in reliance on these EU rights, even though their rights in the continuing EU are likely to be unaffected, and could give rise to claims for loss of enjoyment of property under human rights legislation. We note that there is nothing in either the White Paper or the Queen's speech to reassure businesses in relation to these potential loss of rights.
- **Areas of UK Law currently following EU Law** There may be a number of other areas where changes are required to existing UK domestic legislation: eg the provisions of the Competition Act 1998 s60 provide for UK competition law to be interpreted as far as possible consistently with EU law and the decisions of the EU courts and requires UK courts and authorities to have regard also to any relevant decision or statement of the European Commission. While it will be right for UK courts and authorities to take into account any relevant decisions of the European Courts (and indeed those of courts of Member States of the EU) when applying very similar provisions of the Competition Act 1998, it would not be consistent with the scheme set out in the White Paper that they should be bound to apply the same interpretation once the UK has left the EU, unless, of course, the EU and the UK were to agree to continue closely aligned competition law provisions on a long term basis.

- **Response to loss of reciprocal treatment in the continuing EU** - It should also be borne in mind that applying EU law in the UK will not all achieve that UK businesses and individuals benefit from reciprocal treatment in the continuing EU, where that law applies only as between Member States of the EU, their businesses and nationals. We discuss this further in our response to Chapter 3.

## Chapter 2. Approach to the Great Repeal Bill

We agree that to maintain continuity in the UK not only UK laws implementing EU law (eg Directives) needs to be preserved, but also directly effective EU law created by Regulations. It seems doubtful, however, that any directly effective Treaty provisions will need to be preserved and the same may apply to some other legislation. For example Article 101 et Seq of the Treaty on the Functioning of the European Union (TFEU) provides for a pan-European system of competition law running parallel to domestic law. It is not necessary to have a parallel system post Brexit, unless the UK agrees to remain part of it, so the Treaty provisions are not needed. The same applies to Council Regulation 1039/2004, which establishes a supra-national system of merger control and the Commission Regulations dealing with the application of EU competition law and enforcement processes. These Regulations are directly effective, but do not need to be preserved as part of UK law unless participation in the EU competition law regime is agreed with the EU. This is a different question from the way that these instruments might be relevant in considering interpretation of provisions of UK law that happens to use similar language.

Similarly, there is a broad corpus of EU law dealing with the application of uniform rules or rights throughout the EU: topics range from recognition of electronic signatures, to the application of intellectual property rights, such as EU trade marks, which apply only in the geographical area of the EU. These rules and rights will not extend to the UK once it leaves the EU. While there may in some cases be value in the UK continuing to apply the same rules (possibly on electronic signatures) the continued recognition of an EU intellectual property right will not provide an effective solution once the EU tribunal overseeing the right ceases to have the capacity to deal with disputes regarding the right related to actions (eg alleged third party infringement) in the UK or to hear challenges related to third party rights in the UK. Much of this law will be redundant and the Bill should provide a mechanism for the identification and disapplication of this law, with independent UK rights for affected holders being established by amendment of UK intellectual property laws.

### EU Derived Law

A number of practical and legal issues arise from the proposal, set out in paragraph 2.8, that "EU Regulations will not be 'copied out' into UK law regulation by regulation, instead the Bill will make clear that EU regulations - as they applied in the UK the moment before we left the EU - will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise":

1. **Status of EU Regulations converted into UK law and impact on method of amendment** -The status of the converted EU legislation under UK law needs to be made clear i.e. will they be treated as equivalent to primary legislation or equivalent to secondary legislation? There are two types of directly applicable EU Regulations: Council Regulations (most of which are passed in a co-operative process between the Council of Ministers and the European Parliament) and Commission Regulations. Council Regulations are broadly equivalent to primary legislation and Commission Regulations are broadly equivalent to secondary legislation. EU law which is converted into UK law could be categorised in line with this division and the Bill could provide, accordingly, for amendments to the legislation so converted to be made according to the UK Parliamentary processes for primary and secondary legislation respectively.

   By way of example, the EU Market Abuse Regulation EU No. (596/2014) (MAR) is a directly applicable EU Regulation. There are then a series of Implementing Regulations which have issued under the powers set out in MAR. Under this division, MAR would become the equivalent of an Act of Parliament with the Implementing Regulations being the equivalent of statutory instruments, and with the power to amend them in future being based on that status. The Bill should set out a default position but the government may wish to make exceptions in the Bill or in subsidiary legislation for particular cases

2. **Immediate amendments to EU Regulations converted into UK law -** Consideration also needs to be given to what method will be used to make all necessary immediate amendments to the directly applicable EU law which is being incorporated into UK law. Will this be done via separate statutory instruments for each of the relevant directly applicable Regulations in the same way as is being proposed for existing UK legislation impacted by Brexit?

We would suggest that this is done as far as possible through over-arching provisions in the Great Repeal Bill. For example, for most purposes the "Secretary of State" will be the right person to exercise powers and carry out duties in the UK assigned under EU laws to the European Commission. The Interpretation Act 1978 means that it is not necessary to determine which Secretary of State assumes which functions and this is decided according to their ministerial responsibilities. He could also be appointed to designate successors to European bodies such as the European Banking Authority or the European Medicines Agency and could be authorised to delegate powers and duties to UK regulators where he considers the Commission's functions would better be carried out by a UK regulatory body rather than at ministerial level. The same over-arching approach could be used do deal with instances where UK implementations of EU law that will remain in place contain references to the Commission or to EU regulatory bodies.

There may be other instances of general over-arching rules which could be used: eg on territoriality or to remove impediments to action at national level contained in EU legislation.

Rules will also need to be considered in the context of laws delegated to the devolved administrations, where there may be some division of powers between the national government and the devolved administrations.

3. **Identification of definitive texts as at date of Brexit** - EU Law, both Regulations and Directives, represent a moving body of law. While the Europa website provides access to the entire corpus of EU law, edited to the latest version and annotated with the source of changes, the UK will be looking to a version of that law (frozen at the date of Brexit) which, over time, will become different from developing EU law. If the relevant EU law is not to be transposed then, at the very least, there should be provision for publication in the UK on legislation.gov.uk of the definitive text of those directly applicable EU laws which post-Brexit are either to form part of UK law (Regulations) or to be relied on as an aid to interpretation of UK law originating as an implementation of EU law: that is Directives (as well as Regulations which required an adjustment of UK law to accommodate their direct application) and in some cases provisions of the EU Treaties themselves.

4. **Referencing and naming conventions for converted EU Regulations-** It will also be necessary post-Brexit for the EU Regulations that have been converted into UK law to be identified and referenced using a naming/numbering convention. The Bill should make express provision for this. Taking again the Market Abuse Regulation example, the EU reference for that regulation is (EU) No. 596/2014, but for UK purposes, it will not be possible to use that reference when referring to MAR as incorporated into UK law, because the Regulation with that reference will be MAR as in force, and potentially amended, in the EU. One suggestion would be to add the suffix "(UK)" after each EU Regulation reference when referring to that Regulation as incorporated into UK law. So taking again the MAR example, MAR as incorporated into UK law would be referred to as Regulation "(EU) No. 596/2014 (UK)".

   It would also assist to have a short consistent and obvious naming convention for the UK Statutory Instruments that will amend existing UK law and will amend the directly applicable EU law which is converted into UK law, which is different for that for normal Statutory Instruments.

5. **Accessibility of UK law, including the numerous amendments to both domestic and EU-derived law resulting from Brexit** - It is a principle of law in England (and we believe other UK jurisdictions) that citizens and businesses are deemed to know the law. Despite this, it is often practically difficult to find the UK domestic law as in force and, even if found, to follow through the amendments made. This is because the UK does not provide a comprehensive updating service following amendments to legislation similar to that which the EU has for its legislation. The UK website legislation.gov.uk prefaces most of its statutory publications with the notice:

   > "Changes to legislation: There are outstanding changes not yet made by the legislation.gov.uk editorial team to [……]. Those changes will be listed when you open the content using the Table of Contents below. Any changes that have already been made by the team appear in the content and are referenced with annotations."

   The annotations enable the amending legislation to be tracked down, but where there are numerous unincorporated amendments, the comprehensibility of the legislation is severely compromised.

In the case of Statutory Instruments, there is no attempt to provide for or indicate amendments via annotations. The equivalent notice on legislation.gov.uk is:

> "**Status**: This is the original version (as it was originally made). This item of legislation is currently only available in its original format."

No notice is given indicating the existence of amending regulations. This situation appears to apply to a significant volume of UK subsidiary legislation.

As all law applicable in the UK will become domestic, the Europa website will cease to be an accurate source of law at the date of Brexit (since it updates swiftly to current EU law - see paragraph 3 above). EU derived laws, both domestic and transposed, will undergo thousands of changes to reflect Brexit, much of this change being in subsidiary legislation. It is vital that specific consideration is given to how UK law post-Brexit will be made accessible in comprehensible form to those bound by it. A database of at least the same quality as that maintained by the EU will be of great importance for businesses and individuals coping with an unprecedented scale and speed of legislative change.

6. **Interpretation of EU-Derived law** - We suggest that it will be desirable to set out the rules of interpretation for EU derived law in the UK and to provide that these rules also apply to UK law which implements (or has been accepted as implementation of EU law).

   In order to achieve the same interpretation as presently for "EU-derived law", courts would need to be able to adopt a purposive approach to interpretation of EU law, to take full account of recitals and headings in EU legislation, as well as travaux preparatoires. This is essential as, for example, ambiguities in the operative parts of EU law are commonly resolved by reference to their extensive recitals but this is not permitted under domestic English rules of interpretation.

   In addition EU regulators, like UK regulators issue a good deal of guidance which, while not having the force of law, explains the intentions of the legislation and how they will apply it. This can also be a useful, though non-binding aid to interpretation and UK courts and regulators should be free to refer to it. It may be helpful to make this explicit.

7. **Acceptance of pre-existing UK law as implementation of EU law** - In some cases EU law has taken concepts from pre-existing UK law (e.g. the Bank Recovery and Resolution Directive 2014 (2014/59/EU), has drawn on the approach taken by the Banking Act 2009 and thus the UK had little to do to implement many aspects of the Directive), but the courts would currently interpret those pre-existing rules consistently with the Directive of which they are accepted as good implementation. The term "EU-derived law" needs to extend to include this category of pre-existing UK law.

## Case law of the CJEU after Brexit

EU law is relatively young and the corpus of decisions on its interpretation is still in a phase of expansion. For much of the UK's EU-derived law which continues to be applicable in the UK and has not been replaced or over-ridden by any later UK law there will be little judicial precedent. Highly relevant decisions of the CJEU and indeed of the courts of continuing EU Member States will be taken on the meaning of provisions of "EU-derived law".

Although the Government proposes (see para 2.14) that CJEU decisions taken post Brexit should have no authority at all in the UK post Brexit, we suggest that it should be made clear that there is no bar to the UK courts applying their usual approach of taking judicial notice of relevant decisions of foreign courts, whether the CJEU or national courts. This happens currently where, for example, there is a useful decision of an EU national court on a piece of EU legislation effective also in the UK (but no authoritative CJEU decision on point), where an Australian decision on a contract law point (derived from our mutual common law heritage) assists an English court to decide a similar point arising in relation to an English law contract, or an Irish decision on words common to their Companies Act and the UK Companies Act illuminates the issue for a UK court.

This in no way constrains the courts to a common interpretation but will assist the goal of predictability of interpretation, which is a benefit to business and reduces costly litigation.

## Individual Decisions

The Repeal Bill will need to deal with the transition of regulatory powers (including powers to make orders and impose fines on businesses) from the EU. These arise primarily in the field of competition law, but may also be possible in other fields of regulation. What is required will depend upon what is agreed with the EU, but it will need

to be clear whether decisions taken pre-Brexit will be fully enforceable (including variations arising from appeal processes) and how decisions taken after Brexit in relation to proceedings commenced before Brexit will be dealt with. Consideration will also need to be given to the position on pre-Brexit conduct which only becomes the subject of proceedings post-Brexit.

## Chapter 3: Delegated Powers in the Great Repeal Bill

### Reciprocity with the EU

We agree with the issues stated in relation to law intended to be applied reciprocally within the EU:

- Many provisions of EU law only apply as between Member States (eg most of the Brussels Regulation on Choice of Court has no application in relation to third countries). When the UK ceases to be a Member State of the EU and becomes a third country, then most of these laws will cease to benefit the UK and its businesses and citizens in the continuing EU. This is not in itself a reason why the UK should deny EU States, their businesses and citizens the benefits these laws currently give them within the UK, but means that the UK needs to look to get agreement with the EU to preserve rights within the EU for the UK, its businesses and citizens.

  This can only be achieved fully through implementing arrangements and long term agreements with the EU. The affected areas, which include insolvency and reconstruction law, generally, as well as the special regimes for banks and insurance companies, should be a high priority in negotiation with the EU.
- In the event where there are areas where agreement cannot be reached, it will be for case by case assessment whether it is in the best interest of the UK to continue to afford similar rights in the UK to continuing EU Member States, their businesses and citizens. This may depend on consideration of the rights the UK currently affords third countries generally, their businesses and citizens under our domestic law (for example, English rules for recognising legal qualifications and for requalification are very similar for EU and third State citizens and WTO rules would require equal treatment of EU and third country lawyers in this regard).
- In other areas, eg insolvency, recognition of third country processes is underpinned by the UK's implementation of the UNCITRAL Model Law on Insolvency, and, as regards banks and financial institutions, by commitments under the Basel accords. These measures would militate in favour of affording full recognition to EU insolvency and reconstruction processes, regardless of the EU's willingness to immediately ensure reciprocal treatment in all continuing Member States.
- We think that this will always require case by case consideration and that a blanket approach to reciprocity with the EU will not be practicable - indeed it would risk placing the UK in breach of continuing international obligations as well as potentially damaging the UK economy.

### Delegated Powers

1. **The need for delegated powers and where the lines should be drawn** - It seems to us essential that some delegated powers are used to make changes to continuing EU-derived law and to UK implementing law. There will be changes required that cannot be achieved by overarching amendment, such as that discussed in point 2 of our comments on Chapter 2.

   We believe that the question of status of the EU law being changed is relevant to the consideration of the appropriate process for making changes: see our comments on Chapter 2, numbered point 1 above, although the approach to dealing with uncontroversial changes may be the same for all EU-derived law. Parliament will no doubt decide where precisely the lines should be drawn and the process to be used when more substantive changes are proposed in subsidiary legislation and this chapter provides a valuable basis for this debate.

2. **Consultation and approach to amendments** - Given the need to draft and adopt very many statutory instruments in order to make the necessary amendments to both EU law which is to be incorporated into UK law and current UK law which is derived from EU law, we think that as a starting point the government should publish detailed proposals for consultation as to the principles to be applied to such amendments and to seek comments on such principles before moving to the detailed work of looking at each individual piece of legislation that needs to be amended. When considering the amendments required to legislation

in each sphere of activity, it will be important for the government to consult legal and other experts in that field of activity to determine what specific amendments are required to each piece of legislation.

## Chapter 5: Crown Dependencies and Overseas Territories

We have no observations to make on this section of the White Paper, save to note that the interests of the Channel Islands, lying as they do between the UK and the EU, will require careful consideration.

### General comments on process and access to information and documents

Tracking the details of the Bill and secondary legislation under it and other legislation affected by Brexit will be a huge undertaking. Ease of public access and a highly organized approach to the publication of the details of the progress of the Bill and all of the proposed legislation, the final forms of the primary legislation and the thousands of pieces of secondary legislation will be vital. Although the current UK Parliament website covers the passage of each Bill through Parliament in an effective way for normal legislation, the scale of the Brexit legislation and the number of Regulations required means that it will not be adequate as a method of following the Great Repeal Bill. There is also a risk of relevant information about the Bill being held in different places across the gov.uk website, the Parliament website and the legislation.gov website. We think that a separate website or at least specific area, covering the Great Repeal Bill should be created (which could be linked to from the Parliament website) on which all of the relevant materials, consultation documents etc. could be placed. This might be expanded or contain links to other Brexit related amendments to UK law.

Some lessons may be learnt from the process that was followed for the Companies Act 2006 and the many Regulations issued as a result of the implementation of that Act. That was a three year process done in a series of stages. Regular email bulletins were issued by the Government (to anyone who signed up to receive them) in relation to the implementation of the Act, including implementing Regulations. There were also dedicated webpages explaining the implementing Regulations and providing access to them.

If you have any queries on any of the issues raised in this submission, or would like to discuss any of them directly with us, please feel free to contact Dorothy Livingston, Carol Shutkever or Paul Butcher using the details below.

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