

Withdrawing from the past, amending the present and back to the future? Assessing key legal aspects of certain withdrawal bill amendments

Introduction

As covered in more detail in our [previous article](#), on 13 July 2017 the UK Government published the European Union (Withdrawal) Bill (the Bill).

The Bill's primary – and somewhat daunting – objective is to convert the body of existing European Union (EU) law into UK law, from the point at which the UK exits the EU law ("Exit Day", which is currently envisaged to be 29 March 2019).

As part of the Committee Stage of parliamentary scrutiny, on 14 November 2017 the House of Commons began debating proposed amendments to – and new clauses for – the Bill. This part of the process (which will be followed by a similarly rigorous examination in the House of Lords), is expected to involve at least 64 hours of parliamentary debate across eight days.

Given the significant and wide-ranging implications of the Bill on not only the shape and impact of Brexit but also on most, if not all, areas of business and everyday life in the UK, a very large number and variety of proposals have been tabled.

While there are obvious political dimensions, we focus on three significant legal issues arising from the proposed amendments, which have a particular relevance for businesses.

These are the:

1. UK's future relationship with the European Economic Area¹ (the EEA);
2. retention of EU law rights; and
3. parliamentary vote on the agreement relating to the terms of withdrawal agreed between the UK and the EU (the Withdrawal Agreement).

The UK's relationship with the EEA

The UK Government's position is that, once the UK leaves the EU on Exit Day, the EEA Agreement² will – at that point – cease to apply to the UK (because the UK is a member of the EEA solely by virtue of its membership of the EU).

¹ The EEA was formally established on 1 January 1994, upon entry into force of the EEA Agreement (as described below). As at the date of this article, the EEA comprises all 28 EU Member States (including the UK), together with Iceland, Liechtenstein and Norway.

² The EEA Agreement provides for the Four Freedoms within the Single Market (which includes all EEA states), but not membership of the EU Customs Union.

On this basis, the Bill as currently drafted removes in its entirety the domestic effect of the European Economic Area Act 1993 (the Act which incorporated into UK domestic legislation the provisions of the EEA Agreement) (the EEA Act).

If enacted unamended, and absent any trade agreement with the EU to the contrary, the UK would cease to be part of the Single Market (and would in all likelihood have to conduct its external trading relations under World Trade Organisation (WTO) rules alone).

Whilst an earlier amendment relating to the UK's membership of the Customs Union and Single Market was recently defeated, there is still a live issue concerning EEA membership. This is particularly significant, as for some, retaining membership of the EEA is seen as the best available route to ensuring a soft landing, rather than a "hard Brexit".

Broadly, the proposed amendments in this area take one of two forms:

1. keeping the UK's options open by retaining the possibility of EEA membership; and
2. being more directional on the issue by seeking to explicitly maintain EEA membership post-Exit Day.

For both options, the fundamental question is this: will the UK Government close the door on EEA membership, or will such membership be maintained (most likely through the retention in UK domestic law of all, or part, of the EEA Act) until the direction of travel in the EU negotiation becomes clearer?

As foreshadowed in our [previous bulletin](#), during any implementation / transitional period the UK may continue to be bound by the existing structure of EU rules and regulations, which will include continued membership of the Customs Union and Single Market. If, however, the UK seeks to negotiate a different legal basis for such period, the EEA would provide a ready-made structure. As EEA membership requires retention of the Single Market but not the Customs Union, such membership may offer a more flexible solution during the implementation period. Given the inherent technical difficulty in negotiating and implementing both the UK's withdrawal from, and future relationship with, the EU, the EEA may represent a pragmatic and effective means of transitioning to a new UK / EU trade agreement.

An important aspect of this dynamic (from an EU perspective) is that, under the terms of Article 50, the EU can only "discuss the framework" of any future trading relationship with the UK, and cannot formally negotiate a trade deal until the UK leaves the EU and becomes a third country. These negotiations may indeed last for significantly longer than the two year 'implementation period' currently sought by the UK Government.

In these circumstances, if the proposed amendments concerning the EEA are not accepted, an important option for transitional arrangements may be lost, which in turn is likely to create further uncertainty for UK businesses.

Retention of EU law rights

The Bill will convert existing direct EU legislation into UK law insofar as such legislation is operative immediately before Exit Day. However, the initial draft of the Bill expressly excludes a number of significant existing EU law rights - which individuals and businesses may otherwise have enjoyed.

These include:

- the right to challenge under domestic law the validity of any retained EU law on the basis that it was invalid prior to Exit Day;
- the right to bring a claim under domestic law based on a failure to comply with any of the general principles of EU law;
- the entitlement under domestic law to damages in accordance with the *Francovich* rule (which established state liability for losses suffered by individuals due to a Member State's failure to properly implement EU law and which may relate to such failures by the UK Government occurring many years before Exit Day); and
- the continued application in domestic law of the EU Charter of Fundamental Rights.

Amendments before the House of Commons effectively sought to reinstate these rights so that they would not be excluded from the *acquis* which will be preserved in UK law post-Exit Day. The Government announced on 21 November that it would bring forward its own amendment to address the proposed challenges regarding both the *Francovich* rule and the EU Charter of Fundamental Rights.

Such retention of these EU rights could have a significant effect for individuals and businesses alike. Included within their scope are the fundamental principles of non-discrimination on grounds of nationality, proportionality, equality before the law and legal certainty.

Although such principles may seem rather abstract, they are important elements of an individual's or an entity's arsenal when seeking to challenge UK laws or when pursuing administrative action. There is also the practical importance of retaining such rights in the UK, as it is likely that the UK would want to ensure the continued application of reciprocal rights for UK nationals residing in other EEA countries. That said, since it is envisaged that the Court of Justice of the EU will cease to have jurisdiction in the UK at the end of any transitional period, the scope and interpretation of these principles may in the future differ in the UK from in the EU.

Parliamentary vote on the Withdrawal Agreement

The UK Government has announced its intention to enact the Withdrawal Agreement that is reached with the EU by way of primary legislation (named the Withdrawal Agreement and Implementation Bill), allowing Parliament to scrutinise and vote on the eventual terms of the UK's exit from the EU.

At the time of writing, three separate bills relating to Brexit are due to be put before the UK Parliament: the Bill (pursuant to which the supremacy of EU law will come to an end in the UK); the bill referred to above relating to the terms of withdrawal negotiated with the EU; and, in the future, a bill relating to the terms of any future trade arrangement with the EU (which is unlikely to be agreed upon until significantly after Exit Day).

The Withdrawal Agreement will cover the three areas currently being negotiated by the UK and the EU, namely:

1. financial settlement;
2. citizens' rights; and
3. the border between the Republic of Ireland and Northern Ireland.

The Department for Exiting the EU has indicated that the vote on the withdrawal terms will also encompass the terms of any agreement concerning the 'implementation period' which is being sought by the UK. Shortly before announcing the vote on the Withdrawal Agreement, the

UK Government tabled its own amendment to the Bill to include a precise time and date (11pm on 29 March 2019) for the UK's exit (and thereby potentially removing any flexibility in extending the duration of the withdrawal period).

Given this potential "hard-wiring" of the UK's exit from the EU, the effect of either (i) a failure to agree with the EU a Withdrawal Agreement or (ii) the rejection by the UK Parliament of the terms of the Withdrawal Agreement remains unclear. Indeed, a parliamentary vote on the Withdrawal Agreement may become academic if the enacted Bill provides for a "hard" exit date on 29 March 2019.

As the Withdrawal Agreement will include the terms of any transitional arrangement, its potential rejection by the UK Parliament (and the likely timing of such rejection if it were to happen) renders the possibility of a "hard Brexit" without any transitional period more likely and contingency planning for a so-called "cliff edge" to WTO rules becomes all the more important.

Concluding remarks

Against this background, there are two general observations as to the Bill and its potential implications for the shape and impact of Brexit:

1. As far as UK domestic issues are concerned, passage through the Commons is only part of the battle; the Bill will in time also be subject to similarly rigorous scrutiny in the House of Lords (including by the EU Select Committee, which has earned a reputation for being thorough and effective).
2. Although the passage of the Bill and the EU negotiations are essentially on parallel tracks, there is no evidence of – and, by definition, there cannot be – any clear co-ordination between the two processes and the scope for contradictory outcomes is considerable.

Whilst each of these factors (and particularly the EU negotiation) creates inevitable uncertainty for businesses, it is to be hoped that some of these key legal questions will become clearer during the parliamentary progress of the Bill.

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