



Bar Council response to the Great Repeal Bill White paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Department for Exiting the European Union's paper on "Legislating for the United Kingdom's withdrawal from the European Union"¹, also known as the Great Repeal Bill White paper.
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. This response represents the preliminary views of the Bar Council, some of which have developed as a result of discussion with Government and other stakeholders. We look forward to inputting further with our views as the Great Repeal Bill passes through Parliament. The response deals with a number of issues, including the status of repatriated EU legislation, the need for clear safeguards concerning the use of delegated legislation when converting EU law into UK law, the scope of ministerial amending power and procedure for Parliamentary scrutiny, the influence of the Court of Justice of the European Union (CJEU) and the treatment of the Treaty.

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

The Bar Council supports important recommendations made by the House of Lords Select Committee on the Constitution" in HL Paper 123 "*The Great Repeal Bill and delegated powers*"², particularly with regards the importance of specific safeguards being written into the Bill, to mitigate against the risks of using extensive delegated legislation. Lastly, this response briefly looks at the implications of the Great Repeal Bill for environmental law.

The "snapshot": what is the new status of repatriated EU legislation?

5. The White Paper does not specify the intended status of "repatriated" EU legislation that becomes effective as domestic law on exit day. That is fairly easy to resolve where the item of EU law is not directly effective (typically where it is a Directive), since it will have been transposed either through primary legislation or ECA s. 2(2) regulations, each of which will retain their status after exit day. The usual domestic hierarchy will apply to them. The difficulty arises in relation to a directly effective Treaty provision or a Regulation, be it secondary or delegated (for example, to an agency or authority, as below, paragraph 7). Even though the domestic effect of such law technically arises as a result of operation of ECA s. 2(1), it is in no sense "delegated" legislation; on the contrary, it is superior to conflicting domestic law. We know the intention is for the Bill to remove its superiority. This leaves questions over its resulting status. The Select Committee paper³ raised this point. Can it be overridden only by primary legislation, or is ordinary secondary legislation sufficient to override it as well? Will it be as resistant to implied repeal as the ECA itself (*Thoburn v. Sunderland*)? It would be helpful for the Bill to clarify the position. There may be a conscious choice to leave questions to be resolved by the judiciary in due course, much as the Human Right Act left similar questions open for judicial determination. However, if that is the intention, and if the Bill therefore does not expressly deal with these points, then the ExNotes to the Bill should make that intention clear.

The use of delegated legislation for transposition of EU law into UK law

6. The Bar Council accepts that the objective of ensuring that a coherent body of law is in force the day that the UK leaves the EU (and that the European Communities Act 1972 is repealed) necessitates an extensive use of delegated legislation. There has never been a legislative exercise anything like that which is now required in terms of volume, complexity and scope. There is also a need to be able to react to developments in the course of negotiations. However there is also need for more clarity over what lies within the scope of delegated legislation and for the imposition of safeguards to

² The House of Lords Select Committee on the Constitution [9th report of session 2016-17 The 'Great Repeal Bill' and delegated powers](#), HL Paper 123, 7 March 2017

³ Ibid

enable parliament to scrutinise where necessary and prevent the use of secondary legalisation to make policy changes.

7. It is important to note that, quite apart from the transposition of "ordinary" EU secondary legislation emanating from the EU legislator, detailed rule-making powers have increasingly been given to European agencies and authorities (e.g. in the financial services field, the European Banking Authority, European Securities Market Authority, European Insurance and Occupational Pensions Authority) which govern the interpretation and/or application of secondary EU legislation in the relevant field. In many cases, these rules have in fact been issued via the legal instrument of an EU regulation, whereby they have direct effect. In the absence of these rules, equivalence will be undermined immediately as of BREXIT. The transposition of this category of EU measure will present its own challenges. By way of example, in the competition field, the Commission has issued important Guidelines regarding the application of the Vertical Block Exemption and the application of Article 101(3) to horizontal agreements. Leniency applications, immunity from fines exchange of information and rights of defence in investigations are all coordinated through soft European Competition Network (ECN) statements such as the Cooperation Notice and the ECN Model Leniency Program. Following Brexit, the Competition and Markets Authority and national courts will no longer need to have regard to those under s.60 CA98 nor will they be under any duty of sincere cooperation. There will therefore need to be some mechanisms for replicating some of these requirements, even if just on a transitional basis.

Scope of ministerial amending power and procedure for Parliamentary scrutiny

8. One of the most important questions for the Bill to address will be the scope and terms of the intended power to alter the content of "repatriated" EU law. But the question is wider than that, because the White Paper also foreshadows the possibility of amendments to other legislation as a consequence of the UK's withdrawal. It is reassuring that the Government appear to have taken to heart a number of the concerns expressed by the House of Lords Select Committee on the Constitution, including points where the Bar Council's evidence was cited by or influenced the Committee. We made the point, which the Committee accepted, that although EU Directives can be implemented by ECA s. 2(2) regulations using "ordinary" Parliamentary scrutiny mechanisms, that derives its legitimacy from the fact that the EU instrument will already have been through a detailed legislative process at EU level, with extensive public and Member State involvement. So there would be a democratic deficit if the Government chose to use an equivalent power in the Great Repeal Bill to amend the substantive content of rights and duties currently flowing from EU law as opposed to simply making incidental or remedial provision consequential on the UK leaving. Hence the Committee's recommendation for heightened scrutiny: "*We would expect that a statutory instrument which amends EU law*

in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure".⁴

9. The Government appears to have committed itself to use primary rather than secondary legislation where it "*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*"⁵. In other words, policy changes to transposed EU legislation is to be seen as separate from the technical, though highly complex, process of transposition. Separate legislation will be necessary for the first. We are firmly of the view that the Great Repeal Bill machinery is designed solely for the second. The Bar Council sees the safeguards proposed by the Select Committee as a transparent way of ensuring that this division is maintained.

10. The White Paper indicates that where ministers make secondary legislation under powers in the new Bill, they will adopt one of the existing Parliamentary scrutiny procedures, i.e. the negative or affirmative procedure. They appear not to have accepted the HL Select Committee view about heightened scrutiny. In other words, if the Government is not proposing to enable secondary legislation that "determines matters of significant policy interest or principle" then there is no need for the kind of super-affirmative or super-consultative procedure the HL had in mind.

11. A number of points flow from this. Probably the most important is how the Bill defines the dividing line, to use the language of the White Paper, between "dealing with deficiencies" (an expression which, if adopted in the Bill, ought to be adequately defined), and "making a policy change" going beyond that.

12. Also important here is the extent of any Henry VIII power attached to this amending power. The ECA enables s. 2(2) regulations to make "any provision that could be made by Act of Parliament". Again, such a wide power may be acceptable in that context for the reason stated above, but we would be concerned if such open-ended wording appeared in the Bill. We believe that any power to amend an Act should be carefully limited to, for example, making provision incidental or consequential on the desired amendment.

13. Assuming the general rule is that any policy change beyond dealing with a "deficiency" will need primary legislation, we can expect a crowded Parliamentary timetable for new Brexit-related primary legislation – which of course brings its own implications for effective scrutiny.

⁴ ibid

⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf para 3.17

14. There is also an existing, though rather weak, convention that where there is a choice, EU legislation requiring UK secondary legislation should be implemented using powers contained in an "ordinary" subject-specific Act rather than using ECA s. 2(2) powers. It remains to be seen whether that convention will also apply to the choice of enabling legislation to address "deficiencies" in EU-related domestic law in consequence of Brexit.

15. A further interesting issue is whether and how the Government proposes to address the point flagged at para 1.17 of the White Paper regarding the withdrawal agreement (assuming there is one). The Government referred to the Constitution Committee's observation that "*further amendments to domesticated EU law... will be needed in order to implement the final withdrawal agreement. While the Government will need to get the separate approval of Parliament to this agreement, it may well choose to use powers granted under the 'Great Repeal Bill' to prepare some of the necessary changes to domesticated EU law to take effect on Brexit-day*"⁶. There might well be provisions of any withdrawal agreement that require changes to the law going beyond "deficiencies" in the above sense. We would hope that the Government will use primary legislation to make those "non-deficiency" changes, though we can see that given the need to make certain changes quickly, it will be tempting for ministers to seek a power in the Bill. In that event the power should be tightly circumscribed, and because it would go beyond a mere "deficiency" there would be an obvious case for heightened scrutiny arrangements.

Other Safeguards

16. This need for very extensive use of delegated legislation brings with it an imperative need for safeguards. The Select Committee⁷ identified some of these. The White Paper is drafted in a manner generally compatible with the thinking underlying the recommendations; but there is no clear and explicit commitment to specifics. The Bar Council is concerned that the specific recommendations of the Select Committee are not "watered down" into vaguer ministerial assurances during the legislative process. The safeguards should be clearly written into the text of the Bill, given the unparalleled nature of the exercise.

17. The first safeguard is set out in paragraph 50 of the Select Committee Paper⁸. This would be an express restriction on the face of the Bill that the powers to enact delegated legislation will only be used "*so far as is necessary to adapt the body of EU law to fit the UK's domestic framework*" and "*so far as necessary to implement the result of the*

⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf_p.11

⁷ The House of Lords Select Committee on the Constitution 9th report of session 2016-17 The 'Great Repeal Bill' and delegated powers, HL Paper 123, 7 March 2017

⁸ Ibid

UK's negotiations with the EU". We recognise that the latter purpose is potentially very wide and it therefore ought to be clearly defined. Careful thought will also be needed about the effect of a breach of such a provision, and whether breach should render the delegated legislation ultra vires, the primary purpose of such a provision would be to provide a clear marker for the parliamentary process and a clear division between substantive changes to the law on the one hand and technical process of transposition on the other.

18. The three remaining safeguards are set out in paragraph 102 of the Select Committee Paper. Their purpose, as the Bar Council understands it, is to provide a mechanism for tying emerging draft statutory instruments back to the objective described in paragraph 8 above.

19. The first of them is that the Minister should be required to sign a declaration in the Explanatory Memorandum of each relevant instrument that one of the two limbs set out in paragraph 8 above is satisfied. It would be the job of the Joint Committee on Statutory Instruments to assess whether the instrument in question complies with the restriction, and thus to raise any potential vires issue.

20. The second is that the Explanatory Memorandum to each instrument sets out clearly what the pre-Brexit EU law currently is; and what effect the amendments made by the instrument will be. The Bar Council regards this requirement as likely to impose a highly beneficial discipline on the process.

21. The final safeguard we highlight is that government should make a recommendation for each draft instrument as to the appropriate level of parliamentary scrutiny. This recommendation should be considered by an appropriate parliamentary committee. The greater the degree of policy change the greater the amount of scrutiny there should be.

22. The requirement for these last three safeguards should be written into the text of the Bill, to accompany the basic restriction on the use of delegated legislation set out in paragraph 8 above. The Bar Council repeats its view of the desirability of strong transparent safeguards on the face of the bill.

CJEU case law and jurisdiction

23. The Government are evidently alive to some of the issues concerning CJEU jurisprudence that have emerged in our discussions so far, including those at the Bar Council's two Round Tables with civil servants. In interpreting "domesticated" EU law following Brexit-day, the UK courts will initially be bound by interpretative CJEU jurisprudence down to that date as if those were decisions of the UKSC. However, (a) they will not continue to be bound by subsequent CJEU decisions, and (b) in due

course the UKSC will be able to depart from pre-Brexit CJEU decisions much as it can depart from its own previous decisions. While it is helpful to understand the Government's current thinking on these points, our concern is that the relationship between CJEU jurisprudence and the domestic courts' future application of domesticated EU law is a complex and nuanced one, and at present the White Paper only scratches the surface of the issue. The Bar Council is in the course of preparing a free-standing paper on the CJEU dimension of Brexit as part of our well-received "Brexit Papers"⁹ series, and we hope that this will provide a further opportunity to contribute to the Government's thinking on the matters that the Bill will need to address.

24. The White Paper does not appear to deal expressly with the possibility of UK courts making references to the CJEU post-Brexit in proceedings concerning a factual situation governed by EU law arising pre-Brexit. That is admittedly a rather technical point, but whatever provision the Bill makes might not prevent the CJEU finding other routes to assuming jurisdiction over things taking place in the UK during the period when the Treaties remain applicable. There will also presumably be a need to provide for the domestic consequences of any dispute-resolution mechanism between the UK and EU appearing in the withdrawal agreement, and likewise in any future agreement for the new relationship. Perhaps this is the kind of point the Government have in mind in White Paper para. 1.17 (see above).

The EU Charter of Fundamental Rights ('the Charter')

25. Paras. 2.21 to 2.25 of the White Paper indicate that the Charter will not form part of the body of existing EU law to which UK courts should have regard following withdrawal. One can understand that from a political standpoint, but legally it is very curious, and all the more so given that the White Paper addresses continued reference to the Treaties and CJEU jurisprudence in order to make sense of, and provide context for, the "domesticated" bits of EU law. The CJEU habitually interprets EU acts and decisions in the light of the Charter, evident in the sanctions cases such as Kadi and Kadi II, for example. It unclear whether the general principles of EU law would have the same degree of clarity and precision as the Charter. Conversely if the Government are right to say, as the White Paper does, that the Charter does indeed simply replicate pre-existing general principles of EU law without conferring any new rights, then we would ask what is the problem in retaining it as a reference source?

Implications for environmental law

26. We now turn, briefly, to environmental law because it is one of the case studies

⁹ The Bar Council's Brexit Papers can be seen here: <http://www.barcouncil.org.uk/media-centre/campaigns/brexit/>

used in the White Paper and through examining it we can illustrate some of the challenges we have described. The white paper recognizes that the Great Repeal Bill needs to anticipate potential ‘gaps’ in legislation where changes in EU law are either imminent or due to change at the point of Brexit. It is suggested that these will be addressed using secondary legislation, however it is not clear how long that scrutiny of changes to EU law would continue. More clarity on this point in the Bill would be helpful.

27. In terms of environmental law (which influences every aspect of the building industry as well as industry generally, agriculture, energy, transport, and waste management by controlling the impacts these sectors have upon the environment as well as trade), the White Paper, on page 17, states that the Great Repeal Bill will ensure that the whole body of existing EU environmental law “continues to have effect in UK law”, but that thereafter the Government, “will then have the opportunity, over time, to ensure our legislative framework is outcome driven”. The White paper also refers to an “overall commitment to improve the environment within a generation” which it will seek to deliver and flags up the likelihood of “future changes to the regulatory frameworks”.

28. A great deal of environmental law is derived from the EU and the implications are that the Government will want to allow for departures from it, changes to it or seek re-interpretation of it. It is not clear how it intends to treat future changes to EU environmental law beyond the point of exit from the EU. To that end, we consider that the White paper could have been clearer on what is or is not to be treated as “EU-derived law” as time progresses and what the approach will be to future changes to EU law which might affect that “EU-derived law” beyond the point of exit from the EU. This will help achieve greater certainty and stability for the sectors of the economy impacted by environmental law.

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