

# UK Government publishes paper on legislating for Brexit

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On March 30, 2017, David Davis, Secretary of State for Exiting the European Union, presented a “**White Paper**” to Parliament. The paper sets out how the Government intends to treat EU law once Britain leaves the European Union. This proposal is an indication of the Government’s thinking and is not binding.

In brief, the Government plans a “**Great Repeal Bill**”. The Bill will repeal the European Communities Act 1972 (the “**ECA**”), which is the principal piece of UK legislation which gives EU law effect in the United Kingdom and primacy over UK law. However, in order to maintain continuity and provide certainty, the Government plans to transpose the body of EU law which will exist on the day of Britain’s departure from the EU into UK domestic law and to preserve EU case law “as it applies” on the date of Brexit.

The paper anticipates that the Great Repeal Bill will not make major changes to policy or establish new legal frameworks beyond those necessary to ensure continuity of properly functioning laws. There will be separate primary legislation to implement new policies or institutional arrangements that go beyond replicating current EU arrangements in UK law. In addition to introducing new frameworks to deal with customs and immigration laws, more detail will be required with respect to key industries such as financial services, aerospace and pharmaceuticals which are likely to be closely aligned with EU rules in order to benefit from any equivalence arrangements in the future.

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The full text of the UK Government’s White Paper can be accessed via this link: [UK Government White Paper](#)



### Why are these measures necessary?

Britain's decision to leave the European Union on June 23, 2016 was implemented by the UK Government on March 29, 2017. The Prime Minister, Theresa May, triggered Article 50 of the Treaty on the Functioning of the European Union, the formal mechanism for withdrawal from the organisation. On March 31, 2017 the President of the European Council published the European Union's draft guidelines for future negotiations with Britain.

Leaving the European Union will also require major changes to the United Kingdom's statute book. The Government aims to provide "maximum certainty" by introducing primary legislation, known as the Great Repeal Bill (the "**Bill**"), at the start of the next parliamentary session. The key elements of the Government's proposals are set out below.

### Repeal of existing European Union law

EU law in the United Kingdom derives both from measures at EU level that are directly applicable in the United Kingdom and those that are indirectly applicable.

EU regulations and certain provisions of the EU treaties are directly applicable in the United Kingdom, meaning that they require no implementing legislation and that individuals and companies can enforce their rights directly in front of national courts. These will cease to have effect in the United Kingdom once Britain leaves the European Union and the ECA is repealed.

EU law is also given effect by directives which are indirectly applicable in member states, meaning that they require implementation through domestic legislation. This has principally been done either by enacting primary legislation in the United Kingdom or via secondary legislation made under the ECA. The

latter of these will cease to have effect once the Britain leaves the European Union and the ECA is repealed.

### Summary of the White Paper's provisions

EU law as it stands at the date of Brexit will be brought onto the UK statute book by reference save to the extent that UK primary legislation which provides otherwise is enacted as part of the UK's departure from the EU.

EU case law as it stands at the date of Brexit will remain part of UK law but the CJEU will cease to have any jurisdiction in the UK and the UK Supreme Court may depart from prior CJEU rulings in appropriate circumstances.

The position of rights of individuals and companies deriving from EU treaty law is less clear, but it appears that they will be incorporated into UK law.

Substantial amendments may need to be made to the EU law brought onto the UK statute book so that it makes sense in light of Brexit. These amendments will be made by statutory instruments – a mechanism that provides the Government with flexibility in order to implement primary legislation. The amount of proposed flexibility has received some criticism from the opposition in the United Kingdom.

How much UK law will ultimately depart from EU law as a result of Brexit in key areas is still a matter of significant uncertainty and will depend on the outcome of negotiations.

Currently EU law enjoys primacy over UK law.<sup>1</sup> In the event of an inconsistency between domestic legislation and EU law, national courts must give primacy to EU law.

As mentioned, the Government proposes to repeal the ECA which will end the applicability of EU law in the United Kingdom and will provide for the primacy of UK law. A vote in both Houses of Parliament will be required to achieve this. Accordingly, the Bill might not pass without amendment from the opposition in the House of Commons or in the House of Lords.

### **Incorporation of EU law into UK law**

The existing body of European legislation is known as the *acquis communautaire* (the “**acquis**”). It is the Government’s intention that the Bill will convert the entire *acquis* into UK law at the point of Britain’s departure from the European Union.

In principle, the Bill will convert directly-applicable regulations into UK law. The Government does not seek to “copy out” these regulations onto the UK statute book, but to incorporate them by reference. The Bill will also preserve implementing legislation that the United Kingdom has passed to give effect to directives.

The Government’s proposals are less clear when it comes to the incorporation of relevant parts of EU treaties into UK law. The Government recognises that “much of the content of the treaties will become irrelevant” but that courts in the United Kingdom should “continue to be able to look to the treaty provisions in interpreting EU laws” still on the UK statute book. Additionally the White Paper states that those rights in EU treaties that can be relied on directly in court by an individual will be incorporated into UK

law. This suggests a piecemeal approach will be taken with some EU treaty rights and obligations being phased out as they become inapplicable in the UK.

The White Paper does not make reference to decisions of the European Commission or recommendations or opinions of EU institutions. It is likely that binding decisions made prior to Brexit, particularly in areas such as state aid and competition law, will continue to have force in the United Kingdom post-Brexit as there would be insufficient time for the Competition and Markets Authority (the United Kingdom’s competition authority) to re-assess European Commission decisions. It is also likely that guidance issued by EU institutions prior to Brexit will continue to be used as an aid to interpretation of regulations in the short-term, although this is not mentioned in the White Paper.

### **Interpretation of EU law**

The White Paper indicates that on exit from the EU, the Court of Justice of the European Union and the General Court of the European Union (together the “**CJEU**”) will cease to have jurisdiction. This means that CJEU will no longer be the final arbiter of the EU law that has been incorporated into the UK statute book after Brexit. The Government’s White Paper proposes that the Bill will “not require domestic courts to consider the CJEU’s jurisprudence” but that any question as to the meaning of EU-derived law which remains on the UK statute book will be answered with respect to the CJEU’s case law as at the date at which Britain leaves the European Union.

Such EU case law will be given the same precedent value as the judgments of the Supreme Court (*i.e.* they will be binding on all lower courts in England and Wales, Scotland and Northern Ireland) but the Supreme Court will have the ability to depart from these decisions “when it appears right to do so”. This mirrors the approach currently taken by the Supreme Court to its previous decisions. The status of pending decisions of the CJEU or opinions of the Advocates

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<sup>1</sup> Please note that we use the term “UK law” as shorthand to refer collectively to the laws of England and Wales, Scotland and Northern Ireland.

General (court appointed lawyers who provide independent opinions to the CJEU) is unclear and not addressed by the Government's White Paper.

### **Delegated Powers to Correct the UK Statute Book**

The Government foresees that changes will have to be made both to EU law upon its being imported into UK law and to pre-existing UK law for it to function properly in the post-Brexit environment. For example, references to EU institutions or to EU laws themselves will likely no longer be appropriate at that time. Further, processes required by EU law will become redundant (for example the "passporting" rights conferred on authorised firms under the Financial Services and Markets Act 2000). The White Paper makes it clear that UK Government departments have already conducted a preliminary "trawl" of legislation which will need to be amended in order for it to function appropriately post-Brexit, but little detail has been given on the specific pieces of legislation which will be affected in this way, or how they will need to be amended.

The Government has outlined that corrections to primary and secondary UK legislation will be made by statutory instrument. Statutory instruments ("SIs") are secondary legislation which allow governments to make more detailed orders, rules or regulations to supplement primary legislation. Statutory instruments can be passed in one of two ways: where Parliament (or the House of Commons only with respect to financial matters) does not pass a motion calling for the SI's annulment within a certain number of days (the so-called "**negative procedure**") or where Parliament approves a draft form of the order laid before it (the so-called "**affirmative procedure**").

The Government proposes significant safeguards to prevent the abuse of such sweeping powers, when enacted. The powers will not be available where the Government wishes to make a policy change. The powers will be time-limited and the Government is

also considering prohibiting their use to make retrospective provisions or impose taxation. The White Paper contains little further detail on the safeguards but more should be provided when the proposals are formally introduced to Parliament later this year.

### **Impact on Key Industries**

A number of the regulations which underpin key industries in the United Kingdom stem from EU law. Industry bodies from the financial services, pharmaceuticals, aerospace and transportation sectors are currently lobbying the Government to ensure that post-Brexit regulatory frameworks and agencies remain closely aligned with the EU standard. The rationale for such lobbying efforts is that it will be easier for the EU to grant regulatory equivalence in the event of a complete withdrawal of the Britain from the single market and customs union. This process will require an analysis by the relevant regulator to assess equivalence and determine which business lines can be given access to the single market and those which cannot.

The White Paper does not address in detail specific requirements for any sector of the economy as the question of whether to mirror future developments in EU law will be a question of policy for future governments and Parliaments.

### **Conclusion**

The Government's White Paper is a preliminary attempt to provide information on its future intentions and is necessarily light on detail. The Bill will be presented to Parliament at the start of the next parliamentary session and will be debated in the House of Commons twice before it is passed to the Exiting the European Union Committee for enhanced scrutiny. There may be amendments to the Bill in the House of Commons or the House of Lords.

*Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed in the “Practices” section of our website (<http://www.clearygottlieb.com>) if you have any questions.*

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