

AMENDMENTS TO THE EUROPEAN UNION (WITHDRAWAL) BILL – KEY TRENDS

The European Union (Withdrawal) Bill is one of the most controversial pieces of legislation to be put before MPs in recent memory. The objective of the Bill is to ensure that the UK's body of law continues to operate as a coherent and complete whole post-Brexit, effectively grandfathering existing EU law into UK law.

The challenge the government faces is the scale of the exercise - thousands of instruments need to be retained - and the Government has proposed extensive use of delegated legislation to adapt these instruments to the UK's new position, provoking accusations of executive overreach.

MPs from all main parties have proposed a large number of amendments on a range of issues. This briefing sets out the key trends in the amendments proposed so far.

Passage of the Bill

The Bill's fundamental purpose is to repeal the European Communities Act 1972 on "exit day" (a date to be determined by Government) and retain as part of UK law all "EU-derived domestic legislation" and "direct EU legislation" thus creating a new body of "retained EU law". The Bill seeks to confer wide powers on the Government to undertake the huge task of adapting retained EU law to the post-Brexit situation, notably clause 7 which gives Ministers wide discretion to make secondary legislation to "prevent, remedy or mitigate" any "deficiencies" in retained EU law "arising from the withdrawal of the United Kingdom from the EU". For further detail see Clifford Chance briefing [Brexit: European Union \(Withdrawal\) Bill Published](#), July 2017.

In order to become law, the Bill must pass both Houses of Parliament, undergoing the five main stages in each House as set out in Figure 1 below. The Bill started in the House of Commons and, after the formality of First Reading, progressed to Second Reading which allowed MPs to debate the Bill's main principles. The Bill passed its Second Reading in the Commons on 11 September 2017 by a vote of 326 to 290 after several hours of debate by MPs over two days. The Bill now moves to the Commons Committee stage

Key Issues

- Several amendments have been proposed by high-profile Conservative MPs.
- The Government may give ground on strengthening Parliamentary scrutiny and possibly devolution.
- Few amendments sufficiently address the importance of public consultation.

where it will be analysed in detail and amendments will be debated. As a bill of major constitutional importance, the Bill has been committed to a Committee of the whole House for consideration over eight days beginning on a date yet to be assigned.

Over 150 amendments and New Clauses (NCs) have been proposed so far, with more likely to be proposed once the House of Commons returns from the party conference recess on 9 October 2017, including amendments from the Government. With a small Commons majority, the Government is likely to follow Conservative-sponsored amendments with particular interest as it looks to ensure that it can muster enough votes to avoid any embarrassing and potentially devastating defeats.

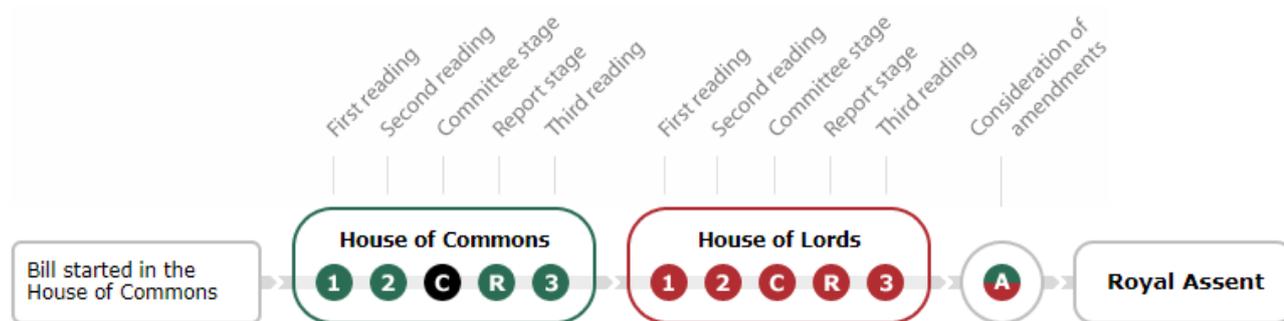


Figure 1: The stages for the passage of the Bill.

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Transparency and scrutiny

Parliamentary scrutiny

Under current Parliamentary procedure, Parliament has a limited ability to scrutinise the secondary legislation in the form of Statutory Instruments (SIs) that will be adopted under the powers conferred by the Bill. The majority of SIs made under the Bill would likely be subject to the "negative procedure" and, as such, would not automatically receive a debate or vote in either House. Several amendments aim to strengthen Parliamentary scrutiny, for example:

- giving Parliament the ability to bring a larger proportion of SIs made under the Bill into the scope of the "affirmative procedure" which provides for higher levels of Parliamentary oversight (for example, Conservative-sponsored Amendment 3);
- allowing Parliament to recommend amendments to certain SIs to Ministers (for example, Labour-sponsored Amendment 68 and Conservative-sponsored Amendment 3);
- providing for Parliamentary committees to determine the level of scrutiny that a particular SI should receive (for example, Labour-sponsored NC1).

In addition, the House of Lords Delegated Powers and Regulatory Reform Committee published a report on the Bill on 28 September 2017. The report recommends increased powers for Parliament to determine the level of scrutiny of SIs made under the powers granted by the Bill, indicating that this is a key area of contention in both Houses.

Key Amendments – Transparency and scrutiny

- Amendment 3 (Dominic Grieve MP, Conservative) and Amendment 68 (Chris Leslie MP, Labour) – Set out detailed processes for Parliamentary scrutiny of secondary legislation under the Bill, including processes for recommending amendments to Ministers.
- NC1 and Amendments 33 to 41 (Jeremy Corbyn MP, Labour) – Existing Lords Committee and new Commons committee to determine level of Parliamentary scrutiny of SIs, including, for some SIs, a procedure that allows for amendment.

Whilst improved scrutiny provisions may be helpful in offering an opportunity to object to proposed secondary legislation, Parliament can only reject and cannot itself amend an SI and any Parliamentary scrutiny may be too late in the process to give other stakeholders a meaningful opportunity to comment on and shape the content of an SI.

Public consultation

The desire for scrutiny of the Government's proposed changes to retained EU law goes beyond Parliament. A key concern for the business community is that, given the timing constraints, the Government will produce a very large number of SIs without sufficient, perhaps any, prior consultation. This would risk stakeholders not having an opportunity to spot issues and provide important industry-specific insights into complex areas of law in time to influence its content or to highlight the need for Parliamentary scrutiny. There are only a few amendments so far which deal specifically with this issue. For example, NC7 (Chris Leslie MP, Labour) would require Ministers to follow the Cabinet Office Code of Practice principles in respect of public consultation in advance of regulations being made, but this would appear only to regulate how any consultation is conducted rather than imposing a duty to consult.

An enormous task ahead

Robust, and therefore lengthy, scrutiny procedures may be resisted by the Government on the grounds of time. There is a huge amount to do, and Parliament's capacity before 29 March 2019 is limited. The Government itself has estimated (perhaps conservatively) that it needs to make 800 to 1,000 SIs in order to make the necessary corrections to retained EU law, and Parliament cannot in practice consider more than a tiny minority of these in any detail.

Even after exit day, the Bill gives the Government only two further years to exercise its powers under clause 7 to remedy "deficiencies" in retained EU law and to put right any problems that have emerged from earlier attempts.

But as importantly, there are questions about how, after Brexit, the UK will be able to adapt the body of retained EU law to address changing circumstances and future changes to policy (not just simply to address the deficiencies resulting from the UK withdrawal from the EU). After exit day, it could require an Act of Parliament to make any change at all to a vast number of the EU regulations and existing SIs implementing EU directives which will be carried over into UK law under the Bill, however technical their subject-matter and even if the powers to make rules in that area would normally be given to the Government or to a statutory regulator. This creates the risk that UK law will become inflexible and difficult to adapt, for example, to conform to changing international standards or to maintain equivalence with the corresponding EU legislation where this is desired.

NC25 (Kerry McCarthy MP, Labour) seeks to ensure that an Act of Parliament would be needed to make changes to any retained EU law (even though this would, for example, restrict the ability of statutory regulators to amend their own rules adopted under general statutory powers to implement EU directives). However, the amendment would allow Ministers to establish a list of technical provisions of retained EU law that may be amended by subordinate legislation outside the time limits imposed by the Bill and subject to some additional safeguards.

Key Amendments – Transparency and scrutiny (continued)

- NC7 (Chris Leslie MP, Labour) – Any public consultation in advance of regulations being made must follow Cabinet Office Code of Practice principles.
- NC25 (Kerry McCarthy MP, Labour) – Allows Ministers to establish a list of technical provisions that may be amended by subordinate legislation outside time limits imposed by the Bill and with enhanced scrutiny, including public consultation.
- NC26 (Kerry McCarthy MP, Labour) – Parliamentary committee to determine the form of parliamentary and public scrutiny and impose enhanced scrutiny for some SIs. Ministers must have regard to the results of a public consultation.

Limits on Government's delegated powers under the Bill

A good number of the amendments – several of which are Conservative-sponsored – look to restrict the Government's ability to use its sweeping powers under the Bill to amend retained EU law via secondary legislation (for example, Conservative-sponsored Amendments 1 and 15 – see the box on the right). However, it seems unlikely that the Government will accept amendments which prevent it from using the wide-ranging powers it seeks under the Bill, whether in relation to EU regulations, UK legislation or anything else. Even the process of considering all the amendments that EU withdrawal will require to UK primary legislation may be beyond Parliament's capacity in the run-up to March 2019.

In addition, MPs have proposed a number of 'wrecking' amendments that contradict the purpose of the Bill altogether. For example, one proposes that the European Communities Act 1972 will only be repealed if the UK remains a member of the EEA and the Customs Union (Amendment 78, Hywel Williams MP, Plaid Cymru). Such amendments are usually proposed in the knowledge that they have no chance of success, but allow the proposers to highlight opposition to a particular measure.

Retaining principles of EU law

While the Bill aims to bring existing EU law into UK law on the UK's exit day, it expressly excludes certain provisions of EU law, including the EU Charter of Fundamental Rights and the *Francovich* principle which provides that individuals can obtain damages in national courts if a state fails to implement EU law properly. There are several amendments which aim to remove these exclusions from the Bill or to continue the application of principles of EU law including, notably, Conservative-sponsored amendments to continue the application of the Charter of Fundamental Rights (Amendment 8) and the *Francovich* principle (Amendment 9).

In addition, Conservative-sponsored Amendments 9 and 10 aim to remove the restriction on bringing a challenge to retained EU law on the grounds that it is in breach of general principles of EU law.

Devolution

The Bill grants devolved authorities a limited role in adapting retained EU law, and has been attacked by the First Ministers of Scotland and Wales (from the Scottish National Party and the Labour Party respectively) as a "naked-power grab" by the UK Government. Several amendments have already been filed to enhance the powers of the devolved legislatures and governments, and the Scottish and Welsh governments jointly published on 19 September 2017 38 further amendments, which are likely to be put forward once the House of Commons returns from recess. Whilst the UK Government has insisted that the Bill does not change the devolved legislatures' current competence (the devolved administrations have no authority over these areas before Brexit because they fall within the competence of the EU), there is potential for the Government to accept some significant devolution-related amendments, particularly if this were in return for the support of 35 SNP MPs. If the other opposition parties were united with regard to a particular amendment and could bring along a few dissident Conservative backbenchers, the SNP's MPs could prove crucial in avoiding a Government defeat.

Key Amendments – Limits on Government's delegated powers

- Amendment 1 (Dominic Grieve MP, Conservative) – Restricts Government's power to amend retained EU law to a list of specified circumstances.
- Amendment 15 (Dominic Grieve MP, Conservative) – Removes Government power to amend retained EU law to remedy "deficiencies".
- Amendment 7 (Dominic Grieve MP, Conservative) – Restricts the Government's use of its powers to implement the withdrawal agreement until Parliament enacts a statute approving the final terms of withdrawal.

Key Amendments – Retaining principles of EU law

- Amendment 8 (Dominic Grieve MP, Conservative) – Continues the application of the Charter of Fundamental Rights.
- Amendment 9 (Dominic Grieve MP, Conservative) – Continues the application of the *Francovich* principle.
- Amendments 9 and 10 (Dominic Grieve MP, Conservative) – Removes restriction on bringing challenges to retained EU law on grounds that it breaches general principles of EU law.

Key Amendments – Devolution

- Amendments 90, 91 and 92 (Hywel Williams MP, Plaid Cymru) – Removes the restrictions on the Scottish Parliament, Welsh Assembly and Northern Ireland Assembly modifying retained EU law except in relation to matters which are reserved (for Northern Ireland, matters which are reserved or excepted).

For further detail on the Devolution element of the Bill see Clifford Chance briefing [BrexIt: European Union \(Withdrawal\) Bill and the Devolution Dimension](#), July 2017.

Conclusion

With the Government's slim working majority (13, including the Democratic Unionist Party), any united front between dissident Conservatives and opposition parties would be a cause for concern for the Government. Several amendments indicate commonality of purpose between high-profile (and largely Remain) Conservative MPs (e.g., Dominic Grieve, Kenneth Clarke, Anna Soubry and Nicky Morgan) with leading figures from the opposition parties.

Nevertheless, Labour and Conservative MPs remain fragmented between pro and anti-Brexit camps, and any proposals that could be portrayed as hindering the Brexit process are likely to have little chance of success. Increased Parliamentary scrutiny is one area which is likely to unite MPs across party lines and the Brexit divide – another should be ensuring that robust public consultation procedures allow stakeholders to contribute to and shape proposed secondary legislation. All parties should also have an interest in ensuring that the law remains sufficiently flexible in the future to respond to changing circumstances. Indeed, it may be that we see the Government adopt adapted forms of some of the proposals in these areas as its own.

CONTACTS

Phillip Souta
Head of UK Public Policy
T +44 20 7006 1097
E phillip.souta@cliffordchance.com

Simon James
Partner
T +44 20 7006 8405
E simon.james@cliffordchance.com

Jessica Gladstone
Partner
T +44 20 7006 5953
E jessica.gladstone@cliffordchance.com

Kate Gibbons
Partner
T +44 20 7006 2544
E kate.gibbons@cliffordchance.com

Chris Bates
Partner
T +44 20 7006 1041
E chris.bates@cliffordchance.com

Simon Gleeson
Partner
T +44 20 7006 4979
E simon.gleeson@cliffordchance.com



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London, E14 5JJ

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