Brexit: transition and standstill

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Theresa May, 2 October 2016

The UK must now determine its future relationship with the EU. The final thing I want to say about the process of withdrawal is the most important. And that is that ***we will soon put before Parliament a Great Repeal Bill****, which will remove from the statute book—once and for all—the European Communities Act.*

This historic Bill—which will be included in the next Queen's Speech—will mean that ***the 1972 Act, the legislation that gives direct effect to all EU law in Britain, will no longer apply from the date upon which we formally leave the European Union****. And its effect will be clear. Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.*

As we repeal the European Communities Act, ***we will convert the "acquis"—that is, the body of existing EU law – into British law****. When the Great Repeal Bill is given Royal Assent, Parliament will be free—subject to international agreements and treaties with other countries and the EU on matters such as trade—to amend, repeal and improve any law it chooses.*

Department for Exiting the European Union, 2 October 2016

The European Communities Act ("ECA") has meant that if there is a clash between an act of the British Parliament and EU law, EU law prevails. The European Court of Justice (ECJ) has interpreted EU law and delivered judgments that were binding on the UK and other member states. ***The repeal Bill will end ECJ jurisdiction in the UK.***

The Repeal Bill will include powers for ministers to make some changes by secondary legislation*, giving the Government the flexibility to take account of the negotiations with the EU as they proceed.*

It will also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level*, and amendments are required to ensure the law operates effectively at a domestic level. The ECA created a power which currently exists for Ministers to make secondary legislation to give effect to EU law. […]*

In order for the UK to withdraw in an orderly way, ECA repeal will ensure that legislation is passed in advance so that EU law ceases to apply and domestic law can take its place on the day of exit.

The Great Repeal Bill
What we do know about it…

- The Bill will be included in the Queen's Speech next spring (May 2017).
- That means it is scheduled to come after the Prime Minister's March 31 deadline for triggering Article 50
- It will repeal the European Communities Act 1972.
- It will take effect on the day the UK ceases to be part of the EU.
- EU law will then, by virtue of the new provisions, cease to apply in the UK.
- The new Act will transpose the EU *acquis* into UK law.
- It will include powers for ministers to alter the *acquis* by secondary legislation.
- And it will establish a new domestic platform for regulatory agencies.

The Great Repeal Bill
What we don't know about it…

- Will the UK transpose the entire *acquis* on Brexit day, or just those parts regarded as favourable or essential? (For reasons discussed below, it may not be practicable to incorporate the entire *acquis* "at the stroke of a pen".)
- How will the new Act impact on the wider exit negotiations both before and after it is enacted?
- What sort of Parliamentary scrutiny will there be (a) of the new Act; (b) of the exercise by ministers of their legislative powers to alter the *acquis* under the new Act?
- How will the devolved parliaments/assemblies interact with the legislative process?
- Will the new Act indicate that rules of the *acquis* are no longer be required to be interpreted in a manner consistent with ECJ case law? If so, will new guidelines on the interpretation of the *acquis* be included?

We do not yet have any clarity on the draft Bill, nevertheless on the little we know about the new Act, there are several significant issues which arise…

The Great Repeal Bill
Issues and challenges I

- First, section 2(1) European Communities Act currently provides that provisions of EU law which are directly applicable or have direct effect, including certain articles of the EU Treaties, are automatically binding "without further enactment". So, when an EU Regulation enters into force, it automatically becomes part of national law, without the need for implementing legislation, as would usually be required for obligations assumed under international law.
- When section 2(1) is repealed, rules of EU law which have not been separately implemented—e.g. Regulations like EMIR and MiFIR—will disappear, unless a "standstill" provision is enacted incorporating them into national law.
- The simplest "standstill" provision would incorporate Regulations wholesale—*including references to the secondary jurisdiction of EU institutions*. This is likely to be politically unacceptable but a more bespoke solution will be time-consuming and complicated. (One suggested solution is to append a schedule to the Act for each EU Regulation in force!) Can it be done in the six months to May 2017?

The Great Repeal Bill
Issues and challenges II

- Second, the Bill will contain provisions for the government to repeal or amend primary law using subordinate legislation.
- These are commonly known as "Henry VIII clauses" following the Statute of Proclamations of 1539, which gave King Henry VIII power to legislate by proclamation. Modern governments have relied on these clauses sparingly and only for tightly-circumscribed purposes. (A ministerial power to make regulations amending the law on financial collateral is set out in section 255 of the Banking Act 2009.)
- Using such clauses to amend the vast EU *acquis* could become a thorny constitutional and political issue.

The Great Repeal Bill
Issues and challenges III

- Third, the EU *acquis* is a "living" body of law which, even in the absence of new legislative proposals by the EU Commission, is frequently consolidated, amended and/or supplemented by legislative activity at all three levels of authority (primary, secondary and tertiary). EU measures which are already in existence at the date of Brexit will soon begin to look different from the *acquis* adopted by the UK. In some cases the policy behind the changes will be rejected the UK but in large numbers these legislative "refreshers" are likely be formal, sensible or uncontroversial. There is a risk that UK ministerial resources will be unnecessarily monopolised by the activity of assessing each update to see whether it should be reflected in UK law.
- If the UK is hoping to establish "equivalence", the process of keeping up-to-date may be particularly important.
- The challenges are more acute in relation to Regulations (in respect of which changes can take effect without any further implementation process owing to their "direct effect") than in relation to Directives.

The Great Repeal Bill
Issues and challenges IV

- Fourth, a closely related point is the challenge of dealing in the draft Bill with legislative references to the powers of institutions such as the European Commission, the ECJ, ESMA and the EBA, which won't have jurisdiction over the U.K.
- These latter two issues are closely inter-related in relation to the powers of the European Commission to adopt delegated and implementing measures. In financial markets law, Level 2 Measures are normally informed by technical standards specified by ESMA or the EBA under a legislative mandate. This is the process by which the European Union tackles the uncertainty which would otherwise result from a lack of detailed provisions.
- If the jurisdiction of EU institutions is to be fully abrogated in the UK, the Great Repeal Bill must incorporate bespoke versions of existing Regulations which make sense without these legislative mandates. Doing so will be time-consuming and complicated.
- Even then, the challenges and resource-implications of remaining aligned with the "living" laws of the European Union, for the purposes of remaining equivalent, will be considerable. The alternatives are to accept the risk of non-equivalence or to submit to the continuing jurisdiction of EU institutions for limited purposes.

European Union Legal Acts: extract from the official website of the European Union

EU legal acts and their classification

Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), the European institutions may adopt 5 types of legal acts:

- the regulation;
- the directive;
- the decision;
- the recommendation;
- the opinion.

Regulations, directives and decisions are binding legal acts, while the recommendation and the opinion are not.

A decision can specifically address one or more addressees (EU countries, businesses or individuals). There are also decisions with no specific addressee, particularly in the area of the Common Foreign and Security Policy (CFSP).

Delegated acts

Article 290 of the TFEU allows the EU legislator (generally, the European Parliament and the Council) to delegate to the Commission the power to adopt non-legislative acts of general application that supplement or amend certain non-essential elements of a legislative act.

For example, delegated acts may add new (non-essential) rules or involve a subsequent amendment to certain aspects of a legislative act. The legislator can thus concentrate on policy direction and objectives without entering into overly detailed and often highly technical debates.

The delegation of power to adopt delegated acts is nevertheless subject to strict limits. Indeed, only the Commission can be empowered to adopt delegated acts. Furthermore, the essential elements of an area may not be subject to a delegation of power. In addition, the objectives, content, scope and duration of the delegation of power must be defined in the legislative acts. Lastly, the legislator must explicitly set in the legislative act the conditions under which this delegation may be exercised. In this respect, the Parliament and the Council may provide for the right to revoke the delegation or to express objections to the delegated act.

This procedure is widely used in many areas, for example: internal market, agriculture, environment, consumer protection, transport, and the area of freedom, security and justice.

Implementing acts

Responsibility for implementing legally binding EU acts lies primarily with EU countries. However, some legally binding EU acts require uniform conditions for the implementation. In these cases, the Commission or, in duly justified specific cases and in cases provided in the Articles 24 and 26 of the Treaty on European Union, the Council is empowered to adopt implementing acts (Article 291 of the TFEU).

Key EU legislation affecting the financial markets

Industry Activity	EU Legislation relied on/applied	Derives from global (G20 or other) commitments?	Implemented in UK law? If so, how?	Introduces equivalence concept and/or third country rules?	Refers to organs of EU (ESAs, Commission)	Establishes reciprocity between Member States' authorities?	Uncertainty issues	Comments
Derivatives Clearing	EMIR	Yes – G20	In part – Part VII Companies Act	Yes – for CCP recognition	Yes, ESMA to establish RTS	Yes – regulatory authorities, through supervisory colleges	EMIR will lose "direct effect", replicating it would be tricky in view of role of ESMA and supervisory colleges	Core infrastructure regulation
Litigation	Brussels I Regulation	No.	In small part – Civil Jurisdiction and Judgments Act replicates reciprocity for 4 UK jurisdictions, see also Civil Procedure Rules ("CPR")	No.	Yes – EU Commission has small administrative role.	Yes - courts	Brussels I will lose direct effect, will the UK be able to accede to Lugano or Hague Choice of Courts Convention? There may be a loss of reciprocity on the enforceability of judgments.	Supports London as popular destination for corporate resolution, reciprocal enforcement of UK judgments enhances legal certainty and effectiveness
Corporate insol.	EUIR	No	In small part – see CPR		Yes – EU Commission has small administrative role.		Risk to reciprocity in respect of decisions taken by the courts of the UK where it is the insolvency forum.	Reciprocal enforcement of UK judgments enhances legal certainty and effectiveness
Bank resolution	BRRD	Yes – G20	Yes, through amendments to the Banking Act 2009	Yes, contains detailed provisions for relations with third countries.	Yes – EU Commission to adopt secondary legislation. The EBA to prepare draft RTS and ITS.	Yes – resolution authorities through resolution colleges.	If the UK becomes a third country, EU financial institutions would be required to apply Article 55 (contractual recognition of bail-in) to contracts entered into with UK counterparties. There is also the question of reciprocity and the degree to which resolution action undertaken by the UK resolution authorities will be recognised by EU Member States as well as the question of the role of the UK authorities in resolution colleges.	
Securities issuance	Prospectus Directive/ Regulation	No	Yes – through changes to the Financial Services and Markets Act 2000 ("FSMA"), the Prospectus Rules and consequential amendments to the Listing Rules and the Disclosure and Transparency Rules. The Prospectus Amending Regulation has direct effect in Member States.	Yes – equivalence decisions to be taken by the Commission. EU Member States to conclude cooperation arrangements with supervisory authorities of third countries.	Yes, EU Commission to adopt secondary legislation, ESMA to develop draft RTS and ITS and deliver opinions on third country prospectus regime.	No	Loss of "passporting" rights.	The Prospectus Directive provides for a single regime throughout the EU governing the requirement for a prospectus and its content, format, approval and publication.

Key EU legislation affecting the financial markets

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Benchmarks	BMR	Yes – but only EU has implemented	In part – through FCA Handbook	Yes, establishes three routes to the recognition of "third country" benchmarks	Yes, ESMA to maintain register and prepare RTS.	Yes through supervisory colleges	BMR will only just have come into application after two years, only to lose direct effect in the UK. Replicating it would be tricky in view of role of ESMA and supervisory colleges	
Investment services	MiFID/MiFIR	Yes, in part.	Entry into force of MiFID II and MiFIR delayed to 3 January 2018.	Yes, access dependent on the type of client a third country investment firm intends to provide services to.	Yes, ESMA and the Commission	No	If the UK triggers Article 50, it is likely that MIFID II/ MiFIR will enter in to force before the UK's exit under that procedure. The UK could choose to implement MiFID II or introduce alternative legislation.	MiFID II and MiFIR are designed to take into account developments in the trading environment since the implementation of MiFID in 2007 and, in light of the financial crisis, to improve the functioning of financial markets making them more efficient, resilient and transparent.
Securities Markets	MAR/ Directive on Criminal Sanctions for Market Abuse ("MAD")	In part – MAR introduces a trading obligation for derivatives which are eligible for clearing under EMIR in accordance with G20 commitment.	Being a regulation, MAR takes direct effect in the UK (entered into force on 3 July 2016 with certain provisions delayed to 3 January 2018). Substantial amendments made to the FCA Handbook including Chapters 2 & 3 of the Disclosure and Transparency Rules The UK chose to opt out of CSMAD.	No but has extraterritorial impact – it captures any actions and omissions in the EU and also in a third country where they relate to financial instruments captured by under it.	EU Commission and ESMA	No	MAR will lose "direct effect" in the UK but will continue to confer a degree of extra-territorial jurisdiction on EU Member States in respect of UK-traded securities with a connection to EU-traded securities. This may mean that EU competent authorities levy penalties on UK firms for market abuse in respect of UK securities exclusively admitted to trading in the UK.	Market abuse regulation facilitates fair and effective markets and enhances reputation of participants.
Banking (prudential supervision)	CRR/CRD IV	Yes – G20	CRR is directly applicable in the UK. CRD IV is implemented in the UK by Treasury Regulations and rules made by the PRA and the FCA.	For CRR – Commission to adopt implementing acts on the equivalence of third country regimes. For CRD IV, Commission to negotiate agreements with third countries re supervision on a consolidated basis.	CRR/ Commission, EBA and the ESRB CRD IV/ Commission and the EBA	For CRD IV, yes through colleges of supervisors. Reciprocity for firms incorporated in EEA states that have adopted and implemented CRD IV.	Would CRR cease to have effect in the UK following formal withdrawal/exit from the EU?	CRR and CRD IV form the legal framework governing banking activities, the supervisory framework and the prudential rules for credit institutions and investment firms.
Financial contracts	Rome I Regulation	No	Implemented through two statutory instruments.	No, Commission to make a proposal to the EU Parliament and Council on the procedures under which Member States are able to negotiate and conclude agreements with third countries.	No	Yes, courts		Rome I sets out EU-wide rules for determining which national law should apply to contractual obligations in civil and commercial matters involving more than one country.

Key EU legislation affecting the financial markets

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Alternatives	AIFMD	In part- G20	Through the Alternative Investment Fund Managers Regulations 2013 and policy statements from the FCA.	Third country AIFM is required to comply with the Directive and certain other requirements, depending upon whether the AIF is EU or non-EU including cooperation arrangements, tax information sharing, and the third country AIFM must not be established in a jurisdiction that is designated as non-cooperative by the FATF.	Commission, ESMA, EBA	No	Loss of passporting rights. Will there be transitional arrangements for AIFs already in the market and fully passported prior to the date of Brexit?	The AIFMD provides an EU framework for the regulation and oversight of alternative investment fund managers (AIFMs).
OTC Derivatives	FCAD	No	Implemented in the UK by the Financial Collateral Arrangements (No. 2) Regulations 2013	No	No	No	It remains to be seen whether the UK will retain extant protections for financial collateral arrangements.	FCAD provides a harmonised EU regime for the receipt and enforcement of financial collateral.
Securities settlement	SFD	No	By the Financial Markets and Insolvency (Settlement Finality) Regulations 1999.	No	Commission in an administrative capacity.	No	Whether the UK will retain protections for transfer orders in payment and securities settlement system and whether it will disapply insolvency law from interfering in the insolvency of a participant in such a system.	The SFD is aimed at reducing the systemic risk associated with participation in payment and securities settlement systems, and in particular the risk linked to the insolvency of a participant in such a system.
Securitisation	Forth-coming…	No but Commission will consider if and how to incorporate criteria developed by the BCBS and IOSCO	Regulation yet to be adopted by the EU.	No	ESMA, EBA, EIOPA and the Commission	No		The proposed Regulation provides a framework to identify simple, transparent and standardised securitisations and to allow investors to analyse associated risks.
Money Markets	MMFs Regulation	No	Regulation yet to be adopted by the EU.	No	Commission, ESMA, ESRB	No		The Proposed Regulation introduces new rules aimed at making MMFs more resilient to future financial crisis and at the same time securing their financing role for the economy.
Securities Financing	SFTR	Yes, follows the FSB Policy Framework	Directly applicable	Yes, it does provide for equivalence and recognition of trade repositories and equivalence of reporting.	Commission, ESMA, EBA, EIOPA, ESRB, ESCB including the ECB	No	SFTR will lose direct effect.	The SFTR provides a set of measures for enhancing regulators' and investors' understanding of securities financing transactions

The Great Repeal Bill
Issues and challenges V

- The Great Repeal Bill will "*end ECJ jurisdiction in the UK*".
- This raises the question of whether, and to what extent, ECJ case decisions will retain the force of precedent or persuasive authority in the English and Scottish legal systems: a) in relation to the transposed acquis; and b) in relation to any new rules of UK statute law that are aligned, for reasons of equivalence or otherwise, with EU laws brought into force after Brexit.
- On the one hand, following ECJ jurisprudence arguably amounts to giving continued effect to decisions of the ECJ, and to do so in a situation where the UK will not have been able to nominate judges to the court or advocate for its preferred approach.
- On the other hand, abandoning any expectation that ECJ jurisprudence is binding, or at the least heavily persuasive, would leave a disconcerting and possibly disruptive legal vacuum. It would also allow divergences to grow between EU and UK law in areas where there might be much to be said for trying to maintain consistency.

Conclusion