

POLICY PAPER

No 4

The Repeal Bill

Legal and Practical Challenges of Implementing Brexit

Tobias Lock

June 2017

scer.scot

Introduction

The United Kingdom's departure from the European Union requires not only a readjustment of the UK's external relations with the EU and the wider world, but also changes to domestic law. At present, some areas of domestic UK law, such as environmental, agricultural, consumer protection or labour law, are to a large extent determined by EU law obligations. In addition, EU law has effects in many other areas of the law, such as that on product standards and services. EU law is given effect in the law of the UK by the European Communities Act 1972 (ECA).

Brexit will result in the UK again being competent to determine policy and legislate in these areas. The UK having withdrawn from the EU will mean that the ECA will no longer serve its purpose and will need to be repealed. However, unless EU law currently applicable in the UK were either retained or replaced domestically, withdrawal from the EU would result in gaps in the UK's legal order.

To avoid such gaps, the government announced the introduction of a Repeal Bill, the aim of which is to repeal the ECA and to 'convert directly-applicable EU laws into UK law.'¹ The Repeal Bill will be a technically complex piece of legislation. By introducing a previously unknown category of legislation – referred to here as incorporated EU law, including decisions of the European Court of Justice – it will have far-reaching consequences for the UK legal system. In addition, the process of amending EU law converted by the Repeal Bill – whether through primary or secondary legislation – raises questions about the appropriate balance of powers between the legislature and the executive.

The Repeal Bill furthermore raises important questions as far as devolution is concerned. This is true first for whether the passage of the bill itself is likely to require the consent of the devolved legislatures; and it is also true for the devolution settlement as a whole, given that under current devolution arrangements some policy fields covered by EU legislation are devolved, so that the plans to convert EU law touching on these fields into UK law – and not Scottish, Northern Irish or Welsh law – are liable to causing controversies between central government and the devolved governments and legislatures.

How Will the Repeal Act Be Made?

The Repeal Bill was announced in the Queen's Speech of 21 June 2017 and is going to be introduced into the UK parliament shortly thereafter. It will then go through the usual parliamentary process with votes in both the House of Commons and the House of Lords followed by the royal assent.

(1) Role of the House of Lords

Given that the government failed to win a majority of seats in the general election of 8 June 2017, the House of Lords may come to play a more prominent role than perhaps expected. This is because the so-called Salisbury-Addison Convention, which constrains the powers of the House of Lords to oppose legislation that had been promised in the governing party's election manifesto,² does not apply to minority governments.³ Hence

there is nothing to prevent the Lords from amending the Repeal Bill or even voting it down.

Furthermore, the current parliamentary session, which commenced with the Queen's Speech, is due to last an unusually two years. This has consequences for the Lords' powers to delay the bill. Since the adoption of the Parliament Acts 1911 and 1949, the Lords can no longer veto legislation. If the House of Lords voted against the bill, the House of Commons would be able to override this vote, but crucially only in the next session of parliament. Hence if the current session is to last two years – beyond the envisaged date of Brexit with necessity dictating that the Repeal Act is in force at that point in time – the Lords are in a strong position to shape the contents of the bill.

(2) Role of the devolved legislatures

A further question concerns the involvement of the devolved legislatures in the legislative process. The so-called Sewel Convention – now reflected in law by the Scotland Act 2016⁴ and applicable as regards the other two devolved legislatures as well – states 'that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'.⁵ Moreover, the Sewel Convention also applies where a bill passing through the UK parliament alters the legislative competence of the Scottish parliament.⁶ The Repeal Bill will probably fall into both categories: it will legislate with regard to devolved matters as far as it will convert EU legislation – in particular directly applicable regulations (e.g. concerning the environment) – into UK law; and it will probably alter the powers of the Scottish parliament, which is currently unable to legislate contrary to EU law.

The Prime Minister said in the debate on the Queen's Speech that there was 'a possibility that a legislative consent motion may be required in the Scottish parliament, but that matter is being considered between the Westminster and Scottish governments'⁷ and it has now been confirmed by the Secretary of State for Leaving the EU that legislative consent will be sought.⁸

What would happen, however, if consent were refused? The first possibility would be to amend the bill so as to exclude its effects for Scotland as far as devolved subject matters are concerned. The Scottish parliament would then need to pass its own legislation salvaging the EU law concerned. This may, however, not prove to be practical or desirable from a Westminster perspective.

First, it will in practice be difficult and complex task to precisely determine which aspect of a piece of EU legislation would be a reserved matter and which a devolved matter, so there is a danger of omission. Second, the white paper on the Repeal Bill makes it clear that the bill will provide an opportunity to determine the level (central or devolved) best placed to take decisions on repatriated policy areas.⁹ In order to be in a position to do so, it could be considered a logical step to centralise all of these powers first before coming to a decision on this question. This requires the bill to be passed with effect for Scotland and the other devolved nations.

However, it should be noted that this would likely be seen as a highly controversial step in the devolved parts of the UK.

Westminster might therefore see it fit to offer some compensatory measures to bring the devolved legislatures on board. This could consist in the devolution of powers in other areas; monetary compensation; or stronger involvement in the Brexit negotiation process. Alternatively, the Scottish government (and/or parliament) might formulate different demands.

The second possible reaction for Westminster would be to ignore the refusal of legislative consent. From a legal perspective, this is possible for two reasons. First, the Sewel Convention only applies 'normally' and the UK government could argue that the Brexit process and the Repeal Bill pose unique challenges that cannot be considered normal. Second, even if this view is not shared by the devolved administrations and legislatures, the convention remains not justiciable. As confirmed by the UK Supreme Court in the Miller case concerning the need for parliamentary approval for the Article 50 notification, judges 'cannot give legal rulings on [a convention's] operation or scope, because those matters are determined within the political world.'¹⁰ This quote shows on the one hand that the Sewel Convention is not legally binding; on the other hand it suggests that there are political consequences of ignoring it, which in the case of Brexit might amount to a constitutional crisis.

In any event, the refusal to give consent would take up time as one can expect political consultations to precede any one of the possible reactions set out above. Given the tight time frame for the passage of the Repeal Bill, this in itself would be problematic.

What Will the Repeal Act Do?

The Repeal Bill promises to repeal the ECA and convert EU law into UK law. While the UK is still a member of the EU, EU law is applicable in a number of guises domestically. The EU treaties and other directly effective EU law are part of UK law according to s. 2(1) ECA. For this reason, EU citizens have a right to work in the UK and traders have a right to import and sell goods from other member states without the need to pay customs duties or modify them. Furthermore, directly applicable EU legislation (so-called regulations) applies on the same basis. Hence an EU citizen working in the UK has a right to be given the same social and tax advantages as UK citizens.

EU directives – which are not directly applicable, but need implementation through national legislation – are given effect in a slightly different manner. Some have been incorporated into acts of parliament. For instance the Equality Act 2010 transposes a number of EU anti-discrimination directives into UK law and makes them applicable here. The vast majority of EU directives however are not transformed into acts of parliament, but are made applicable by way of secondary legislation (i.e. by the executive). The executive – either a Westminster department or a devolved executive – is given this power by s. 2(2) ECA. Hence there are currently thousands of statutory instruments in force in the UK that have been adopted on this basis. Examples include the environmental impact assessment regulations or the working time regulations.

By repealing the ECA, the Repeal Bill will sever the link between EU law and domestic law as far as its application is conditional on the ECA being in force. Hence, following repeal of the ECA, the EU treaties will cease to have effect in the UK. In addition, all secondary legislation adopted on its basis will lose its legislative footing and would

ordinarily fall away. By contrast, those provisions of EU law that have been separately legislated for by statute, such as the Equality Act 2010, will remain unaffected.

This would lead to large gaps in the law of the UK. Vast swaths of environmental, labour, agricultural, fisheries, private international and migration law would disappear overnight.

This is why the second, and more important, feature of the Repeal Bill will be to convert existing EU law into domestic law in order to avoid those gaps from occurring. As a result, EU law will continue to apply as it did on the day the UK leaves the EU.

According to the UK government's white paper, the bill will preserve the EU treaties – as far as they contain directly effective rules (e.g. on equal pay for men and women) – but it will not preserve the Charter of Fundamental Rights. The bill will also convert and preserve all EU secondary law currently applicable in the UK.

The Repeal Bill will not be the only piece of legislation dealing with Brexit. According to the Queen's Speech, it will be accompanied by seven other substantive bills concerning customs, trade, immigration, fisheries, agriculture, nuclear safeguards, and international sanctions. These separate bills deal with policies that are currently determined at EU level and which the UK will need to have in place on the day of withdrawal.¹¹ The precise relationship between the Repeal Bill and the seven other bills is not clear yet.

The Repeal Bill poses a number of technical challenges in relation to its legal consequences; amendments (powers and timing); as well as devolution. These will be explored in what follows.

Legal Consequences

(1) Incorporated EU law

The Repeal Bill will have far-reaching legal consequences in that it will create a new type of legal source in UK law: incorporated EU law. At the moment, EU law takes primacy over conflicting UK law. This means that where an act of the UK parliament contradicts, for instance, an (incorporated) EU Directive, the act of parliament must be disapplied. According to the government's white paper, incorporated EU law will continue to have this effect, but only as far as UK legislation adopted before Brexit are concerned. Where there is a conflict between a new act of parliament and incorporated law, the new act of parliament prevails.

Despite these important clarifications, the white paper leaves a number of questions open. The first concerns the relationship between incorporated EU law and newly adopted secondary legislation, which is not clear, unless of course the secondary legislation is expressly used to amend the provision of incorporated EU law concerned using the delegated powers discussed below.

The second concerns the relationship between incorporated EU law and devolved (primary and secondary) legislation. At the moment, s. 29 of the Scotland Act, for instance, considers that acts of the Scottish parliament that contradict EU law are 'not

law'. The same goes for acts of the Scottish government.¹² Comparable limits are placed on their Northern Irish and Welsh equivalents.¹³ The white paper is silent about whether these limits to the powers of the devolved institutions will be scrapped or whether – which seems more likely – will be retained for incorporated EU law.

The third question concerns the precise identification of incorporated EU law. While this will be relatively straightforward in the immediate aftermath of Brexit, it will become increasingly more difficult once elements of incorporated EU law have been repealed or amended. Much will depend on the legislative technique used and the precise extent of the amending powers given to the executive. For instance, if the government planned to change the maximum number of hours that an employee may work per week – currently 48 hours under the working time regulations – it would have two options. It could either amend the incorporated working time regulations to this effect (e.g. by raising the number of hours to 60), or it could use the opportunity to pass entirely new working time legislation. If the latter route is chosen, there will be no issue: the new legislation will be entirely domestic.

If the former route is chosen, the question will be whether the now-amended working time regulations would still be classed as incorporated EU law – thus enjoying primacy over conflicting pre-Brexit UK law; whether they would be classed as having been endorsed in their entirety by the legislator post-Brexit so that they would be considered domestic legislation; or whether only the amended provision would be considered post-Brexit legislation and the other provisions would still be classed as incorporated EU law enjoying primacy over conflicting pre-Brexit legislation.

The fourth question is if and how the future relationship – as well as a likely transitional relationship – between the EU and the UK will be reflected in all of this. For instance, if in the future there is still mutual recognition of professional qualifications (e.g. for architects, dentists, lawyers, teachers), the UK may commit to continue to apply the EU's Professional Qualifications Directive (2005/36/EC). According to the UK government's plans set out in the white paper, this directive – currently applicable in the UK through the Recognition of Professional Qualifications Regulations 2007 – will continue to apply post-Brexit.

The question is therefore whether EU law that – by virtue of the UK's post-Brexit arrangements with the EU – will continue to be binding, will be given a special status, including primacy, or not. The Repeal Bill could, for instance, provide such law will continue to have primacy over domestic law, even if adopted after Brexit. Equally, the bill could provide that amendments to that law which are necessitated by the new EU-UK relationship will also have that effect. Depending on whether a future EU-UK arrangement provides for some form of primacy, such a solution may or may not be required.

(2) ECJ case law

Furthermore, the white paper states that the European Court of Justice's (ECJ) case law as it stood on the day of Brexit will remain binding on UK courts when interpreting incorporated EU law. It will be given the same status as the case law of the UK Supreme

Court, which means that all inferior courts will be bound by it. The UK Supreme Court itself will, however, be able to deviate from it. This warrants three remarks.

First, this approach raises the same question as above about the exact moment when incorporated EU law ceases to have that status and becomes domestic law. Connected with that is the question whether ECJ case law would be relevant for any future arrangement between the EU and the UK, in particular if it merely continued the status quo. Second, UK courts will have lost the ability to request preliminary rulings from the ECJ on the interpretation of incorporated EU law and clarification of ECJ case law. Third, while only pre-Brexit case law will be binding, there is nothing in the white paper that would prevent UK courts from considering post-Brexit ECJ case law as a persuasive (as opposed to binding) authority when interpreting incorporated EU law.

Amending Incorporated EU Law

Following the incorporation of EU law by the Repeal Act, incorporated EU law is likely to be amended at various stages. One can draw a broad distinction between technical changes that will become necessary once the UK has left the EU and substantive changes that mark a change in policy.

(1) Types of changes and timing

Technical changes will be needed to make incorporated EU law function in a post-Brexit setting. Not only will there be a need to remove references to the European Union from the statute book, but the same will be true for references to decisions by EU institutions and agencies, which often perform a supervisory function.

The white paper says that these technical changes should take effect on the day of Brexit. This means not only that the Repeal Bill must have received its royal assent by then, but it implies that it must enter into force in time for any procedure for making those changes (see below) to have been complied with. While minor technical changes – such as references to EU law or EU parliament elections – can be effected straight away, others will need to reflect the outcome of the UK's withdrawal negotiations. For instance, if the UK continued to be subject to the supervision by certain EU agencies, references to these agencies would need to remain on the statute book. The outcome of this might not be known until the end of the Brexit negotiations or indeed until the future relationship between the EU and the UK – expected to be fully negotiated and agreed on after Brexit during a transition period – will take effect.

At the same time, the white paper envisages that the repeal of the ECA will only be effective from the date of Brexit. This implies that the conversion of EU law into domestic law will happen on that same day. This means that the technical changes necessary will need to be made in advance of this.

In order to allow for at least some parliamentary scrutiny, there ought to be (at least) three rounds of amendments. A first round, which can be completed while Brexit negotiations are ongoing and which would bring about clerical changes like the removal of references to the EU from the statute book; a second round after Brexit negotiations are complete but before the date of Brexit, which takes into account the transitional

relationship between the EU and the UK; and a third round, probably after Brexit, once the future relationship has been fully agreed and before it enters into force. In this context one must bear in mind that EU law will not stop evolving during the Brexit process. New legislation will be passed and will enter into force. Hence there may have to be 'mini' rounds one and two to catch up with the latest developments at the EU level.

In addition, there will be amendments affecting the substance of incorporated EU law. After all, the purpose of the Repeal Bill is to ensure that after Brexit the legislature will be in a position to decide which laws it would like to retain, which it would like to amend, and which it decides to repeal.

The difference between technical and substantive amendments will not always be easy to draw. For instance a technical change can have substantive effects: if – as is suggested in one of the white paper's case studies – the requirement to obtain an opinion from the European Commission – or any other body – on the compatibility of a particular oil and gas project with environmental standards will no longer be necessary, this may in effect amount to a reduction in those standards. This means a purely technical correction of removing a procedure involving an EU institution can have substantive effects.

In addition, the white paper proposes that the government be given powers to make substantive changes in three cases: a) matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the government needs to allow for progress of negotiations; b) adjustments to policy that are directly consequential on exiting the EU; and c) to provide a level of detail not thought appropriate for primary legislation.

These are fairly malleable categories and it will be important to ensure that proper parliamentary scrutiny is made possible (see below). Otherwise – as the House of Lords Constitution Committee put it – the Repeal Bill would enable 'the government effectively to re-write the law across whole swathes of the statute book'.

(2) Powers to make changes

There are essentially two avenues open for amending incorporated EU law in the future: through primary legislation (i.e. acts of parliament) or through secondary legislation (i.e. executive law-making by way of delegated powers). The white paper correctly recognises that not all of these changes can and indeed need to be effected by parliament. This is because some of the changes needed will be of a purely technical nature – not an issue parliament is best placed to deal with or ought to spend its time on. In addition, there will be enormous time pressure to effect these changes in time for Brexit (see above). Hence the proposal to make provision in the Repeal Bill for delegated powers makes sense.

Secondary legislation need not escape parliamentary scrutiny, which the parent act can provide for. Nonetheless, not all statutory instruments are laid before parliament. And if they are, parliament's role differs considerably from that in the primary legislative process.

There are two standard procedures open to the drafters of the Repeal Bill: the negative resolution procedure and the affirmative resolution procedure.¹⁴ The latter means that any statutory instrument must be approved by (usually) both Houses at Westminster. However, parliament cannot propose amendments, so that the vote is held on a take it or leave it basis. Given the time pressures that the government is likely to be under once the ramifications of Brexit are clear, the affirmative resolution procedure is unlikely to be workable.

Where the negative resolution procedure applies, there is not normally a parliamentary debate and the statutory instrument becomes law after the passage of normally forty days, unless an objection is raised by a member of parliament. The current hung parliament makes objections under both procedures relatively, likely resulting in delays in the domestic implementation of Brexit.

However, there is nothing to prevent parliament from decreeing a completely novel procedure for scrutinising the delegated powers given to the government by the Repeal Act. One could for instance conceive of a requirement for approval by a newly formed EU repeal committee or by existing committees depending on the subject matter of the change concerned. Nonetheless, the sheer volume of anticipated changes coupled with the time pressures outlined above – according to the white paper a ‘very significant proportion of EU-derived law’ will need to be amended – will make effective scrutiny difficult.

A key question with regard to delegated powers concerns their limits and the appropriate level at which they will be exercised (i.e. by Whitehall/Westminster or by the devolved administrations and/or legislatures). The latter question will be addressed in the following section.

As for the limits to delegated powers, the white paper says expressly that delegated powers will be limited to ensure that the government cannot thereby introduce changes in policy. As explained above, the difference between a technical amendment and a substantive policy change is sometimes hard to draw, as one can lead to the other. Hence effective parliamentary scrutiny will be particularly important to ensure that the Repeal Bill does not lead to a massive accretion of barely supervised discretionary powers for Whitehall. This is demonstrated by the white paper itself, which points to amendments that cannot be classified as mere technical changes: for instance, where it speaks of certain reciprocal arrangements – such as mutual recognition of product standards – that will need to be ended because of Brexit, these will necessarily involve a policy change, even though that policy change may be considered part and parcel of Brexit.

The discussion on delegated powers warrants an additional point which the white paper only briefly touches on. The delegated powers provided for in the Repeal Bill will also extend to corrections of acts of parliament that have transposed EU law into domestic law. The Equality Act, for instance, makes numerous references to EU law and itself contains a provision empowering the government to pass secondary legislation in order to comply with future EU law obligations. Other acts directly connected with EU law include the Consumer Rights Act 2015 and the Data Protection Act 1995,¹⁵ for instance.

Again, it will be important to ensure that the powers to amend these acts of parliament are precisely circumscribed.

It should be noted in this regard that many of the powers envisaged by the Repeal Bill are not technically Henry VIII powers, which are powers given to the executive to amend primary legislation (acts of parliament). Given that the Repeal Bill will convert EU law into secondary law and will retain existing secondary law derived from EU law and based on the ECA, the delegated powers contained in it are theoretically different from Henry VIII powers. However, given that – in contrast to most secondary legislation – incorporated EU law will deal with substantive issues which would ordinarily be found in primary legislation, the delegated powers provided for by the Repeal Bill will potentially be of similar force as Henry VIII powers. Much like Henry VIII powers, they are therefore liable to undermine the role of parliament as the democratically-elected sovereign body for taking far-reaching political decisions.¹⁶

For this reason, the introduction of strict limits on the powers of the executive are necessary. The House of Lords Constitution Committee makes valuable suggestions.¹⁷ They include sunset clauses, which bring these powers to an end after a certain period; enhanced scrutiny procedures and additional obligations on ministers in disclosing the extent of the changes proposed.

The Repeal Bill and Devolution

The Repeal Bill will pose particular challenges for the devolution settlement. Two questions have already been covered in this paper: the involvement of the devolved legislatures in the making of the Repeal Bill, as well as the possible retention of the currently existing limitation on the powers of the devolved legislatures and governments stemming from EU law. The most controversial question however will be whether the Repeal Bill will respect the current devolution arrangements or whether it will change them either temporarily or permanently.

At the moment, the devolved legislatures have powers over a number of policy areas that are currently largely or partly determined by EU law. For Scotland, the most important ones are agriculture, environment, fisheries and judicial cooperation, in particular in the area of private international law.¹⁸ If the Repeal Bill did nothing but incorporate EU law into domestic law, then the Scottish parliament would be competent to legislate in the areas mentioned and to amend or repeal incorporated EU law with effect for Scotland. For instance, the Scottish parliament could legislate for a Scottish agricultural policy.

The Queen's Speech however suggests that – at least in the first instance – this will not happen. It envisages to 'replicate the common UK frameworks created by EU law in UK law, and maintain the scope of devolved decision-making powers immediately after exit. This will be a transitional arrangement to provide certainty after exit and allow intensive discussion and consultation with the devolved administrations on where lasting common frameworks are needed.'

The main reason for this is that EU law currently provides for a common framework. The devolution settlement was devised on that basis, so that the retention of common

frameworks in some areas can be considered desirable to preserve the UK's own domestic market. At the same time one, must recognise that such a step will prove highly controversial in the devolved parts of the UK, so that mitigating measures should be considered. These could include an equal involvement of the devolved legislatures and governments in the policy-making process (e.g. by giving them veto rights); or compensatory devolution of other powers to them; or a stronger involvement of the devolved governments in the Brexit negotiations.

In order to achieve this aim, the Repeal Bill will have to make specific provision. The Scotland Act 1998 – which sets out the powers of the Scottish parliament – as well as its Northern Irish and Welsh equivalents are constitutional statutes and not subject to implied repeal. This means that any modification of the status quo needs to be done expressly. Hence the Repeal Bill could stipulate that changes to incorporated EU law must be considered reserved matters under Schedule 5 of the Scotland Act.

Alternatively, it could opt for a wholesale change of the Scotland Act and remove certain policy areas – such as agriculture and fisheries – from the competence of the Scottish parliament.

Another – subtler – option would be to merely modify s. 29 and s. 57 of the Scotland Act and their Welsh and Northern Irish equivalents, which say that any Scottish parliament legislation and any Scottish government action contrary to EU law is ultra vires. Hence by modifying these provisions to extend to 'EU law converted by the Repeal Act' or something along these lines, the environment, agriculture, fisheries, etc would formally remain devolved powers of the Scottish parliament, but in so far as it has been incorporated into UK law it would be immune from being modified or contradicted by Scottish legislation.

As far as the delegated powers discussed above are concerned, it would depend on whether the Repeal Bill makes provision for these to be exercised by the devolved administrations where they concern devolved issues or not. If this is not desired, the Repeal Bill would need to reserve any powers of amendment for Whitehall and Westminster.

The key challenge for Westminster in this regard will be to avoid a constitutional crisis. Of course, legally speaking, the UK parliament is sovereign and can decree whatever it chooses. Nonetheless, it will be important to commence a dialogue with the devolved administrations – either through the Joint Ministerial Committee or in another form – about these matters. Otherwise, the passage of the Repeal Bill could be delayed through refusals of giving legislative consent. Moreover, a functioning redesign of the devolution settlement, which will become necessary after Brexit, given that a whole layer of policy-making will have disappeared, can only happen in a spirit of cooperation and not antagonism.

The Repeal Bill and a No-Deal Brexit

The white paper also mentions the possibility that the UK leaves the EU without a deal. It is argued that the Repeal Bill would still serve its purpose 'by facilitating the creation of a complete and functioning statute book no longer reliant on EU membership'. This is

true in so far as it would avoid some gaps in the law. However, a no-deal Brexit would see the UK leave the EU after the expiry of the two-year negotiating period without an agreement about the legacy of EU membership (in particular the rights of EU citizens living in the UK), an agreement about the future relations between the EU and the UK, and without any transitional arrangements.

This would necessitate many more domestic law changes than would otherwise be the case. For instance, during a transition period, the UK might still cooperate with certain EU agencies until it has set up its own equivalents. It might still be part of the customs union until it has introduced its own customs policy and provided for the necessary infrastructure at ports of entry. The legal changes needed in a very short period of time if there were a no-deal Brexit would by far outstrip those needed in case of an orderly transition towards a future EU-UK relationship.

The Repeal Bill and EEA Membership

If the UK decided to opt for a 'soft' Brexit in the form of membership of the European Economic Area (EEA), the Repeal Bill would still be necessary to allow for a repeal of the ECA and for a smooth incorporation of EU laws into UK law. Equally, powers of amendment would remain necessary, at least as far as formal changes to the EU law incorporated are concerned and for policy areas not affected by EEA membership (in particular agriculture and fisheries). At the same time, parliament would need to legislate for EEA membership – which is dependent on membership of the European Free Trade Association – with a separate bill. Such a bill would need to make provision, among other things, for the implementation of EEA obligations in domestic law and in particular powers allowing for a continuous update of internal market legislation.

Conclusion

The Repeal Bill poses a huge challenge in terms of law, politics, and timing. Intricate legal questions need to be resolved and approved by a hung Westminster parliament and three devolved legislatures. This will then be followed by a long process of continuous amendments, which will not only need to reflect new policy choices, but also the outcome of the Brexit negotiations and any transitional arrangement leading towards a deal on the future EU-UK relationship. This provides many opportunities for political disagreement and may result in considerable legal uncertainty.

Key points

1. Legislation converting existing EU law into domestic law is a necessary measure to avoid gaps in UK law once Brexit has happened. Any form of Brexit – whether Brexit without a deal or a 'soft Brexit' resulting in membership of the EEA – will require legislation to this effect. For this reason, the Repeal Bill should be considered a vital element of the Brexit process.
2. The passage of the Repeal Bill puts the House of Lords in a strong position as it will not be bound to respect the Conservative party's manifesto under the Salisbury

Convention. Equally, the two-year-long session of parliament means that the House of Lords can delay its passage longer than would usually be the case.

3. It is likely that the devolved legislatures will be asked for their legislative consent. If consent is refused, there is nothing that could legally prevent the Westminster parliament from passing the Repeal Bill regardless, but this would come at a high political cost and might result in a constitutional crisis, the evolution of which would be unpredictable. Therefore both groundless refusal of consent by the devolved legislatures and groundless dismissal of their valid concerns by Westminster should be avoided.
4. The Repeal Act will create a new category of law in the UK: incorporated EU law (as interpreted in the past by the European Court of Justice), which will continue to take primacy over existing UK law including statute. However, it will not have this effect with regard to legislation adopted after Brexit. There are still a number of open questions that any draft bill will need to answer: the relationship between incorporated EU law and secondary legislation; that between incorporated EU law and new devolved legislation; and the exact moment when incorporated EU law ceases to have these effects due to having been amended.
5. Amendments to incorporated EU law will become possible by way of secondary legislation (i.e. they will be done by the government and not by parliament). While this is a sensible way forward where technical questions are concerned, there is a danger that substantive changes to incorporated EU law will be made without proper parliamentary scrutiny. It is therefore essential that parliament ensures in the Repeal Act that these powers of amendment are properly supervised. Due to the volume of changes necessary before Brexit and due to the great time pressure compounded by a hung parliament, the standard procedures used by parliament – affirmative and negative – may prove ineffective. Parliament should consider new and innovative ways of scrutinising proposed secondary legislation under the Repeal Act.
6. The Repeal Bill is likely to (at least temporarily) reserve policy areas currently determined by EU law, which would normally be devolved. This will in particular affect environment, agriculture and fisheries. The retention of common frameworks in some areas can be considered desirable to preserve the UK's own domestic market. At the same time, it must be recognised that such a step will prove highly controversial in the devolved parts of the UK. Mitigating measures should therefore be considered. These could include an equal involvement of the devolved legislatures and governments in the policy-making process (e.g. by giving them veto rights); or compensatory devolution of other powers to them; or a stronger involvement of the devolved governments in the Brexit negotiations.

Dr Tobias Lock is Senior Lecturer in European Union Law and Co-Director of the Edinburgh Europa Institute at the University of Edinburgh

¹ See Queen's Speech of 21 June 2017. The bill was originally dubbed the 'Great Repeal Bill' with the adjective 'great' having been dropped in the Queen's Speech. The government had previously published a white paper on the Repeal Bill: see Department for Exiting the European Union, '[Legislating for the United Kingdom's withdrawal from the European Union](#)' Cm 9446

² See the [report](#) by the Joint Committee on Conventions of 31 October 2006

³ See Mark Elliot, '[Does the Salisbury convention apply during a hung Parliament?](#)', *Public Law for Everyone*, 10 June 2017

⁴ There are plans to amend the two other devolution acts, the Northern Ireland Act 1998 and the Government of Wales Act 2006, accordingly

⁵ This is the formulation found in s. 28(8) Scotland Act 1998

⁶ See Devolution [Guidance Note 10](#)

⁷ Hansard HC Deb vol 622 col 62 (21 June 2017). This confirms the earlier announcement by the Secretary of State for Scotland

⁸ See BBC News [report](#), 26 June 2017

⁹ On this see below

¹⁰ R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 146

¹¹ Ideally these policies should be in place before Brexit in order to allow the UK to enter into meaningful negotiations about trade with the EU. This cannot happen in the absence of, of example, an agricultural policy

¹² S. 57 Scotland Act.

¹³ S. 6 and s. 24 Northern Ireland Act 1998; s. 94 and s. 80 Government of Wales Act 2006

¹⁴ There is additionally a 'super-affirmative' resolution procedure under s. 18 of the Legislative and Regulatory Reform Act 2006.

¹⁵ Note, however, that the Queen's Speech promised the introduction of a new data protection bill

¹⁶ See Lord Judge, '[Ceding Power to the Executive: the Resurrection of Henry VIII](#)', King's College London, 12 April 2016

¹⁷ House of Lords Constitution Committee, '[The 'Great Repeal Bill' and Delegated Powers](#)', 9th Report of Session 2016-2017, 7 March 2017

¹⁸ For an overview of how EU competences map onto the reserved and devolved powers under the Scotland Act see Alan Page, '[The Implications of EU Withdrawal for the Devolution Settlement](#)', report prepared for the Scottish parliament's CTEER Committee