



## Brexit: White Paper on the *Great Repeal Bill* – some initial points of interest

Jorren Knibbe, Guildhall Chambers

The UK Government has published its proposals for the Great Repeal Bill in a [White Paper](#) on 30 March 2017.

The proposals are in line with the Government's previous announcements on the Bill – for example in its February 2017 White Paper on [The United Kingdom's exit from and new partnership with the European Union](#) (see e.g. p. 10).

Broadly speaking, the Great Repeal Bill will:

- repeal the European Communities Act 1972 (“ECA”), thus ending the supremacy of EU law in the UK;
- nonetheless preserve the effect of directly applicable EU laws in the UK, as they stood at the moment of exit, until Parliament decides to modify or repeal them; and
- grant powers to the Government to amend existing law by statutory instrument, to give effect to the UK's withdrawal from the EU.

The new White Paper explains the proposed content of the bill in more detail. The following points seem likely to be of particular interest for lawyers.

1. **The Great Repeal Bill will legislate for how the UK courts interpret EU law which is preserved in the UK post-exit.**
2. **The White Paper says that “any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU”** (at 2.14).
3. **The White Paper doesn't say what this means for decisions issued by the CJEU after exit day, but which relate to the pre-exit EU laws which are preserved in the UK by the Bill.** If post-exit decisions of the CJEU are not expressly addressed in the Bill, it seems to be a fair assumption that national courts will at least regard them as persuasive. The CJEU has an established and unique approach to the interpretation of legislation, and the Government appears to intend that this approach will be preserved in the way in which EU law is interpreted by the UK courts post-exit (e.g. 2.10). Where the CJEU applies its interpretative approach to pre-exit EU law in a decision reached post-exit, and decides what the outcome of that approach is, it may be difficult for domestic courts in the UK to conclude that, in the UK interpretation of pre-exit EU law, the outcome ought to be different.
4. **The White Paper makes an exception for the EU Charter of Fundamental Rights, which will not be converted into UK law by the Bill** (see 2.23). It seems to follow that national courts, when they interpret EU law which is preserved in the UK post-exit, are to ignore the effect which the Charter would have had on that interpretation; previous CJEU decisions based on the Charter “*will have to be read as referring only to the underlying rights, rather than to the Charter itself*” (2.25). Whether this will make a significant difference is open to question.



5. **CJEU decisions which are preserved in the UK by the Bill are to “be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court”** (2.16). The Government expects that the Supreme Court will take the same approach to previous CJEU case law as to its own previous decisions, and may therefore depart from previous CJEU case law under the 1966 Practice Direction, when it considers it right to do so (2.16). The Government is, however, *“also examining whether it might be desirable for any additional steps to be taken to give further clarity about the circumstances in which such a departure might occur”* (2.17).

The White Paper makes clear that pre-exit EU law which is preserved by the Bill will take precedence over pre-exit national law (2.20). It seems to follow that the Supreme Court will not be free simply to prefer old domestic law. Instead, the Government seems to intend to allow the Supreme Court to disagree with the CJEU’s approach to the interpretation of EU law, and thus to reach decisions different from those previously issued by the CJEU. For example, existing CJEU case law recognises only a relatively limited discretion for national courts to refuse relief in judicial review proceedings when they find a breach of EU environmental laws (whereas the discretion under English law to refuse relief is broader). The Supreme Court might plausibly be tempted to expand the EU case law on this point in the future.<sup>1</sup>

If this is the intention, it seems to undermine the Government’s plan to provide certainty, and not to change the law, on exit day (see e.g. 2.14).

6. **There will be other primary legislation, in addition to the Great Repeal Bill, dealing with the immediate consequences of Brexit.** The White Paper specifically mentions (at 1.22):
- a. a Customs Bill, creating a new customs regime; and
  - b. an Immigration Bill, *“so nothing will change for any EU citizen, whether already resident in the UK or moving from the EU, without Parliament’s approval”*. **This might be taken to suggest that EU citizens will not be required to apply for leave to remain in the UK after Brexit unless Parliament enacts specific legislation requiring them to do so.**
7. The Bill is expected to enter into law before the UK leaves the EU. The White Paper suggests that the ECA will be repealed on the day of exit (1.11). However the power to make changes by statutory instrument will come into effect when the Bill becomes law, to enable that project to start before exit (3.24).

Jorren Knibbe

Guildhall Chambers

31<sup>st</sup> March 2017

---

<sup>1</sup> See J. Knibbe “Decision of the Supreme Court in *R (Champion) v North Norfolk District Council: An Assessment*” [2016] J.P.L 12, 14-16; see also J. Knibbe “Viability Assessments, Dead Rubber Appeals, and EU Law” [2017] J.P.L 473, 480 (forthcoming)