Brexit: EU (Withdrawal) Bill

General Features

01 October 2017

The European Union (Withdrawal) Bill was published in July 2017. This Bill is intended to be the legal basis of the application of what will become retained EU law in the UK following Brexit. The CIOT welcomes the early publication of this Bill, which provides all interested stakeholders with an opportunity to consider it.

The CIOT is reviewing the European Union (Withdrawal) Bill which was published in July 2017 and is considering the implications for the UK's tax system. The Explanatory Notes say that the principal purpose of the Bill is to provide a functioning statute book on the day the UK leaves the EU. It is also intended that, as a general rule, the same rules and laws will apply on the day after exit as on the day before.

We welcome these intentions as a starting point to provide legal continuity following Brexit. However, our initial review of the Bill indicates that the intended scope and effect of some of the provisions of the Bill is not very clear. In addition, there are a number of provisions which go beyond incorporating EU law as it stands at exit day into UK law, and which result in the position for taxpayers after exit day being different from their position immediately before it.

As an educational charity, our primary purpose is to promote education in taxation. In addition, one of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are always made solely in order to achieve this aim; we are a non-party-political organisation. In our view objectives for the tax system should include a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences and results in legislation which provides certainty, so businesses and individuals can plan ahead with confidence.

With these aims in mind, we will be writing to the Department for Exiting the EU with our comments on the Bill in the coming weeks.

One key area that we have identified as being unclear is around the incorporation into UK domestic law of general principles of EU law. For example, there is a lack of clarity as to whether principles relevant to specific areas of law – such as fiscal neutrality in VAT – will be incorporated into UK law on exit. In addition, the scope and effect of general principles of EU law is curtailed by the Bill: they will no longer be available as the basis of a right of action in domestic law after exit day and after exit day no court will be able to disapply or quash any enactment on the basis that it is incompatible with any of the general principles of EU law.

Another area of change is that after exit day, there will be no ability for UK courts to refer matters to the CJEU. It is, of course, an important political principle that the jurisdiction of the CJEU should cease on exit day. However, this has practical consequences for taxpayers and HMRC, in that they will be faced with a different route to determining any question regarding the interpretation of retained EU law that arises after exit day.

Currently a referral to the CJEU can be at any point in court proceedings, including, at the earliest stage, from the First Tier Tribunal. Although a referral is not without cost and time implications, it does mean that a conclusion can often be reached on a point of EU law at an early stage in the proceedings. After exit day each UK court (including the First Tier Tribunal) will have to reach a conclusion on the point of EU law itself, which, of course, it does do to some extent already if the point is considered to be sufficiently clear. This conclusion will be subject to appeal in the ordinary way, potentially until the case reaches the Supreme Court. There are differing views as to whether this change in procedure is in the best interests of an efficient and fair legal system. We think that this is an area where government could encourage further public discussion to gather views as to whether or not there should be some sort of new procedure for UK courts to deal with retained EU law. Ideas include developing a right to leap frog directly to the Supreme Court, or for there to be a specialist tribunal staffed with EU law experts which can be referred to in circumstances where previously UK courts could have made a referral to the CJEU.

We would welcome views of members on either of these areas and, indeed, any other comments on the Bill and these can be sent to technical@ciot.org.uk or directly to me.