Brexit – Moving beyond simple slogans

International Tax Tax voice



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“Taking back control” was, arguably, the simple and winning message of the June 2016 EU referendum. However, some 18 months from the leave vote, and 15 months until the UK leaves the EU, legislators and businesses alike are mired in the detailed implications – still unsure what the future, post Brexit will look like. As tax law practitioners, we will also be impacted by the changes that are unfolding in front of us, and very much need to stay alert to the unravelling ramifications, which are anything but simple.

Introduction

Untypical of a British Summer, the Government was (apparently) very busy with a stream of publications and position papers relating to Brexit. Amidst all this was the "Great Repeal Bill" – or to give its proper name, the European Union (Withdrawal) Bill, published on 13 July 2017.

It is currently being debated in the House of Commons with the Government fighting off amendments and building coalitions to ensure its survives its passage to the House of Lords in the new year, where it is set to face further opposition.

What the Bill is designed to do?

The Great Repeal Bill tag is a misnomer; it is not designed to cancel or revoke (the vast majority of) EU law. Instead, its objective is to achieve the exact opposite – preserve the situation for businesses and individuals alike for the day after the UK leaves the EU (11pm on 29 March 2019). It does repeal the European Communities Act 1972 (which is the Act that gives direct effect to all EU law in the UK), but then converts EU law into domestic legislation through various mechanisms which are considered further below.

So, a "Great Conversion Bill" would have been a more apt name, but that may not have passed the tabloid test!

To achieve the above objective of conversion, the Bill creates a new category of domestic legislation called "retained EU law", which consists of:

- Retained domestic legislation that gives effect to EU law obligations, i.e. law that is already in the UK statute books.
- Converts existing EU law that applies in the UK into domestic law.
- Retains other rights, powers, obligations, restrictions, remedies and procedure, which are recognised and available before exit. This is in effect a "clear up" clause which is designed to catch anything not caught in the first two parts.

The above conversion and retaining into domestic law is subject to two key exceptions:

- The principle of supremacy of EU law does not apply to laws passed on or after exit day.
- The Charter of Fundamental Rights is not part of domestic law after exit.

The first exception is the crux of Brexit, but it has one important caveat, which is that the principle of EU Supremacy will *continue to apply* to the interpretation of law passed before exit day.

Comment

The Bill is designed to disentangle the UK from an over 40-year period of convergence with its EU neighbours in one fell swoop. This is a mammoth task by anyone's imagination whose impact on us as tax advisors is just one small aspect of its effect.

It is important to ask: does the Bill achieve its purpose and where are the uncertainties that still need to be elucidated?

Retained EU law

One of the important questions highlighted by the House of Commons Brexit Committee in its report of 17 November 2017 was the uncertainty of the constitutional status of retained EU law. Was it primary legislation, secondary legislation or in its own category? The categorisation is important as primary legislation cannot be ruled invalid by the courts.

The Government indicated in one of the evidence sessions that it was a "unique and new category of domestic law" which will operate differently to primary and secondary law. This is of course correct in a way, as retained EU law will continue to take precedence over pre-exit domestic legislation unlike any other category of law going forward. Furthermore, it is also made clear in the Bill that retained EU law cannot be challenged on judicial review grounds.

The above clarification does provide some certainty alongside oral statements made to hearings by Government ministers but there remains some confusion on the meaning of EU law post exit and its interpretation by judges going forward. Without that clarity, there is the danger of judge made law post exit and inconsistency, which may take a decade or more to sort out.

Divergence

We rely on EU case law to understand the application of domestic and EU legislation. After exit, any future evolution of interpretation in the EU will not have automatic application in the UK. What this will mean in practice is that though there will be certainty on Day 1 there will be a gradual divergence as differences in domestic and EU law and its interpretation appear, so, perversely, we could experience more uncertainty as time passes.

Interaction of retained EU law with new laws enacted post exit could be a potential minefield to navigate for clients. For tax advisors, differences in interpretation with HM Revenue & Customs (HMRC), for example, could create genuine doubt that may take years of litigation before certainty is achieved.

Some of the ambiguity is unavoidable and there is a limit to what this Bill can achieve. However, further clarity on the position of retained EU law is something that is badly needed.

Furthermore, measures should be put in place so that businesses can clearly understand how changes in interpretation in EU law can be updated in domestic legislation where it is deemed to be sensible to do so. The danger with not doing that is, as one witness to the Brexit Committee pointed out, that the UK could become entrenched to a version of law that in a couple of years after exit may not be followed anymore by other member states. So, not only is there the divergence by virtue of a different direction taken in the UK but also by different routes taken by EU institutions. Of course, deliberate and thought out divergence will inevitably occur, but the danger lies in situations where it’s not premediated.

Finally, it is worth also pointing out there are no provisions which specifically cater for pending cases on exit day, either in the domestic courts or at the European Court. It could be argued that it would be fairer to allow those cases, which raise an EU question, to be allowed to refer that question to the CJEU.

Charter of Fundamental Rights

This Charter became binding EU law in the Treaty of Lisbon in 2009. It has a peculiar place within the EU Treaties (some criticise its lack of preciseness) but can sometimes be helpful in interpretation. As experts have pointed out, it has been

decisive in some pre-exit cases so choosing to exclude it from the conversion, by saying no substantive rights would be lost, does not quite ring true. In fact, even if that argument were credible, it should not be a barrier to keeping it in. Where it may help domestic courts to rely upon it to determine the validity and meaning of retained EU law this can be a helpful tool which should not be discarded.

Henry VIII powers

A large part of the current Parliamentary struggle over the Bill has been over the so-called Henry VIII powers contained within it. This is a reference to delegated powers available to the Government to amend and rectify legislation to remedy or mitigate deficiencies in the operation of retained EU law.

Many of the changes required will be simple and technical such as amending for references to other member states or to EU bodies that are no longer relevant. It is also worth noting that these powers are only available for a period of two years beginning with exit day.

The concern has been as to how these wide-ranging powers can be exercised with so little scrutiny (there is *some* limit and oversight to these powers built into the main body and Schedule to the Bill) and that they can be used as a way to implement new policies without the usual safeguards. The restriction of the use of these powers is not as narrow as many people would like, and the way the Government can use them is “as the Minister considers appropriate”. This adds a lot of subjectivity as any deficiencies may not be universally agreed as being deficiencies.

More Parliamentary safeguards need to be built into the Bill to ensure that taxpayers can be assured of certainty that retained EU legislation is not able to be changed, at the subjective whims of Ministers.

When is exit day?

The Bill is littered with references to particular things happening on exit day. However, exit day is not defined. This is sensible as that day may be a few different dates. For example, if there is a transitional period, exit day could also be the day after the transitional period comes to an end. For some provisions, it will be 29th March 2019. These issues will only become clearer as the negotiations progress.

Therefore, recent overtures by the Prime Minister that she is inclined to amend the Bill to include a specific date for exit seem misplaced and not make sense, and will likely not be made.

Again, the earlier that certainty is obtained the better as that will enable tax advisors to really understand the timeframe for retained EU legislation. It could be many years that the UK remains subject to EU legislation and case law if there is a long transitional period.

Conclusion

It is apparent to even the most disinterested observer that there is a lot yet to be done. Hindsight (some would argue mere common sense) would suggest that triggering Article 50 and hence the two year clock was not the smartest thing to have done before a plan was formulated and some negotiating undertaken. Once that clock started ticking the EU's leverage over the UK has become more and more apparent, and their positions ever more rigid.

It is also not practical, in my view, to talk about reversing Brexit – that ship has sailed. Those with longer memories will recall it took three attempts to get into the club (more specifically its predecessor the European Economic Community) and then years of negotiations to obtain favourable opt outs and other special deals. Should the UK seek to climb back in the boat, they may find they are not able to retain the same seat.

There is much to do and so little time. The UK must either compromise or prepare for a very sudden exit; it is unlikely now (as it was before the referendum) that the EU will give ground on issues which are fundamental to the bloc – it is silly to think otherwise, regardless of the numbers of German automobiles or French cheese at stake.

As this article was being finalised, the UK and EU reached what seems like an agreement on phase 1 of the talks – dealing with matters related to citizens' rights, Northern Ireland and the "divorce" bill. This agreement is perhaps a sign of things to come as much of the ground that the Government said they would stand firm on has crumbled away.

For example, paragraph 38 of the Joint report issued on 8th December 2017 allows for domestic courts to consider decisions of the CJEU made after the UK's

withdrawal. Furthermore, they can refer questions to the CJEU for interpretation for eight years from when the rules come into place. This only applies to the issue of citizens rights, but many will be wondering why similar rules should not apply to other areas, especially, where these transitional provisions are designed to safeguard the consequences of past decisions made by individuals. What about decisions made by non-natural persons?

Another key section is paragraph 49 which establishes a back-stop position (i.e. in the absence of a further all-party agreement) that the UK will maintain “full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North -South Cooperation, the all-island economy and the protection of the 1998 Agreement [Good Friday Agreement]”.

This has been read as the UK staying within the single market especially when read in conjunction with paragraph 50 which sets out the UK will not allow “regulatory barriers” to develop between Northern Ireland and the rest of the UK. This paragraph was only inserted at the insistence of the DUP (the minority partners in the Government) who feared Northern Ireland was going to become the sacrificial lamb to the North/South border question.

The latter section of the above quote, however, does restrict the full alignment promise in that it only requires the UK to have alignment to the rules which are necessary for supporting the Good Friday Agreement and North/South border. What that entails in practice and how one makes those judgments will be hideously complex.

The agreement reached will also likely necessitate some changes to the Withdrawal Bill as some of its clauses will not be compatible with what has been agreed now.

Finally, it is worth noting perhaps the most important caveats in the agreement. Twice (on the first page and Paragraph 5) the agreement states that it is subject to a “caveat that nothing is agreed until everything is agreed”. Also, in the final paragraph (96) it says this has been agreed by the UK on the “condition of an overall agreement under Article 50 on the UK’s withdrawal, taking into account the framework for the future relationship, including an agreement as early as possible in 2018 on transitional arrangements”.

The UK may have conceded much ground in this phase, but it can all be taken back should there be no successful phase 2.

The Government is not wholly in control of how phase 2 progresses. What is important now though, is that it creates the maximum possible clarity and answer some of the outstanding questions relating to the Bill and be prepared to listen to changes that are sensibly required by businesses and their advisors so that they (like citizens) can have the certainty they are also entitled to. In particular, the Government should make sure that the use of delegated powers is practiced with as much scrutiny as is available in the time frames available. We have become used to, over the last few years, legislation being introduced with only expansive consultation beforehand. This is about to change and inevitably the consequences will not be pretty.

The silver lining is that if the UK gets this right, it will be home to a talented group of individuals whose specialism in the field of leaving supranational organisations will be second to none!