

BMA

European Union (Withdrawal) Bill



British Medical Association
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This briefing provides an overview of the European Union (Withdrawal) Bill¹, its implications for the BMA and what we need to do as the Bill progresses through Parliament. The Bill is scheduled to have its Second Reading in the House of Commons on **Thursday 7th September 2017** and **Monday 11th September 2017** and is expected to complete its passage through Parliament by Spring 2018.

What is the European Union (Withdrawal) Bill seeking to achieve?

The Bill, which has 19 Clauses and 9 schedules, has four main aims²:

- Repeal the European Communities Act 1972
- Convert EU law as it stands at the moment of exit into domestic law before the UK leaves the EU. Essentially, the same rules and laws will apply on the day after exit as on the day before: this will ensure a 'smooth and orderly withdrawal'
- Create powers to make secondary legislation (e.g. statutory instruments), including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement
- Maintain the current scope of devolved decision making powers in areas currently governed by EU law

Scope and powers within the Bill

This is a controversial Bill, largely because of the extensive power it gives to ministers as the UK prepares to leave the EU and make preparations for life after Brexit. Political commentators have described the provisions in the Bill in varying tones ranging from the 'broadest constitutionally important provisions ever seen in legislation'³ to an 'executive power grab'⁴. The main points of contention revolve around what is perceived to be a lack of parliamentary democracy and scrutiny in the Bill as the government seeks to convert EU law into domestic law and implement a withdrawal agreement.

The rationale being given for this 'executive power grab' is that ministers need to have a fully functioning statute book in place in time for Brexit day. Given the legislative challenges presented by Brexit, such as the 'hard' exit deadline of March 29 2019, a lack of certainty over the content, timing and order of negotiations and the inability to predict (with any kind of certainty) the final outcome of the Brexit negotiations, the ability to legislate quickly is vital⁵.

Through the Bill, ministers will be able to make extensive changes to the statute book without going through lengthy parliamentary scrutiny. Changes will be made via secondary legislation to amend primary legislation. Essentially, most legislation relating to Brexit will go through Parliament without any form of debate; debate will only be granted on legislation which will lead to significant political and policy changes after Brexit. More information on this is provided below.

1 [European Union \(Withdrawal\) Bill](#)

2 [European Union \(Withdrawal\) Bill, Explanatory Notes](#)

3 [Hansard Society: The European Union \(Withdrawal\) Bill – initial reflections on the Bill's delegated powers and delegated legislation](#)

4 [Politics.co.uk: Small print of repeal bill creates unprecedented new powers for Brexit ministers](#)

5 [Hansard Society: The European Union \(Withdrawal\) Bill – initial reflections on the Bill's delegated powers and delegated legislation](#)

How will this be done?

The Bill will create powers to make secondary legislation, which will enable Parliament to make corrections to laws that would no longer operate appropriately once we have left the EU. There are currently 12,000 EU regulations in force and around 7,900 statutory instruments (SIs) which have implemented EU legislation.

The government estimates that the necessary corrections to the law will require between 800 and 1,000 SIs. The government expects most SIs here to follow the negative procedure (no requirement for parliamentary debate) to deal with technical changes. The affirmative procedure for SIs (debate and approval by both Houses) will be needed for more substantive changes, such as those that establish a new public authority or transfers an EU function to a newly created public authority.

The power to correct the law through SIs will expire two years after exit day. As an additional safeguard, the government has clarified that there is a list of things these powers cannot be used for, including imposing taxation; creating a criminal offence; making retrospective provisions; and amending, repealing or revoking the Human Rights Act 1998.

Process for secondary legislation

Negative procedure

The negative procedure will be the default scrutiny mechanism for the Bill. This means that SIs will only be debated if a Member formally objects to the SI and the government grants parliamentary time for a debate (which the government isn't required, or inclined to do, as they control the parliamentary schedule).

Affirmative procedure

Debate is guaranteed on these SIs as approval has to be given by both houses of parliament. However, under the scope of this Bill, this procedure is required only in limited cases where ministers:

- create a new public authority
- transfer EU functions to a newly created public authority
- transfer an EU legislative function to a UK body
- create a new offence
- Charge a fee or 'creates or amends a power to legislate'

Essentially, the affirmative procedure is intended for SIs which are likely to be of political and policy significance. **So, for example, the affirmative procedure could be used if the government decides to transfer powers from the European Medicines Agency to the MHRA or from Euratom to a UK institution. However, this could also mean that the repeal of EU citizen rights would not be subject to debate because it does not fulfil the criteria as set out above.**

'Made affirmative resolution procedure'

This is an incredibly wide ranging power within the European Union (Withdrawal) Bill. Schedule 7, parts 3 (1) to (6) of the Bill refers to 'scrutiny procedure in certain urgent cases'. Specifically, this is the creation of an 'urgent' power which allows ministers to make changes without any parliamentary scrutiny. The rationale for this is to help ministers push through a significant mass of legislation if negotiations between the EU and the UK go down to the wire⁶. The process here therefore will be the following: ministers will be allowed to make an urgent change without any parliamentary scrutiny; the change will then have to be approved by both houses of Parliament within one month; if this approval is not gained within the one month period, the policy change lapses.

Will the Bill lead to policy changes?

The government has stated that the aim of Bill is **not** to create a vehicle for policy changes⁷. The Bill does not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one after Brexit. The government will introduce separate primary legislation to make such policy changes which will establish new legal frameworks e.g. an Immigration Bill.

It will be up to the UK Parliament (and where appropriate, the devolved legislatures) to amend, repeal, or improve any piece of EU law (once it has been brought into UK law) at the appropriate time once the UK has left the EU.

What does it mean for the devolved administrations?

The government has begun discussions with each of the nations to identify where UK-wide approaches (common frameworks) need to be retained in the future and where these frameworks are no longer necessary (so where powers may be given at a devolved level after Brexit). The Bill will also give devolved ministers the power to amend devolved legislation to correct law that will no longer operate appropriately once the UK has left the EU.

In its [factsheet on devolved nations](#), the government expects one of the outcomes of Brexit to be a major increase in the decision making powers of each devolved administration. However, the expectation that areas that are devolved, but which have been subject to EU law, such as agriculture, environmental policy, fisheries and regional policy, will result in new powers for the devolved nations now seem to be misguided: the suggestion is that these policies will continue to be subject to a UK wide common framework. The UK government's argument for this seems to be to maintain consistency across the UK and to avoid any divergences in law that could hinder internal UK trade or future international trade negotiations⁸.

On the issue of Brexit, the UK government has promised to seek agreement through a constructive and collaborative approach with the devolved legislatures but whether this will extend to requiring their explicit consent through a legislative consent motion⁹ is not clear.

Initial indications from both the Scottish Parliament and the Welsh Assembly are that they would withhold consent for the Brexit repeal bill unless changes were made to it which would protect the interests of all the nations within the UK. Legally, although the absence of a legislative consent motion would not prevent the passage of the Bill through the UK Parliament, the lack of such consent could create significant political difficulties.

The UK Parliament can override the devolved bodies, even on devolved matters because the UK Parliament is sovereign.¹⁰ However, it remains to be seen whether the Westminster government will choose to take this course of action on such a contentious issue.

⁷ Department for Exiting the EU: Legislating for the United Kingdom's Withdrawal from the European Union

⁸ The UK in a Changing Europe: EU referendum: one year on – repatriation of consequences

⁹ UK Parliament glossary: 'A legislative consent motion is the means by which a devolved body grants permission to the UK Parliament to pass a law on something that is a devolved matter. Sometimes referred to as Sewel motions, they arise out of the convention that the UK Parliament would not normally legislate on a devolved matter without the consent of the relevant devolved institution'.

¹⁰ The Institute for Government: Battle lines are drawn around the EU Repeal Bill

What does this mean for EU law and case law of the European Court of Justice?

The Bill will end the general supremacy of EU law. Once the UK leaves the EU, newer legislation will take precedence over EU derived law which has been preserved. Brexit will also bring an end to the jurisdiction of the European Court of Justice in the UK. The Bill will not require the domestic courts to consider the Court's system of laws.

However, while the Bill explicitly states that the British courts are 'not bound' by any decisions made by the European Court after exit day they 'may have regard' to 'anything done' by the ECJ or by another EU entity after Brexit if the British court considers it appropriate to do so. With regards to the Supreme Court and previous ECJ judgements, the Bill gives the court discretion by stating it 'must apply the same test as it would in deciding whether to depart from its own case law'.

What does the Bill mean for the European Convention on Human Rights and the Charter of Fundamental Rights?

The ECHR is an instrument of the Council of Europe, not of the EU. The UK's withdrawal from the EU will not change the UK's participation in the ECHR. There are no plans to withdraw from the ECHR. In its White Paper on the Bill, the government clarified that the Charter of Fundamental Rights only applies to member states, so its relevance is removed by the UK's withdrawal from the EU. The Charter will not be converted into UK law by the Repeal Bill.

Workers' rights

In its [factsheet on Workers' Rights](#), the Government says 'The Repeal Bill will ensure that the workers' rights that are enjoyed under EU law will continue to be available in UK law after we have left the EU. This includes rights derived from EU law, such as the Working Time Directive and the Agency Workers' Directive. This will give certainty and continuity to employees and employers alike, creating stability in which the UK can grow and thrive.'

While this is a welcome statement, we will need to monitor the situation closely to ensure changes to the working time regulations and other workers' rights are not introduced through the back door.

What does the BMA need to do next?

The BMA will brief MPs ahead of the Bill's Second Reading on 7th September 2017. It is essential that we monitor the SIs as they progress through Parliament to ensure the government does not sneak in any policy changes without thorough scrutiny or push through major changes on issues which are of high importance to the BMA, such as to EU/ UK workers and citizens' rights, without debate. We'll also have to monitor the negotiations very closely, and any associated legislation, to ensure any new arrangements which will be put in place such as the establishment of a new public authority or the transfer of an EU function to a newly created public authority is subject to thorough scrutiny and parliamentary approval.

Helpfully, the government has agreed to provide more detailed information than normal in the explanatory memorandums (EMs) that accompany any SIs that will derive from powers in the Bill.

The EMs will do the following:

- Explain what any relevant EU law did before exit day
- What is being changed and why
- Confirm that the minister considers that the SI does no more than what is appropriate

The government has also promised to publish draft SIs during the passage of the Bill. However, political commentators have rightfully said that to be practically useful, these draft regulations need to be produced early enough for MPs and Peers, and organisations such as ourselves, to be able to properly scrutinise them.

Clauses of interest to the BMA

Clause 2: Saving for EU-derived domestic legislation

This clause will ensure that existing domestic legislation which implements EU directives remains on the statute book after Brexit. **We will need to monitor this closely during the course of the Bill re EU directives that are of interest to the BMA.**

Clause 3: Incorporation of direct EU legislation

This clause converts direct EU legislation e.g. EU regulations into UK law. The text of the regulation will form part of domestic legislation. **We will need to monitor this closely during the course of the Bill re EU regulations that are of interest to the BMA.**

Clause 4: Saving for rights etc under section 2 (1) of the ECA

This section refers to directly effective rights e.g. individual rights which the courts of member states of the European Union are bound to recognise and enforce. These directly effective rights are 'provisions of EU treaties which are sufficiently clear, precise and unconditional to confer rights directly on individuals which can be relied on in national law without the need for implementing measures', such as citizenship rights, rights of movement and residence deriving from EU citizenship, free movement of workers, competition, state aid, equal pay etc.¹¹ Any of these rights which are converted into UK law would be subject to amendment or repeal via SIs made under clause 7.

Clause 7: Dealing with deficiencies arising from withdrawal

Clause 7 of the Bill enables ministers to make the corrections to those laws which will no longer operate appropriately once we leave the EU. Examples of changes that will need to be made include removing references to 'Member states other than the United Kingdom', 'EU law' and 'EU obligations' and to EU bodies such as the European Commission.

Crucially, the government could use this clause (depending on the course of the negotiations) to 'modify, limit or remove' the current reciprocal arrangements that apply to EU citizens living in the UK and UK citizens in the EU. **Given our extensive work on securing the rights of EU nationals currently working in the NHS, academia and research we will need to monitor this closely during the course of the Bill.**

It is also worth noting that regulations under Clause 7 (5) would allow the functions of EU bodies to be transferred to a UK public authority or to create a new UK public authority to take on that function. This could be used with regards to the European Medicines Agency, Euratom etc and the transfer of their responsibilities to UK institutions and entities. **We will need to monitor this closely during the course of the Bill.**

¹¹ European Union (Withdrawal) Bill Explanatory notes

Clause 9: Implementing the withdrawal agreement

This clause gives ministers extensive powers to implement the withdrawal agreement and make the necessary changes for Brexit. Specifically, this power will enable the UK to be in a position to 'start preparing the statute book as soon as possible once a deal with the EU is reached'.

'A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day'.

Common sense would suggest that this power should/could only be used once the content of the withdrawal agreement is known. A complicating factor however, is that there may be a lack of clarity on when in the Brexit process the content of the withdrawal agreement is reached, particularly as the mantra around the negotiations has been one of 'nothing is agreed until everything is agreed'. Some political commentators are worried that this power could be used prior to a parliamentary vote on the withdrawal deal.

One rationale put forward for such extensive powers is that the last few days of negotiation are expected to be very hectic: ministers will need to be able to put laws in place and make changes to the statute book incredibly quickly. This will be essential to ensure the UK is in a position to fulfil its obligations under a withdrawal agreement by exit day.

The power within clause 9 to implement the withdrawal agreement has a 'sunset clause' – this essentially means that it expires on exit day.

It is worth noting that under the power in Clause 9, an SI regarding the future arrangements for UK and EU citizens would not be subject to the affirmative procedure because it does not fulfil the criteria outlined for its use under the terms of the Bill e.g. the creation of a new public authority, transfer powers to such an authority, create a new offence, charge a fee or create or amend a power to legislate. So theoretically, changes to the rights of EU citizens could pass through parliament without any debate. It is hard to imagine a scenario in which either MPs or Peers would allow this to happen. **Given our extensive work on securing the rights of EU nationals working in the NHS, we will need to monitor this closely as the Bill passes through Parliament and the negotiations continue.**

Clause 10: Corresponding powers involving devolved authorities

This clause enables devolved authorities to exercise power to deal with deficiencies which arise from Brexit, power to comply with international obligations and the power to implement the withdrawal agreement. **We will need to monitor this closely as the Bill passes through Parliament because of the impact on the devolved nations.**

Schedules

Schedule 2: Corresponding powers involving devolved authorities and Schedule 3: Further amendments of devolution legislation.

Political commentators have also raised doubts about whether the devolved nations will be given additional powers under the Bill, citing Part 3 (2) of Schedule Two which seems to challenge this. Specifically, Part 3 (2) of Schedule Two says that the devolved nations cannot make changes which are 'inconsistent' with those made by Westminster. It is also worth noting that the restrictions on the use of powers that apply to UK ministers under the Bill also apply to devolved ministers. With regards to implementing the withdrawal agreement, the devolved nations will be required to consult and seek consent from the UK government. **We will need to monitor this closely as the Bill passes through Parliament because of the impact on the devolved nations.**

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BMA 20170697