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Paving the way to the UK's departure from the EU– an overview of the key provisions of the European Union (Withdrawal Agreement) Act 2020

Updated 31 January 2020

Following the Conservative Party's victory in the UK's general election in December 2019, the priority for both the UK and the EU27 in relation to Brexit was the approval, ratification and implementation of the deal agreed at a political level between the European Commission and the UK in October 2019 on the terms of the UK's departure from the EU (the **Withdrawal Agreement**).

From a UK perspective, this required legislation to be passed to give domestic legal effect to the agreed deal by 31 January 2020 (**Exit Day**). The Conservative Party majority in the House of Commons ensured that this was a relatively straight forward process and on 23 January 2020, the European Union (Withdrawal Agreement) Act 2020 (the **WAA**) received Royal Assent. On 29 January 2020, members of the European Parliament (**MEPs**) voted by a total of 621 MEPs in favour of ratifying the Withdrawal Agreement with 49 against (and 13 abstentions) and the Council of the EU adopted a decision concluding the Brexit deal on 30 January.

The WAA gives effect to the Withdrawal Agreement (including the transitional or implementation period provided for in the Withdrawal Agreement) by amending the European Union (Withdrawal) Act 2018 (the **EUWA**), the key UK statute on Brexit. By way of reminder, the primary purpose of the EUWA is to ensure that the UK continues to have a functioning statute book on Exit Day. In preparation for a 'hard' Brexit, it originally did this by providing that, on Exit Day, EU laws will cease to flow automatically into UK law via the European Communities Act 1972 (the **ECA**) and would instead be "onshored" as at that date and amended (principally by statutory instrument) as necessary to correct any deficiencies in those onshored laws. In broad terms, the WAA:

- amended the EUWA to give effect to the provisions of the Withdrawal Agreement requiring EU laws (and international agreements between the EU and non-Member States) to continue to apply in the UK during the transition period, notwithstanding the fact that the UK is no longer a Member State (and put on hold the statutory instruments amending deficiencies in onshored EU laws that would have applied on Exit Day); and

- introduced a new section into the EUWA which ensures that all rights, powers, liabilities, obligations and restrictions arising by reason of the remainder of the Withdrawal Agreement will be recognised and available in domestic law.

We consider the key provisions of the WAA in more detail below as well as looking at:

- the limited role Parliament will have going forward in relation to negotiations on the future relationship between the UK and the EU27; and

- the likelihood of any extension to the transition period to allow more time for those negotiations.

In summary, the effect of the WAA is that it will be business as usual from a legal perspective in the vast majority of cases for the duration of the implementation period. However, there is no clarity as to the legal regime that will apply following the end of that period. The time available for negotiating a trade deal is tight to say the least, and the amendments to the WAA discussed below decrease the likelihood that an extension of time will be agreed.

Giving effect to the implementation period

Part Four of the Withdrawal Agreement provides that the UK's exit will be followed by a time-limited transition period. This will last until 31 December 2020 unless the UK-EU Joint Committee (to be established under the Withdrawal Agreement) agrees by 1 July 2020 to extend this period by one or two years (as to which see further below). The Withdrawal Agreement provides that, during the transition period, the UK will no longer be an EU Member State but it will continue be treated as such under Union law unless otherwise specified. This means that, during this time, EU law and EU supervision and enforcement arrangements will, in the vast majority of cases, continue to apply to the UK. The UK will continue to participate in the EU Customs Union and Single Market (with all four freedoms) and comply with EU policies. Any changes to EU law will automatically apply to and in the UK unless provided otherwise. At the end of the transition period, this arrangement will come to an end. The terms of Part Four remained unchanged from the draft withdrawal agreement agreed between the EU27 and the UK in November 2018, which we discussed in one of our earlier papers, available here.

The WAA gives domestic effect to the transition period (which it refers to as the "implementation period") and the agreed position as to the application of EU law during that period as set out below.

Continued application of EU law during the implementation period

The WAA deals with the application of EU law during the implementation period principally via amendments to the EUWA. Specifically, the WAA ensures that, during the implementation period:

- **The ECA continues to have effect in the UK**: The ECA is the primary legal instrument providing for EU law to have effect and supremacy in UK law. The EUWA was originally drafted to ensure that the ECA ceased to have effect on Exit Day as this is what would need to happen in a no-deal scenario. The WAA amends the EUWA by ensuring that the effect of the ECA is saved for the time-limited

implementation period. The WAA also modifies the saved ECA to reflect the fact that the UK will have left the EU and that the UK's relationship with EU law during the implementation period will be determined by the UK's obligations under the Withdrawal Agreement, rather than as a Member State. This saving provision will be repealed at the end of the implementation period.

- **EU-derived domestic legislation will continue to have domestic effect in the UK**: Despite the time-limited saving of the effect of the ECA discussed above, strictly speaking the ECA is repealed on Exit Day. This means existing domestic legislation which implements EU law obligations (for example, directives) would have ceased to have effect after Exit Day unless specifically saved. The WAA therefore introduces a new saving provision for this legislation which will be repealed at the end of the implementation period and, at that point, the sections dealing with the "onshoring" process (discussed further below) may become relevant.

- **Government Ministers have wide powers to "correct deficiencies" in legislation**: The WAA introduces wide powers that ensure Ministers can correct "deficiencies" in legislation during the implementation period. This includes amending references to EU laws and concepts and modifying the legislation to "ensure the statute book continues to function during the implementation period". While this power is subject to a two-year sunset clause from the end of the implementation period and the procedures for the scrutiny of secondary legislation already set out in the EUWA will apply, the power is undoubtedly wide. This power is in addition to the existing deficiency-correcting powers included within the EUWA in respect of the "onshoring" process (discussed below) which is also widened by the WAA to enable Minsters to make provision in relation to arrangements which no longer exist or are no longer appropriate as a result of the termination of the implementation period or any other effect of the Withdrawal Agreement. The sunset provision for these provisions also now run from the end of the implementation period rather than from Exit Day.

Delay and change of approach to "onshoring" of EU law after the implementation period

As originally drafted the EUWA provided that relevant provisions of EU law would be onshored (and become "retained EU law") on Exit Day and that case law of the CJEU handed down prior to Exit Day would continue to be binding in the UK (where appropriate). To take account of the implementation period and the continued application of EU law during that period, the WAA amends the EUWA so that the conversion of EU law into "retained EU law" and the domestication of CJEU case law takes place at the end of the implementation period rather than on Exit Day.

The WAA also makes a number of other changes to the way in which EU law will apply in the UK following the end of the implementation period assuming no new arrangement is put in place. In particular:

- The WAA puts on hold the secondary legislation enacted under the EUWA to correct deficiencies arising in the context of onshoring EU law in the event of a no-deal Brexit. Much of that secondary legislation (which now comprises hundreds of statutory instruments) was originally due to take effect either immediately prior to, on or after Exit Day. The WAA provides a mass deferral mechanism which 'glosses' (defined as "non-textually amends") the commencement date of that secondary legislation and ensures that it will instead come into force either immediately before, on, or after the end of the implementation period, as applicable. The WAA does, however, enable secondary legislation to still apply from Exit Day and therefore be exempt from the mass deferral exercise where a Minister of the Crown deems it appropriate. It is also worth noting that some of the statutory instruments mentioned

above referred to Exit Day but were already in force – for example, in relation to various transitional regimes in the area of financial services. On 28 January 2020, the Government published the Financial Services (Consequential Amendments) Regulations 2020 to ensure that such regimes would apply by reference to the end of the implementation period rather than Exit Day – further consequential amendment statutory instruments should be expected over the coming months.

- In relation to direct EU legislation (for example, EU regulations), the WAA amends the EUWA to ensure that only direct EU legislation that applied in the UK during the implementation period by virtue of Part Four of the Withdrawal Agreement will be onshored at the end of the implementation period.

- The WAA changes the approach to be taken to the interpretation of retained EU law following the end of the implementation period. Originally, section 6 of the EUWA provided that, following Exit Day, any question as to the validity, meaning and effect of retained EU law was to be decided in accordance with, among other things, "retained EU case law" – ie "principles laid down by, and any decisions of [the CJEU], as they have effect in EU law immediately before exit day". Only the Supreme Court was excepted from this obligation placed on UK courts to apply pre-Brexit CJEU decisions to retained EU law (it was instead required to treat such decisions as equivalent to its own previous decisions, which it only departs from sparingly). The EUWA further provided that UK courts were not bound by decisions of the CJEU made after Exit Day, but "may have regard" to those decisions "so far as it is relevant to any matter before the court". The WAA introduced a power for the Government power to determine by regulation (before the end of the implementation period) the circumstances in which, following the end of the implementation period, any lower court can depart from previous EU case law (or domestic case law relating to EU case law) and the power to specify the test that must be applied in so departing. It is not clear how these powers will be used but they effectively give the Government power to remove the precedent effect of large swathes of EU and domestic (including Supreme Court) case law.

Continued application of the EU's international agreements with non-Member States during the implementation period

According to the Withdrawal Agreement, during the implementation period, the UK will be bound by the international agreements concluded by the EU. This means, for example, that third countries that have entered into free trade agreements with the EU will have access to the UK market under the conditions set out in those agreements. A footnote to the Withdrawal Agreement confirms that the third country parties to these agreements will be notified of this approach by the EU (although it remains unclear how those third countries would be bound by this arrangement) and, where the implementation period is extended, those third countries will also be notified of that fact. The WAA implements that position through the insertion of a new sub-section to the EUWA which takes a 'snap shot' of what falls within the definition of 'the Treaties' and 'the EU Treaties' (which, under the ECA, captures any international agreement) as at Exit Day and provides that these instruments only will continue to apply. As a result, if the EU agrees and ratifies any international agreements with third countries (for example, Australia) during the implementation period, these would not apply to the UK.

Interpreting the Withdrawal Agreement under UK law

The Withdrawal Agreement provides for:

- the Withdrawal Agreement and EU law made applicable by the Withdrawal Agreement to produce the same effects in the UK as they produce in the EU and for individuals and businesses to be able to rely directly on the terms of the Withdrawal Agreement (where certain tests are met);
- the UK to ensure compliance with the above obligation, including as regards the required powers of its judicial and administrative authorities to disapply provisions of domestic law which are inconsistent or incompatible; and
- provisions of the Withdrawal Agreement referring to EU law and its concepts to be interpreted and applied in the UK using the methods and general principles of EU law.

The Withdrawal Agreement also states that any provisions of the Withdrawal Agreement which are based on EU law must be interpreted in the UK in conformity with CJEU case law handed down before the end of the implementation period, and that the UK's courts need to have due regard to relevant CJEU case law handed down after this point when interpreting and applying relevant areas of the Withdrawal Agreement.

The WAA takes a relatively straightforward approach to implementing the above through the introduction of a new section to the EUWA which provides that all rights, powers, liabilities, obligations and restrictions arising by reason of the Withdrawal Agreement will be recognised and available in domestic law and enforced, allowed and followed accordingly. It further ensures that UK law must be read, and given effect, subject to this provision.

Parliamentary Sovereignty?

The final substantive provision in the WAA is entitled "Parliamentary Sovereignty". This is a curious clause that simply attempts to reflect the current constitutional position on Parliamentary sovereignty, namely, that under the UK constitution Parliament is sovereign and so can make and unmake any law, but that in certain circumstances it has provided that EU-derived law should be given overriding effect in the UK (originally by virtue of the ECA, and now the EUWA as amended by the WAA). The clause therefore has no practical effect and has presumably been included for political reasons.

As discussed further below, however, notwithstanding this clause, Parliament's influence over the next stages of the Brexit process is likely to be significantly diminished compared to what we have seen over the last few years.

Scrutiny of EU legislation during the implementation period

The WAA does attempt to provide for Parliamentary scrutiny of EU legislation made during the implementation period. Where certain Parliamentary select committees report that EU legislation "*raises a*

matter of vital national interest" the Government must table a motion to be debated and voted in the relevant House of Parliament. The intention here appears to be to allow Parliament to scrutinise legislation passed by the EU during the implementation period which will have effect in the UK. This reflects the power of the House of Commons' European Scrutiny Committee (prior to the dissolution of Parliament in the run up to the general election) in requiring significant EU legislation to be approved by a debate in the House of Commons before Ministers could vote for the proposed legislation in the EU institutions.

However, under this new regime, the debate and subsequent vote provided for under the WAA will not have any legal effect. The UK has committed under the Withdrawal Agreement to following all EU legislation passed during the implementation period without any ability to vote on it. This process may nevertheless be useful in highlighting areas where the UK may seek to diverge from the body of retained EU law after the end of the implementation period or where consequential amendments will be required for other UK laws.

Oversight of the UK-EU Joint Committee

There is no provision to allow Parliament to scrutinise the UK representative's decisions in the EU-UK Joint Committee. The Joint Committee is established under the Withdrawal Agreement to oversee its interpretation and implementation and will have the power to agree amendments to the Withdrawal Agreement and make decisions binding on the UK and EU. For this reason, the House of Lords EU Select Committee proposed that Parliament should have a power to prevent the UK representative from taking a decision in the Joint Committee without parliamentary approval.[1] However this proposal has not been included in the WAA.

Instead Parliament's ability to scrutinise the UK's involvement in the Joint Committee will be limited to questioning the Minister appointed as the UK co-chair. In order to facilitate this, the WAA requires that this role is fulfilled by a Government Minister personally, and prohibits the Minister from agreeing to any decisions using the written procedure provided for in the Withdrawal Agreement. The WAA also introduces a new requirement that a Minister reports annually to Parliament on any disputes with the EU regarding the Withdrawal Agreement submitted to the UK-EU Joint Committee and notifies Parliament if any such disputes are submitted to arbitration or any questions are referred to the CJEU.

Negotiation of the future relationship

The October 2019 European Union (Withdrawal Agreement) Bill (introduced prior to the dissolution of Parliament ahead of the general election) provided for significant Parliamentary oversight of the negotiation of the UK-EU future relationship. Under those provisions, the Government would have been required to present its negotiating objectives for the future relationship for approval by the House of Commons before it could commence negotiations (and those objectives had to be consistent with the Political Declaration on the future relationship between the UK and the EU27 agreed politically between the European Commission and the UK Government at the same time as the revised Withdrawal Agreement, the **Political Declaration**). Once approved, the Government would have been legally required to seek to achieve these objectives. A Minister would have had to report back to Parliament regularly on the progress of negotiations, including explaining whether the approved objectives were likely to be achieved (and if not, why not). Ultimately Parliament would have been required to approve the final treaty for the future relationship before it could be ratified, in a similar manner to the "Meaningful Votes" on the withdrawal agreement.

[1] Letter from the Chair of the House of Lords European Union Committee to the Leader of the House of Lords, dated 4 November 2019.

However, the WAA makes no reference to Parliamentary approval of any future relationship treaty or any power of oversight of the negotiations to achieve that relationship. Parliament's formal role in the next stage of Brexit is therefore likely to be restricted to the usual process under section 20 of the CRAG Act. This requires most treaties to be laid before Parliament at least 21 sitting days before ratification, theoretically giving the House of Commons the opportunity to block their ratification, but only if the Government allows time for such a vote. It is also possible for the Government to dispense with this requirement in "exceptional circumstances". However, Parliament will need to be involved in the passing of any domestic legislation required to implement any future relationship.

Likelihood of an extension to the implementation period

As indicated above, under Part Four of the Withdrawal Agreement there is scope for the UK-EU Joint Committee established under the Withdrawal Agreement to agree (by mutual consent) by 1 July 2020 to extend the implementation period by one or two years. Under the terms of the Withdrawal Agreement, the Joint Committee will be made up of representatives of – and co-chaired by – the UK and the EU and will meet once a year or at the request of one of the two parties. It will be able to adopt decisions amending certain parts of the Withdrawal Agreement. These decisions will be binding and the EU and the UK will need to implement them. Specialised committees will be established on each of the key separation issues.

It appears unlikely that the comprehensive free trade agreement envisaged in the Political Declaration on the future relationship between the UK and the EU27 (agreed politically between the European Commission and the UK Government at the same time as the revised Withdrawal Agreement) could be negotiated by 31 December 2020. As such, it was previously expected that an extension to the implementation period would be agreed. However, in line with the Government's public announcements following the general election, the WAA introduced a specific prohibition on any Minister of the Crown from agreeing any extension to the implementation period in the Joint Committee. This replaced previous provisions in the October 2019 European Union (Withdrawal Agreement) Bill (and commitments by the Government at the time) to give Parliament a vote on any extension.

While this does not entirely remove the prospect that the implementation period will be extended (as Parliament could pass legislation that would override the effect of this prohibition), the effect of this provision is that an extension is a less likely outcome than it was a few months ago. Instead there is an increased likelihood that no agreement is reached at all or that a significantly narrower deal is reached than that envisaged by the Political Declaration, perhaps with scope to continue to negotiate a wider deal.

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