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Brexit: The Great Repeal Bill

This briefing gives NFU members an overview of the Government's white paper on the Great Repeal Bill ("the Bill"), published on 30 March 2017, and considers the possible implications for farmers.

Introduction

One of the biggest challenges facing the Government in preparing the UK to leave the EU, particularly in the narrow two-year timeframe, is to ensure that there is a stable and legally enforceable framework in which organisations continue to operate and in which individuals live their day to day lives. This means that the body of EU law – the "acquis" – that applies in the UK must be converted to UK law at the moment we leave the EU. The Great Repeal Bill (whether it retains that name when it is actually published or not) is the piece of primary legislation designed to do just that.

There has been much speculation about what Brexit will mean for the huge number of EU rules and regulations that govern farming in the UK, and about the opportunity to overhaul certain regulatory regimes to reduce red-tape on farmers and improve access to new technologies. This is an opportunity the NFU is committed to taking – but it has to be balanced with the need to ensure stability and continuity for farm businesses, as well as the need to align our standards with the EU if we are to secure and maintain a EU/UK free-trading relationship. It is clear from the Government's approach, as explained below, that in order to make sure the process is manageable within the short timeframe available, the Great Repeal Bill will not be the vehicle through which significant regulatory change is fashioned. The NFU will nevertheless continue to lobby for better regulation, both now and after Brexit, that promotes productive agriculture while protecting human health and the environment.

The key points at a glance

- The Bill will repeal the European Communities Act 1972 on the day we leave the EU. This will mean that EU law will no longer be supreme over UK law.
- The Bill will convert all existing EU law into UK law. This means that the same rules and laws will apply on the day we leave the EU, as they did before.
- The Bill will not make any major changes to policy or laws; the only changes that will be made will be changes to make the laws operable.
- The Government will continue to negotiate, implement and apply EU law until we leave the EU.
- Regulatory changes will be made in the years after Brexit; they will not be made before we leave the EU.
- After we leave the EU, the UK courts will not have to follow new EU case law. The UK courts will follow EU case law as it exists on the day we leave the EU, but the Supreme Court (the UK's most senior court) will be able to depart from the existing EU law "when it appears right to do so".
- The UK's departure from the EU will not affect human rights law.

Q: What exactly has been published by the Government?

The Government has published a white paper titled “Legislating for the United Kingdom’s withdrawal from the European Union”. It can be found [here](#). The white paper sets out Government’s intentions as regards the Bill. The Bill itself has not yet been published.

The white paper tells us what the Government will seek to achieve in the Bill. Whilst the white paper is not a formal consultation, the Government invites feedback on the white paper. The NFU is currently considering a response.

Q: What is the Great Repeal Bill going to repeal?

The Bill will repeal the European Communities Act 1972 (“the ECA”) on the day we leave the EU. The ECA makes EU law apply in the UK, and it makes EU law supreme over UK law. The effect of the ECA is that Parliament cannot bring in new law that is inconsistent with EU law.

The ECA also requires UK courts to follow the case law of the EU courts. The repeal of the ECA will mean that EU law is no longer supreme over UK law. This means that after we leave the EU, Parliament can bring in new legislation that does not comply with EU law.

Q: What will happen to existing EU law?

The Bill will convert existing EU law on the day we leave the EU into UK law. This means that exactly the same rules and laws will apply on the day we leave the EU, as they did on the day before.

There are different sources of EU law, but broadly speaking, whatever the source of EU law, if it applies in the UK currently, it will be converted into UK law on the day we leave the EU.

Q: What will happen to EU law after Brexit?

The extent to which the UK will need to comply with EU law after Brexit will need to be negotiated with the EU, but in legal terms what will happen is that after Brexit, Parliament will be free to change the law as it sees fit, whether that law originated in the UK or whether that law originated in the EU and was converted into UK law by the Bill.

Q: Can’t we ditch lots of EU regulations as part of Brexit?

The Government has been clear that the Bill will not make major changes to existing EU law or policy. The purpose of the Bill is to provide legal certainty, because if we just repealed the ECA there would be massive holes in our statute book and the laws that remained simply wouldn’t work properly. So, the Bill will transfer all existing EU law across into UK law. Then, in the years that follow, Parliament can make changes to the law as it sees fit, with time to consider the changes and to make the changes work properly.

Q: Will the UK courts apply EU law after Brexit?

The Bill will say that any question about the meaning of EU law will be determined in the UK courts by referring to the case law of the EU courts as it exists on the day we leave the EU. That’s because we need legal certainty about the law as it exists on the day we leave, and any other approach would mean a change to the law.

However, after Brexit, the Supreme Court (the UK’s most senior court) will be able to depart from EU law “when it appears right to do so”. The Bill will give EU case law the same status as existing

decisions of the Supreme Court, meaning that the Supreme Court is highly likely to follow those decisions, but it can overturn those decisions if necessary. In practice, this happens very rarely.

Of course, Parliament will be able to overturn case law and make new law through legislation, where it sees fit, at any time after Brexit.

Q: Surely the Government will stop implementing EU law in the mean time?

No. The white paper says that the Government will continue to negotiate, implement and apply EU law until we leave the EU.

Q: Will each and every piece of EU law be written into UK law?

No. The white paper says that EU law will not be ‘copied out’ into UK law regulation by regulation. Instead the Bill will say that EU regulations – as they applied in the UK just before Brexit – will be converted into UK law and will continue to apply after Brexit.

Q: Will there be any changes to EU law at all?

Yes there will need to be some changes to EU law, as it is converted into UK law, to make it operate properly in the UK. For example, where EU law refers to EU institutions, those references will need to be changed. The Government plans to make these changes using secondary legislation (statutory instruments).

Q: How will any changes be made?

The Government proposes that any changes needed to EU law to make it operate properly as UK law are made using secondary legislation (see above). As the Government points out, in the short time frame that the Government has, trying to do everything using primary legislation (i.e. Acts of Parliament) would be unworkable. So, the Government proposes that it be given powers in the Bill to use secondary legislation to make many of the changes to EU law that will be necessary to convert it to UK law.

Secondary legislation is still subject to Parliamentary scrutiny, but not as much as primary legislation. This has made some people concerned that the Government will use the Bill to grant wide ranging powers to enable the Government to make changes to the law. The Government says that the Bill will include some limits on this power, but there has to be a balance struck between keeping the powers in check but also giving the Government enough flexibility to do what needs to be done in what is a very short time frame.

As ever, the devil will be in the detail and no doubt the powers actually granted to the Government in the Bill will be hotly debated – and amended – in Parliament.

Q: What about human rights law?

The Human Rights Act 1998 is a UK statute made to give effect to rights and freedoms guaranteed under the European Convention on Human Rights (“ECHR”). The ECHR is separate from the EU, and the white paper says that the UK’s withdrawal from the EU will not change the UK’s participation in the ECHR, and there are no plans to withdraw from the ECHR.

The rights guaranteed under the ECHR are interpreted by the European Court of Human Rights (ECtHR). The ECtHR is entirely separate from the EU courts. So, human rights law is here to stay and won’t be affected by Brexit.

Q: What about Wales?

As it stands the courts in Wales apply EU law in just the same way as the courts in England. So, the answers in this briefing apply in Wales and England.

In the white paper, the Government says that new UK frameworks may be required to replace EU ones as regards the functioning of the UK's single market. The Government's guiding principle will be to ensure that no new barriers to living and doing business within the UK are created as we leave the EU.

Q: What about the Common Agricultural Policy?

The Government has not specifically addressed what will happen to the CAP, but if we take the white paper at its word, all of the CAP regulations (such as the regulations underpinning the Basic Payment Scheme) will be converted into UK law on the day we leave the EU.

The objectives of the CAP are set out in the Treaty on the Functioning of the European Union. The white paper says that rights in the EU treaties that can be relied upon in court directly by an individual will continue to be available in UK law. It's not clear whether the Government would consider the objectives of the CAP to be a right that can be relied upon in court by an individual.

Q: Does the white paper mention agriculture at all?

In her foreword, Prime Minister Theresa May mentions the need for Government to act quickly and to provide clarity and she cites the example of the Government acting quickly last year to give certainty about farm payments.

In the section relating to the devolved administrations, the paper notes that at present the devolved administrations have competence in areas such as agriculture. This means that decision-making in agriculture is at the devolved government level, not at Westminster. However, all decisions made by the devolved administrations in the context of agriculture are made in the context of the CAP framework set by the EU. Presuming that competence in agriculture will remain with the devolved administrations, the UK may need to create new frameworks to replace the EU frameworks. As mentioned above, the white paper says that the guiding principle will be to ensure that no new barriers to living and doing business within our own UK union are created as we leave the EU.

Finally, the white paper notes that there is currently free movement of agricultural goods and derived products between Jersey, Guernsey and the Isle of Man, and the rest of the EU. These islands are not part of the UK for the purposes of EU law, and they are not part of the EU. They do, however, have special status under the EU treaties. It is not clear what is going to happen as regards these islands – or indeed, other UK overseas territories – as the UK exits the EU. In the white paper, the Government commits to engaging with these territories, but that's as much as it says at the moment.

Q: So what does this all mean for farmers?

It means that we're going to be living with EU regulation, at least for the next two years, and immediately after Brexit. The NFU will of course be lobbying hard to ensure that the UK regulatory regime in agriculture is fit for purpose post-Brexit, but it's likely to take time before we see substantial changes to the regulations in farming.

Brexit provides a real opportunity for the UK to develop a world leading agricultural policy, with a regulatory backdrop that delivers for farm businesses rather than stifling them. However, the white paper makes it clear that big changes are not on the Government's agenda until we're out of the EU.