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CHAMBERS

The European Union (Withdrawal) Bill: constructive ambiguity or a political choice not yet made?

Which legal rights derived from EU law will we keep or lose when the UK exits the EU? This question is of fundamental importance. Yet the European Union (Withdrawal) Bill (the "Brexit Bill") fails to provide a clear answer. Either the Government has not really thought about it properly; or, more probably, there is one of two truths that dare not speak its name and, as Henry Kissinger would have it, the Bill is a deliberate "constructive ambiguity".

The question of automatic lapse of EU rights upon Brexit was much-debated, but ultimately somewhat parked, in the *Miller* litigation. The EU-related rights were put into three categories and debated as such (see the majority decision at ¶¶57-61). But the UK Government accepted that there were at least some rights which could not be replicated in UK law (¶63), and therefore discussion of the detail was limited (¶¶64-66). As is well known, the Government made much of its intention to enact a "Great Repeal Bill" which *"…will repeal the 1972 Act and, wherever practical, it will convert existing EU law into domestic law at least for a transitional period"* (¶34, see also ¶¶94, 263).

The Brexit Bill has now been presented to Parliament to serve as this "Great Repeal Bill". It raises a rather large question as to what the words *"wherever practical"* in the above quotation were really intended to mean. Indeed, it is hard to see that the Government can possibly mean the Bill to have the effect it would currently appear to have.

The intended effect is the retention of much of EU law, at least for a transitional period. Clause 1 would repeal the European Communities Act 1972, and clauses 2 and 3 would preserve the effect of both "EU-derived domestic legislation" (i.e. domestic provisions implementing Directives and other EU obligations) and "direct EU legislation" (i.e. EU instruments with direct applicability, most notably Regulations, whether EU Regulations or Commission Regulations). The point of interest for present purposes emerges, however, most clearly from clause 4. The meat of this clause provides (with our bold emphasis) as follows:

> *"Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day—*
>
> *(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and*
>
> *(b) are enforced, allowed and followed accordingly,*
>
> ***continue on and after exit day to be recognised and available in domestic law*** *(and to be enforced, allowed and followed accordingly)."*

This is a critical clause. Ostensibly, it is the means by which to fulfil the promise of the Government that EU rights *"…would be re-enacted as ordinary rights in primary legislation"* (*Miller*, ¶58). The Government considers that it will catch many of the most important rights which EU law confers: the Explanatory Notes say that it will preserve, for instance,

"directly effective rights" deriving from Treaty provisions on the free movement of goods (TFEU Articles 34-36), the freedom to provide services (TFEU Article 56), the state aid rules (TFEU Articles 107-108) and the equal pay provisions (TFEU Article 157).

Clause 4 necessarily assumes that these rights will remain meaningful as domestic rights if *"recognised"* and made *"available"* in domestic law after exit day. It *"continues"* in domestic law a whole series of EU rights without itself making any further provision or adjustment to ensure that those rights will have any practical bite after *"exit day"*.

But this skates over the fact that the enforceability of almost all of the EU rights in question depends expressly upon the UK being member of the EU, or the person being a citizen of the EU, or there being an effect on trade between Member States. This simple, but fundamental, point can be explained by reference to some examples amongst the very Treaty provisions identified by the Government in the Explanatory Notes as ones which it wishes to preserve:[1]

(i) Discrimination: The general Treaty prohibition against discrimination is embodied in Article 18 TFEU which provides "***Within the scope of application of the Treaties****, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited*." But discrimination in the UK after exit day will not be "within the scope of application of the Treaties".

(ii) Free movement of goods: The right of UK citizens under Article 34 of the TFEU, as continued by clause 4 of the Bill, would be to enforce a provision which states: *"Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited* ***between Member States****."* The UK will not, however, be a Member State after exit day. Moreover, under the famous *Dassonville* formulation measures of equivalent effect to quantitative restrictions must have an actual or potential effect on trade between Member States. What meaningful right could this provision ever confer in circumstances where, after exit Day, the UK is no longer a "Member State"? What quantitative restrictions could be imposed by the UK Government which would operate *between* Member States? The "right" enjoyed *"immediately before exit day"* would appear to mean very little after it.

(iii) Free movement of services: The same questions arise in relation to Article 56 which concerns the free movement of services. Article 56 provides that *"…restrictions on freedom to provide services* ***within the Union*** *shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended"*. The UK will no longer be a member of *"the Union"* and so no restrictions under UK law could possibly be prohibited by this Article. The continued right is meaningless.

(iv) State aid: The right of UK citizens under Article 107 of the TFEU, as preserved by clause 4, would be to enforce this prohibition: *"Save as otherwise provided in the Treaties, any aid* ***granted by a Member State*** *or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain*

[1] We take directly effective Treaty rights unlikely to be addressed, in part or in whole, in the seven Bills which will in due course accompany the Brexit Bill. So, for example, exclude from consideration the provisions of free movement of persons since immigration will be the subject of a dedicated Bill and will, we suppose, make comprehensive provision for this subject.

*undertakings or the production of certain goods shall, **in so far as it affects trade between Member States**, be **incompatible with the internal market**."* The UK will not be a Member State after exit day, nor will it be in the internal market, and so this provision will cease on its face to have any application to the UK at all.

(v) Equal pay: The continued right under Article 157 TFEU states that *"**Each Member State shall ensure** that the principle of equal pay for male and female workers for equal work or work of equal value is applied."* It will, on its face, cease to apply to the UK after exit day.

As can be seen simply from their text, none of these provisions will make any sense once we have left. Or, seen another way, they will make perfect sense, but simply have no possible application.

The same problem of unintelligible rights arises from the porting over by clause 3 of much so-called "direct EU legislation", that is EU Regulations and Decisions addressed to the UK. A good number of such Regulations, despite being directly applicable, are drafted in terms that make frequent and substantial allusion to Member States or the scope of EU law.[2] Take the General Data Protection Regulation (2016/679/EU), a topical and very important example. This is a critical and long-negotiated EU instrument replacing the Data Protection Directive and destined to be central to the digital economy. Its territorial scope is set by Article 3 which confines its operations to "*the activities of an establishment of a controller or a processor **in the Union"***; Article 2.2(b) further provides that the Regulation does not apply "*in the course of an activity which falls outside the scope of Union law*".

In the case of "EU-derived domestic legislation", preserved by clause 2, the basic textual problems are less acute, precisely because the obligations in a Directive have been transposed into a purely domestic context. In the analytical scheme used by *Miller* these are "category (i) rights" which present the least textual problems in preservation. However, even here the problems of intelligibility are significant, albeit of a different nature: the problem is more that such domestic legislation is predicated upon common EU institutions or procedures, or regimes of mutual cooperation or mutual recognition which will no longer work: anyone in doubt of this should read, for instance, the Human Medicines Regulations 2012 (SI 2012/1916) and then ask "how is this to work outside the EU/EMA?"

Given these structural features the question arises "what in fact does clause 4 preserve?". There are two possible analyses:

(1) The first possibility is that Clause 4 preserves little, if anything, after exit day: the text of the Treaty articles and the suchlike is carried over, but they are all on their face inapplicable if the UK is no longer a member.

(2) The second possibility is that all the references to *"Member States"*, *"the Union"* the *"internal market"* and so forth in retained EU law and rights must be read as including – or perhaps even as limited to – the UK.

[2] Equally, a good number of Regulations do not have such jurisdictional fault lines, for instance Council Regulation 207/2009/EC on the Community trade mark; and the Recast Judgments Regulation 1215/2012. But even here there are frequent (albeit non-jurisdictional) references to "Member States" or reliance upon mutual recognition/mutual enforcement that render the regime incoherent.

If the latter is correct then, as we explain below, it would represent a political choice of remarkable significance which has, so far as we are aware, barely been debated. Before coming to that, however, we will address the first possible interpretation.

The first analysis: clause 4 in fact preserves little, if anything after exit day

The first analysis of clause 4 is that there are in fact no current Treaty rights which are, to use the language of that clause, currently *"available in domestic law by virtue of section 2(1) of the European Communities Act 1972"*, other than Article 308 TFEU[3] and *possibly* Article 101 and 102 TFEU, which will actually be preserved in any meaningful way after exit day. The references to *"Member States"*, *"the Union"* the *"internal market"* mean exactly what they say; they will not include the UK after exit day; and so the rights are practically meaningless.

Precisely the same point would arise in relation to (formerly) directly effective provisions of Directives. Such obligations are by legal definition directed at Member States alone: such "vertical direct effect" arises only because the Defendant is or is part of the Member State. So these too would fall away on exit day. Likewise also the general principles of EU law, which include EU fundamental rights principles (before their codification in the Charter): these can only operate "*within the scope of EU law*" as CJEU cases consistently reaffirm. As such, all of the rights and (corollary) obligations at which clause 4 purports to be directed would, on this interpretation, be incapable of application after exit day. Equally, there would probably be surprisingly little preserved by clause 3, given the way Regulations are drafted.

On this analysis, say that the free movement of goods or state aid rules, or the GDPR, do not work or, in the language of clause 7 *"[fail] … to operate effectively*" or are "*deficient*" upon exit day. In that event, the Minister may pass correcting secondary legislation under clause 7. Such interpretation is borne out by the way in which the term *"deficiencies in retained EU law"* used in clause 7(1) is defined in clause 7(2), in particular clause 7(2)(a) which applies to retained EU law which "*contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant*".

Given the contents of clause 7, this reading of the Act at first sight appears the more natural, indeed inevitable. But there are at least four significant consequences if this is right.

The first is that such a reading would make clause 4 strikingly light on content. It would indeed be something close to a misdirection, since there would be nothing to bite upon. The misdirection would be profound, not least because the Explanatory Notes to Clause 4, suggest at §§87-92 that clause 4 does have meaningful effect and that a long list of directly effective Treaty provisions "*would be converted into domestic law as a result of this clause*",[4] before going on to note at §91 that "*any directly effective rights converted into domestic law as a result of this clause would be subject to amendment or repeal via statutory instrument made under clause 7*". A fairer account would acknowledge the limitations built into such rights (as above) and recognise that no right (or virtually no right)

[3] This confers legal personality on the EIB and operates sensibly even when the UK ceases to be a Member State.

[4] Admittedly the list is somewhat suspect given its inclusion of, for instance, Articles 120-126 TFEU on economic cooperation and Article 325 of cooperation to combat fraud which self-evidently are not directly effective.

would be meaningfully converted, such that every EU Treaty right will require modification using clause 7 or clause 17 powers, if it is to continue at all.

The second consequence would thus be that, on this analysis, clause 4 meaningfully operates only as a hugely wide enabling provision for secondary legislation under clause 7 (and the suite of other widely drawn powers of secondary legislation): as noted above, the non-functioning or incoherence of former EU rights specifically justifies the making of consequential secondary legislation. The (huge) extent of the now-unworkable rights would set the subject-matter of the responsive powers of secondary legislation. This means that the material scope of those delegated powers has few boundaries.

If these first two points are correct, this goes significantly beyond the critique of clause 4 made by Professor Mark Elliott in his comments on the Brexit Bill,[5] where he suggests that the saving effected by clause 4 is uncertain because of problems of reciprocity. The point is more basic: there would, in practice, be *no surviving rights*, which would lapse with membership; only a large body of unworkable or redundant retained EU law, creating correspondingly large delegated powers to replace it.

The third consequence would be that the appearance of continuity or stability that the Brexit Bill carefully cultivates is unwarranted. Directly effective rights are a substantial part of EU law and its effective enforcement; yet, simply put, direct effect is not continued, or at least the rights no longer have any meaningful content. This is a potentially significant problem. The Brexit Bill expressly continues the principle of supremacy of EU law over laws made before exit day (clause 5), and makes the retention of EU law *"subject to"* that basic rule of supremacy (see clauses 2(3), 3(5) and 4(3)). It is quite difficult to see, however, how supremacy can operate sensibly if the main "pillars" of the legal order which is being retained have ceased to make any sense. Treaty rights, and the four Treaty freedoms in particular, are the intellectual cornerstone of single market legislation, and often operate to fill in any gaps or to drive the purposive interpretation of secondary EU legislation. Much of the EU lawyer's toolkit, for instance, is based on two key interdependent concepts: supremacy and direct effect. The direct effect of Treaty provisions, Regulations and Directives gives the supremacy doctrine teeth, and enables either a *Marleasing* interpretation or, in an extreme case, disapplication of domestic law (e.g. by an *EOC* declaration) to be used to solve both types of problem. It is far from obvious how these sorts of problems are to be resolved if the guiding Treaty provisions are inapplicable to the UK or make no sense in their retained form.

The fourth consequence would be that the loss of directly effective rights would affect the interpretation after exit day of EU secondary legislation, and by extension EU-derived domestic legislation. Unless some variant of the second analysis considered below is adopted, and the UK is treated 'as if' it were still part of the EU for the purposes of its domestic law, such EU legislation becomes incoherent or potentially so, once retained by clause 2. Why? Recitals to market-harmonising Directives invariably track back to, rely upon and then build from the underlying Treaty rights of relevance; then, the substantive provisions of the Directive invariably build upon the directly effective Treaty provision's

[5] See his blog "*The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill*" *and* "*The EU (Withdrawal) Bill: Initial Thoughts*", particularly in his comments on clause 4; and see the House of Lords Constitution Select Committee (to which Prof Elliott acts as adviser), 3rd Report of 2017-19, *European Union (Withdrawal) Bill: interim report*, at §27.

framework, adding flesh to its bones. Yet if the directly effective Treaty right in question has ceased to make any sense (unless and until any clause 7 legislation is made), how is such legislation be read, at least after exit day? How does one give (or does one give) effect to original legislative intent, when the underlying Treaty right or obligation itself has fallen away, or has been altered?

The second analysis: clause 4 requires "retained EU law" to be construed as if the UK were still a Member State

The profound problems we identify above would tend to suggest that clause 4 has to be read in a different way.

Given the apparent legislative intent as embodied in the Explanatory Notes, the most obvious alternative construction would be to read clause 4 as having a wider effect: that when it says that Treaty rights and the suchlike *"continue"* after exit day, this means every time one encounters in retained EU law expressions such as *"Member States"*, *"the Union"*, the *"internal market"*, one has to read them all as including the UK.

The legal and political consequences of such an interpretation would, however, be remarkable. It would create a "one way Brexit" under which the UK would be adopting a wide-ranging suite of continued protections for nationals and companies of the remaining 27 EU Member States, without any guarantee of reciprocity at all. Take the free movement of goods as an example. Article 34 of the TFEU prohibits, as we set out above, all *"[q]uantitative restrictions on imports and all measures having equivalent effect … between Member States."* The notion of a measure having *"equivalent effect"* has been interpreted extremely widely by the CJEU so as to prohibit all manner of things. It has held, for instance, that a restriction on the keeping of bees, applying exclusively to an island constituting only 0.3% of Denmark's land area, was in principle an interference with the free movement of goods. If the alternative interpretation of clause 4 is correct, then the UK Government will remain prohibited by law from imposing any restrictions on the importation of goods from the EU, whilst the remaining 27 countries of the EU will cease to be bound by any reciprocal obligation. It is true that this could be solved by post-Brexit primary or secondary legislation.[6] But again, therefore, the "continuation" of the right would remain, in effect, the simply laying down of a marker for future rules in the area.

The freedom to provide services is a further example. Were clause 4 to be read as requiring Article 56 TFEU to be read as if the UK were still a Member State, Article 56 would continue to prohibit any pre-Brexit primary legislation from doing anything to inhibit, say, French nationals or companies from exercising rights to provide cross-border services after exit day, whilst France would be free to take whatever measures it wishes against British nationals and companies. It may be, of course, that this is all to be dealt with by the transitional deal. The Prime Minister has indicated in her Florence speech on 22 September 2017 that the UK desires a transitional deal until 2021. But it appears that Parliament will be asked to enact clause 4 well before there is any certainty on the content of that deal.

Furthermore, there are some Treaty rights which would continue to look very strange even if the expression "Member States" were interpreted as including the UK. The prohibition on state aid, for example, prohibits "*any aid granted by a Member State"* but only *"in so far as*

[6] Because post-Brexit domestic legislation, seeming primary or secondary (in all its guises) would be supreme after exit day: see Clause 5(1).

it affects trade between Member States". This makes sense as a Treaty provision in a supranational legal order. It makes little sense as legislation of the UK Parliament. On its face, the provision would make it contrary to UK statute for, say, Lithuania to grant a state aid in a manner which distorted competition in trade between it and Latvia. The obvious way to solve this problem would be to construe *"Member State"* as meaning *only* the UK and *"trade between Member States"* as meaning trade with the EU27. But this would be a dramatic alteration of the ambit of this rule under the guise of interpretation.

The alternative possible reading of clause 4 – a bare "as if" approach – would thus meet the four concerns identified above, and provide for real continuity of rights and obligations within the UK. But it would create a one-sided system of law in many cases: EU27 persons, goods, services, companies, competitors and so forth might be treated more generously in the UK than their UK analogues in the EU27.

A constructive ambiguity, or a political choice not yet made?

Such a critical ambiguity seems unlikely to have arisen by accident. It may be that clause 4 allows the Brexit Bill to seem to be all things to all people. To "Remainers" the apparent promise to continue EU rights, until they are reconsidered by Parliament at its leisure, softens the blow. To "Brexiteers" (and they are amongst the most long-term and careful students of the actual contents of the EU Treaties) clause 4, read with the textual limitations in the underlying EU rights, is a promise of a substantially clean slate.

Whichever of the two possible interpretations of clause 4 is correct, it is hardly satisfactory that such an important, indeed fundamental, choice is apparently to be left to the Courts as a matter of interpretation. The Brexit Bill is one of almost unparalleled constitutional (and economic) significance. The legislation must be clear as to how (if at all) the relevant EU rights are to be preserved. The choice discussed above is one which needs to be debated in Parliament. Ideally, the Brexit Bill would follow the format of the Human Rights Act and annex those directly effective EU rights that it actually intends to preserve, or at least the most important ones thereof. Crucially, the Bill needs to explain what Courts are intended to do when, after exit day, they are asked to apply a provision which has no obvious textual application in the UK at all. The selection of the proper interpretative response to this scenario would involve, in essence, some very large and effectively political choices about what kind of Brexit our Parliament wishes to see.

Such clarity is of critical importance given the historic significance of such Treaty rights and the policy implications as to the various ways in which they may or may not be continued as general, organising constitutional principles, used, at the very least purposively to interpret retained EU law and, *perhaps* (as now), other domestic legislation. For nearly forty years such rights have been used as tools of policy and legislation, and failing that of litigation, to ensure that all UK legislation regulating or affecting commercial activity respects and is aligned with the common boundaries they shape. In this way EU membership has required the UK to be a certain form of market economy (shaped by the four freedoms) operating within certain parameters, accompanied by (or checked by) certain social guarantees (such as equal pay). Such directly effective Treaty rights have for instance reshaped domestic tax law, ended direct and indirect discrimination on grounds of nationality, tackled pay discrimination, and guaranteed rights to run cross-border businesses. These Treaty rights are social and economic rights of constitutional importance. The continuation or not of any of these economic and social rights, and the degree to which they are constitutionally

entrenched, is not a minor matter suited to be left to secondary legislation or judicial inference in litigation, but is at the heart of the type of economic and social polity the UK will be after Brexit.

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