



Association for Financial Markets in Europe

AFME Member Briefing

The EU (Withdrawal) Act: Implications for industry

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Introduction

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C L I F F O R D
C H A N C E

THE EUROPEAN UNION (WITHDRAWAL) ACT

JULY 2018



OVERVIEW OF THE ACT

| | |
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| Section 1 | Repeal of the ECA 1972 |
| Sections 2 – 7 | Retention of existing EU law |
| Sections 8 – 9 | Main powers in connection with withdrawal |
| Sections 10 – 12 | Devolution |
| Section 13 | Parliamentary approval of outcome of EU negotiations |
| Sections 14 - 19 | Financial and other matters |
| Sections 20 - 25 | General and final provision |
| Schedules | |

Clifford Chance briefings:

The European Union (Withdrawal) Act 2018: What it does, why and how

Onshoring EU financial services legislation under the European Union (Withdrawal) Act 2018

Available at www.cliffordchance.com and <http://financialmarketstoolkit.cliffordchance.com>

Objectives

- Repeal European Communities Act 1972 on Brexit
- Onshore EU law into UK law on Brexit as ‘retained EU law’
- Give Government wide powers to remedy the deficiencies in retained EU law resulting from Brexit

Key amendments to the Bill

- More Parliamentary control over the Brexit process and the Government’s powers under the Act
- Protecting retained EU law from other future amendments under delegated powers
- Devolution

REPEAL OF THE EUROPEAN COMMUNITIES ACT



SECTION 1 - REPEAL OF THE EUROPEAN COMMUNITIES ACT 1972



“The European Communities Act 1972 is repealed on exit day”.

Section 1 (Repeal of the European Communities Act 1972)

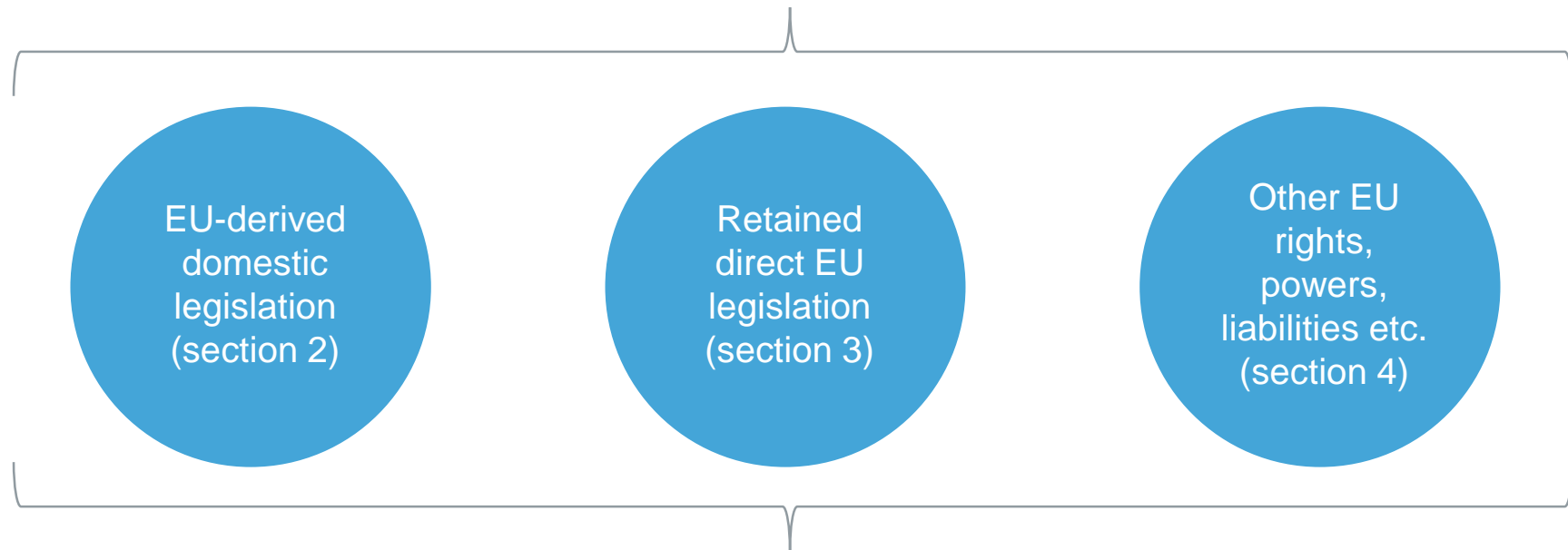
- ECA provides that :
 - rights and obligations under the EU Treaties and EU regulations are directly applicable in the UK, without the need for further UK implementing legislation; and
 - Government can implement EU obligations under directives by secondary legislation
- Repeal seeks to assert the supremacy of UK law by removing the main legislation which gives effect to EU law in the UK
- ‘Exit day’ means 29 March 2019 at 11.00 pm (subject to amendment by regulations if the UK leaves the EU at a different time)

RETAINED EU LAW



A NEW BODY OF 'RETAINED EU LAW'

RETAINED EU LAW:



INTERPRETED BY RETAINED EU CASE LAW AND GENERAL PRINCIPLES OF EU LAW

ONSHORING EU LAW INTO UK LAW

Section 2 – EU-derived domestic legislation:

“EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day”.

- Confirms that domestic legislation that implements EU law obligations remain on the statute book, notwithstanding the repeal of the ECA
- Seeks to remove doubt as to whether legislation which presupposes membership of the EU would continue to function if the UK ceases to be a member of the EU

Section 3 – Direct EU legislation:

“Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”.

- Converts directly applicable EU legislation (e.g., EMIR and MiFIR) into domestic legislation at the point of exit
- NB – the direct EU legislation must be ‘operative’ (i.e., in force and applicable) immediately before exit day

Section 4 – Other rights, powers, liabilities etc.:

“Any rights, powers, liabilities, 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 [ECA] 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)”.

- Continues the application of other rights which are available in domestic law by virtue of s2(1) of the ECA e.g. Treaty rights
- NB – s4(2)(b) indicates that this provision does not incorporate rights, powers etc which arise under an EU directive and have not been judicially determined to be directly effective

INTERPRETATION OF RETAINED EU LAW

Section 6 provides that:

Status of CJEU judgments

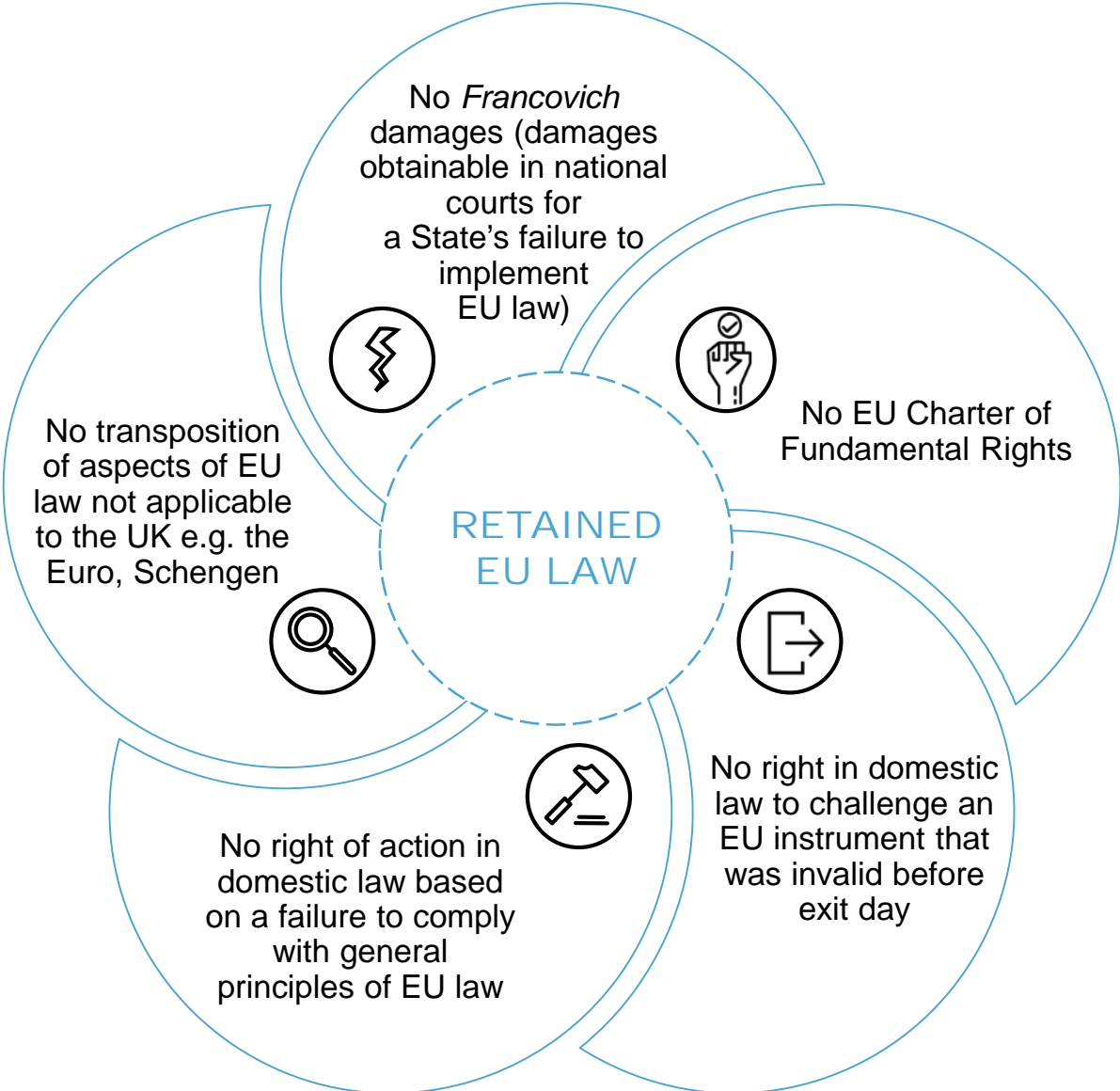
- A UK court or tribunal:
 - is not bound by any principles laid down, or any decisions made, after exit day by the Court of Justice of the European Union (CJEU)
 - cannot refer any matter to the CJEU on or after exit day
 - may have regard to anything done on or after exit day by the CJEU or the EU, so far as relevant to any matter before the court or tribunal
- The meaning of retained EU law will be determined in accordance with pre-exit CJEU case law and general principles, so far as the law has not been modified on or after exit day
- The Supreme Court and (in certain circumstances) the High Court of Justiciary will not be bound by retained EU case law

Supremacy of EU law

- Section 5(1) adds that the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
- However, the principle of the supremacy of EU law will continue to apply to any enactment or rule of law passed or made before exit day, and the Act does not prevent it applying to later modifications of law made before exit day if consistent with the intention of the modification.



RETAINED EU LAW - EXCEPTIONS



'LEGISLATIVE SCLEROSIS' LAW AFTER BREXIT

Act restricts Government's powers to amend retained EU law other than to remedy deficiencies

'Retained direct principal EU legislation' (section 7(2))

- EU 'Level 1' regulations (such as EMIR, CRR, MiFIR, etc.) treated as if they were UK primary legislation
- After exit day, cannot generally be amended except by Act of Parliament
- Similar protection for Treaty rights, duties, etc. forming part of retained EU law (section 7(4))

'Retained direct minor EU legislation' (section 7(3))

- EU 'Level 2' regulations, e.g., RTS, ITS or delegated or implementing acts
- After exit day, broader powers to amend by secondary legislation (special arrangements envisaged for financial services legislation)

Statutory instruments under ECA implementing EU directives

- E.g., statutory instruments implementing financial collateral directive, MiFID2, etc.
- After exit day, cannot generally be amended except by Act of Parliament

Enhanced protection for certain areas of EU law (section 4)

- Covers retained EU law affecting employment, equality, health and safety, consumer standards and environment
- Any amendment, repeal or revocation requires primary legislation or compliance with enhanced Parliamentary scrutiny process

POWERS TO MAKE SECONDARY LEGISLATION



SECTION 8 – POWER TO REMEDY DEFICIENCIES

- Power to remedy deficiencies available up to two years after exit day
- Enables a Minister to make secondary legislation that the Minister considers appropriate to prevent, remedy or mitigate:
 - any failure of retained EU law to operate effectively; or
 - any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU
- Failure to ‘operate effectively’ includes, inter alia:
 - EU references that are no longer appropriate and references to EU entities that no longer undertake functions with respect to the UK
 - Provisions relating to reciprocal arrangements that no longer exist or are inappropriate
- Henry VIII power to make any provision that could be made by Act of Parliament
- Powers cannot be used to impose tax or fees, make retrospective provision, create certain criminal offences, establish a public authority, amend Human Rights Act, etc.
- Regulations are subject either to affirmative approval of both Houses of Parliament or negative approval (Parliamentary ‘sifting committees’ play a role in determining process)

International obligations?

The original Bill proposed a power to prevent or remedy any breach of the UK’s international obligations arising from Brexit. The Act does not contain an equivalent power.

SECTION 9 – IMPLEMENTING THE WITHDRAWAL AGREEMENT

- Power to implement the withdrawal agreement available until exit day
- Enables Ministers to make secondary legislation for the purposes of implementing the withdrawal agreement if Minister considers that that such provisions should be in force on or before exit day
- Henry VIII power to make any provision that could be made by Act of Parliament
- Powers cannot be used to impose tax or fees, make retrospective provision, create certain criminal offences, establish a public authority, amend Human Rights Act
- Powers cannot be used until the withdrawal agreement has been approved by an Act of Parliament



TIMING OF CHANGES TO RETAINED EU LAW

What would be the impact of a transition period on the powers under the Act?

- Agreed draft text for Withdrawal Agreement envisages a transition period until the end of December 2020
 - During the transition period, UK and the EU would continue to apply EU law as if the UK were still a Member State
 - Including new EU law required to be implemented or becoming applicable during the transition period
 - However, UK loses rights to participate in EU institutions including voting rights
- If a transition period were agreed under the Withdrawal Agreement:
 - Powers under section 9 could be used to provide for the continued application of EU law after exit day
 - Measures under section 8 to correct deficiencies in retained EU law could be delayed or extended
 - The transitional powers under section 23 could be used
- Alternatively, transition period could be implemented via proposed Withdrawal Agreement and Implementation Bill (WAIB)

ONSHORING EU FINANCIAL SERVICES LEGISLATION



POWERS DELEGATED TO FINANCIAL SERVICES REGULATORS

EU exit instruments

The Financial Regulators' Powers (Technical Standards)(Amendments etc)(EU Exit) Regulations 2018 will delegate to the PRA, FCA, BoE and Payment Services Regulator the power to make 'EU exit instruments' remedying deficiencies in binding technical standards

The regulators will also be able to make EU exit instruments to remedy deficiencies in the EU-derived provisions of their own rules

No need to consult or comply with other requirements that normally apply to rule changes

HMT can veto these instruments if it considers that they do not comply with the Act

Standards instruments

HMT also proposes to give the UK regulators the ongoing power to make binding technical standards ("standards instruments") under retained EU law

The UK regulators will have to follow the usual rule-making procedures when making standards instruments (i.e., they will have to consult etc)

HMT will be able to veto these instruments if they have implications for public funds or would interfere with international negotiations

Level 3

Level 3 comprises Commission and ESA guidelines, recommendations, FAQs, opinions, etc.

These are not part of 'retained EU law' as they are not legally binding

UK regulators may choose to continue to apply these measures anyway



APPROACH TO ONSHORING

“Firms do not need to prepare now to implement onshoring changes in the event no deal is reached with the EU” – HM Treasury

If no transition period, UK will default to treating EU member states in same way as it treats third countries

EU financial services firms operating in the UK would be subject to broadly the same regime as apply to third country firms operating in the UK

In some areas, a different approach may be needed to manage the transition to a stand-alone UK regime

Treasury proposes to introduce a Temporary Permissions Regime (TPR)

- In line with announcements in December 2017
- Allowing firms to operate in UK for a time limited period after Brexit and to apply for full authorisation

HMT intends to introduce transitional regimes for entities operating cross-border and outside the passporting framework

HMT will also provide regulators with a general power to phase-in post-Brexit rules, to allow firms to transition to fully domestic regime

PARLIAMENTARY APPROVAL OF OUTCOME OF EU NEGOTIATION



PARLIAMENTARY APPROVAL FOR OUTCOME OF EU NEGOTIATION

The withdrawal agreement may only be ratified if:

- A Minister has laid before each House a statement that political agreement has been reached, together with a copy of the negotiated agreement and a copy of the framework for the future relationship
- The negotiated agreement and framework have been approved by a resolution of the House of Commons
- A motion for the House of Lords to take note of the negotiated agreement and framework has been tabled, and the House of Lords has debated the motion or has not concluded a debate on the motion within 5 Lords sitting days of the House of Commons resolution; and
- An Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

What happens if the House of Commons does not approve the agreement?

- A Minister must, within 21 days, prepare a written statement setting out how the Government proposes to proceed
- A Minister must make arrangements for a motion in neutral terms, to the effect that the House of Commons has considered the written statement, and for a motion in the House of Lords to take note of the statement.

What happens if no deal is reached with the EU?

- If the Prime Minister makes a statement before the end of 21 January 2019 that no agreement in principle can be reached on the arrangements for UK withdrawal from the EU and on the framework for the future relationship, a Minister must make a statement within 14 days setting out how the Government proposes to proceed.
- If there is no agreement in principle by the end of 21 January 2019, a Minister must make a statement within 5 days setting out how the Government proposes to proceed.
- In each case, the Minister must make arrangements for a motion in neutral terms, to the effect that the House of Commons has considered the written statement, and for a motion in the House of Lords to take note of the statement.

ACTIONS?



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Q&A

The Association for Financial Markets in Europe advocates stable, competitive and sustainable European financial markets that support economic growth and benefit society.

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