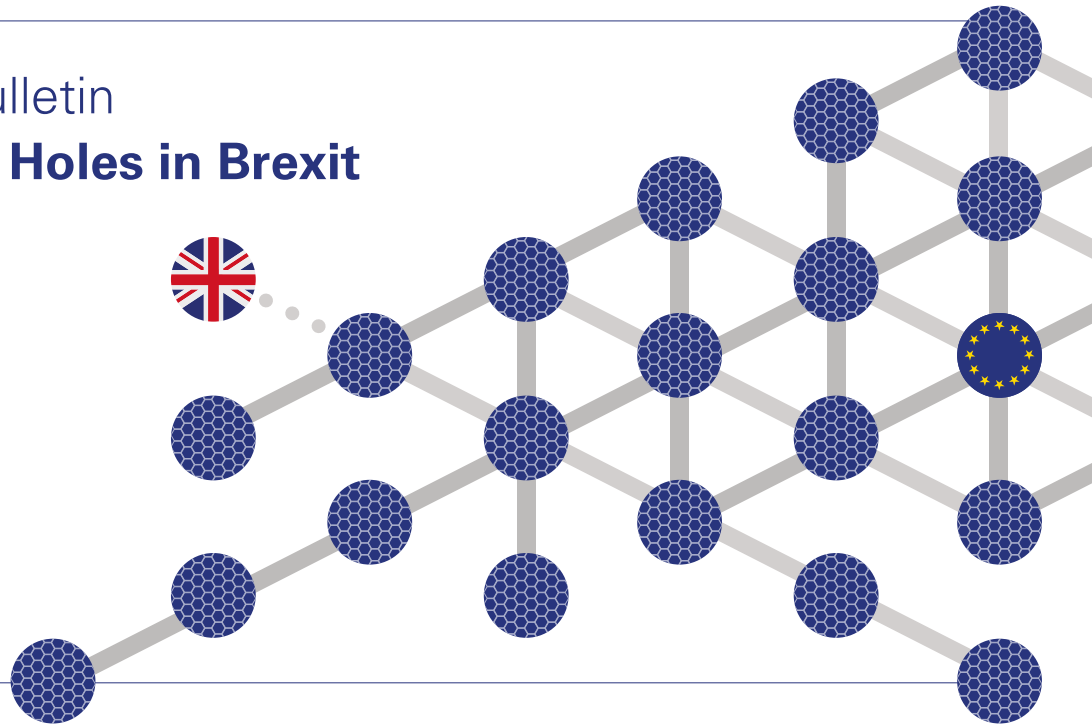


Brexit Analysis Bulletin

Filling The Black Holes in Brexit



The legislative and political challenges the UK faces in leaving the EU are significant, and whatever kind of Brexit ends up being negotiated, legal certainty and continuity are going to be crucial – to individuals, business and trade. This bulletin explains the legal consequences of repealing the European Communities Act 1972 (**1972 Act**), and how the government currently plans to avoid creating black holes in UK law.

Article 50 will be triggered by the end of March 2017, which starts the two-year countdown to the UK's exit from the EU. The Great Repeal Bill is proposed as the way to make sure the UK's legal arrangements are fit for purpose once the UK has left the EU.

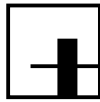
The 1972 Act will be repealed by the Great Repeal Bill when enacted. When that happens all EU law directly applicable in the UK will cease to have effect, and these laws will no longer be part of UK law. This is a large, diverse body of law covering, to take a few examples: agriculture, consumer safety, equality measures, chemical safety, trade-marks and security.

These directly applicable EU laws are contained, not in UK legislation, but in around 5000 EU regulations, EU decisions, and some Treaty provisions. If account isn't taken for this body of law on repeal of the 1972 Act, then there will be black holes in the UK statute book. This will result in a chaotic situation where important aspects of civic and commercial life have no governing rules or law at all. The sheer size of the body of directly applicable EU law means that it is practically impossible for Government to replace it with equivalent UK legislation on repeal of the 1972 Act.

Many of these directly applicable laws are significant and complex:

- The Common Agricultural Policy is implemented across the EU by four regulations covering rural development, funding, direct payments to farmers and market measures.
- The EU Data Protection regulation gives EU citizens control over their personal data.
- 'REACH' provides a comprehensive legal framework for the management and use of chemicals in the EU, creates a single market and the European Chemicals Agency.
- At the end of last year a package of measures was introduced to strengthen the EU's capacity to fight terrorist financing and organised crime including regulations on cash controls for those entering/leaving the EU, and on criminal asset freezing.

As a result, Government proposes transposing, wholesale, all existing directly applicable EU law into UK law on repeal of the 1972 Act. This should, in broad terms deal with the black hole problem. That said, transposition of some directly applicable law may not be possible, and



some will be subject to ongoing negotiation which is likely to result in continuing post-Brexit legal uncertainty.

Areas of directly applicable law will simply cease to have effect on Brexit; the right EU citizens have to stand for election as an MEP can't be transposed into UK law, nor could the UK courts' ability to refer questions of EU law to the Court of Justice. These types of laws all depend on continuing UK membership of the EU. Other directly applicable EU laws are highly contentious (free movement of people and goods), and these depend on cooperation with the EU, and will be subject to extensive negotiation. As such, the rules on trade will only be workable if agreement is reached with the EU post Brexit. The Great Repeal Bill proposes that ministers should be given the power to adjust statutory instruments to give Government the flexibility "to take account of the negotiations with the EU as they proceed". Quite how this will operate in practice, and the extent of ministerial delegated powers, remain unclear. This will be politically contentious as it impacts on the level of scrutiny Parliament will have over future changes to existing (EU related) legislation.

In addition to directly applicable EU law, many UK statutes give effect to EU legislation – the House of Commons estimates that 13.2% of UK legislation between 1993 and 2004 was EU related. This legislation will remain on

the statute book post Brexit, but some Acts will need to be amended to reflect Brexit negotiations and the UK's approach to certain EU standards and agencies. Many UK statutes refer to EU law or institutions (the Trade Marks Act 1994 provides that a trade mark cannot be registered in the UK if prohibited by EU law), and it is not clear whether these provisions can/should remain in place and how they should be interpreted in light of future developments in EU law.

Whilst the Great Repeal Bill proposals go a long way to avoid the problem of black holes, the challenge shouldn't be underestimated. The outcome of the negotiations with the EU is unlikely to be known when the Great Repeal Bill is introduced which means it will remain unclear what changes will be required to the body of existing EU law post Brexit, whether ministers will have the power to amend primary legislation, and the extent to which any changes will be subject to full parliamentary scrutiny. Inevitably there will be significant uncertainty, and no doubt unforeseen consequences, both in law and politics as we move towards Brexit day.

In the period post Brexit it will be critical for the uncertainties to be effectively dealt with to ensure legal stability.

SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS

JOINING THE DOTS OF THE EU REFERENDUM

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Now that the vote has been cast to leave the EU, members of our dedicated Brexit group continue to interrogate the regulatory and commercial issues and to advise clients on next steps and outcomes.

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