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The European Union (Withdrawal) Bill – Implications for Environmental Law

On 13 July 2017 the *European Union (Withdrawal) Bill* (the **Bill**) was presented to the United Kingdom Parliament for its initial reading. This draft legislation, previously referred to as the "*Great Repeal Bill*", is intended to give substantive effect to the UK's 23 June 2016 Brexit vote by, when enacted, repealing the *European Communities Act 1972* through which the UK became a member of the European Union.

The Bill will also convert, for legal continuity, existing EU law into domestic UK law. Following the UK's exit from the EU - expected to be in March 2019 - the UK Parliament will then have the ability to amend such converted EU law as it sees fit (subject of course to the UK's other international legal obligations, including any exit agreement reached with the EU). The Bill will therefore bring to an end the supremacy of EU law in the UK.

However, as discussed in a 2016 [GT Alert](#), the Bill's ability to replicate the existing EU legal framework post-Brexit is likely to be limited. This will be particularly the case in respect of the EU's chemicals, emissions, and medicines regimes, all of which operate at a pan-European level and which, depending on the UK's eventual post-Brexit relationship with the EU, the UK may cease to be part of post-Brexit.

In an attempt to address this, the Bill contains various so-called "*Henry VIII*" powers. Such powers enable primary legislation (i.e. Acts of Parliament) to be amended or repealed by secondary legislation put forward by UK Government Ministers. They take their name from the *Proclamation by the Crown Act 1539* which gave the then King of England, Henry VIII, the statutory power to legislate by decree. Such a power was controversial even in the 1500s and Henry VIII powers are themselves a controversial element of contemporary UK law-making. They are, however, usually accepted as being suitable - when subject to proper limits - in order to streamline the implementation of complex legislation.

It has been estimated that hundreds of pieces of secondary legislation will be needed to address the complexities arising from EU withdrawal, complying with the UK's international obligations and implementing any eventual UK/EU withdrawal agreement. The Bill therefore provides that Ministers "*may make such provision as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively*". Further, the Bill's Henry VIII powers can be used to enact regulations that make "*any provision that could be made by an Act of Parliament*" (which could include enacting further Henry VIII powers or, potentially, amending the Bill once it is enacted) – they are therefore extremely broad.

The Bill gives examples of "*deficiencies*" in retained EU law which it may be appropriate for a Minister to address through the Bill's Henry VIII powers. These include, relevant in the pan-European environmental and regulatory context, where retained EU law "*confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the [UK]*" or where EU law makes provision "*for arrangements which involve the EU, an EU entity, a member State or a public authority in a member State and which no longer exists or are no longer appropriate*".

The Henry VIII powers in the Bill are limited to some degree by a schedule which provides, amongst other things, for the parliamentary approval of draft secondary legislation under certain circumstances. These circumstances include where the Henry VIII powers are used to establish a public authority in the UK or to transfer the functions of any EU entity or EU public authority to a UK public authority. This approval process (which does not provide the UK Parliament with any formal power to amend Ministerial proposals) would therefore appear to be relevant to replacement chemicals, emissions and medicines regulatory regimes being established in the UK.

In addition, the Bill's Henry VIII powers are only exercisable by Ministers for two years following the UK's exit from the EU.

The Bill, which is still only in draft form, arguably represents a pragmatic way to address the immense complexity of the UK's exit from the EU. It nevertheless provides scope for highly consequential measures to be put in place with less formal scrutiny and oversight than may have been expected given Brexit's purported aim of reclaiming the UK's political and legal sovereignty from the EU. In the context of environmental law, there is therefore obvious scope for Ministers to potentially devise and implement replacement chemicals, emissions and medicines regulatory regimes with a high degree of executive discretion. Further, given the tight time constraints facing the UK in respect of Brexit, there may be pressure on Ministers to implement these replacement regimes quickly – this may limit the opportunities for consultation and industry engagement. As a result, businesses currently subject to the existing EU regimes may find themselves facing the imposition of additional UK regimes (potentially without the passporting of existing EU approvals) relatively quickly and with uncertainty regarding their actual regulatory obligations.

This, taking account of Brexit's undeniable complexity, may be both necessary and unavoidable, but what also appears unavoidable is that the implementation of Brexit, and the exercise of Henry VIII powers in particular, will be at serious risk of legal challenge and, potentially, be subject to judicial review on behalf interested parties such as individuals, pressure groups and businesses.

It is important that businesses continue to closely monitor developments and seek to identify those areas that are likely to be affected by new or amended legislation and arrangements in order to consider how impacts in affected areas can be mitigated or where lobbying and advocacy efforts can best be directed.

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