KEY POINTS

- Most important in practice for commercial regulation is likely to be the disappearance of EU "soft law measures", including communications, declarations, guidelines and special reports of the EU institutions.
- The content of the Bill seems likely to provide (among others) banks and other financial market participants with a myriad of possible challenges by way of judicial review if they dislike the way in which amendments to primary financial services legislation are made by statutory instrument.
- In giving effect to the need for expedition, Parliament has simply passed the burden of sculpting a satisfactory legal and constitutional post-Brexit resolution to the courts.

Spotlight

Author Richard Gordon QC

The EU (Withdrawal) Bill and the courts: peering through the glass darkly

In this article, Richard Gordon QC considers the first draft of the EU (Withdrawal) Bill and the extent to which banks and other financial market participants can challenge by way of judicial review if they dislike the way the government amends primary financial services legislation by statutory instrument.

Like a rare but inevitable extinction event, EU withdrawal is almost upon us and we have little obvious legislative means of coping with it. Even in anticipation, the European Union (Withdrawal) Bill (the Bill) could only ever have been the bluntest of instruments for resolving the constitutional fall-out from Brexit.

Now that we have a first draft (which may be amended materially on its way through Parliament) it is apparent that if the Bill stays in its present form the burden of achieving any clarity will lie on the courts and, then, only through the happenstance of public law litigation; primarily judicial review.

The objective of the Bill and its general scheme is straightforward. It has been crafted so as to ensure that UK law functions as effectively after Brexit as before. That aim is sought to be achieved by replacing the structure of the European Communities Act 1972 (the ECA) by a new juridical concept; that of "retained EU law".

This composite notion of "retained EU law" is central to the structure of the Bill. In very general terms, it defines the nature of the EU law that, at the relevant exit date, the Bill retains unless and until it is superseded by domestic legislation.

Three main classes of law will be retained in this way (see clauses 2–4 of the Bill). They comprise:

(i) by clause 2, EU-derived domestic legislation (ie statutory instruments under the ECA giving effect to EU law);
(ii) by clause 3, direct EU legislation (as, for example, EU regulations and decisions);
(iii) by clause 4, all other directly enforceable EU law (as for example directly effective rights).

For commercial lawyers, including those engaged in financial services, the detail of the new regime has material implications. Two can be sketched immediately; the rest of this article is concerned with the third.

LOSS OF "SOFT LAW" MEASURES

The first practical effect will be that although most of EU law will be statutorily retained after Brexit, there are significant areas where (subject to any contrary result being produced by negotiation) it will not be (see, especially, clause 5(4)–(5), schedule 1 and schedule 6).

In that context, most important in practice for commercial regulation is likely to be the disappearance of EU "soft law measures" Such measures have always been significant in relation to financial services but have acquired even more significance since the financial crisis of 2008. They include communications, declarations, guidelines and special reports of the EU institutions (level 3 of the Lamfalussy approach). Measures of this kind will not be converted by the Bill and the task of ensuring that they are successfully and appropriately converted into domestic regulation will not necessarily be easy.

Indeed, even where EU direct legislation is converted into domestic law the task of conversion itself will be enormous because of the need to remove EU-specific terms and replace them with domestic versions (including, where necessary, substituting domestic for EU institutions). Part of this task will, for example, necessitate the replacement of the entirety of references to EU financial directives in EU direct legislation by references to new national implementing rules.

Second, the intended removal of the doctrine of supremacy of EU law (see clause 5(1)) and, with it, the concomitant overriding jurisdiction of the Court of Justice of the European Union (CJEU) (see clause 6) will inevitably result in the loss of EU remedies including valuable commercial remedies. Some of these, such as Francovich damages, are expressly removed by the Bill (see schedule 1).

Other commercial remedies will fall away with the *leitmotiv* of the Bill that, post-Brexit, retained EU laws will no longer be supreme over laws enacted by Parliament. This has the necessary effect that primary legislation may no longer be disapplied by a court. A good practical example of the loss of a remedy of this kind is afforded by the pre-Brexit decision of the Court of Appeal in *Vidal-Hall v Google Inc.* [2015] EWCA Civ 311. There, a right to claim damages for non-pecuniary loss for data protection breaches by reason of the incompatibility of certain provisions of the Data Protection Act with EU Directive 95/46 EC would no longer be enforceable

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in domestic law under the terms of the Act (as it was then) because the Act could no longer be disapplied or interpreted to be compatible with the Directive.

It is, though, the third effect of the Bill which is the most profound and which will, almost certainly, give rise to complex litigation, predominantly in public law. It derives from the content of the Bill itself which seems likely to provide (among others) banks and other financial market participants with a myriad of possible challenges by way of judicial review if they dislike the way in which amendments to primary financial services legislation are made by statutory instrument. Such amendments are permitted in several of the Bill's provisions. Power to use secondary legislation to amend primary legislation is known as a "Henry VIII" power.

The scope for judicial review in this arena arises because of the very wide and uncertain powers of amendment given to Ministers under the Bill (see clauses 7–9 and 17 and schedule 8). As such, although appearing in primary legislation, amendments of this kind (being made by statutory instrument) are susceptible to judicial review as delegated or subordinate legislation in the same way as any other statutory instrument.

Moreover, the subject-matter of the Bill – effecting, as it will do, a major constitutional change equivalent, it might be thought, to that of entering the EU – may involve a high-level intensity of judicial review. In this respect it is instructive to compare the approach of the Supreme Court in the recent, high-profile Brexit challenge of *R (on the application of Miller and Another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 where the court held that only Parliament could authorise the triggering of Art 50 of the Treaty on European Union given the unique constitutional context.

The cluster of amendment powers (Henry VIII clauses) are, in outline, these:

- By clause 7(1) the power to make amending regulations to prevent, remedy or mitigate "deficiencies" in EU law where the minister considers that retained EU law contains 'anything which has no practical application' to the UK or 'is otherwise redundant or substantially redundant'. There are (see clause 7(2)) only illustrations of what "deficiencies" might mean so that in the absence of statutory definition one minister might (subject to the constraints of judicial review) reach a different conclusion to another thereby producing a raft of inconsistencies in amended primary legislation.
- By clause 7(5) the power to make amending regulations which may 'among other things' provide for the functions of EU bodies to be exercised by a similar UK body or to be 'replaced, abolished or otherwise modified'. Again, there is no definition of what is meant by "among other things" leaving it potentially open to ministers (subject to public law constraint) to legislate as they wish.
- By clauses 7(4), 8(4) and 9(2) regulations may be made for 'any provision that could be made by an Act of Parliament'. It is rare in the extreme for a Henry VIII clause to permit wholesale amendment of a statute (as opposed to specific parts of a statute).
- By schedule 8 any statutory instrument under the Bill may be amended by another statutory instrument made under any other power in existing or future legislation. This means that the already wide powers conferred under the Bill may themselves be augmented by any statutes at any time and whenever enacted to amend the body of retained EU law without even the constraints on the deployment of Henry VIII clauses in the Bill.
- By clause 9(1) regulations may be made as the minister 'considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.' Ostensibly the breadth of this provision might be read by ministers as permitting use of the regulation-making power prior to any Parliamentary consideration of the withdrawal agreement.
- By clause 17(1) regulations may be made so as to 'make such provision as the Minister considers appropriate in consequence of this Act.' Clause 17(2) states that (subject to clause 17(3)) this power 'may (among other things) be exercised by modifying any provision made by or under an enactment'.

Judicial review will lie against the unlawful deployment of these very wide powers which will, in any event, lead to amendments to the post-Brexit scope of the Financial Services and Markets Act 2000 and the underlying Financial Services and Markets (Regulated Activities) Order 2001 (the main pre-Brexit vehicles for giving effect to EU financial services directives in the United Kingdom).

JUDICIAL REVIEW

There are two broad ways in which judicial review will be likely to be used to challenge the exercise of such powers.

First, there are breaches of the express prohibitions in the Bill itself (for which see clause 7(6)). For the most part the express constraints are, on their face, relatively limited although one of the most practically significant is that the powers may not be operated retrospectively.

Nonetheless, a ministerial judgment that goes outside the object and purpose of the Bill when enacted is unlawful however broadly the express prohibition is articulated (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997).

When it comes to Henry VIII powers it will be interesting to see how the courts address challenges focusing on judicial review grounds that the minister has exceeded his or her power in going outside the object and purpose of the provision in question (as for example the identification by a minister of a "deficiency" in EU law).

Ordinarily, flexibility in the exercise of delegated powers is not tolerated in measures of constitutional significance. However, it is at least possible that the

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courts will in general adopt a more relaxed approach given the unprecedented circumstances involved in erecting a new post-Brexit, legal landscape.

As against this, the use of Henry VIII powers is constitutionally objectionable and should not be used routinely. There is a growing body of case law that suggests that whatever the approach of the courts in general to the exercise of power under the Bill, a more restrictive line may be taken in relation to the deployment of Henry VIII clauses and the consequent invoking of powers conferred on Ministers under them.

Most recently in the Unison case (see *R (Unison) v Lord Chancellor* [2017] UKSC 51) Lord Reed observed as follows (see [65]):

> 'In determining the extent of the power conferred on the Lord Chancellor by section 42(1) of the 2007 Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles.'

And, specifically in relation to Henry VIII clauses, in *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39 at [26] Lord Neuberger approved the following proposition:

> '…Although Henry VIII powers are often cast in very wide terms, the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.'

The second broad way in which judicial review may be used successfully to challenge the use of Henry VIII powers lies in challenges to the proper interpretation of many of the provisions where a particular power is sought to be exercised.

The following interpretative questions are advanced simply by way of illustration. For present purposes three will suffice:

(i) The term '*exit day*' is not defined in the Bill and is to be prescribed by regulations (see clause 14(2)). Regulations may make different provision for different cases and this raises the possibility of regulations defining '*exit day*' in different ways even to the extent of prolonging the power to invoke Henry VIII powers. Would a regulation extending Henry VIII powers be lawful or unlawful?

(ii) Bearing in mind that clause 7(1) the regulation-making power encompasses 'any provision that could be made by an Act of Parliament' does it follow that a Minister could give to third parties the power to do that which could not otherwise be done within the scope of clause 7(1)?

(iii) How broad are the powers under clause 17? Could clause 17 be used so as to amend the Bill itself?

It should be emphasised that there are also many other difficulties of interpretation in the Bill which, though not relating directly to Henry VIII powers, will impinge indirectly on the use of such powers because they relate to concepts in the Bill that form part of the basis for exercise of such a power. Some even touch judicial review itself. What, for example, is the forensic status of retained EU law? Is such law to be regarded as primary legislation and so immune from judicial review altogether or is it necessarily subject to judicial review and, if so, on what basis?

If the current drafting of the Bill remains in substantially the same form as it is now, one thing is certain. Parliament no doubt wants a flexible Bill in order to push through the gargantuan task that lies ahead. But easy legislative solutions rarely work in a constitutional context. In giving effect to the need for expedition, Parliament has simply passed the burden of sculpting a satisfactory legal and constitutional post-Brexit resolution to the courts.

It may well be in the courts in judicial review, rather than in Parliament in debate, that the most formidable obstacles to the progress of Brexit will now surface. ■

Further Reading:

- Reciprocity after Brexit (2017) 2 JIBFL 69.
- The UK courts after Brexit (2016) 9 JIBFL 511.
- LexisNexis Loan Ranger blog: What Brexit means for the interpretation and drafting of financial contracts.