The UK government has succeeded in passing the critical piece of legislation needed to prepare the UK’s legal system for its withdrawal from the EU.

**How will it affect UK laws and regulations?**

The European Union (Withdrawal) Act 2018 aims to ensure that the UK will maintain a functioning legal framework even if there is no agreement with the EU. This will involve a massive overhaul of EU-derived regulation over the coming months. The Act also sets out a process for Parliament to vote on the outcome of the withdrawal negotiations.

**Overview of the Act**

The Act is about 100 pages long, but much of its length is taken up with technical and procedural provisions. In a nutshell, it:

> sets 29 March 2019 as the date of the UK’s exit from the EU
> ends the direct effect of EU law in the UK from that date
> converts existing directly applicable EU law at that date into UK law
> sets out the powers and processes by which the government can make amendments to EU derived law to make it work properly in the UK context from the exit date
> sets out the terms on which Parliament can approve the outcome of negotiations with the EU on the withdrawal agreement and the framework for the future relationship between the EU and the UK
> contains limited provisions on the direction of future UK policies on the environment and the Irish border

**Date of exit**

The principal provisions of the Act apply from “exit day”. This is defined as 11:00pm (UK time) on 29 March 2019. This is the time at which the two year negotiation period expires under Article 50 of the Treaty on European Union, at which point the UK will no longer be a member of the EU. If the Article 50 period were to be extended, or if the withdrawal agreement provided a different expiry date, the Act allows the definition of the “exit date” to be adjusted accordingly. The expected transition period, lasting until the end of 2020, is not dealt with in the Act – on this, see Implementing the withdrawal agreement and transition below.

**Ending EU law in the UK**

The Act will repeal the European Communities Act 1972 from “exit day”. The ECA 1972 provides the legal basis, as a matter of UK law, for the UK’s membership of the European Union. Its repeal will mean that the EU treaties, other EU laws and the principle of supremacy of EU law will no longer apply in the UK.
Converting EU law into UK law

The Act will convert EU law that applies directly to the UK under the EU treaties into UK law on and from the exit date by specifying categories of “retained EU law”. This will ensure that generally speaking, existing laws and regulations will continue to apply. Directly effective EU law that is operative at the exit date (directly effective law includes EU regulations, but not directives, because directives are implemented by domestic law) will be retained, alongside relevant EU case law. The Act will also preserve UK legislation that might otherwise fall away because of the repeal of the ECA 1972.

The Act sets out in detail the categories of legislation and law that will be retained. It confirms that general EU law principles will continue to be used to interpret retained law except as modified by UK law. There are a number of exclusions. The most significant is that the EU Charter of Fundamental Rights will not be retained. EU law will not be preserved if its effect is reproduced in UK legislation made for that purpose.

Powers to amend the law to make it work after Brexit

The Act gives the government powers to make legislation to amend “deficiencies” in retained EU law, and existing UK laws, so that they work appropriately once the UK has left the EU. For example, the powers of EU institutions will need to be transferred to an appropriate UK body, and laws that are stated to apply to “EU” or “EEA” persons will need to be adapted so that they still apply to UK persons – otherwise a UK business might suddenly become subject to rules that currently only apply to “third country” (non-EU or EEA) businesses.

The powers are broad and include any failure of retained EU law to “operate effectively” arising from the UK’s withdrawal from the EU. This goes beyond correcting what might be regarded as purely technical matters, into dealing with far more political issues such as reciprocal rights which ministers consider no longer “appropriate” after exit (see Process for legislating under the Act, below). The powers will cease to apply two years after exit day.

Responsibility as between the devolved governments and Westminster

Some areas of EU law fall within the scope of the powers devolved to Scotland, Wales and Northern Ireland. The UK government has been concerned to retain a degree of control, giving rise to disagreement with the Scottish government and the Scottish Parliament.

The Act gives the devolved administrations powers to amend retained EU law, except where the UK government considers common legislative frameworks are required for the whole of the UK. UK ministers must specify in regulations the areas where the devolved administrations’ legislative competence is to be curtailed. The regulations will be temporary, lasting no more than five years and the power to make such regulations is limited to two years from exit day. The Act amends the devolution laws to prevent the devolved administrations of Northern Ireland, Scotland and Wales from legislating contrary to the restrictions set out in the regulations.

The Scottish Parliament refused to give its consent to the Act as is “normally” required under the Sewel Convention and Scotland Act 1998 (as amended). The Scottish Parliament has passed alternative legislation – the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – to ensure continuity of law in devolved areas. The UK government has referred the Bill to the UK Supreme Court for a ruling on whether the Bill is within the Scottish Parliament’s legislative competence.

Negotiations on withdrawal and future relationship

Attempts to amend the EU Withdrawal Bill to make the government negotiate for a customs union with the EU were not successful. Only one specific negotiating objective has been included in the Act. This is to seek agreement for unaccompanied children seeking asylum in a member state to be able to join relatives who are in the UK or vice versa.

The Bill was also amended to give the UK Parliament a formal role in the outcome of negotiations with the EU. The withdrawal agreement, including any transition arrangements, the text of the withdrawal agreement and framework for the future relationship must be approved by the House of Commons and debated in the House of Lords. If possible, the Commons should debate and vote on the agreement before the European Parliament decides whether to give its consent. This is in addition to the Act of Parliament needed to implement the withdrawal agreement (see further Implementing the withdrawal agreement and transition below).

However, if:

> the House of Commons does not approve the deal, or
> the Prime Minister makes a statement by 21 January 2019 that no agreement in principle can be reached, or
> there is no agreement in principle on the substance of the withdrawal agreement and future framework by that date, a minister must make a written statement setting out how the government intends to proceed. The proposal will then be debated as “a motion in neutral terms” in the House of Commons and a “motion to take note” in the House of Lords.

This process is the result of a compromise, after government defeats, on the extent of Parliament’s “meaningful vote” and whether it should be able to direct the government’s approach at the end of the negotiations with the EU. Opponents of the compromise wording argued that it would not give Parliament enough influence as a “motion in neutral terms” cannot be amended, so Parliament would have to take it or leave it choice. Parliament agreed this wording after the Secretary of State for Exiting the EU talked to the government about the future relationship provisions. The government has not yet reached agreement with the EU on this issue.

Framing future UK policies

Various amendments to the Bill which aimed to frame future government policy or expressly preserve elements of EU law such as worker and environmental protections were ultimately defeated. These provisions would have had limited effect since Parliament can always amend or override previous statutes. However, the Act does include provisions about two future policy areas.

It requires a draft Bill on the environment to be published within six months. This should set out environmental principles (such as the precautionary principle, polluter pays, sustainable development etc) to be followed by ministers. It should also provide for the establishment of a new public authority to ensure that the government complies with environmental law. This accords with the government’s existing intentions in relation to replacing EU environmental regulation and enforcement.

The Act also requires the government and devolved authorities, when exercising powers under the Act, to do so in a way that is compatible with the legislation enacted by the Belfast (Good Friday) agreement. It precludes the powers under the Act being used to create or facilitate a hard border between Northern Ireland and the Republic of Ireland, featuring physical infrastructure such as border posts, checks and controls.
What happens next?

Process for legislating under the Act
The government is expected shortly to begin publishing regulations to amend retained EU law. Over 800 statutory instruments (SIs) are expected.

The SIs will make changes to many thousands of individual provisions in EU regulations and existing domestic legislation to make them work properly in the UK context after Brexit. Many of these will be changes needed for the law to work properly, where there is no intention to remove or substantively change any of the retained EU laws. However, the non-exhaustive list of “deficiencies” in the Act will allow the government to make more than purely consequential changes. A deficiency includes:

> A failure of retained EU law to operate effectively
> Any reference relating to the EU or EU law which a minister considers no longer appropriate
> Any provision for reciprocal arrangements between the UK or UK public authorities and the EU, EU entities, member states or their public authorities which are no longer appropriate
> Other reciprocal arrangements which are no longer considered appropriate as a result of the UK ceasing to be party to the EU treaties,
> Functions or restrictions included in EU directives (and so not automatically retained) that it is appropriate to incorporate into UK law, or
> Anything which is substantially redundant after exit.

There is potential scope for challenge of the use of legislative powers if what is “appropriate” can be disputed, but the discretion given to ministers is wide, making challenge difficult. The Act lays down special processes for committees to examine the SIs to be made under these powers. “Sifting committees” will be set up to ensure that each piece of legislation has the appropriate level of scrutiny within the parliamentary process. Broadly, as is normal for secondary legislation, all instruments passed under the Act will be subject either to no resolution of either House of Parliament having been passed against (the negative procedure) or to both houses having passed a resolution to approve (the affirmative procedure). The affirmative procedure must be used for more significant legislative instruments such as ones which create criminal offences, further delegate powers, or allow taxes or fees to be levied. The sifting committees will seek to ensure the right level of scrutiny, and so may require the affirmative procedure rather than the negative procedure to apply.

The powers cannot be exercised from two years after the exit date and amendments cannot be made to impose new taxes or serious criminal offences, have retrospective effect, or affect the Human Rights Act 1998 or the Northern Ireland Act 1998.

Other Brexit-related legislation
Apart from the SIs, and the Withdrawal Agreement and Implementation Act discussed below, there are several other Acts of Parliament that the government has announced will be needed in preparation for exit. The Trade Bill and Taxation (Cross-border Trade) Bill are already before Parliament and the Data Protection Act 2018, Nuclear Safeguards Act 2018 and Sanctions and Anti-Money Laundering Act 2018 have already been passed.

An Agriculture Bill, a Fisheries Bill and an Immigration Bill are expected but the government has not yet published drafts or white papers on these.

The government has said that “in the low hundreds” more SIs may be needed under Brexit legislation in addition to the SIs under the EU Withdrawal Act.

Implementing the withdrawal agreement and transition
It may seem surprising that the EU Withdrawal Act says nothing about the transition period which is provided for in the draft EU/UK withdrawal agreement. The transition period, which is crucial to give governments as well as businesses time to plan for the post-Brexit future is expected to broadly preserve the legal status quo from 30 March 2019 until 31 December 2020, so that for 21 months the UK will be treated as if it was still a member of the EU, apart from participation in the EU’s decision-making bodies and processes. A separate piece of legislation, a Withdrawal Agreement and Implementation Bill, will be required before the UK ratifies the withdrawal agreement. This will give legal effect to the terms of the agreement. It will need to make provisions to recognise the transition period, the payments to be made by the UK to the EU to settle its liabilities on leaving the EU and other commitments under the withdrawal agreement.

During the transition period the UK will continue to be treated as though it were a member of the EU and laws read accordingly. The UK will have to recognise and implement both existing and new EU laws as though it was a member of the EU. The Withdrawal Agreement and Implementation Act will need to provide a mechanism to enable this to happen, given that the ECA 1972, which currently provides for the operation and implementation of EU law in the UK, will be repealed at the exit date.

The withdrawal agreement, and therefore the expected Withdrawal Agreement and Implementation Bill, will not cover the detailed terms of any future partnership agreement between the EU and the UK. The framework of the future economic relationship between the EU and the UK is currently expected to be set out in October 2018, at the earliest, by way of a political declaration accompanying the withdrawal agreement. This will set the scope of the negotiations of the future relationship that the UK government hopes will be completed and ratified by the end of 2020.
Comment

The EU Withdrawal Act addresses the important goal of providing legal certainty within the UK once the UK leaves the EU. It cannot solve problems that depend on the EU, or other countries, taking reciprocal action to solve them. Nor does it tell us what the UK’s future economic relationship with the EU or with other countries will look like.

If the EU/UK withdrawal agreement as currently drafted is agreed and ratified, the 29 March 2019 exit date should be more symbolic and of less practical importance than 31 December 2020 – the end of the transition period. The uncertainty over whether an agreement will be reached does mean, however, that preparations by governments and businesses for a “no deal” exit on 29 March 2019 are continuing. The EU Withdrawal Act enables these preparations to be made, so far as the UK’s law and regulations are concerned.

The Act’s broad objective of retaining EU-derived law is welcome. It seeks to preserve the legal status quo for the vast bulk of law that comes from the EU – including treaty rights, EU regulations and other provisions of EU law that have been incorporated into UK primary or secondary legislation. In this way, the Act will, in the short term, preserve existing rights for workers, environmental regulations and many other EU-derived laws – ensuring there is no legal vacuum. Given the changes that Brexit will inevitably bring, continuity at a domestic level is important for business stability and certainty – businesses need assurance that, as far as possible, the rules and regulations that apply to them in the UK won’t suddenly change overnight because of Brexit.

The process of correcting the deficiencies in retained law is a challenge not to be underestimated. The government began drafting not long after the referendum result but given the volume of changes, this has been and will continue to be a significant burden on the government’s legal resources.

Reviewing hundreds of pages of detailed consequential changes, to make sure that there are no surprises, will likewise be a big task for businesses and lawyers. Multiple changes will add to the complexity and reduce the accessibility of the law going forward.

The timing and content of the changes may of course depend on when there is certainty on the withdrawal agreement and transition period. With a transition period, it will be possible to defer amending retained law and to tailor changes where appropriate to whatever the future relationship between the EU and the UK looks like. If, on the other hand, there is no agreement, then the time pressure on making all the necessary amendments, as well as passing other Brexit-related statutes over the next nine months, will be very great indeed.

Further information

The European Union (Withdrawal) Act 2018 is available [here](#). For more information please get in touch with your usual contact or any of the contacts listed [here](#).