CULMER RAPHAEL

THE PROPOSED REPEAL OF THE EUROPEAN COMMUNITIES ACT1972

"Q&A WITH CULMER RAPHAEL ASSOCIATE, PENELOPE NEVILL"

Along with announcing that Article 50 would be invoked by March 2017 the Prime Minister has stated that her government will publish a Bill to repeal the 1972 European Communities Act. How significant is this?

Repealing the European Communities Act 1972 (and the European Union Act 2011) is the necessary corollary of withdrawing from the EU Treaties by giving notice of intent to withdraw from the Treaties under Article 50 of the Treaty on European Union (TEU).

The effect of the Bill when enacted will not be to terminate the UK's membership of the European Union. As a matter of international law, the UK is a party to the EU Treaties until its withdrawal under Article 50 takes effect. The actual withdrawal date is not set yet, because it will be the subject of negotiations with other EU Member States under Article 50. If they cannot agree, it will be two years from the date notice is given by the UK, expected to be March 2017.

Is the Bill necessary or just political symbolism?

The answer to this requires a brief explanation of the legal relationship between public international law and domestic UK law which are two different legal systems.

The EU Treaties operate in international law in the international (and EU) legal systems. Like other treaties the UK has entered into under international law, the EU Treaties do not have immediate effect in UK domestic law (the law of England & Wales, Scotland and Northern Ireland) because the UK is constitutionally what is known in international law as a "dualist" State.

This means that for most treaties which bind the UK in international law to take effect in domestic law, they have to be incorporated or transformed through an Act of Parliament.

Technically speaking, the treaty itself never actually forms part of UK law. It is UK domestic law that gives effect to the UK's obligations under the treaty.

Because of this, what normally happens when the UK is ratifying a treaty (ratification is the legal act which binds the UK as a matter of international law) which requires domestic legislation in place to comply with it, is that the government will first have drafted and passed through Parliament that necessary legislation so it is in place at the time the treaty obligation takes effect.

So, in the case of the EU Treaties, what gives them effect in UK domestic law are the European Communities Act of 1972 and the European Union Act 2011. From an international law perspective, in passing these Acts the UK is complying with its obligation under international law to implement and comply with its obligations in the treaties.

However, mostly we do not make this distinction when we speak about EU law or other treaties like the European Convention on Human Rights – we just refer to the treaty, not the domestic legislation and the distinction is rarely important in day-to-day legal practice. In the case of the EU Treaties this is partly because of the concept developed by the European Court of Justice of "direct effect", i.e. that EU law (treaty articles, regulations made under the treaty, etc) takes direct effect in the legal systems of its Member States.

Actually, not all Member States or their courts agree with this analysis because their constitutions all treat the reception of international law into domestic law differently. But they agree to disagree and mostly it doesn't matter. In the UK, it is the EC Act 1972 that makes the case law of the EU courts, including the ECJ's direct effect case law, binding in UK domestic law. Another way of putting that is that EU law would not have direct effect if there was no EC Act.

The distinction is, however, important in the case of Brexit. The UK cannot bring into effect an Act repealing the EC Act until the date of its withdrawal from the EU Treaties also becomes effective because, until that date, it is obliged to continue to comply with the EU Treaties and therefore to give effect to EU law. Conversely, withdrawing from the EU Treaties would not be

sufficient to stop EU law applying in the UK without repealing the Act because the Act incorporates EU law by reference to it.

The government has to do both – give notice under Article 50 and repeal the 1972 and 2011 Acts, the act at the international level and the act at the domestic level - and coordinate the timing between the two.

So, what if the UK did repeal the 1972 and 2011 Acts before the completion of exit talks or two years under article 50 – would it then be in breach of international law? The Conservative chair of the UK parliament's constitutional affairs select committee, Bernard Jenkin MP, recommends precisely this.

Yes, if repealing the Acts meant the UK was not implementing its obligations under the EU Treaties (it might continue to meet them through other mechanisms), unless an agreement was reached with the other EU Member States which allowed for, e.g. a "phase out" or non-application of certain EU laws in the interim period before withdrawal takes effect. This is unlikely, in large part because the operation of the single market which the UK will continue to be part of as an EU Member State until withdrawal takes effect (unless agreed otherwise) requires the uniform application of EU law. You can't have one without the other. There would have to be a very good reason to dis-apply a particular EU law in the interim period. Also, the negotiators have a very big task ahead of them in a relatively short space of time, so they are unlikely to be concerned with negotiating provisional arrangements unless there is a very good reason to do so.

AND WHAT HAPPENS IF THE EU 27 JUST "RUN THE CLOCK DOWN" ON THE UK?

DO WE LEAVE WITH NOTHING?

And what happens if the EU 27 just "run the clock down" on the exit talks – does the UK "leave with nothing" after two years, as the saying goes?

Yes. But this is a rather emotional and provocative way of putting it which is not very helpful. We cannot predict where we will be or what the UK people will want in two years. Withdrawal from a treaty and institutional framework on this scale is unprecedented. It may be the UK which "runs the clock down" or that the parties agree to extend the two-year period. We just don't know.

There is no reason to believe that the negotiators on all sides of the table will not be working hard in good faith to achieve the best outcome they can for all involved, which is continued order, stability, prosperity and peace. The obligation of *pacta sunt servanda* in international law requires them to perform in good faith their obligation under Article 50(2) to negotiate and conclude an exit agreement taking into account the framework for a future relationship with the EU.

The UK's withdrawal from the EU Treaties could come into effect under Article 50 without an agreement being concluded, but that does not mean the UK cannot and will not enter into trade and other agreements with the EU and its Member States at any time in the same way that other third countries do now. There are also other existing treaty relationships between the UK and the EU and/or EU Member States that will remain in place, such as the WTO Agreements and investment treaties. These are not the same as - and do not provide the same level of integration and protection as - the single market under the EU Treaties, but they do provide certain mechanisms and protections for trade and investment.

In terms of UK domestic law, is repealing the Act not merely a temporary measure, as wouldn't that render some essential EU-derived regulations non-applicable in the UK?

There is a lot of detailed EU law across many sectors and which affects many people that has "direct effect" in the UK. It would be impossible for Parliament to have considered all the EU law applicable in the UK and amend all of it before the Bill is drafted passed and EU membership is terminated, because of the volume of EU law, the fact that the terms of exit are yet to be negotiated

(it may entail leaving some of the EU law intact) and because it may not be desirable to change much of the law, even if it becomes "UK law" rather than "EU law" because of the repeal Act. Some significant and important law has come via the EU since the UK has been a member. And the UK has been significant and important in drafting that law. We may well want to keep it.

This is why the decision to "domesticate" EU law through this Bill in the first instance is sensible and really the only option. Then we can decide through the normal constitutional legislative processes what needs to change and how.

Wouldn't new provisions have to be made?

Not necessarily. It depends on an assessment of what is desirable and necessary in the case of each piece of legislation. And the terms reached with the other EU member States on "Brexit".

And how long might this process take - wouldn't it be very lengthy (perhaps a decade)?

No one can tell at the moment. Where there is a good reason for change to happen quickly, it probably will in the normal way that UK domestic legislation changes now. EU law itself in certain areas can change a lot in 10 years, especially in areas where there is a pressing need for change.

Legislative change will happen in the same way that it happens now, for the same reasons and with the same drivers as it ever did. Where the area of law concerned is EU law rather than domestic law, instead of driving that change through the EU legislative system, the UK will do it domestically, through Acts of Parliament and secondary legislation.

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Adapting to Brexit

Culmer Raphael is a regulatory strategy and communications consultancy whose consultants have decades of experience working in London and Brussels and the EU27. We understand the interaction of UK and EU politics and policy and how they impact organisations of all sizes, in a range of sectors.

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