

The Civil Society Brexit Project: Information

THE EUROPEAN UNION (WITHDRAWAL) ACT

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: Information for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

This briefing sets out key aspects of the European Union (Withdrawal) Act, which entered into force on 26 June 2018. It follows on from an earlier briefing on “[Brexit and the EU Withdrawal Bill](#)”, which summarised various proposed amendments to the Bill that were of concern to NGOs in Scotland.

1. What does the European Union (Withdrawal) Act do?

The purpose of the European Union (Withdrawal) Act (EUWA) is to ensure that the many pieces of EU law that currently apply in the UK and Scotland continue to apply after Brexit. Otherwise, there would be huge gaps in the law of the UK: for instance, there would be big holes in environmental law, labour law, rules on food standards, consumer protection, and so on.

EU law currently applies in the UK – often directly – because of the European Communities Act 1972. In a **first step**, the EUWA will repeal the European

Communities Act on 29 March 2019, the probable date of Brexit¹. In a **second step**, it will then ‘retain’ all EU law that currently applies: that EU law will then be known as ‘retained EU law’.² However, EU law as it currently stands will not be able to operate in the same way: for instance, EU law will often make reference to ‘the EU’ or decisions by the EU Commission, which will no longer be accurate once the UK has left. Therefore, in a **third step** the EUWA gives powers to the UK Government – and in some cases the Scottish Government – to amend ‘retained EU law’ to deal with such ‘deficiencies’.

2. Amendments that made it into the Act

The EUWA is one of the most important pieces of constitutional legislation ever enacted. Many amendments had been tabled in the House of Commons and the House of Lords, but only fourteen (including several Government amendments) were eventually accepted.³ They can roughly be divided into four categories:

1. Section 1 EUWA; note, however, that the effects of the European Communities Act may in fact continue beyond 29 March 2019 if the UK and the EU agree a transitional phase. See the UK Government’s White Paper on ‘[Legislating for the Withdrawal Agreement between the UK and the EU](#)’ of 24 July 2018, para 60.
2. See sections 2-4 EUWA.

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a. Devolution

The EU can currently pass legislation in a number of areas which are devolved to Scotland. These include agriculture, the environment, inshore fisheries and certain aspects of private and criminal law and procedure. Where there is EU legislation in these areas, the Scottish Parliament is currently unable to legislate in contravention to it.⁴

After Brexit, powers in these areas would normally return to the Scottish Parliament. Hence any ‘retained EU law’ falling into devolved competence, e.g. legislation on agricultural or environmental matters, would become amendable and could be repealed by the Scottish Parliament.

The original European Union (Withdrawal) Bill (introduced by the Government in late 2017) aimed to prevent this from happening by keeping the current restrictions on the legislative powers of the Scottish Parliament in place. This would have meant that the UK Government and Parliament, rather than the Scottish Parliament, would have been able to amend or repeal those pieces of retained EU law that would be devolved. This was met by resistance in the Scottish Parliament and in the Welsh Assembly, who both refused to give their legislative consent to the EU Withdrawal Bill.⁵

The UK Government subsequently introduced a compromise amendment, which was accepted and can now be found in section 12.⁶ According to this amendment, there is **no longer a blanket restriction** on devolved legislatures when it comes to legislating on retained EU law that falls into devolved competence. Instead the UK Government **has the power to designate** which bits of retained EU law shall be outside the competence of the Scottish

Parliament and thereby amendable by the UK Government.

While in practice the UK Government could choose to do this with regard to all retained EU law that is devolved, there are procedural hurdles that may make this difficult. **First**, the UK Government must seek a consent decision from the Scottish Parliament (though importantly, it can ignore it if the Scottish Parliament does not consent); **second**, the power to reserve retained EU law can only be used for two years from exit day; and **third**, any such restriction ceases to have effect five years after its entry into force. **This means that, at the latest, seven years after Brexit the Scottish Parliament will have full powers to legislate on all devolved matters currently dealt with by EU law.**⁷

A further amendment concerns North-South cooperation on the island of Ireland. Notably, it prevents the Government from creating or facilitating border arrangements between Northern Ireland and the Republic of Ireland which feature physical infrastructure.⁸

b. More influence for Parliament

A second set of amendments increases the influence of the Westminster Parliament in the Brexit process.

Following a high-profile debate on whether Parliament should be given a ‘meaningful vote’ in the Brexit process, the EUWA now contains a requirement that Parliament approve the withdrawal agreement and the framework for the future relationship between the EU and the UK.⁹ **If Parliament votes against the withdrawal agreement, the Government cannot ratify it.**

3. For a comprehensive list see <https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates>.

4. See section 29 Scotland Act 1998.

5. The Scottish Parliament and the Welsh Assembly both passed so-called Continuity Bills (see the separate [Civil Society Brexit Project briefing](#)), which broadly mirror the effects of the EUWA, but limited to devolved areas. The UK Government challenged the compatibility of the [Scottish Continuity Bill](#) with the Scotland Act 1998 before the Supreme Court arguing that the Scottish Parliament was not competent to pass it. An oral hearing was held in late July and a decision is expected for the early autumn.

6. This compromise was accepted by the Welsh Assembly; but not by the Scottish Parliament. Westminster chose to legislate despite Holyrood not having consented to this legislation, which raised question marks over the future of the so-called Sewel Convention.

7. Note that the fate of the Scottish Parliament’s Continuity Bill – the subject of a separate [CSBP briefing](#) – is currently unclear until the Supreme Court has decided whether it is compatible with the Scotland Act 1998.

8. Section 10 EUWA.

9. Section 13 EUWA.

In case there is no deal, i.e. no withdrawal agreement,¹⁰ the EUWA now contains a right of Parliament to be informed by the Government on how it wishes to proceed.

Furthermore, the Government must present a neutral motion to Parliament to the effect that Parliament has considered the statement. A neutral motion merely says that Parliament has taken note of the Government's position; and it cannot be amended.¹¹ It should be noted that this falls somewhat short of a 'meaningful vote' in case of a no-deal Brexit. Amendments proposed earlier but not agreed to, would have made it possible for Parliament to direct the Government to pursue a certain political course in case of a no deal.

The EUWA strengthens Parliament's role in two further respects: (1) it contains a requirement for Government to lay a statement before Parliament outlining the Government's steps to seek to negotiate a customs arrangement with the EU;¹² and (2) it provides for stronger parliamentary scrutiny of the Government's powers to modify or repeal 'retained EU law'.¹³

c. Substantive guarantees

The Bill also includes two substantive guarantees concerning (1) protections for unaccompanied child refugees, where if they make a claim for asylum in the UK they can move to an EU member state to join a relative there, or vice versa;¹⁴ and (2) the maintenance of EU environmental principles for the protection of which the Government must introduce a separate Bill.¹⁵

d. Technical and procedural issues

The final set of amendments concerns technical and procedural questions:

1. a possibility to challenge domestic law – except Acts of Parliament – for violations of EU fundamental rights for the duration of three years from exit day;¹⁶
2. a clarification that the Act does not prevent the UK from replicating future EU law or participating in EU agencies;¹⁷
3. clearer guidance on the legal status of European Court of Justice judgments and of retained EU law;¹⁸ and
4. some changes to the extent of delegated powers.¹⁹

3. Defeated amendments

Some of the amendments accepted by Parliament alleviate – at least partially – the concerns set out in the previous briefing on “Brexit and the EU Withdrawal Bill”. The remaining concerns found in that briefing were largely translated into amendments to the Bill and tabled in Parliament but then defeated.

Among them was a House of Lords amendment making the EU Charter of Fundamental Rights part of 'retained EU law' and allowing it to be used as a right of action in domestic law. Instead of the Charter, individuals will now only be able to rely on EU fundamental rights protected as general principles of EU law. While these are largely the same as the rights in the Charter, this introduces unnecessary legal uncertainty. However, the Government had to compromise in getting this amendment defeated by conceding a three-year possibility to challenge domestic law on the basis of general principles (see above). After three years,

10. Either if the Government informs Parliament that this is the outcome of the negotiations; alternatively, if no deal has been reached by 21 January 2019.

11. There is only one caveat here: the speaker may decide that the Government's motion – as tabled – is in fact not neutral and can therefore be amended.

12. Section 18 EUWA.

13. See Schedule 7 EUWA, paragraph 3.

14. Section 17 EUWA.

15. Section 16.

16. See Schedule 8, paragraph 39 (5) EUWA; on EU fundamental rights see also below.

17. Section 19 EUWA.

18. Sections 6 and 7 EUWA.

19. A removal of the power to set up new public bodies; and a removal of clause 8, which concerned powers to implement international obligations and which the Government considered no longer necessary.

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however, EU fundamental rights will only be relevant in helping with the interpretation of ‘retained EU law’.

A further widely raised issue concerned the extent of the Government’s powers to amend and modify ‘retained EU law’. These include so-called Henry VIII powers – i.e. powers for the Government ‘to make any provision that could be made by an Act of Parliament’. While Henry VIII powers are not unusual, the EUWA allows them to be used if a Minister considers this ‘appropriate’. An amendment to restrict these powers to cases where this is ‘necessary’ was defeated, however.

As far as Parliament’s powers to influence the outcome of the Brexit negotiations was concerned, Parliament did not accept a proposed amendment to make the Government’s powers to implement the withdrawal agreement subject to parliamentary approval of the Government’s plans to negotiate the future relationship with the EU; nor has an attempt been successful at making membership of the European Economic Area – the so-called Norway model – a negotiating objective.

4. Outlook

The EUWA is only one – albeit crucial – piece in the bigger Brexit puzzle. Leaving aside the uncertain outcome of the Brexit negotiations with the EU, several other Acts of Parliament will need to accompany the EUWA. Among them are the Taxation (Cross-border Trade) Bill and the Trade Bill, both of which have recently received their third reading in the House of Commons and will be debated in the House of Lords from September onwards. Further key bills – not yet introduced – will be an Immigration Bill and the EU (Withdrawal Agreement) Bill.²⁰ The latter will probably make further changes to the EUWA to facilitate a transition (or implementation) phase that is likely to last from 30 March 2019 until 31 December 2020.²¹ A challenge will be to make these Acts (1) mutually compatible with each other and (2) compatible with any commitments the UK enters into with the EU.

Tobias Lock
August 2018

20. For a White Paper outlining its main contents, see <https://www.gov.uk/government/publications/legislating-for-the-withdrawal-agreement-between-the-united-kingdom-and-the-european-union>.

21. See the separate Civil Society Brexit Project: Information on Transition <https://hrcscotland.files.wordpress.com/2018/04/csdp-briefing-apr-18-transition.pdf>.



WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit