

BREXIT: ALTERNATIVE WHITE PAPER

THE REPEAL BILL ALLIANCE

Ahead of the publication of the long-awaited Government White Paper setting out the UK's Brexit position, the Repeal Bill Alliance is publishing its own Alternative White Paper. This builds on the aims and values that have guided the work of the Alliance and is a timely reminder that as we embark on the next stage of the Brexit journey these values and principles should continue to apply.

The EU Withdrawal Act is now law, EU heads of government have held their June summit, and the UK Government's White Paper on future relations with the EU is just about to be published.

Debates on the Withdrawal Bill – now the European Union (Withdrawal) Act 2018 – raised many issues, many of which remain unresolved. And of course we still don't know what the future arrangements will be between the UK and the EU, or even what the UK Government's negotiating objectives are, and therefore much remains unresolved in that area too, creating massive uncertainty for businesses, civil society organisations, and people generally.

In this Alternative White Paper, we set out first the principles the Repeal Bill Alliance started with, then look at some of the issues which face civil society organisations now.

PRINCIPLES

The Repeal Bill Alliance is a coalition of a wide range of charities and other civil society organisations, more than 80 in total. It was formed to focus on the Withdrawal Bill, and now we are following that up by working on the next stages of the Brexit process. For more information, visit our website- www.repealbill.org. The Repeal Bill Alliance operates on the following principles -

Open and accountable law-making:

- Respect for democratic processes, including the devolved nature of the UK constitution.
- There must be clear limits and safeguards on the powers given to ministers in the bill.

- There must be robust parliamentary scrutiny at all levels with appropriate levels of transparency and debate both before and during the conversion process.

A high standards UK:

- Ensuring that as EU law is transposed into UK law, rights and standards for all sectors are maintained.
- A UK framework for common standards, mutually agreed between the four administrations, to enable cross-border working and maintain an internal common market. This framework must respect the devolution settlements, meaning any administration can raise standards within the scope of those settlements, if they wish to do so.
- Leaving the EU must not create a governance gap. EU institutions have a role in monitoring, oversight and ensuring compliance with the law as well as setting regulations. Where governance arrangements are changed as a result of leaving the EU, there must be clear powers and procedures for ensuring the law is properly implemented and enforced on an ongoing basis.

These principles guided our activity around amendments to the EU Withdrawal Bill, and we had some partial successes. How will those principles apply now, in the light of the Brexit issues which face us over the next few years?

THE PROCESSES AND THE POLITICS

The issues for the next few years are best understood against the background of the political processes which will determine what happens with Brexit. These are –

(1) Tensions within the Cabinet and Conservative Party. Hardliners fear that Theresa May is leading them into a “soft” version of Brexit, preparing to negotiate away her stated “red lines” in order to remain in a close economic relationship with the EU. The internal politics of the Conservative Party could lead to a new leadership election.

(2) A series of bills and votes in Parliament. These include votes on amendments in favour of “a customs union” in the Trade Bill and the Customs Bill, the (hopefully meaningful) vote on the outcome of the UK/EU27 negotiations, the Withdrawal Agreement and Implementation Bill, and the bills on specific issues such as immigration, fisheries, and the environment.

(3) The negotiations between the UK and the EU27. These are basically continuous at civil service level, with major issues coming up for consideration at the heads of government meetings (scheduled for October 18/19 and December 13/14). A key

issue here is the content of the transition period, currently proposed to last from “exit day” on March 29 2019 to December 31 2020. There is also the major unresolved question of the Irish border and the maintenance of the Belfast Good Friday Agreement. The negotiations may also be affected – though this does not appear to have happened much so far – by differences amongst the EU27 governments, for example on migration and freedom of movement. There might also be complications from the scrutiny role of the European Parliament (especially with MEPs facing elections May 23rd-26th 2019).

Two different things are being negotiated between the UK and EU: the agreement about withdrawal arrangements (including budget payments and the transition period); and the Future Framework, which will outline the future relations between the UK and EU (to be followed up after Brexit by a detailed legal text). There is currently a March 29th 2019 deadline for both to be signed and sealed, in line with the timing set in motion by the UK’s triggering of Article 50.

(4) Business decisions about how to respond to the prospects for Brexit, and particularly future trade relations. Many companies are already implementing contingency plans.

(5) Movement within public opinion in the UK. Recent opinion polls have shown a majority for Remain, but the pressure on MPs and parties does not currently look strong enough to achieve that outcome. The most plausible ‘Remain’ scenario is a no-deal Brexit voted down by MPs, followed by a new referendum in which most people prefer Remain to a “cliff edge” version of Leave. Another, more unlikely, possibility is that the Irish border issue could lead the DUP to withdraw support from the Government, precipitating a general election in which Labour advocate a position much closer to Remain than it had in 2017, and that this eventually leads to a Remain outcome.

ISSUES AND ASKS

The debates on the EU Withdrawal Bill raised many issues which remain unresolved. The political processes outlined above raise numerous issues too. Civil society has a lot of work to do over the next few years, and the Repeal Bill Alliance intends to remain fully involved. We will be highlighting the following areas amongst others -

LIMITING DAMAGE TO PARTS OF THE UK

Almost all professional economic forecasters agree there will be a significant economic cost to the UK as a result of Brexit, although of course it can be argued that there may be benefits which nevertheless make it worthwhile. However whatever the situation turns out to be nationally, there are particular parts of the UK where safeguards will be needed in order to ensure they do not lose out excessively.

Which areas these will be will depend on the form that Brexit eventually takes. It might, for example, be that special help will be needed around ports (e.g. Dover and Holyhead), in areas of labour shortages (e.g. fruit-picking in East Anglia), and in places making parts for cars and aircraft (e.g. Swindon, Sunderland). There may also be a major economic impact on Northern Ireland, both because of problems about the border and because of the knock-on consequences of Brexit for the economy of the Republic of Ireland.

More predictably, there will be problems for areas currently receiving funding from the EU, mainly allocated through the European Regional Development Fund (ERDF), the European Social Fund (ESF), and the European Agricultural Guarantee Fund (EAGF). In 2016/17, the UK received over £5 billion pounds from these sources. This will affect particularly parts of Wales, the Westcountry, Northern Ireland, and North-east England.

According to the UK/EU political agreement reached in December 2017, the UK should continue to receive EU funding until the current programmes end. This means that most funding will end in 2020, although European Investment Bank loans to the UK will cease after March 2019. It is possible that the UK will continue to participate in some EU-run schemes after Brexit, such as the Horizon 2020 research programme.

However a “No Deal” version of Brexit would imply that the 2017 political agreement is cancelled, with all EU funding likely to end on “exit day”, 29 March 2019. This would be devastating for many businesses and civil society organisations.

The Equality and Diversity Forum (EDF) commissioned research last year which shows that marginalised and disadvantaged groups could lose out on crucial support when Britain leaves the EU unless the government commits to replacing funds.

There is particular concern about the future of the Rights, Equality and Citizenship programme which supports projects combating violence against women and children, hate crime, discrimination and exploitation at work. There are no current plans to replace this funding.

Brexit offers a real opportunity to design a fund that combines economic activity with an anti-discrimination agenda so that we create truly shared prosperity and inclusive growth. It's crucial that any replacement schemes continue to invest at current levels or more, and continue to target groups facing disadvantage. It's also vital we don't see a reduction or loss of projects supporting people facing violence, abuse or exploitation.

The European Union has provided vital funding for projects that have helped challenge injustice. Post-Brexit, the UK will need the economic benefits that those projects deliver, alongside the social good that they do.

The Government has consulted on setting up a new agricultural payments system to replace EU funding, and announced that existing total funding will be maintained (in cash terms) until 2022, but no other decisions on the new system have been announced yet. The Conservative general election manifesto 2017 promised a new

Shared Prosperity Fund for disadvantaged parts of the UK, replacing EU structural funds, but no details have appeared so far.

Uncertainty about future funding and economic impacts affects business, but not only business. People's jobs are at stake, and civil society organisations are also currently unable to plan ahead, especially with the threat of a "No Deal" Brexit. We have all entered a chaotic period in which some reassurance is desperately needed.

CHALLENGING TRADE DEALS

At the centre of Brexit will be a whole series of new arrangements about trade. Some will be between the UK and EU, covering issues such as customs union, single market, product standards and financial services regulations. There may then also be a whole series of new, or updated and renegotiated, agreements with the USA, Australia, India, Japan and other countries outside the EU.

Trade agreements used to be about tariff rates, with proposals about "disarmament", whereby one country agrees to lower its tariffs on one category of products in return for another country lowering them for some other category. Negotiations could get complicated, but fundamentally the aims were clear.

However what are still called "trade agreements" now increasingly cover also product standards, whereby goods are allowed into a country without further testing. Product standards, such as those in the EU single market, have major implications for public health, food safety, consumer rights, energy efficiency, and environmental impacts. Often added on to that are "investor protection" provisions, whereby foreign investment is guaranteed not to be subject to various types of new regulation. Both these aspects of trade agreements have proved hugely controversial, for example in the arguments over the now-abandoned TTIP (Transatlantic Trade & Investment Partnership) and the prospect of "chlorine chicken" from the US. Rules for trade in financial services, such as banking, can also be part of new trade agreements.

Parliamentary scrutiny arrangements have not caught up with these changes in the nature of trade agreements, and nor are they adequate to the sheer volume and importance of the new and updated trade agreements there will need to be if Brexit goes ahead. Without proper scrutiny, trade rules could undermine whatever environmental, public health, and consumer rights protections are in place.

MAINTAINING EU PRINCIPLES

The EU Withdrawal Act puts into UK law the laws which already applied here because of the UK's current membership of the EU. This "retained law" will continue to apply, at least for the time being (it might be amended through legislation later). But the EU has official principles as well as laws – and these will now have no standing in the UK. There are two sets of these: fundamental rights and environmental principles.

The EU Charter of Fundamental Rights sets out a series of human rights, including citizens' democratic rights, which can be appealed to as the basis for legal challenges to national laws, arguing in some cases (e.g. in relation to Article 21 on non-discrimination) that these are incompatible with the rights guaranteed by the Charter. Such an argument will no longer be available for citizens in the UK following Brexit.

The EU Withdrawal and Implementation Bill, which it is intended will put into UK law the agreement on future relations agreed between the UK and the EU (or to provide for the implications of no deal having been agreed) will give another opportunity to propose amendments to press for the Charter to be given a status in the UK legal system.

Similarly, the EU's environmental principles, which it uses to guide the writing and interpretation of specific laws and regulations, will no longer apply in the UK following Brexit. These include "polluter pays" and "the precautionary principle", which says that where evidence is absent, caution should apply rather than making the assumption that everything must be OK.

A new clause was, however, added to the Withdrawal Bill, requiring the Government to include these principles in future legislation next year to establish an "environment watchdog" which will have as its main role the enforcement of environmental standards, for example on air quality, following Brexit. The way in which these principles will be applied and the nature, remit and powers of the new watchdog remain to be determined.

A NEW DEVOLUTION SETTLEMENT

Current arrangements for devolution to Scotland and Wales were established in a situation where continued UK membership of the EU was taken for granted. Brexit, however, raises questions about where the powers which were shared at an EU level are now to be brought back to. Do they come to Westminster, which may or may not devolve them further, or do they get distributed in accordance with the policy areas listed in the devolution legislation?

Then there are questions about how, when powers go to devolved bodies, they could be co-ordinated across the UK. For example, will different parts of the UK have different agricultural payments systems, and if they are to have a single system, how is it to be sorted out, what that system will be and what the levels of payments will be?

The UK already has a body – the Joint Ministerial Committee (JMC) – where such issues are discussed. But the need for it has been quite limited until recently, and it has operated on a "typically British" set of vague unwritten understandings. Attempts were made to amend the EU Withdrawal Bill to put the JMC on a statutory basis, and with clear rules. It might for example operate on the basis that the three devolved bodies (Northern Ireland, Scotland, and Wales) acting together could outvote and overrule the UK government. It could also have added to it regional representatives,

e.g. from northern England. The JMC could become something like a post-Brexit Council of Ministers for the UK.

SCRUTINISING THE DETAILS

One of the key arguments about the EU Withdrawal Bill was around the scope it provides for ministers to make changes through the use of statutory instruments. SIs are a form of “secondary legislation” generally used to sort out details which are not important enough to be put into Acts of Parliament (“primary legislation”) or which change too frequently (e.g. social security benefit levels). The Bill as originally presented to Parliament gave a very wide scope for the ministerial use of SIs, and as it went through, the scope was reduced and some safeguards were introduced as regards scrutiny.

The problem here is that scrutiny is often rushed and far from thorough, and this can only be expected to get worse as the volume of SIs increases to cope with the many implications and repercussions of Brexit, including the replacement of the systems whereby EU regulations are updated through the EU structures.

It will therefore be important to monitor the stream of statutory instruments which will follow Brexit. Some of the more hardline Brexiteers have seen Brexit as an opportunity to dismantle employment and environmental protection measures, and the issuing of new SIs would provide them with a means of achieving that (possibly in conjunction with a new trade agreement with the US). Parliament and civil society organisations need to be geared up to watch this very carefully.

A CONSTITUTIONAL SETTLEMENT

The Withdrawal Bill debates showed very clearly some of the problems caused by the vagueness of the UK’s constitution, which relies to an unhealthy extent on conventions and understandings which have no legal force.

The most important of these is the Sewel Convention, on the relationship between the parliaments in Scotland and Westminster. There are also unclear conventions on the relationship between the House of Lords and the Commons when bills are being amended. The rules for the sharing of powers between Government and Parliament in international negotiations is unclear, with the doctrine of “Crown prerogative” holding dangers for the competing doctrine of “Parliamentary sovereignty”. The criteria used by the Speaker and Deputy Speaker to select amendments for debate, and not to select others, remain largely mysterious. It has also long been the case that even the power of the monarch to invite someone to become Prime Minister is not governed by clear rules.

There is now an urgent need for national debate about our constitution. The easiest way to clarify the constitution is to write it down. The process of writing a constitution

would be a focus for the important debate we will need now in the UK about what sort of country this is going to be following Brexit.

WHAT HAPPENS NEXT?

This is a time for civil society organisations to rethink and plan again for the next stage of the Brexit journey. In this 'Alternative White Paper' we have deliberately focused on highlighting key issues rather than on producing a specific set of answers.

The overall message here is that Royal Assent to the EU Withdrawal Bill is far from being the end of the processes which charities and campaign organisations will need to be involved in on Brexit. Many of the issues which concern us still remain very much unresolved.

As well as a general rethink of our plans and priorities, there is an immediate need now to focus on –

- Responding to the Government's White Paper.
- The customs union amendments to the Trade Bill and Customs Bill, expected in the Commons at some point in July.
- The build-up to the October EU heads of government meeting, which will be a crucial point for assessing progress – or lack of it – in the negotiations.
- If progress is slow and issues get delayed to the December summit, there will then be a need to get organised for a very busy and possibly chaotic time in the first 4 months of 2019.

This paper has been written by Victor Anderson & Jane Thomas, 04.07.2018.