

## **Briefing to MPs: A Case for Publishing the Withdrawal Agreement Bill in draft now February 2019**

### **About the Brexit Civil Society Alliance**

The Brexit Civil Society Alliance is made up of over 80 organisations from across the UK and includes voices from health, human rights, the environment, consumer and workers' rights, equality, food, farming and trade.

The Brexit Civil Society Alliance is guided by a broad set of principles which are:

- **Open and accountable lawmaking:** Legislating for Brexit must respect the democratic processes, including the devolved nature of the UK constitution. There must be clear limits and safeguards on executive power. There must be robust parliamentary scrutiny at all levels with appropriate levels of transparency and debate.
- **A high standards UK, with rights, standards and funding to underpin them maintained:** Leaving the EU should not mean weaker standards, fewer rights or loss of funding. A UK framework for common standards must be mutually agreed between the four administrations to enable cross-border working and internal common market
- **Leaving the EU should 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.

## Executive summary

In the event of parliamentary approval of the Withdrawal Agreement, the Government has to bring forward the EU (Withdrawal Agreement) Bill to give effect to the Brexit deal in domestic law<sup>1</sup>. The Bill will contain provisions that are likely to be highly contentious politically and constitutionally. The Bill will also contain important provisions about citizens' rights, how they will be protected and how they will be enforced.

The government has not set out a time frame in which this legislative process ought to take place. Doing so is crucial because, as set out in section 13 of the EU (Withdrawal) Act, the Withdrawal Agreement Bill (hereafter the WA Bill) has to complete its parliamentary passage before the government may legally ratify the Withdrawal Agreement. The government's timetable for exiting the EU therefore means that the Bill would need to be passed by Parliament by March 29th 2019. The EU (Withdrawal) Act took 11 months to go through Parliament<sup>2</sup>. **Parliament now has fewer than 40 calendar days, and less than 30 sitting days to scrutinise a Bill that will carry significant constitutional weight and likely attract fierce debate in Parliament. The Bill has not even been published yet.**

There are serious questions to be raised of the government as to why they haven't yet published the WA Bill, or at least parts of it in draft. Doing so would mean that parliamentarians, business and civil society have as much time as possible to consider its provisions, which will no doubt have serious constitutional and legal implications.

There are a number of issues that the White Paper on the Bill does not clarify. In this briefing, we cover some of the elements of the WA Bill that we believe the government needs to clarify and that parliamentarians needs sufficient time to debate:

- 1) The constitutional status of the WA Bill
- 2) Citizens' rights in the Withdrawal Agreement

---

1

<https://www.parliament.uk/documents/lords-committees/constitution/Correswithministers/Lord%20Callanan%20to%20Baroness%20Taylor%207%20January%20.pdf>

2

<https://www.instituteforgovernment.org.uk/charts/parliamentary-progress-legislation-introduced-implemented-brexit>

- 3) The Protocol on Ireland/ Northern Ireland
- 4) Transition period: The relationship between the EU Withdrawal Act 2018 and the Withdrawal Agreement Bill

## 1) The constitutional status of the WA Bill

The Withdrawal Agreement makes certain commitments in regards to the constitutional effect the WA Bill should have once enacted.

Specifically, Article 4 of the Withdrawal Agreement places a commitment on the UK to continue to give effect to two fundamental elements of EU law\_ 'direct effect' and 'supremacy'. This means that a) individuals and private parties can rely directly on, and enforce their rights as set out in the Withdrawal Agreement before domestic courts and b) any domestic laws that are inconsistent with the Agreement 'shall be disapplied'.

Article 4 of the Withdrawal Agreement sits uncomfortably with the constitutional principle of parliamentary sovereignty. No Act of Parliament can bind future parliaments.

In addition, the government has said that to repeal provisions in the Withdrawal Agreement, future parliaments will have to take 'an additional procedural step'. Details on that procedural step are not provided in the White Paper.

Reports from both the [Institute for Government](#) and [Bingham Centre for the Rule of Law](#) set out a number of suggestions that can be used as a basis for defining the 'additional procedural step'. Some of these are highlighted below:

- The WA Bill could contain a provision that requires a referendum before Parliament could repeal or amend the WA Bill<sup>3</sup> (As the IoG report sets out, this would not be on whether the UK exit commitments in the Withdrawal Agreement unilaterally but on whether the UK continue to meet the international obligations by keeping in force the legislation which implemented its commitments).

---

<sup>3</sup> The Institute for Government (2019) Legislating Brexit: the Withdrawal Agreement Bill paper, p. 5.

- Parliament could provide that once the WA Bill becomes law, it can only be repealed by a 'supermajority' (i.e. two-thirds majority) in the House of Commons<sup>4</sup>

The government could also look to previous international treaties to inform the kind of mechanism by which the Withdrawal Agreement could effectively be entrenched via the WA Bill in domestic law. For instance, the European Communities Act 1972 sets out that any subsequent legislation that conflict with EU law shall be disapplied<sup>5</sup>.

Whatever the 'additional procedural step' the government decides to go for, it will likely attract fierce debate in Parliament and more importantly, parliamentarians will need time to assess the constitutional implications of this step.

**This very issue, coupled with the fact that parliamentary time is running out, highlights the need to publish the Bill, or at least key provisions from it that are relatively settled such as those on citizens' rights, as soon as possible.**

## **2) Citizens' rights in the Withdrawal Agreement**

Part 2 of the Withdrawal Agreement concerns citizens' rights. The WA Bill will be the 'primary means by which this agreement is given effect in UK law'<sup>6</sup>. The White Paper also commits to ensuring that these rights are "accessible and understandable for those citizens who rely on their rights under it". These rights relate to residence; equal treatment; mutual recognition of professional qualifications; and coordination of social security systems.

---

<sup>4</sup> The Institute for Government, 'Legislating Brexit: the Withdrawal Agreement Bill' (07th Dec, 2018) p. 6. Available at <https://www.instituteforgovernment.org.uk/publications/brexit-withdrawal-agreement-bill-parliamentary-sovereignty>

<sup>5</sup> Bingham Centre Rule of Law, 'The Withdrawal Agreement and the EU (Withdrawal Agreement): A Preliminary Rule of Law analysis' (2018) (available at: [https://www.biicl.org/documents/2018\\_bingham\\_centre\\_-\\_rol\\_analysis\\_wa\\_and\\_pdf\\_-\\_full\\_final.pdf?showdocument=1](https://www.biicl.org/documents/2018_bingham_centre_-_rol_analysis_wa_and_pdf_-_full_final.pdf?showdocument=1)). See also J. Simson Caird and E. Paterson, 'Could the UK Courts Disapply Domestic Legislation to Enforce the Protocol on Ireland and Northern Ireland?', U.K. Const. L. Blog (19th Feb. 2019) (available at <https://ukconstitutionallaw.org/>)

<sup>6</sup> Department for Exiting the EU, White Paper, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (24th July 2018). Paragraph 17 (Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728757/6.4737\\_Cm9674\\_Legislating\\_for\\_the\\_withdrawl\\_agreement\\_FINAL\\_230718\\_v3a\\_WEB\\_PM.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf))

## **How will citizens' rights be protected from repeal by future Parliaments?**

As mentioned above, the government has promised to introduce an 'additional procedural step' to provide safeguards against the repeal of citizens' rights. That future parliaments cannot repeal citizens' rights provisions is meant to provide legal certainty for EU citizens. However, it may actually give rise to further uncertainty. The Bill has yet to be published and so no detail has been provided on how entrenching citizens' rights may work in practice.

**How citizens' rights in the Withdrawal Agreement will be protected from repeal by future Parliaments needs to be clarified as soon as possible to give EU citizens the legal certainty and assurances they need. It will also be important that the government details how the courts are supposed to interpret the legal status of citizens' rights.**

## **Other issues the Withdrawal Agreement Bill will need to clarify in relation to citizens' rights**

When it comes to equal treatment and non-discrimination for EU citizens living or working in the UK, the White Paper merely states that 'the UK already provides significant equal treatment protections' but admits that some 'technical' changes are needs to be included in the Withdrawal Agreement Bill to reflect commitments set out in the Withdrawal Agreement<sup>7</sup>. **No further detail is provided and yet again EU Citizens are left to wait and see what these 'technical changes' are once the Bill is published.**

The White Paper on the WA Bill sets out that the Bill will provide a right to redress and a right of appeal if rights in the Withdrawal Agreement are not implemented properly or if other domestic legislation conflicts with the Withdrawal Agreement. **It is not clear what sort of redress will be available and how such procedures are meant to work in practice.**

---

<sup>7</sup>Department for Exiting the EU, White Paper, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (24th July 2018). Paragraph 34 and 35 (Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728757/6.4737\\_Cm9674\\_Legislating\\_for\\_the\\_withdrawl\\_agreement\\_FINAL\\_230718\\_v3a\\_WEB\\_PM.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf))

## **Enforcing citizens' rights: The Independent Monitoring Authority**

Another, but somewhat overlooked question surrounds the 'Independent Monitoring Authority' (IMA), which will have effect from the end of the implementation period. The IMA will be equipped to monitor the implementation and application of Part Two (i.e. citizens' rights), from the end of the implementation period. The IMA will have equivalent powers to the European Commission's to conduct inquiries concerned alleged breaches of Part Two. The IMA will also be equipped to bring legal action before a court or tribunal in the UK 'with a view to seeking an adequate remedy' following complaints from EU citizens and their family members<sup>8</sup>.

What counts as an 'adequate remedy' is not defined in the White Paper nor the Withdrawal Agreement itself. Presumably, on the basis of Article 4 of the Withdrawal Agreement, 'adequate remedy' means that IMA would seek to prevent UK authorities from acting in a way that is inconsistent with the rights under Part Two. **Without a published draft Bill, we are only left to wait for further clarifications and the uncertainty continues.**

There are a number of issues that the WA Bill will need to clarify around the Independent Monitoring Authority. For instance, the Bill will need to clearly set out in detail the provisions establishing the Independent Monitoring Authority, its powers, how it will be held to account and how its independence will be ensured.

## **3) The Protocol on Ireland and Northern Ireland**

The Protocol on Ireland and Northern Ireland, specifically the backstop provisions have so far proved to be the most contentious element of the Withdrawal Agreement. At the time of writing, the government is seeking further changes to the backstop. This has also been one of the principal reasons for not publishing the WA Bill. It is therefore difficult to assess the government's approach to implementing it in domestic law.

However, what we do know is that the scope of Article 4 in the Withdrawal Agreement will also cover the Protocol- meaning that UK courts could potentially disapply domestic legislation that is incompatible with the provisions in the Protocol. How the courts would decide whether to disapply domestic legislation is

---

<sup>8</sup> Withdrawal Agreement Article 159

explored in more detail by Jack Simson Caird and Ellis Patterson from the Bingham Centre Rule of Law.<sup>9</sup> They argue that **unless** Parliament deliberately passed an Act with the explicit intention of repealing the provisions of a treaty, the courts would likely give priority the treaty and disapply incompatible domestic law.

There are also other questions about how the Protocol will be implemented in domestic law. For instance, the commitment on no diminution of rights will be implemented through a “dedicated mechanism.” This will draw on existing human rights and equality bodies established under the Good Friday Agreement<sup>10</sup>, i.e. the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and for issues with an all-island dimension, the Joint Committee of NIHRC and the Irish Human Rights and Equality Commission. Presumably such measures will be subject to equality impact assessments, as required under the Northern Ireland Act 1998<sup>11</sup>.

The Report from Royal Irish Academy and the British Academy also notes that several rights listed in the Good Friday Agreement are currently not protected under the ECHR or the Human Rights Act but are contained to some extent under the EU Charter of Fundamental Rights. Specifically, “the right to freely choose one’s place of residence” (Article 45 of the Charter), and the “the right of women to full and equal political participation” (Article 23 of the Charter). The UK government excluded the EU Charter from the EU Withdrawal Act 2018, meaning it will not longer apply post-Brexit. The absence of the Charter, means that these GFA rights will not be as fully guaranteed as they would have had the Charter been incorporated into domestic law. It is also likely that the Charter will be necessary for the interpretation and application of the citizens’ rights provisions (i.e. part two) of the Withdrawal Agreement<sup>12</sup>.

---

<sup>9</sup> J. Simson Caird and E. Paterson, ‘Could the UK Courts Disapply Domestic Legislation to Enforce the Protocol on Ireland and Northern Ireland?’, U.K. Const. L. Blog (19th Feb. 2019) (available at <https://ukconstitutionallaw.org/>)

<sup>10</sup> UK Government Explainer for the Agreement on the withdrawal of the United Kingdom from the European Union (14th Nov 2018) para 176 (available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/756376/14\\_November\\_Explainer\\_for\\_the\\_agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_1\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756376/14_November_Explainer_for_the_agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_1_.pdf))

<sup>11</sup> Northern Ireland Act (1998) Section 75 and Schedule 9. See also ECNI guide for public authorities on section 75 (available [here](#))

<sup>12</sup> The Bingham Centre Rule of Law (2018) The Withdrawal Agreement and the Political Declaration: A Preliminary Rule of Law Analysis. Page 23, para 75 (available at: [https://www.biicl.org/documents/2018\\_bingham\\_centre\\_-\\_rol\\_analysis\\_wa\\_and\\_pdf\\_-\\_full\\_final.pdf?showdocument=1](https://www.biicl.org/documents/2018_bingham_centre_-_rol_analysis_wa_and_pdf_-_full_final.pdf?showdocument=1))

Past experience has shown a significant gap between commitments in international agreements and the domestic incorporation (for instance the implementation of the Good Friday Agreement in the Northern Ireland Act 1998)<sup>13</sup>. The implementation of the Protocol must ensure that the government makes good on its commitments, especially in relation to human and citizens' rights provisions. **It is essential that civil society and parliamentarians are given sufficient time to scrutinise the legal and constitutional impacts of the implementation of the Protocol.**

## **4) Transition period: the relationship between the EU Withdrawal Act and the Withdrawal Agreement Bill**

One of the central aspects of the transition period is that EU law will continue to apply in the UK as it does now, which in effect means that the European Communities Act (ECA) will remain necessary during this period.

Instead of amending exit day (i.e. 29th March 2019) as defined in the EU Withdrawal Act 2018, the White Paper proposes that the 29th March will remain as exit day but the certain sections of the ECA will be 'saved' for the transition period. In other words, the ECA is not in any meaningful way repealed on 'exit day' but its key provisions will remain legally effective for the 21-month transition period.

The EU Withdrawal Act 2018 confers exceptionally broad powers on ministers to amend 'retained EU law'. These powers were rightly sunsetted so that they could not be used for more than two years after exit day. However, under the WA Bill, ministers will have the powers to make changes to 'retained EU law' up to 31 December 2022, two years after the transition period ends<sup>14</sup>.

The White Paper does not adequately justify why ministers will need double the time initially set to make changes to 'retained EU law'. Part of the purpose of

---

<sup>13</sup> The Royal Irish Academy and the British Academy, 'Brexit Rights and Northern-Ireland Protocol to the Withdrawal Agreement' (December 2018). Available at <https://www.thebritishacademy.ac.uk/sites/default/files/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement.pdf>

<sup>14</sup> Department for Exiting the EU, White Paper, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' (24th July 2018). Paragraph 73 (Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728757/6.4737\\_Cm9674\\_Legislating\\_for\\_the\\_withdrawal\\_agreement\\_FINAL\\_230718\\_v3a\\_WEB\\_PM.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawal_agreement_FINAL_230718_v3a_WEB_PM.pdf))



conferring those powers in the first place was to make the statute book ready for 'exit day'. Once initial necessary changes had been made using those powers then decisions about UK's legal frameworks post-Brexit would be made subsequently through usual, proper, processes. A transition period of 21 months\_ where most of EU law will apply to the UK\_ allows for the process of mapping the post-Brexit legal landscape. On that basis, it is not clear why the government needs or wants to confer broad powers on ministers for two years after the transition period.

Furthermore, the Government's failure to raise this as a possibility at any point during the 11-month<sup>15</sup> parliamentary passage of the EU Withdrawal Act suggests that the government is not taking seriously the safeguards that Parliament agreed.

The limits on powers in the EU Withdrawal Act preclude those powers from being used to implement the Withdrawal Agreement. However, there are no explicit constraints on those powers being used to implement the Treaty on the Future Relationship. Any power conferred on ministers in the Withdrawal Agreement Bill must have strict limits to preclude them from being used to implement the Future Relationship.

**The WA Bill must make it clear that delegated powers may not be used to implement any agreement on the future relationship. Instead, new primary legislation will be needed to implement such agreement.**

As seen with a number of pieces of Brexit legislation<sup>16</sup>, there is a tendency on the government's part to effectively produce 'skeleton bills'. In other words, a number of Brexit Bills lack any substantive provisions and instead give ministers unusually broad powers to fill in the details at a later stage. There is a risk that if the WA Bill is published at a late stage, the government will confer exceptionally broad powers on ministers to implement the Agreement. Doing so would have huge implications for transparent law-making\_ making it not only difficult for parliamentarians to engage but also civil society and business.

---

<sup>15</sup> <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/stages.html>

<sup>16</sup> Brexit Civil Society Alliance, 'Legislating for Brexit: Parliament is being written out of the process', (29 Nov 2018). Available at <https://www.brexitcivilsocietyalliance.org/resources-indexpage/legislating-for-brexit-parliament-is-being-written-out-of-the-process>

**The WA Bill must keep executive law-making powers to a minimum\_where these exist, parliamentarians and civil society must be given adequate time to scrutinise the use of these powers.**

## **Conclusion**

There are serious questions to be raised of the government as to why they haven't yet published the Withdrawal Agreement Bill, at least in parts or in draft. The government has done this with other pieces of Brexit legislation, for instance, a [draft of the Environment \(Principles and Governance\) Bill](#) was published in December 2018. It has yet to be introduced to Parliament but since the draft publication of the Bill, civil society, environmental groups and parliamentarians had a chance to scrutinise it. So we know that when the will is there, the government can put in place measures to allow Parliament, business and civil society to scrutinise the details of a Bill in advance of its being introduced into Parliament.

The government has so far justified the reason for not publishing the Withdrawal Agreement on the basis that there are still issues left to resolve, both with the EU and with Parliament. Mainly what needs to be resolved is, of course, the 'backstop' provisions in the Agreement. However, this does not apply to parts of the deal where there is agreement, e.g. citizens' rights. It is therefore hard to understand why the government cannot publish draft provisions outlining the constitutional status of the Bill and what 'additional procedural step' future parliaments have to take to repeal citizens' rights.

We remain concerned that the government will fast-track the WA Bill through Parliament at the end of March, using the argument that Parliament has already agreed to the Withdrawal Agreement in principle, and so there is no need to seek further amendments or clarifications to the Withdrawal Agreement Bill. This is simply not the case, as highlighted with the numerous issues raised above. The White Paper fails to answer a range of questions, from the Bill's constitutional status to how citizens' rights will be properly protected. It is imperative that this Bill is published in draft as soon as possible.