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THE LEGAL MECHANICS OF BREXIT

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This paper will offer some crystal ball gazing about how Brexit might take legal effect. It is necessarily speculative and uncertain. It looks at:-

- (1) the referendum;
- (2) withdrawal from membership of the EU under the Treaty for European Union (“TEU”); and
- (3) the effect of the European Communities Act 1972 (“the ECA”).

(1) THE REFERENDUM

There have to date been 12 referendums mandated specifically by UK primary legislation, most of them about devolution (though referendums are also provided for indirectly at the local government level by e.g. the Local Government Finance Act 1992 and the Local Government Act 2000). Brexit will be the 13th.

The first was in March 1973 (the Northern Ireland “border poll”). Only two have involved the entire UK electorate – whether to stay in the EU in 1975, and on voting reform in 2011. All 12 sought views on one issue, though in four cases an either/or format was put to the electorate, rather than a request for a yes/no answer to one question.

The Brexit vote and question are provided for by section 1 of the European Union Referendum Act 2015, which states (with the equivalent Welsh for the question and answers):-

(4) *The question that is to appear on the ballot papers is—*

“Should the United Kingdom remain a member of the European Union or leave the European Union?”

(5) *The alternative answers to that question that are to appear on the ballot papers are—*

Remain a member of the European Union

Leave the European Union.

Regulations set the day of the vote, which will be 23rd June.

A referendum will be advisory only, unless the legislation providing for it states what effect the outcome will have - and even then, Parliament could legislate to nullify its effect. In the case

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of the Brexit referendum, a vote to leave the EU would in practice be given effect by (1) the UK notifying the EU that it wants to withdraw under art 50 TEU and (2) Parliament presumably voting to repeal or amend the ECA, as to both of which, see below.

So the referendum result can create only a political, rather than legal, commitment.

Legally, the Government could reject a referendum “leave” vote by refusing to notify the EU of an intention to withdraw. Whether any Government would take such a step is a political rather than legal question.

Similarly, of course, if there is a “remain” vote, the Government or its successors would be legally free to institute further referendums on the issue whenever they wished.

(2) WITHDRAWAL FROM MEMBERSHIP OF THE EU UNDER THE TEU

Art 50 of the TEU says:-

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it.

A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union.

5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.

The European Parliament’s Report on the Treaty of Lisbon of 29th January 2008 (2007/2286(INI) comments on art 50 at paragraph 10(8):-

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“Voluntary withdrawal from the Union: for the first time in the treaties establishing the European Communities and then the Union, which - with the exception of the first treaty, which established the European Coal and Steel Community – were expressly concluded for an unlimited period but which made no provision for a collective or individual withdrawal procedure, the TEU will incorporate a mechanism for 'voluntary withdrawal from the Union'. Admittedly even in the absence of any specific provisions such a move was anyway already permissible under international treaty law. However, the fact that withdrawal is now explicitly provided for in the TEU, which lays down detailed arrangements for dealing with such a situation, sends out the clear message that no Member State is obliged to continue its involvement in the European project if it no longer wishes to be involved. When taken together with the provisions on enhanced and structured cooperation, this clearly demonstrates that involvement in the Union and in the furtherance of its policies is something that must be chosen freely on the basis of a genuine political commitment.”

Accordingly, under art 50 of the TEU, if there is a “leave” vote:-

- (1) The UK government will notify the Council of its intention to withdraw.
- (2) The parties – i.e. the Union and the UK – then reach an agreement covering withdrawal arrangements. The reference to art 218(3) of the Treaty on the Functioning of the European Union (“TFEU”) in art 50(2) of the TEU suggests that the Commission will formulate recommendations for the Union’s stance in negotiations.
- (3) The agreement must be “concluded” by the Council, acting by “qualified majority”, and the Council must get the European Parliament’s agreement before doing so (there apparently being no bar in art 50 on UK MEPs taking part in the European Parliament’s consideration of the matter). A “qualified majority”, by art 238(3)(b) of the TFEU, means as at least 72% of the members of the Council representing Member States comprising at least 65% of the population of these States. (Note that art 50(4) of the TEU specifically eschews the alternative – and less stringent – definition of “qualified majority” in art 238(3)(a).)
- (4) A two year back stop is given for this process, since the Treaties “shall cease to apply” upon the withdrawal agreement taking effect, or failing that after two years from the notification of withdrawal, though this can be extended by agreement with the Council, acting unanimously.

There are a number of uncertainties. For instance:-

- can the UK withdraw a notice of intention to leave, whether unilaterally or by agreement?
- what are the exact roles, in practice, of the Commission and the Council?
- what happens, in practice, if the two years run out and there is no agreed extension?

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- do the arrangements to be reached include agreements regulating the new relationship between the UK and EU, or are they simply the withdrawal arrangements?
- given that two years is not long to disentangle such a complex relationship, and given that it is not known whether an extension or extensions of the necessary length would be obtained, will the Government, in the event of a “leave” vote, delay giving notification under art 50(1) while preliminary withdrawal work is done?

(3) THE EFFECT OF THE ECA

The ECA provides:-

2 General implementation of Treaties

(1) *All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, **as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law**, and be enforced, allowed and followed accordingly; and the expression “**enforceable EU right**” and similar expressions shall be read as referring to one to which this subsection applies.*

As the judge said in Oakley Inc. v Animal Limited and Others [2005] 1 CMLR 51 at [77], section 2(1) “takes 93 words to tell us that directly applicable laws shall come into force in this country without further ado”. Directly applicable laws include, for instance, EU regulations.

Carrying on with section 2:-

(2) *Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—*

(a) *for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or*

(b) *for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;*

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“EU obligation” is defined in Part II of Schedule 1 as

any obligation created or arising by or under the Treaties, whether an enforceable EU obligation or not.

Section 2(2) is the provision which gives power to make delegated legislation, without the need for further primary legislation, for the purpose of implementing any Treaty obligation or any related matter. For instance, it is under this power that secondary legislation is made giving effect to EU directives which are not directly applicable.

Section 2(4) provides:-

(4) The provision that may be made under subsection (2) above includes ... any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section;

...

This provision means that delegated legislation under section 2(2) not only has the force of law, but may even amend another Act of Parliament.

Is it necessary to repeal the ECA to give effect to Brexit?

If the UK ceases to be a member of the EU by reaching agreement under the art 50 process, and assuming that under that agreement it has withdrawn or will withdraw from all EU obligations, there will at that point cease to be any “enforceable EU right” in section 2(1) of the Act.

As to section 2(2), when all EU obligations have ceased under the art 50 agreement there will be no EU obligation which requires to be put into effect.

So at that point sections 2(1) and 2(2) would not serve the purpose for which they enacted, but it would not be necessary to repeal them to give effect to Brexit – though regulations already made under section 2(2) would remain effective (i.e. Brexit would not render their past making retrospectively ultra vires).

The practical problem

Indeed repeal of section 2(2) of the ECA would have the effect of revoking the vast mass of secondary instruments made thereunder to give effect to EU measures which are not directly applicable, and which are not given effect through primary legislation.

Even putting aside Scottish issues for a moment, presumably the Government will want to consider whether to keep much of the law which the EU has provided, whether directly applicable or not, at least pending consideration of whether it should be retained in a post EU world – in whole, in part or amended.

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If the Government wants to keep the status quo while it goes through this process (as to which, more below) what will be the role of the ECA? The position may vary as between directly applicable EU measures and measures which require national enactment.

Directly applicable measures

As stated above, upon withdrawal from the EU according to the terms of an art 50 agreement, there would be no obligation falling within the terms of section 2(1). So if the Government wants to keep the directly applicable measures in force while deciding what to do about them, it will presumably have to amend section 2(1) or enact alternative primary legislation retaining them in effect for the time being.

Measures which need to be given effect through primary or secondary legislation

Primary and secondary legislation will be considered in turn.

Primary legislation

Some EU measures have been given effect through primary legislation e.g. discrimination provisions under the Equalities Act 2010. Nothing that happens to the ECA can affect those provisions, because they are primary legislation (though the Government may consider amending them in the light of withdrawal from the EU).

What of EU measures which need to be given effect through secondary legislation?

Secondary legislation

Under section 2(2), as we have seen, the power to make secondary legislation is given:-

for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented

and

for the purpose of dealing with matters arising out of or related to any such obligation

... .

The instruments already made under this power would not cease to exist unless revoked by other legislation or if section 2(2) is itself repealed.

How might the “tide over” problem be solved?

There might be various ways of solving the practical problem of tiding the UK over while the Government – possibly successive Governments – decide what EU legislation to keep as national law.

We have been assuming in this paper so far that the art 50 agreement itself provides for all the UK’s EU-derived obligations to end simultaneously on a certain date. Conceivably – though this seems very unlikely – the agreement could be devised in such a fashion that will

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allow the UK to retain membership during the period over which it decides whether to retain EU-derived measures as national legislation post-membership, with the effect of such membership not requiring the UK to abide by such EU-measures as it decides progressively to discard. Meanwhile the ECA could remain intact on the statute book. As stated, this option seems unlikely because it would require the EU to recognise a sort of membership where the member can pick and choose what EU measures to retain.

Assuming that the art 50 agreement does terminate the UK's membership of the EU on a particular date in one fell swoop, the Government might:-

(1) amend section 2(1) of the ECA (or pass other primary legislation) to make what used to be directly applicable law part of our national law for the time being;

(2) though it might not have to, amend section 2(2) (or pass other primary legislation) to make it clear that secondary legislation made under section 2(2) to date remains in existence for the time being otherwise than as an "enforceable EU right".

Coupled with this, there might be transitional provisions allowing the process of winnowing out former EU-derived provisions by further delegated legislation.

Some final considerations

Consultation and impact assessment?

If the Government – very possibly successive Governments – are to sift through all EU measures working out what should be kept, what discarded and what re-shaped, this could take a very long time.

Will the Government wish, or maybe need, to consult about the future of each these rules, if it means to revoke or change them? Before doing so, should it also conduct impact assessments, including (if relevant) equality impact assessments bearing in mind the public sector equality duty in section 149 of the Equality Act 2010?

How will we know what we want to keep?

Further still, can the UK be clear about the replacement laws it wants (e.g. procurement laws and state aid laws) until it has reached post-membership trading and other agreements with the EU, WTO and others?

Scotland?

As stated, this leaves Scotland out of account. Section 2(2) of the ECA was amended by the Scotland Act 1998 so that the regulation making power in relation to devolved matters transferred to Scottish Ministers. A very considerable number of regulations have been made by Scottish Ministers under section 2(2) since 1999. Scottish Ministers will want to consider what to do about this secondary legislation, just as their English counterparts will.

Principles of CJEU caselaw?

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Last, assuming EU-derived law remains part of our national law (e.g. discrimination), will UK Courts and tribunals cease to apply principles derived from EU jurisprudence, including caselaw in the EU Court of Justice?

Sometimes those principles will have become embodied in UK legislation. For instance, the Equality Act 2010 expressly provides for justification of indirect discrimination in EU-derived terms (using the concept of proportionate means of achieving a legitimate aim).

And Courts and tribunals may reach the view that even principles which are not provided for by statute have grown national roots.

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