

Will the 'Great Repeal Bill' be a 'Great Retention Bill'?

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CIPPM Annual Symposium 2016, Bournemouth University



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Theresa May's speech to the Conservative Party Conference, 2 October 2016



'We will soon put before Parliament a Great Repeal Bill, which will remove from the statute book – once and for all – the European Communities Act. This historic Bill – which will be included in the next Queen's Speech – will mean that the 1972 Act, the legislation that gives direct effect to all EU law in Britain, will no longer apply from the date upon which we formally leave the European Union. And its effect will be clear. ***Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.***

David Davis MP's Statement to the House of Commons, 10 October 2016



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'We will start by bringing forward a Great Repeal Bill that will mean the European Communities Act ceasing to apply on the day we leave the EU. ***It was this Act which put EU law above UK law.*** So it is right, given the clear instruction for exit given to us by the people in the referendum, ***that we end the authority of EU law.***

An exercise in wishful thinking? Three aspects:



1. The 'Repeal' bill will 'repatriate' EU law – what does this mean?
 2. What role will the ECJ continue to have?
 3. What 'authority' will EU law retain?
- **Note: the eventual exit agreement will have a significant impact on these three questions.**

'Repatriation'



- Will incorporate directly applicable regulations and those Directives fathered by ECA 1972 into UK law.
- Some 'EU' laws already incorporated via separate statute.
- Without a specific deal, post-Brexit will not produce *new* EU law obligations, and *existing* EU law obligations will become *domestic law obligations*.
- What about the Treaties?
- Broader constitutional issue: Henry VIII clauses.



- Repatriated laws may still refer to EU bodies: e.g. EU agencies listing approved chemicals.
- Will be required to adhere to internal market standards for trade even if hard Brexit.
- *Perhaps still part of UK law, depending on the deal, e.g. EEA Membership: jurisdiction of EFTA Court and other EEA principles must apply.*

The future role of the ECJ?



- Article 218 TFEU: it may have to rule on the legality, in EU law, of the eventual EU-UK agreement: role of the CFR?
- Brexit means no direct CJEU authority – the Treaties '*cease to apply*': Article 50(3).
- CJEU will continue to develop its case law – some of which would have affected 'repatriated' law. An analogy with the 'mirror principle'?
- How to interpret repatriated law: *Marleasing* still?



- Ralf Michaels (2016) 17 German LJ (Brexit Supplement) 51, 55:
 - *‘There are issues on which states are almost bound to follow the demands from other states—not by law, but by necessity. Neighbors of the EU know of the need to enact EU legislation in order to be compatible.* Even seemingly robust states strive to comply with EU data privacy standards in order to serve as “safe havens.” Poorer countries have even less choice. They have to enact certain product and labor standards in order to be allowed to export ... their sovereignty is formal, but in effect they are regulated from elsewhere through economic pressures, even without the formalities of a system like the EU’.

Conclusions



- 'Repatriation' is far from the end of the UK's legal relationship with the EU.
- In a hard Brexit, the CJEU will continue to have an effect on law and policy in the UK, albeit reduced.
- 'Soft' Brexits likely to retain elements of the current relationship.