



The  
manufacturers'  
organisation

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# BREXIT BRIEFING

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## UK REGULATION BEYOND BREXIT

Creating the stability, certainty  
and clarity manufacturers need



# EXECUTIVE SUMMARY

UK manufacturers operate in commercial cycles which span the UK's exit from the EU. They need regulatory stability to be able to plan for the future and invest. This requires certainty and knowledge of what changes they will face in good time to enable them to prepare for these.

The only realistic way forward for the foreseeable future is for the UK to continue to adopt the laws of the European Union in their entirety, and continue to accept the jurisdiction of the Court of Justice until such time as the UK has a new trade agreement with the EU. UK businesses and consumers cannot be left in a state of limbo, facing a period of considerable regulatory change in 2019 and waves of successive change after this, as the UK settles its new relationship with the EU.

It is therefore imperative that the UK agrees a period of transition with the EU, beyond 2019, during which little changes in the UK in terms of regulation. The period of this transition must be as long as is needed to settle a new trading and regulatory relationship with the EU, and we believe that this may be in excess of two years.

Currently the UK government's approach is to convert pre-exit EU law into UK law. Whilst there is little alternative, businesses, Parliament and consumers must have the opportunity to scrutinise these changes before they are made to ensure that they do not adversely affect their current legal rights.

Government must then publish the changes to EU law it proposes to make in good time and consult stakeholders before commencing the process of enacting legal change.

After a significant transitional period, which must maintain regulatory stability, the UK must reach an agreement with the EU that minimises the risk of regulatory divergence in the areas where the EU currently enjoys competence.

Many UK businesses supplying or receiving goods and services from the EU will see little or no benefit from diverging legal and regulatory systems and consumers are likely to suffer. An important element in minimising regulatory divergence will be to agree how the UK and the EU avoid significantly different interpretations of EU law, law which the UK broadly is retaining after the point that it ceases to be an EU member. This is achieved in other agreements the EU has entered into, and the UK should adopt a flexible approach to the Court of Justice of the European Union, and be open to taking account of its jurisprudence after the UK leaves the EU.

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## WHY REGULATION MATTERS TO BUSINESS BEYOND BREXIT

Whilst differing areas of regulation are important to different types of businesses, the single paramount issue for business is how, and how much, of the EU's legal *acquis*<sup>1</sup> the UK will retain after 2019. UK businesses currently buy, sell and contract on the basis of a seamless EU legal base, and their current obligations – contractual and commercial - will extend far beyond the date of the UK's EU exit. Businesses do not then operate on a pre or post-Brexit basis.

The withdrawal of the UK from the European Union will require significant change to the UK's current legal landscape. Untangling the UK from this landscape will not be achieved quickly or by a single legislative measure, and businesses will want any change to be measured and gradual.

The shadow of EU law is likely to be felt in the UK for some considerable time after 2019, and the UK's future approach to EU law will be subject to the agreed terms of the UK's exit from the EU.

The main vehicle for the UK's regulatory withdrawal from the EU is the European Union (Withdrawal) Bill. The objective is to preserve the continuity of the current law and to maintain the certainty and consistency of the current law. However, the process of achieving these aims is one which delivers substantial powers to Ministers, and which Parliament has yet to approve.

## MANUFACTURERS' VIEWS ON THE EU WITHDRAWAL BILL

In addition to the above, the Withdrawal Bill must contain sufficient flexibility for the UK government to implement the terms of the UK's future trading arrangements with the EU. This may then in turn limit the ability of the legislature to depart from current or future EU law. The terms of any future EU deal are likely to be relevant to many areas of EU policy making, including migration, labour market and environmental legislation. Therefore, the process of conversion and amendment of EU law will need to be an agile and evolving process, to account for the eventual, settled trade arrangement with the EU.

Businesses need certainty. They are familiar, within certain bounds, with the current law. However, long term commercial relationships are based on the current law and so any change will need to be measured and give businesses sufficient time to adapt to any change.

***Recommendation:** UK businesses operate over commercial cycles that span March 2019. Stability and certainty of regulation are critical for them, and change, when it comes, must be notified to them in good time, and be predictable.*

## REGULATORY CHANGE – HOW AND WHEN

EEF supports the proposed UK solution, to continue to apply EU law, as it stands at the point of the UK's exit, until such time as the UK legislature opts to alter this, or the senior judiciary departs from this.

Where there is future change, this should only be introduced when it can be absorbed by UK businesses, who will continue to commit themselves to long-term trading relationships under EU law well beyond 2019.

A business entering into 5 year commercial contract in March 2019, subject to EU law, needs the certainty that the UK will apply EU law for the period which they have contracted for. The UK government should commit to apply EU law in the future where this was the governing law in the UK to any agreement or situation which a UK business was a party to. This therefore leaves EU law in place for a considerable period of time after the UK's exit.

***Recommendation:** Where EU law applied at the commencement of an agreement, then it should continue for the entirety of the agreement.*

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<sup>1</sup>The accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.

## EU LAW IN EXISTENCE AT THE POINT OF BREXIT

The UK will need to repeal, amend, or replace the European Communities Act 1972 at the point that it leaves the EU. On leaving the EU, and subject to any future agreed terms, EU law will cease to be directly applicable, and the UK, its citizens and businesses will cease to have access to the institutions of the EU.

The UK will need some alternative means for individuals and businesses to exercise their current EU-based rights, until such time as these are modified. The government's White Paper<sup>2</sup> promised that these rights will continue to be enjoyed post-exit but also made it clear that after the UK leaves the EU, the UK Supreme Court will be the final arbiter of law that applies in the UK, and Parliament will again be the UK's ultimate legislature.

There is, therefore, little alternative to the suggested approach, which is that the UK Courts and Tribunals will apply current EU law after the UK's exit, given that UK individuals and business will ordinarily have no access to institutions of the EU. This then still leaves the UK applying EU law in the same way that the EU would have, albeit via new domestic legislation.

The contents of this "pre-exit EU law", which is selected for conversion in UK law, needs to be made clear by government. It should therefore publish details of which elements of EU law are to be converted into UK law early in the process.

Similarly, government should publish in a consolidated way, those elements of pre-exit EU law which it intends to amend during the conversion process, and the nature of the amendment sought.

**Recommendation:** *Government must, in good time, publish details of EU laws it intends to repeal, amend, or transpose into future UK law, and allow businesses, consumers and stakeholders an opportunity to meaningfully participate in this process.*

## THE EU (WITHDRAWAL) BILL

Presentationally, the Bill suggests that the UK will take back legislative and judicial control by, primarily, repealing the European Communities Act 1972. Considering the totality of the component parts of the Bill together, however, reveals the complexities of the problems involved. The Bill will in effect:

- i) Rebadge most EU law (the EU Treaties will not be retained),
- ii) Convert all pre-exit law into UK law,
- iii) Apply all pre-exit CJEU case law to this pool of EU law being retained,
- iv) Attempt to tie off EU law at the point of exit.

However, the Bill, explanatory notes and the White Paper previously published are contradictory in parts – they suggest little will change in terms of judicial approach, leaving Parliament to be the primary driver of future change.

Indeed, the White Paper suggests that the occasions on which the UK Supreme Court departs from pre-2019 EU law will be very limited. Given that, subsequently, the Prime Minister offered to entrench the UK's exit agreement with the EU, this leaves little capacity for a future UK Parliament to effect change. Businesses may welcome this, as it suggests a high degree of regulatory stability, but this approach may be the subject of challenge from some Parliamentarians and stakeholders, on the basis that it fails to provide for any significant change to the UK's legal landscape and is likely to mean that the UK and EU remain, largely, the same in terms of regulation.

## SECONDARY LEGISLATION

The White Paper and Bill set out a proposal for extensive powers for the executive to make secondary legislation. Given that the UK's exit arrangements are unknown, the limited time available to make the required changes and the number of separate regulations which need to be addressed, there is little alternative to a grant to the executive of wide powers to make delegated legislation, purely as Parliament will not have the capacity to make the required changes.

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<sup>2</sup><https://www.gov.uk/government/publications/the-repeal-bill-white-paper>

However, the grant should be the subject of restrictions. Delegated legislation should be used solely to preserve legal continuity and not to effect policy change. A sunset restriction should be imposed upon the powers granted to ensure that the regulations which are made come into force in a defined period, and businesses do not then face a long and protracted period of change.

## SPECIFIC AREAS OF IMPORTANCE TO BUSINESS

Certain areas of regulation are of such specific importance to individuals and businesses that the government should refrain from change using secondary legislation. Fundamental rights and free movement are two areas where should Government wish to affect change, then it should only do so with the use of primary legislation, which allows for far greater parliamentary scrutiny. This should only occur after the UK's exit from the EU, subject to the UK's agreement with the EU and after EU law has been enshrined, undiluted, in UK law. The Bill should then contain a list of categories of legislation which cannot be altered in substance by secondary legislation.

**Recommendation:** *Delegated legislation, made under the authority of the Withdrawal Bill, must not effect policy change, or change the legal rights currently enjoyed by consumers and businesses. Where any change, other than conversion without alternation, is needed, then Primary legislation should be used.*

## THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION AFTER BREXIT

Businesses generally care little for the legal minutia of the UK's future legal settlement with the EU, and whether the UK accepts the writ of the EU's Court. They do care about the impact on employers of any change, and have found the decisions of the Court of Justice of the European Union, (CJEU), at odds with the UK's approach at times. However, the extent to which these decisions have impacted overall on UK businesses is limited, and the economic gain from

membership of the EU far outweighs this. Increasingly, most observers believe that the UK will need a period of adjustment after it leaves the EU. This implementation or transitional period is likely to need a continuation of the current approach – including current and future regulation, surveillance, enforcement and legal oversight. This then requires the UK to accept the approach of the CJEU during this period. This can be achieved in a number of ways.

## FUTURE OPTIONS

Currently, the EU Withdrawal Bill makes a number of references to the approach of the UK to the CJEU. The Bill made it clear that after the UK leaves the EU, the CJEU will have no (direct) jurisdiction over the UK, and UK Courts and Tribunals will not be bound by the decisions of the CJEU. However, given that most pre-exit EU law will be retained, the Bill allows UK Courts to have regard to future CJEU decisions “if they consider it appropriate to do so”.

This may often be the case, where for example UK Courts encounter future factual situations which are new, or evolving, and where the CJEU has previously provided an opinion but this wording is similar in effect to that contained within the EEA agreement, which stipulates that the EFTA Court “shall pay due account to the principles laid down by the relevant rulings of the Court of Justice.....given after the date of signature of the EEA agreement.” The practical difference between the UK Bill and the EEA agreement may be very little.

## REDUCING THE DIVERGENCE RISK

Removing the direct jurisdiction of the CJEU from the UK, whilst procedurally straightforward, needs to be measured given its role as a key EU institution and the impact of its removal. Article 50 of the Treaty on European Union indicates that the Treaties will cease to apply on exit, which therefore means that UK businesses and citizens, whilst applying EU law in existence before exit, will have no access to the CJEU as a body to arbitrate and explain EU law in the future. They will therefore need to deal with the UK Courts, who

will then apply pre-exit EU law which the Bill will, eventually, convert into UK law.

Currently, where there is a need for an interpretation of EU law, UK Courts refer a matter to the CJEU. This process will cease on the UK's exit from the EU, leaving open the possibility of differing interpretations of pre-exit EU law, which will be retained as part of UK law. This is matter of great concern to businesses and the EU, and enshrining an agreed approach in the UK's withdrawal agreement will not eliminate this possibility.

The scope for uncertainty could be narrowed if UK Courts were required to consider all the case-law of the CJEU regardless of when the CJEU makes its decision. This would reduce the prospect of a UK Court or Tribunal being blinkered – applying pre-exit case-law but not considering related case-law decided upon after the point of exit. Frequently, CJEU case-law is inter-related, with one element being dependent upon a previous decision.

A compromise which gave decision making power to UK Courts, but promoted consistency would be for pre-exit decisions of the CJEU to be binding, but would allow post-exit decisions to be required to be considered, but not strictly binding, by UK Courts in their interpretation of pre-exit EU law. In the implementation period, immediately after the UK's exit, there is unlikely to be an alternative to the current arrangements, but after this, this approach, similar in form to the EEA agreement, with some further enhancement, may be satisfactory to all sides.

## MANAGING NEW EU LAW

The freedom of the UK to adopt, modify or reject future EU law will depend in part upon its future relationship with the EU. Our belief is that given the progress made by the UK and EU to date, the time available, and the procedural complexities involved in agreeing a new arrangement with the EU, a transitional period, after the UK formally leaves the EU will be essential. The component parts of this transitional period should be,

a. That the UK maintains the current regulatory structure within the EU framework for a

**Recommendation:** *The EU Withdrawal Bill should be amended to provide that all UK Courts and Tribunals shall pay due account to the principles and case-law of the Court of Justice, whenever they may be decided, where they consider it appropriate to do so.*

- period after the UK's formal exit from the EU. This means retaining the current regulatory, supervisory and judicial mechanisms.
- b. That during this period, commencing in 2019 and lasting for at least two years, the UK remains in the customs union with the EU.
- c. That UK businesses are able to participate in the single market on the same terms as they currently enjoy until the end of this period.

Given the need for a transitional period commencing on the UK's EU exit, and the wish to avoid businesses having to undergo two separate stages of change, these aims can only be achieved by the UK continuing, in effect, with the current regulatory and legal terms of EU membership beyond its formal exit date from the EU. To do otherwise would mean that UK businesses and consumers would have to adapt to significant change twice – once on the entry into the transitional period, and the other on the expiry of the transitional period.

Should then the UK be successful in agreeing a transitional phase with the EU, and on terms which mirror those which it current enjoys, then the UK is likely to need to agree to adopt EU legislation coming into force before the expiry of the transition. Businesses are likely to want this, as to do otherwise would risk regulatory divergence, and the EU is unlikely to accept the UK continuing to enjoy a trading relationship with the single market on current or similar terms without this. This therefore leaves the UK within the regulatory orbit of the EU until the end of the transitional period.

The UK government has committed relinquishing UK Members of the European Parliament (MEPs), an EU Commissioner or representation at Council after 2019, but it should then find a

mechanism to avoid becoming a “rule-taker” of EU regulation. During the implementation period the government must take steps to ensure a form of continued influence over the rules affecting businesses and secure mechanisms through which the UK could challenge any legislation that posed a direct threat to the competitiveness of businesses in the UK.

## REACHING AGREEMENT

The missing element of the UK’s current approach to EU law in the immediate aftermath of its exit is what it will need to agree to in order to secure an implementation agreement. The EU has set out clearly that any such agreement will need to incorporate that current oversight, regulatory and judicial mechanisms, which means the UK accepting the role of the European Commission, EU law and the Court of Justice.

However, both the UK and the EU seemingly agree that this should be enshrined in a withdrawal agreement and that this agreement would have a superior legal status in UK law, which is essentially repeating the approach of the 1972 European Communities Act. This would also require the Withdrawal Agreement being superior in law to the EU Withdrawal Bill, or Act, until such time as the UK and the EU had agreed otherwise. This would preserve the status quo for businesses and consumers until a new, final, agreement is reached.

Continuing to allow the CJEU to discharge this function within the transitional period would promote consistency and certainty. Alternative approaches are likely to be complex. At the very least, a UK citizen or business in an EU member state is likely to fall under the jurisdiction of the CJEU. Given the UK government’s aim to secure reciprocal rights for UK and EU citizens, this could only be achieved by allowing the CJEU the same role in the determination of the rights of EU citizens in the UK, at least during any period of transition.

Similarly, UK businesses operating in the EU, will need certainty during the transitional period. Their operations in the EU are almost certain

to be governed by the CJEU, and considerable complexity and confusion would be created if they were governed by the CJEU in the EU, but the Supreme Court in the UK, and their legal approaches differed. This would in effect create a series of waves of change in the UK for businesses and consumers. A clearer solution would be to maintain the oversight of the CJEU until such time as the UK’s future relationship had been settled.

***Recommendation:** Considerable complexity and confusion would be created if UK businesses were governed by the CJEU in the EU, but the Supreme Court in the UK, with different legal approaches, in any transitional period. Until the UK reaches a final agreement with the EU, the CJEU should retain its current jurisdiction in the UK.*

## FUTURE EU REGULATORY COOPERATION

Following a period of transition, the UK will need to consider what, if any, system of regulatory cooperation to have with the EU and its other trading partners. Manufacturers trading with the EU will be subject to market access regulation long after the UK’s exit and the EU is likely to insist on other regulatory agreements to ensure a ‘level playing field’ with the UK. In addition, manufacturers’ preference would be to produce one product for multiple markets.

The UK then will need to consider mechanisms for regulatory cooperation within its overall agreement with the EU. Global models of regulatory cooperation range from the more prescriptive EEA agreement to the Joint Interpretative Instrument and Regulatory Cooperation Forum in CETA. EEF considers that, initially, the UK should seek a high level of alignment with the EU, after a status quo transition, and afterwards set up a joint mechanism (i.e. a joint court, arbitration panel, cooperation forum) to review legislative changes in both the UK and EU. Divergence in regulation could be managed by such joint panels that could then maintain a level playing field.

Alternatively, a panel could ensure that a series of shared outcomes are achieved, for example action on climate change. This would enable the UK to move away from the prescriptive rules set out in the European *acquis* while maintaining a level playing field with EU partners. These EU rules could significantly change over time, and the UK will need to consider whether it wishes to adopt this future *acquis*.

Further ahead, and after the UK's new EU partnership has been established, the UK should carry out a comprehensive legislative review grounded on the principles of the UK's established better regulation agenda. This would allow the UK to consider regulatory changes which were in the UK's interest and the establishment of new agencies, recognised by the EU, to oversee regulatory compliance.

### RECOMMENDATIONS:

1. UK businesses operate over commercial cycles that span March 2019. Stability and certainty of regulation are critical for them, and change, when it comes, must be notified to them in good time, and be predictable.
  2. Where EU law applied at the commencement of an agreement, then it should continue for the entirety of the agreement.
  3. Government must, in good time, publish details of EU laws it intends to repeal, amend, or transpose into future UK law, and allow businesses, consumers and stakeholders an opportunity to meaningfully participate in this process.
  4. Delegated legislation, made under the authority of the EU Withdrawal Bill, must not affect policy change, or change the legal rights currently enjoyed by consumers and businesses. Where any change, other than conversion without alternation, is needed, then primary legislation should be used.
  5. The EU Withdrawal Bill should be amended to provide that all UK Courts and Tribunals shall pay due account to the principles and case-law of the Court of Justice, whenever they may be decided, where they consider it appropriate to do so.
  6. Considerable complexity and confusion would be created if UK businesses were governed by the CJEU in the EU, but the Supreme Court in the UK, with different legal approaches, in any transitional period. Until the UK reaches a final agreement with the EU, the CJEU should retain its current jurisdiction in the UK.
  7. The UK should seek a high level of alignment with the EU to protect current trading relationships after its transitional period following Brexit. This must include a mechanism to manage regulatory cooperation and an assessment of whether continued alignment with the EU in specific areas of regulation are in the national interest.
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EEF is dedicated to the future of manufacturing. Everything we do, from business support to championing manufacturing and engineering, is designed to help our industry thrive, innovate and compete locally and globally.

In an increasingly uncertain business environment, where the UK is now on a path to leave the European Union, we recognise that manufacturers face significant challenges and opportunities. We will work with you throughout this period of uncertainty to ensure that you are on top of any legislative changes and their implications for your business.

Furthermore, as the collective voice of UK manufacturing, we will work tirelessly to ensure that our members' voices are heard during the forthcoming negotiations and will give unique insight into the way changing legislation will affect their business.

Our policy, employment law, health, safety and sustainability and productivity experts are on-hand to steer you through Brexit with rational, practical advice for your business.

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