Brexit Editorial Vol 23 Issue 3 September 2017

1 A GENERAL ELECTION

Any discussion of the ongoing details of the Article 50 negotiations must be prefaced by the surprise decision of Mrs May to seek the House of Commons' consent for a snap general election on 8 June. This appeared to be a *volte-face* on her part. On 19 April the Commons overwhelmingly voted in favour of an election by 522 votes to 13.[1] Clearly buoyed by a commanding lead in the polls, Mrs May hoped to increase her overall majority (seventeen as I write) to give her greater authority in the Brexit negotiations. The delaying tactics of the Scottish Nationals and Liberal Democrats were blamed for undermining her negotiating position. In fact, she was prey to the extreme hardliners in her own party pressing for a hard Brexit and a complete schism from the EU. An election victory would strengthen her position and give her the mandate to press her policies and not only on Brexit. Victory would see her as Prime Minister until 2022 prolonging her oversight of the transition from membership of the EU to non-membership. But the election preparations will eat into an already congested Brexit timetable. While her position looks commanding there is still a considerable risk of back-firing.

2 THE TERMS OF NEGOTIATION

The last editorial left readers at the stage when Mrs May delivered the UK government letter to Donald Tusk under Article 50 TEU expressing the UK government's wish to leave the European Union. Amongst various benedictions, the first core objective was to provide as much certainty as possible in a new 'deep and special partnership' with the EU in trade and security. The objective predicated the six principles that she proposed for the discussions under Article 50. The overall tone had previously been dominated by her comments that 'No deal was better than a bad deal' and failure to reach agreement could have an adverse impact on security relations. Her principles included sincere cooperation on both

[1] Under the terms of the Fixed-term Parliaments Act 2011 a majority of at least two-thirds of the seats in the House of Commons including vacant seats had to support her motion i.e. 434.

'Brexit Editorial Vol 23 Issue 3 September 2017'. *European Public Law* 23, no. 3 (2017): 437–446.

sides, putting [EU] citizens first, minimize disruption, address the border question in Ireland, get as much detail on the future trade agreement discussed to 'maintain a fair and open trading environment' and to advance and protect our 'shared European values'. 'Perhaps now more than ever, the world needs the liberal, democratic values of Europe' which I add are addressed in Article 2 TEU.

The guidelines drafted by the European Council for negotiations on withdrawal were published in response and would be updated as necessary. These highlighted the core principles of the Union position. The principles included a close future partnership with the UK based on a level playing field. There will be no sector by sector approach. The same EU rights and benefits cannot be enjoyed by a non EU member. There will be no 'cherry-picking'. Negotiations will be concluded as a single package and not subject to itemized agreement. The Union will act in unity and there will be no individual state negotiation with the UK. However, individual Member State concerns such as Spain's on Gibraltar will be taken into account giving Spain a veto in any trade agreement affecting Gibraltar.

It became clear that the withdrawal agreement under Article 50 would have to be concluded before there was any trade deal under the TFEU Articles 216–218. The guidelines identified a second phase of negotiations in which under Article 50's requirement to take account of the future UK/EU relationship an 'overall understanding' could be identified. As soon as sufficient progress had been made on reaching a satisfactory agreement on the arrangement for making an orderly withdrawal from the EU 'preliminary and preparatory' discussions could commence a second phase. Transitional arrangements may also be identified as necessary and within legal confines. These might establish bridges for the future relationship and which are in the interests of the Union. These if agreed would be subject to effective enforcement mechanisms. If there were any time limited prolongation of Union acquis then 'existing Union regulatory, budgetary, supervisory and enforcement instruments [would] apply'. The UK would be under EU law in that period.

The guidelines make clarification of the rights of EU citizens a priority as well as bringing certainty to existing contractual, financial and commercial arrangements at the date of departure. A 'legal vacuum' should be prevented. The position of peace and reconciliation in Ireland and UK sovereign bases in Cyprus are emphasized. The UK will no longer benefit from international agreements negotiated by the Union or its members. A financial settlement for all commitments and liabilities including contingent liabilities would have to be agreed. All court procedures at the date of departure will continue under the adjudication of the Court of Justice of the European Union. Administrative procedures will continue under the auspices of the Commission or relevant EU

bodies. Appropriate dispute settlement mechanisms would apply to disputes under the withdrawal agreement.

The two year negotiations for agreement under Article 50 will end on 29 March 2019 (precisely 00.00 hours 30 March) – D-Day or departure day. A resolution of the European Parliament on 6 April 2017, for which the negotiator for the Commission had lobbied, stated that the UK could not unilaterally withdraw from the Article 50 process in order to obtain extra time for negotiations. Cessation of withdrawal would be subject to unanimous Member State approval. Article 50 only provides for *continuation* of the two year period as pointed out in earlier editorials.

For any future trade agreements between the EU and UK these will have to be subject to appropriate enforcement and dispute mechanisms that do not adversely affect the Union's autonomy (EUCJ) and the EU will not countenance any aspects of dumping or anti-competitive practices. The ECJ has subsequently sent out the strongest of messages about the autonomy of EU law, and the ECJ's preserve on that autonomy, in the Singapore/EU free trade agreement opinion. While maintaining that most of the agreement was within EU competence and therefore a subject of agreement by the EU and not member states, the ECJ nonetheless reminded us of its exclusive judicial role in interpreting EU measures. In a judgment that was seen initially as presaging favourably for the UK and any future trade agreement with the EU, the ECJ is unlikely to brook any attempt to override or undermine its jurisdiction.[2]

In addition to trade the EU put the highest priority on an agreement combatting terrorism and international crime and on security and defence. Mrs May in her letter had adverted to what was seen as a threat in cooperation in these areas if an acceptable agreement was not forthcoming.

The Union principles of sincere cooperation will continue to apply throughout the negotiations and the UK will participate in 'all ongoing EU business' although obviously the 27 alone (without the UK) will represent the EU in the Article 50 negotiations. There were reports of Commission concerns about 'sensitive information' being excluded from the UK in trade negotiations. The UK may use this to its advantage by agreeing to be excluded in return for an early commencement to its own trading agreement with the EU.[3]

On 29 April 2017 the European Council guidelines were endorsed unanimously by the Member States.[4] There was an addition of some brief wording and

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2 Free Trade Agreement between the European Union and the Republic of Singapore: (Advocate General's opinion) [2017] EUECJ Avis-2/15_O (16 May 2017) esp. para. 301.

3 *Financial Times* 8 and 15 Apr. 2017.

4 http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/ (accessed 24 May 2017).

short paragraphs reflecting the concerns of some states in particular.[5] These involved:

(1) protection of the interests of EU citizens including 'effective, non-discriminatory and comprehensive' permanent safeguards;
(2) transparency in negotiations i.e. no side deals outside the Union framework and in contradistinction to Mrs May's previous emphasis on 'secrecy' in conducting negotiations[6];
(3) a financial settlement to ensure mutual respect for obligations 'resulting from the whole period' of UK membership;
(4) support for Northern Ireland's re-entry to the EU following any vote by Northern Ireland on re-unification with the Republic;
(5) safeguarding financial stability in the Union so that the Union regulatory regime and its standards will be protected i.e. the UK could not seek a competitive advantage by de-regulation. This would infer a continuing role for the CJEU over UK interests. This issue is emerging in other areas such as security, anti-terrorism and crime prevention under justice and security[7] as well as financial disputes under the Article 50 agreement.

The Recommendation for a Council Decision for the Commission to open Article 50 negotiations was published on 3 May 2017[8] and these were unveiled by Michel Barnier at a press conference together with guidance. The mood was becoming mutually antagonistic.

3 THE GREAT REPEAL BILL

On 30 March 2017, the UK government published *Legislating for the United Kingdom's Withdrawal from the EU* (Cm 9446). In reclaiming UK sovereignty – control on one's own laws – the government proposed a Great Repeal Bill (GRB) to repeal the European Communities Act 1972 on the day of departure from the EU, to remove the jurisdiction of the EUCJ and to bring into domestic laws EU laws from the 'day we leave'. The necessary legislative preparations will have to be in place before that day. UK courts will be the final arbiters of our laws including

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5 http://www.telegraph.co.uk/news/2017/04/29/eu-brexit-guidelines-document-really-means/ (accessed 24 May 2017).
6 *See* Brexit Editorial (2016) vol. 22(4) *European Public Law* 589.
7 *See* the comments of Sir Julian King *The Guardian* 1 May 2017.
8 COM2017 218 final, https://ec.europa.eu/info/sites/info/files/recommendation-uk-eu-negotiations_3-may-2017_en.pdf and https://ec.europa.eu/info/sites/info/files/annex-recommendation-uk-eu-negotiations_3-may-2017_en.pdf. The Council of 27 approved these on 27 May, http://www.consilium.europa.eu/en/press/press-releases/2017/05/22-brexit-negotiating-directives/ (accessed 24 May 2017).

former EU law. This is bound to grate with the statements in the EU guidelines above. The GRB, the paper explains, will not be a vehicle for policy changes although the division between policy and technicality is not clear cut as I indicate below. It will allow the government to 'correct or remove laws' that would otherwise not function properly once we leave the EU. This means those laws that are rendered redundant or impossible by UK departure e.g. free movement or elections to the European Parliament. Although the process should be finalized before the conclusion of the Article 50 agreement speed should not prevent appropriate levels of Parliamentary scrutiny. The government will work closely with the devolved administrations who will be beneficiaries of increased powers brought back from Europe.[9] Single market agreements and trade agreements may require a common UK framework reflecting a common EU framework. Again, this does not mesh with the EU guidelines.

'Great' cannot be used in a UK Act's title. The putative title also echoes the Great Reform Bill (Representation of the People Act) of 1832 which helped introduce a new electoral system in the UK and which increased the electorate to about 813,000 males from 500,000 from a population of about 14 million including women and children. There will be a need for further primary legislation in e.g. customs union within the UK and immigration as well as alterations required by institutional changes e.g. requiring the opinion of the Commission or giving information to the EU where this has not been agreed before D-Day. But the bulk of legislative developments will take place by secondary legislation or by legislative activity in devolved parliaments.

The White Paper (WP) seems to reveal confusion in the government's position regarding the timing of the non-legislative votes that it has promised both Houses of Parliament on the Brexit deal. Mrs May has stated approval would be sought before the deal comes into force but also before the agreement is concluded.[10] Parliament needs to clarify this.

4 WHAT DOES THE GREAT REPEAL BILL CONVERT INTO UK LAW?

The Bill will ensure that, wherever possible, the same rules and laws apply on the day after the UK leaves the EU as before. Thereafter, laws will be removed or amended.

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[9] The Scottish Parliament had voted by 69-59 to approve a referendum for Scottish independence on 28 Mar. 2017. This is not legally binding on the UK government.

[10] From http://blog.hansardsociety.org.uk/taking-back-control-initial-thoughts-on-the-great-repeal-bill-white-paper/ (accessed 24 May 2017).

This means that:

- the Bill will convert directly applicable EU law (EU regulations) into UK law (paragraph 2.4);
- it will preserve all the laws we have made in the UK to implement our EU obligations (paragraph 2.5);
- the rights in the EU treaties (and one should add directives) that can be relied on directly in court by an individual will continue to be available in UK law (paragraph 2.11);
- the Bill will provide that historic (historical?) CJEU (prior to D-Day) case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court (SC) (paragraphs 2.12 to 2.17). The SC may depart from its previous judgments in accordance with Practice Statements (1966 and 2010). There will be no role for CJEU judgments in interpretation after D-Day [2.13]. One should add that as with jurisprudence of other jurisdictions CJEU judgments may possess persuasive force.

The WP estimates, citing EUR-Lex, the EU's legal database, there are currently over 12,000 EU regulations in force (this includes amending regulations as well as delegated and implementing regulations) [paragraph 2.6]. For domestic legislation which implements EU law such as directives, research from the House of Commons Library indicates that there have been around 7,900 statutory instruments (SIs) which have implemented EU legislation. This does not include SIs made by the devolved administrations. The WP adds that research from the House of Commons Library indicates that out of 1,302 UK Acts between 1980 and 2009 (excluding those later repealed), 186 Acts (or 14.3%) incorporated a degree of EU influence. The WP represents that existing law in e.g. workers' rights, environmental law and consumer protection will remain the same until changed [paragraph 2.6].

The EU treaties may assist in the interpretation of domestic law [paragraph 2.9].

The WP confirms that the GRB will end the 'general supremacy' of EU law [paragraph 2.19]. Pre D-Day EU laws will take precedence over purely domestic law. Otherwise uncertainty will be produced. As outlined above, however, the EU is clear that the ECJ will still have a role after D-Day.

5 CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights (CFR) will not be converted into UK law post D-Day. The Charter sets out fundamental rights and principles in fifty articles, many of which replicate guarantees in the European Convention on Human

Rights and other international treaties. But certain rights are not contained elsewhere or have not been implemented otherwise into UK law as fundamental rights e.g. the right to dignity, integrity of the person, protection of personal data, academic freedom and many others as well as rights to solidarity. The Government intends that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK. This will no doubt be tested in the courts particularly under the emerging doctrine of domestic common law human rights:

> Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law. Others already exist in UK law, or in international agreements to which the UK is a party. As EU law is converted into UK law by the GRB, it will continue to be interpreted by UK courts in a way that is consistent with those underlying rights. Insofar as cases have been decided by reference to those underlying rights, that case law will continue to be relevant. In addition, insofar as such cases refer to the Charter, that element will have to be read as referring only to the underlying rights, rather than to the Charter itself. [paragraph 2.25]

6 THE ROLE OF SECONDARY LEGISLATION

It is clear that most of the laws will be in the form of secondary (delegated) legislation (SIs). Basically, under the doctrine of Parliamentary sovereignty delegated legislation has to be approved by Parliament although there are exceptions in some primary acts. Primary legislation sets out necessary procedures. In most cases 'approval' is signified by an absence of opposition. A variety of Parliamentary committees review delegated legislation. The WP speaks of 'policies' being delivered by SIs where that is justified [paragraph 3.9]. However, the WP is ambiguous on this and contains conflicting statements.

The House of Lords Select Committee on the Constitution has reported on the use of SIs under the GRB.[11] The Committee spelt out a difference between 'the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence' [paragraph 3.10]. Implementation of new policy should be achieved by primary legislation the Committee believed.[12] While there is inevitably a degree of discretion in how to undertake these tasks, 'the Government agrees that the purpose of the Great Repeal Bill and the secondary legislation is to convert EU law into UK law' [paragraph 3.10]. In paragraph 3.13 the WP stated that the Committee

[11] 'The "Great Repeal Bill" and Delegated Powers', Lords Select Committee on the Constitution, 9th Report of Session 2016–2017, 7 Mar. 2017, 10,http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf (accessed 24 May 2017).

[12] *Ibid*.

acknowledged that there could be no 'tight limit' to such delegated powers which will almost 'certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit'.[13] At paragraph 3.17 the Committee reported that delegated powers should be limited so that they should not be used for policy changes 'not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU'. It is unclear as of writing whether limits on delegated powers in section 2 European Communities Act 1972 will be preserved.

The Hansard Society has reported that the 'use of delegated legislation by successive governments has increasingly drifted into areas of principle and policy, rather than the regulation of administrative procedures and technical areas of operational detail … too much of the process of deciding where the line lies relies on 'gut feeling' and 'judgement' rather than objective criteria.[14]

The justification for using SIs under the GRB and not primary legislation are set out in the WP:

(a) matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations;
(b) adjustments to policy that are directly consequential on our exiting the EU; and
(c) to provide a level of detail not thought appropriate for primary legislation.

At paragraph 3.19 the WP reports that in the previous two Parliaments, an average of 1,338 (2005–2010) and 1,071 (2010–2015) SIs were made per year. A proportion of this secondary legislation, as it has been every year, was implementing EU law. The WP estimates that the necessary corrections to the law will require between 800 and 1,000 SIs [paragraph 3.21]. The Government proposes using existing types of SI procedure.[15] Powers will come into effect on approval of GRB and most will have to be effective before D-Day – 29 March 2019! Appropriate time limits will exist. There will be frenetic activity which the general election will undoubtedly exacerbate.

There is no doubt that the oversight and scrutiny of SIs by Parliament suffer from serious deficiencies. The Hansard Society (above) has outlined these.[16]

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13 *Ibid*., at 16 and 17.
14 Hansard Society, http://blog.hansardsociety.org.uk/taking-back-control-initial-thoughts-on-the-great-repeal-bill-white-paper/ and *see* https://www.hansardsociety.org.uk/projects/delegated-legislation (accessed 24 May 2017).
15 The various types of scrutiny procedure for statutory instruments are described in House of Commons Library note SN06509, available at 'Statutory Instruments', House of Commons Library Briefing Paper Number 06509, 15.
16 *See* Hansard Society, n. 10.

Where the consent of the House of Lords is required under the governing legislation the upper unelected House has had the temerity to reject draft instruments thereby preventing them becoming law even though approved by the House of Commons. This has been the subject of a recent report.[17]

In relation to the Commons, government has firm control over procedures and the timetable and may grant time for debates on an instrument under the negative resolution procedure where it agrees to this 'request' from an MP. 'In the last parliamentary session, MPs debated just 3% of the 585 negative instruments laid before them. And although the Leader of the Opposition and his front bench colleagues tabled 12 prayer motions for a debate, just 5 were granted.'[18] The Hansard report has examples of how the government may easily avoid effective scrutiny.

As well as the negative resolution procedure there is also a much rarer use of the affirmative resolution procedure where a measure has to be positively approved by a vote. These can prove very time consuming requiring a legislative committee or a debate on the floor of the House. Even if under GRB 'the volume of affirmatives were merely to double, it would have serious implications for the resourcing of the House, and Members' workloads'.[19]

There are also enhanced scrutiny procedures that may be used but the WP does not address these. These require enhanced consultation and committee procedures in both Houses which would obviously complicate the serious constraint of the Brexit timetable. The Hansard report is not impressed and states that the use of existing procedures will give the government a blank cheque in the legislative process in a system which amounts to a 'mess'.[20] 'It is also going to be difficult to assign a procedure to a [delegated] power during the … scrutiny process when it is not clear when and how the government may need to use it'[21] i.e. for policy changes or for technical implementation into UK law. 'Both categories would require a widely drawn power to facilitate substantive changes to policy, going well beyond a technical amendment.'

There will undoubtedly be numerous opportunities for legal challenge in the courts on the vires of SIs whether substantive, including the use of Henry VIII clauses, i.e. power conferred by primary legislation to a minister to repeal or amend primary legislation by SIs, and procedural ultra vires e.g. failing to consult. The SC has shown itself vigilant in reviewing SIs on substantive as well as procedural

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17 Cm 9177 Strathclyde Review: *Secondary Legislation and the Primacy of the House of Commons* (2015). The government decided not to act on the proposals which would have curbed the power of the Lords.
18 N. 10.
19 *Ibid*.
20 *Ibid*.
21 *Ibid*.

grounds.[22] Furthermore, the practice of gold plating, i.e. going beyond an EU measure to give additional features to domestic implementing laws, has been addressed.[23]

The period until 29 March 2019 is going to be a period of frantic lobbying, legislating and legal challenge.[24]

7 DEVOLVED ADMINISTRATIONS AND THE DEPENDENCIES

Chapter 4 of the WP covers devolution and the legislative programme. Existing frameworks for legislation at the UK or devolved levels will continue after 'intensive discussions' and 'close involvement'. 'We will work closely with the devolved administrations to deliver an approach that works for the whole and each part of the UK' [paragraph 4.4]. The Government expects a 'significant increase in the decision-making power of each devolved administration' [paragraph 4.5].

A commitment was given to engage fully with Crown dependencies, Gibraltar and overseas territories as the UK departs from the EU [paragraph 5.6].

The Editor.
24 May 2017.

Postscript

On 8 June the UK electors voted for a hung Parliament with no overall control for any party. Mrs May, if she survives as leader of the Conservatives, will have to rely upon the Norther Ireland Democratic Unionist party for a majority of at best and theoretically eight seats in the House of Commons – one seat still has to be declared as I write. This was the usually rock solid Conservative seat of Kensington and Chelsea where the vote counters (tellers) had to retire home because of exhaustion after an unusually close series of recounts through the night.

I pointed out the risk Mrs May was taking in calling the election in my introduction. The situation has exploded dramatically in her face. Her mandate for the Brexit negotiations – due to begin in the week commencing 19 June – is in tatters. Her position completely undermined. Her mantra of 'strong and stable leadership' appears ridiculous. There was no need for this election. As with David Cameron and his call for an EU referendum she has made a major miscalculation. What was that parting quip that Oliver Hardy invariably made to his chum Stan Laurel? The next editorial will deal with the aftermath and consequences of this result. Events will move with precipitate speed. Another general election in the autumn of 2017 is a distinct possibility.

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22 *R (Public Law Project) v. Lord Chancellor* [2016] UKSC 39; *R (Alvi) v. Secretary of State for the Home Department* [2012] UKSC 33; *R v. Secretary of State for the Home Department ex p Simms* [1999] UKHL 33.

23 *Nuclear Decommissioning Authority v. EnergySolutions EU Ltd* [2017] UKSC 34 – on gold plating.

24 On lobbying *see May Ensures Only Brexit Key Allows Entry*, Fin. Times (12 Apr. 2017).