



The Importance of the UK's Withdrawal Bill in the Brexit Negotiations with the EU

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European Union (Withdrawal) Bill 2017–2018 is the highest-level UK government document concerning the legal and administrative dimension of Brexit. The legal importance of the bill is grounded in its designed influence on the UK legal system. Its political importance stems from the UK's demonstrated readiness to leave the EU without a deal and from the polarisation of the country's politics on the issue. In the background of the legislative works are UK government efforts to persuade its EU partners to open talks on the future model of the EU-UK relationship.

The withdrawal bill is a top UK government priority, and consequently, it has been given a three-line whip as it winds its way through parliament. Drafted by the Department for Exiting the European Union, the bill was passed in the Commons on second reading on 11 September. The future act is to constitute the “legal backbone” of leaving the EU. The bill also serves as the focus of a fundamental political conflict, and consequently, of the debate on the model of future UK-EU relations. The bill also will be seen as an important message of the UK government's intentions in the Brexit negotiations. Adopting it in the bill's original form would create legal instruments enabling the UK's exit from the EU without a deal and render appeals on the protection of Union citizens' rights to EU law and institutions impossible. These clauses directly conflict with the EU's negotiation mandate.

Legal Meaning of the Bill. The bill aims to provide full compatibility between the UK and EU legal systems upon exit. At the same time, it would reinstitute full legislative and judicial sovereignty. The bill's legal construction prepares the UK both for exiting the EU without a deal or, alternatively, giving it flexibility in the implementation of concessions made during negotiations. The bill excludes a “soft Brexit” as understood in the EU-27 as a relationship based on the single market, or customs union membership. However, the bill allows for a “soft Brexit” as understood in the UK as an agreement with the EU that includes mutual concessions, instead of no-deal scenario.

The relation between the UK and EU legal systems has always been uneasy because of a basic inconsistency, if not conflict, between the fundamental principles about the UK parliament's legal sovereignty vs. the supremacy of EU law. The bill is designed to fundamentally reshape this relation. On exit day, the European Communities Act 1972 will be repealed and EU law voided. Simultaneously, existing EU laws will be incorporated into UK law and EU-derived British laws retained. The aim is that on exit day, this will eliminate gaps in the UK legal system. Such a solution would also support a presumption of compatibility between the UK and EU regulations at later stages. Formally, however, the incorporated legislation will make the UK parliament (or other UK bodies authorised by it) the only source of law. Moreover, the original EU legislation will be applied in the country in the form and wording present in relevant UK laws. Thus, the incorporated legislation will be open to any amendment UK lawmakers find appropriate. Such an approach is clearly visible in the Home Office paper on future immigration policy, leaked on 5 September by *The Guardian*.

The bill directly provides for excluding the UK upon exit from the jurisdiction of the Court of Justice of the European Union, as well as the application of the Union's Charter of Fundamental Rights. Application of the charter was substantially curbed by a protocol to the Lisbon Treaty. Nonetheless, since there has been a legal debate concerning the exact impact of the protocol, there are provisions contained in the UK bill to resolve the dispute. The bill also provides for supervision by UK supreme judicial bodies of the application of EU legislation in UK courts.

There also are several controversial provisions concerning the definition of "exit day" in UK law. First, the bill stipulates the UK exit date will be disconnected from the EU treaty date. Second, there might be different exit days for different UK laws. Third, the key decision(s) on the exit day(s) will be made by ministers of the Crown issuing acts of delegated legislation, and not by parliament itself.

The Bill and the Brexit Negotiations. As of September, the UK-EU exit negotiations were stagnating despite incremental progress in some policy areas. The first four rounds did not deliver decisive effects on any of the three "Stage One" priorities named in the EU mandate ("divorce conditions"). At the October summit, the European Council will assess the progress made so far and decide whether it has been sufficient to authorise "Stage Two" talks, concerning the future UK-EU relations, in parallel with "Stage One." Opening "Stage Two" talks remains a constant aim of the British side.

In this context, the bill demonstrates, first, the UK's determination to fully exit the EU. This approach is different from the EU mandate, for instance, in EU citizens rights' protection, which the Union seeks to extend indefinitely, and with the right of appeal to EU law and courts. Second, the bill demonstrates the UK's potential flexibility in defining implementation periods, transition periods, and cut-off dates. This flexibility depends on the bill's provisions, their application, and the date(s) used as a reference point after Brexit for recognising under UK law the established rights of EU citizens. Potentially, the UK exit day(s) might correspond to the EU treaty date, the date of issuance of the Article 50 letter, or the referendum day, or any other date or all of them, since multiple exit days are legally possible. From the British point of view, each one could be justified, since after referendum day EU citizens settling in the UK had to be aware that the country would eventually leave the EU.

Granting royal assent to the bill will signify an important change in the UK negotiation team. The political and parliamentary dimension of the talks will become less pressing, whereas the ministerial and bureaucratic dimension will increase. The bill provides for the wide use of secondary legislation (including secondary legislation changing primary legislation), which will doubtless be crucial in avoiding gaps or inconsistencies in UK law upon exit. However, the legislative powers delegated to ministers of the Crown will inevitably strengthen the position of the government vis-à-vis parliament: the government and opposition benches alike. Despite reservations made in the bill for parliament to approve or strike down ministerial regulations, the sheer number (estimated at 1,000 pieces) will make such a mission impossible. Effectively, the pressure on the UK government to constantly seek parliamentary support for their negotiation line will decrease, which might be serious relief for Prime Minister Theresa May, given the open disputes on Brexit in her cabinet and marginal parliamentary majority.

In the EU context, it is crucial for May to convince her EU partners to open the "Stage Two" talks. In the Conservative Party, there are conflicting views on Brexit and public challenges to the leadership of May and her Brexit minister, David Davis.¹ Starting the UK-EU talks on future relations would strengthen them both, and possibly legitimise the adoption of a more flexible approach to the "Stage One" EU priorities. The lack of European Council consent would considerably increase the risk of the negotiations permanently stalling. The bill proves that the UK government seriously considers both eventualities.

Perspectives. Passage of the bill through parliament constitutes a key test of the consistency of both the government and opposition benches. It will make parliamentarians take sides, and their decisions will not necessarily follow their respective party whips' preferences. The practice to now has been proving faith in the Tories' "confidence and supply" agreement with its coalition partner, the Democratic Unionist Party. Nonetheless, preserving party discipline will be increasingly challenging both to the Conservatives and Labour when amendments to the bill will be debated and voted in committee, and on third and final reading.

From the EU's perspective, the bill will be of interest as a clear demonstration that the UK has undertaken serious preparations for a no-deal scenario. Simultaneously, the bill will empower the UK government to flexibly negotiate and implement a deal. Thus, the UK seems to communicate that the conditionality approach (i.e., progress in negotiations is strictly conditional on meeting EU-established criteria), which the EU grew accustomed in past talks with accession countries, will not be effective in the UK-EU exit talks. In conjunction with May's Florence Speech, the bill signifies the need for a new political opening in the negotiations, one that can only be provided by the European Council. From the Polish perspective, it is worth recognising that in case of a deal, the bill will be instrumental in protecting the rights of Polish citizens in the UK. However, in a no-deal scenario, it might easily be used to make their position considerably worse than today.

¹ P. Biskup, "Theresa May's Florence Speech," *PISM Spotlight*, no. 54/2017, 26 September 2017.