



ERG: The European Union (Withdrawal) Bill

The Bill will place EU laws already in force in the UK within the ambit of UK parliamentary scrutiny for the first time.

- **This is a necessary piece of legislation to ensure an orderly Brexit. This Bill is consequent on the decision already taken in the referendum and in Parliament to leave the EU.¹**
- **The alternative to transposing EU law into UK law would be “legal chaos”, given the amount of EU law that has accrued there is no alternative but to “deal with deficiencies” by way of delegated power.**
- **Without this Bill the UK would still leave the EU, but without any continuity of law, including EU social and employment law, a chaotic irresponsible Brexit.**
- **Labour’s decision to vote against it is irresponsible, a breach of trust with their voters and a vote to create chaos.**

Parliamentary scrutiny

- **Many of these laws will need amending so that they work in UK domestic law. The power to amend is subject to Parliamentary scrutiny and time limits:**
 - **Sunset clause:** The power to amend ends two years after exit.
 - The most important delegated powers set out in (Schedule 7 1 (2)) can only be exercised by **affirmative resolution of both houses**.
 - The devolved administrations have similar powers to amend EU laws to the degree they had the day before exit.
- **S.2 of the European Communities Act 1972 was in effect the largest HVIII clause in history bringing in c.20k EU laws without any scrutiny.**

This Bill is not:

- **A vote on whether or not to stay in the EU (decision already taken)**
- **A Vote on future UK policy areas (for future Bills)**
- **A Vote on any Withdrawal agreement or future EU free trade agreement (They don’t exist)**
- **A Vote on devolution of EU policy areas (the Bill freezes it for now)**

¹ Christopher Howarth, ConservativeHome, 5 September 2017 “The European Union (Withdrawal) Bill is necessary – and ultimately uncontroversial”

<https://www.conservativehome.com/thecolumnists/2017/09/christopher-howarth-the-european-union-withdrawal-bill-is-necessary-but-ultimately-uncontroversial.html>

What the Bill does:

The Bill places all current EU law into UK law. Many but not all of these laws will work in UK law without amendment. The Bill therefore introduces a power to amend these laws. The power lasts for a maximum of two years after the day of UK exit (Clause 7 (7)) and is subject to Parliamentary control as set out in Schedule 7 (p.39).²

The Bill also repeals the European Communities Act 1972 creating legal certainty over the supremacy of the UK Courts.

EU laws in force in the UK had no scrutiny by the UK Parliament

All EU regulations in force in the UK have had no scrutiny by the UK Parliament. All EU directives had very little scrutiny as the UK Parliament has no power to object to them and limited leeway in the form of implementation. The Bill will therefore place these laws within the ambit of UK parliamentary scrutiny for the first time.

The biggest Henry VIII power in history: Section 2 of the European Communities Act

The European Communities Act 1972³ contained the power to allow Ministers to legislate via statutory instrument as well as give force to ECJ judgements and regulations without any further need for legislation. As the House of Commons's briefing note explains "*As delegated powers have been central to the legislative scheme used to facilitate the UK's EU membership, namely through section 2(2) of the ECA.*"⁴

EU legislation makes up a large proportion of law in force in the UK. The exact % has been a matter of dispute ranging from 7% to 80%.⁵ Nick Clegg counting primary legislation stated it was 7% (or 50% on another occasion), Business for Britain claimed it was 64.7%. Given the varying importance of different laws a precise figure will remain elusive. These laws will now be for the UK Parliament (and/or devolved administrations where appropriate) to scrutinise.

Labour Party position:

Labour will be on a three line whip to vote against the Bill. A Labour spokesman confirmed:

"Labour fully respects the democratic decision to leave the European Union, voted to trigger Article 50 and backs a jobs-first Brexit with full tariff-free access to the European single market."

² European Union (Withdrawal) Bill; <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>

³ European Communities Act 1972; <http://www.legislation.gov.uk/ukpga/1972/68/contents>

⁴ House of Commons Library February 2017; <http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf>

⁵ Christopher Howarth blog post 2 November 2015; <http://christopherhowarth.uk/what-of-uk-law-comes-from-the-eu/>

“But as democrats we cannot vote for a bill that unamended would let government ministers grab powers from parliament to slash people’s rights at work and reduce protection for consumers and the environment.”

“The government’s EU Withdrawal Bill would allow Conservative ministers to set vital terms on a whim, including of Britain’s exit payment, without democratic scrutiny,”

“Nobody voted in last year’s referendum to give this Conservative government sweeping powers to change laws by the back door.”⁶

Labour Party leader Jeremy Corbyn MP has previously said they would vote against the inclusion of a Henry VIII power.

“We’re not going to sit there and hand over powers to this government to override parliament, override democracy and just set down a series of diktats on what’s going to happen in the future. We’d be failing in our duty as democratically elected parliamentarians if we did that.”

Corbyn said the fact that the constitution allowed these sorts of powers to survive was “a wondrous thing”, but “they’ve got to stop”.⁷

The Bill’s Henry VIII powers:

Clauses 7-11 “Dealing with deficiencies” arising from withdrawal and Schedule 7 on “scrutiny of powers to deal with deficiencies”

The powers to correct EU legislation is contained in Clauses 7-11 of the Bill. For instance:

- Removing redundant EU laws (7 (2) (a))
- References conferring powers on EU agencies (7 (2) (b))
- References to reciprocal arrangements with EU entities (7 (2) (c))
- Prevent breached in international obligations (Clause 8)
- A catch all power for the **“implementing the withdrawal agreement”** that expires on exit (Clause 9)
- Powers for devolved administrations are included in clauses 10 and 11.

The regulations that correct deficiencies in the transposition of EU law have the force of a UK Acts of Parliament.

Affirmative procedure or by Annulment

Schedule 7 to the Bill states that the most important regulations must be made by affirmative resolution of both houses of parliament.⁸ In other cases (Sch 7 1 (3)) would come into force but is subject to annulment by a resolution of both houses.

⁶ FT, 5 September 2017: <https://www.ft.com/content/dceb5a46-920c-11e7-bdfa-eda243196c2c>

⁷ Guardian quoting a 25 March interview of ITV’s Peston on Sunday:
<https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill>

⁸ For instance: Criminal offences, creating a new public authority, creating a new power to legislate.

In urgent cases there is an override contained in (Sch 7 (3)) that would allow a regulation that is considered as one of the important areas set out in Sch 1 (1) can come into force immediately but will then be cancelled if resolutions are not then approved within one month.

Power to implement any Withdrawal agreement

The power to make regulations to implement the withdrawal agreement allows flexibility needed in the negotiations. The Rt. Hon David Davis MP has stated that:

*“The Repeal Bill will include powers for ministers to make some changes by secondary legislation, **giving the Government the flexibility to take account of the negotiations with the EU as they proceed.** It will also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level, and amendments are required to ensure the law operates effectively at a domestic level. The ECA created a power which currently exists for Ministers to make secondary legislation to give effect to EU law.”⁹*

EU laws that potentially need transposing

Policy Area	EU Legislation in force
General, financial and institutional matters	1437
Customs Union and free movement of goods	1138
Agriculture	3055
Fisheries	786
Freedom of movement for workers and social policy	676
Right of establishment and freedom to provide services	432
Transport policy	723
Competition policy	574
Taxation	190
Economic and monetary policy and free movement of capital	564
External relations	4251
Energy	379
Industrial policy and internal market	1520
Regional policy and coordination of structural instruments	359
Environment, consumers and health protection	2210
Science, information, education and culture	450
Law relating to undertakings	116
Common Foreign and Security Policy	639
Area of freedom, security and justice	796
People's Europe	24
Total	20,319¹⁰

What is a Henry VIII power?

⁹ <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>

¹⁰ EU-Lex, EU laws in force, the separate EU total of EU regulations is far larger; <http://eur-lex.europa.eu/browse/directories/legislation.html>

The House of Lords Select Committee on the Scrutiny of Delegated Powers defined a Henry VIII clause as:

“a provision in a Bill which enables primary legislation to be amended or repealed by subordinate legislation, with or without further Parliamentary scrutiny.”¹¹

The most extreme recent proposed Henry VIII clause was the 2006 Legislative and Regulatory Reform Bill introduced. Clause 1 provided that a Minister could, by Order, make provision for ‘reforming legislation.’ This was subsequently dropped after being dubbed the “Abolition of Parliament Bill”.¹² However, delegated legislation is an accepted part of the UK legislative framework and has procedures to scrutinise them, for instance: *“the Lords Secondary Legislation Scrutiny Committee considers every negative and affirmative SI (or draft SI) laid before Parliament - about 1200 per year.”¹³*

The Hansard Society has calculated that in the 2015-16 parliamentary session:

- “Of 23 government Bills, 16 contained a total of 96 Henry VIII powers to amend or repeal primary legislation.
- 65 of these powers were included in Bills on introduction. A further 31 were added during their progress through Parliament.
- 98 statutory instruments (12.9%) amended primary legislation. Over half of which were subject to the least stringent form of parliamentary control, the negative scrutiny procedure.”¹⁴

Why are they called Henry VIII powers?

The ‘Henry VIII’ epithet comes from the 1539 Statute of Proclamations (repealed 1547) which gave King Henry VIII power to legislate by proclamation.

The Statute, passed by Parliament stated that:

“The King for the time being, with the advice of his council, or the more part of them, may set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as though they were made by act of parliament; but this shall not be prejudicial to any person’s inheritance, offices, liberties, goods, chattels or life; and whosoever shall willingly offend any article contained in the said proclamations, shall pay such forfeitures, or be so long imprisoned, as shall be expressed in the said proclamations; and if any offending will depart the realm, to the intent he will not answer his said offence, he shall be adjudged a traitor.”

While the idea of ruling by decree fits the image of the monarch it can be noted that it was somewhat tempered by the caveat for individual rights.

¹¹ First report of 1992-93 [HL 57 1992-93, para 10].

¹² Richard Gordon QC “Why Henry VIII clauses should be abolished”; <http://www.publiclawproject.org.uk/data/resources/220/WHY-HENRY-VIII-CLAUSES-SHOULD-BE-CONSIGNED-TO-THE-DUSTBIN-OF-HISTORY.pdf>

¹³ Parliament: Delegated legislation; <http://www.parliament.uk/about/how/laws/delegated/>

¹⁴ The Hansard Society. “Parliament and Delegated Legislation in the 2015-16 Session”; <https://assets.contentful.com/u1rlvbs33ri/4bENE9GGcg2K2W8soKyeyK/f3137f273a18b43f639833e21be98f75/Westminster-Lens-Hansard-Society.pdf>

Criticism of modern “Henry VIII” powers

Lord Judge in an interesting 2016 speech argued that

“When we speak of Henry VIII clauses, we believe we are referring to the Parliament which enacted that statute and vested arbitrary and dictatorial powers to that terrifying monarch. In doing so, we insult the memory of many brave, but unknown, because this is all pre-Hansard, members of the Commons. I venture to suggest that they would have been appalled at the modern legislative habit of bestowing what we call Henry VIII powers on any old Secretary of State, and insulted that we dismiss them in this way.”¹⁵

He went on to calculate that:

“Since 1950, sixty-five years, some one hundred and seventy thousand statutory instruments, prepared not by Parliamentary Counsel but by government departments, exercising powers granted by legislation, have been laid before Parliament. In that time seventeen, not seventy, have been rejected by one or other house.”

It is important to note however that these criticisms are long standing criticisms of a widely used constitutional device and are not related to this Bill.

What would happen if there were no Henry VIII powers?

It is not clear at present what proportion of the current EU law will require amending. If every law required amendment:

- **An individual vote:** An individual vote on every 20,319 EU laws would take over 200 days of Parliamentary time, sitting 24/7.
- **A debate on every page of law?** In 2005 Open Europe calculated there were already 666,879 pages of law since its inception in 1957. If Parliament discussed every piece 24/7 for a year it would give them 47 seconds per page.¹⁶
- **Abandon all the EU law? Legal Chaos?**
Stephen Laws QC, the First Parliamentary Counsel 2006-2012, has said that

*“It would be constitutionally irresponsible for the Government to take an irrevocable step to begin a process without being wholly confident that it will, in practice, be able to secure the legislation to complete it in an orderly way and on time. The accepted constitutional responsibilities of the Government in the unwritten, political constitution certainly include avoiding the creation of chaos in the UK legal system. Nor should the UK put itself in a position where it **might be forced to make concessions in the negotiations** to secure more time for an orderly implementation.*

“Legal chaos would result if an Art 50 notification expired without new UK legislation in place because directly applicable law would cease to apply in the UK immediately on the exit that follows automatically on the expiry of the notification. Directly applicable law only

¹⁵ Lord Judge, speech, 12 April 2016, King’s College London;
<https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>

¹⁶ <http://researchbriefings.files.parliament.uk/documents/RP10-62/RP10-62.pdf>

applies in EU member States. Furthermore, there is a strong legal argument that implementing UK regulations under s. 2(2) of the 1972 Act would also cease to have effect in relation to times after exit. The power to make those regulations is contingent on the existence of the obligation on the UK, as a member State, to maintain laws giving effect to the relevant EU rules. Once the obligation expires with the termination of membership, it is as if the power to make the regulations is repealed. The effect of repealing a power under which regulations are made is that the regulations cease to have effect for the future. Section 16 of the Interpretation Act 1978 saves the operation of the regulations in relation to pre-repeal cases, but not their continuing effect. Only a Bill passed before exit could prevent that default rule from applying.”¹⁷

¹⁷ Stephen Laws QC, Stephen Laws was the First Parliamentary Counsel 2006-2012 and is an Honorary Senior Research Associate, University College London, and Senior Associate Research Fellow, Institute of Advanced Legal Studies; <https://ukconstitutionallaw.org/2016/07/18/stephen-laws-article-50-and-the-political-constitution/>