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the Great Repeal to the Contingency Plan

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As analysed in the first Part of this Post, the EU Withdrawal Act 2018 offered a hard response to the repeal of EU law, while recognising some leeway to adjust the great repeal operation to the specificities of individual sectors and wider policy needs. This second Part will focus on the apparent revision of that strategy in light of the possible Withdrawal Agreement between the United Kingdom and the European Union.

3. Freezing the Repeal? The Contingency Plan Operation

Since November 2017 Government committed to the preparation of an EU Withdrawal Agreement Bill which should implement the Brexit agreement. On 24 July 2018, the Government published the White Paper setting its expectations and commitment to the adoption of a Withdrawal Agreement Bill. As negotiations are pointing to a transition period for the implementation of the Agreement, the White Paper builds upon the need to introduce such a period.

After less than one month from its adoption, the EU Withdrawal Act 2018 seems not to be the best option for managing the regulatory transition to Brexit. The patchy construction of the way out from the EU turns to a different strategy, which saves the application of EU law instead of domesticating it, at least for a while.

Based on (Article 121 of) the Draft Withdrawal Agreement, the White Paper provides for an implementation period running from exit day to 31 December 2020, where EU law shall continue to

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apply in the same way as under the European Communities Act (ECA) 1972. This means that the Withdrawal Agreement Bill should amend the EU Withdrawal Act 2018 and save the ECA 1972 for the time of the implementation period, whereas the domestication of EU law regime would not come into force before the 21 months of the implementation period (see Para 69, the White Paper). According to Paragraph 61 of the White Paper, the ECA 1972 shall be repealed on exit day, but the Withdrawal Agreement Bill will selectively save the effects of the 1972 Act and accommodate the new UK's relationship with the EU.

Alternative
Dec 1, 2018

The EU Withdrawal Act 2018 shall coordinate with the Withdrawal Agreement Bill. The White Paper proposes to reshuffle the legal effects of Brexit, by revising and postponing the application of the EU Withdrawal Act 2018. Yet, the effects of this strategy are not straightforward.

According to Paragraph 71 of the White Paper, the domestication of EU law shall also include the law provided during the Agreement's implementation period. This means that the Henry VIII powers of the Government to deal with deficiencies under the EU Withdrawal Act 2018 shall cover the deficiencies arising from both withdrawal (as is provided by the EU Withdrawal Act 2018) and the end of the implementation period (as should be provided by the EU Withdrawal Agreement Bill).

Paragraphs 72-73 of the White Paper pursue this goal through the extension of the guillotine clause sunseting the delegated power of Government to deal with deficiencies in the domestication of EU law. The guillotine clause changes from two years after exit day (29 March 2021), to two years after the end of the implementation period (31 December 2022). As the EU Withdrawal Act ill-defines the Government's powers to amend primary legislation and substantially founds its exercise on the Ministers' subjective evaluations of appropriateness for their action, what EU law will be domesticated and what corrections will reasonably occur is rather unpredictable.

In addition, the Henry VIII power to implement the Withdrawal Agreement on or before exit day as it is currently provided by Section 9 of the EU Withdrawal Act 2018, may become redundant. Problems of coordination with the EU Withdrawal Agreement Bill may arise, as Ministers may consider appropriate

to introduce some statutory instruments that might not be consistent with the Bill's approach. The White Paper does not hint at the prorogation of this Henry VIII power after exit day, we should therefore assume that it will be up to the EU Withdrawal Agreement Bill to identify new (different?) instruments to implement the Agreement.

This softer approach to Brexit promises two more years of EU law in the UK, but upon a critical condition: the success of the negotiations and the stipulation of the Agreement between the UK and the EU. The White Paper is based on the confidence that a deal with the EU shall be struck, but so far, the negotiations have not been able to ensure that this will happen. This conditionality has severe effects on legal certainty. Conditionality does not exclude that the harder regulatory approach designed by the EU Withdrawal Act 2018 may still be necessary. Under this conditionality the EU Withdrawal Act 2018 becomes the contingency plan.

Paragraph 75 of the White Paper considers that if no deal is reached with the EU, the EU Withdrawal Act 2018 shall apply from exit day. In the best-case scenario, the implementation of EU Withdrawal Act 2018 shall be frozen for two years. In the worst-case scenario, it shall apply immediately. This uncertainty results in the mobilisation of public resources. Statutory instruments shall continue to be frantically adopted, even if they might not apply before 2021.

The question about the repeal of EU law therefore remains unanswered yet. As the strategy has changed, the EU Withdrawal Act 2018 has been politically downgraded to an emergency plan to be applied only if better solutions cannot apply. The muddy political waters do not rule out any emergency scenario and for the time being, doom the application of the EU Withdrawal Act 2018 to remain uncertain.

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