

## Why getting rid of EU retained law is a massive red herring

**This is a very interesting 2022 blog by Nick Tyrone, including some sensible comments about gold plating EU Directives.**

I have a relatively long history with pro-Europeanism, one that has taken me to some strange places. During the parliament of 2010-2015, I organised a lot of events on the European question, often bringing together both sides of what would formally become Remain and Leave as the referendum of 2016 dawned. I recall thinking back then that the Leave side were well-organised and the Remainers were not particularly. The latter group was a little lackadaisical at the time, assuming that the country would never, could never do anything as stupid as voting to Leave the EU.

After June 2016 and Leave's victory, I wondered what to do with myself in regard to the UK's relationship with the European Union. It wasn't long before a lot of energy in the pro-European world got poured into having a second referendum, something I felt would be a bad idea. I just couldn't see a way of avoiding leaving, at least for a period of time, and even a soft Brexit seemed unlikely to me.

For all the years leading up to the referendum that I had spent listening to the Leave side give their arguments for why Brexit would be a good thing, I found almost all of it could be easily intellectually dismissed: I knew the EU would not fold upon the UK voting to Leave, nor would some magical trade deal with the US emerge, nor would there be significant net Treasury savings as a result of Brexit. But there was one thing I couldn't totally disregard, simply because it was too complex a topic to do so with: the idea that there was a raft of EU derived regulation that was making the UK economy less efficient than it might otherwise be. Yes, you guessed it, this is the mighty "EU red tape" we're talking about here.

As I say, I couldn't totally dismiss this idea back then. After all, the EU Directives are constructed to cover a very large area, one filled with different cultures, varying ways of doing things and with large swings in economic standing from country to country. It wasn't unquestionable that adopting this one size fits all way of doing things meant that sometimes the UK would have been forced to some degree by the bounds of EU membership to regulate something in a fashion that wasn't ideal for the country.

I became the Director General of the Red Tape Initiative in April 2017 and set out to find any of this "EU red tape" I could find. I was determined to locate all of it that was out there. What I discovered, over a two year process, was the following:

1. There is very, very little regulation inherited from the EU that is actively harmful
2. Of what there is that could ideally be removed, none of it is particularly economically significant
3. Pretty much all of the EU derived regulation is well constructed, and in fact, most of the times when it ends up being in any way harmful for the UK, it is because of the poorly thought out way that the Directives have been translated into UK law.

Now seems like a good time to explain something: the EU Directives are created by the EU Commission and then debated and voted on in the EU parliament before becoming EU law. It is then up to each national government to decide how to translate what is contained in the

Directive into national law. Usually, the Directives suggest a range of acceptable measures in order to be flexible.

Perhaps you've heard of the term "gold plating"? This is what often happened to the UK translations of EU Directives - instead of taking the lightest possible approach the Directive required to be fulfilled, the UK tended to take the harshest, most punitive interpretation of the Directives. Why? That's a whole other article, but know that the body that dealt with scrutiny of EU Directives and how best to translate them into UK law was run for years by arch-Eurosceptic Bill Cash.

The question some of you might now have for me is this: surely there was something you found in your quest for EU red tape that was really, really bad? At least one EU Directive that got translated into UK law over the 47 years we were in the bloc had to be terrible, ridiculous, awful, at least one in the column for the Brexiters, right?

No, not really.

As a means of demonstrating this, I will take you through what I think was the worst EU Directive I found, at least from a UK perspective. I think that will hopefully shed some light on just how much of a red herring this government is chasing in thinking there are vast supply side reforms available to the UK from eliminating retained EU derived regulation.

## **Welcome to the Mortgage Credit Directive**

The EU Mortgage Credit Directive (Directive 2014/17/EU) was voted into EU law on February 4, 2014. The Directive had two intentions: one, to provide the EU-wide mortgage credit market with a greater and more uniform degree of consumer protection and two, to foster a single market for mortgages. It applies to all loans made to consumers and businesses for the purpose of buying residential property and includes the following provisions:

- An obligation for lenders to provide clear and detailed information on loan conditions to consumers
- An obligation for lenders to assess the creditworthiness of consumers according to common EU standards
- Common quality standards and business conduct principles for all EU lenders
- The right for consumers to repay credit earlier than determined in a contract
- An EU passport scheme that allows credit intermediaries authorised to operate in any EU country to deliver services across the EU

The UK translation of the MCD is odd and unlike what was usually the case, contains no gold plating. In fact, a lot of the customer protection stuff (notably the right to repay credit early) was greatly watered down. It was actually put into UK law via a statutory instrument as opposed to part of primary legislation (it's a change to the Financial Services and Markets Act 2000 which itself was amended via the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001).

Now, some of the above provisions of the MCD probably sound good to you. Firms having to be clearer with consumers about what they are signing up to is a plus and trying to create a more competitive mortgage market by making it much more possible for firms to trade across borders is also good, at least I would argue that it is. However, the MCD is bad for the UK for several reasons. One is that it causes those in the building trade who are essentially builders and not bankers, but who seek to make it possible for people to buy their houses under shared equity schemes to have to endure the unnecessary bureaucratic burdens of being regulated by the FCA. It makes it difficult for small building firms to break earth because in order to do so they have to enter into the somewhat specialised sector of shared equity via the bureaucratic burden of FCA regulation created by the MCD.

The MCD also widened the scope of bureaucracy to include any possible interpretation of what constitutes a mortgage. Article 4 (21) (a)(i) of Part 2 of the MCD Order 2015 (page 32 of the Order) appears by amendment to have delimited the lending security from only a *first* mortgage to include *any* mortgage, thus bringing into the regime of regulated mortgage contracts under the remit of the FCA any shared equity provided by a builder in addition to the buy-to-let purchaser's "ordinary" or first mortgage, by defining the shared equity contract as a form of "second charge" mortgage.

This makes house building much more difficult without creating any greater oversight or other benefit. It is the very definition of red tape: something that creates bureaucratic burdens without making anything safer, cheaper or better.

The way to fix this within UK law post-Brexit is very simple: you take all of this out of FCA oversight by one, reverting the 2001 Order to its original wording prior to its being amended by the 2015 Order and then adding a new, post-Brexit version of Article 61 which also has a "for the avoidance of doubt" provision which makes it clear that shared equity provided by the builder of a house is expressly excluded from the definition of a regulated mortgage agreement. That's it, the MCD expunged from UK law.

Okay, so the real question is, what would the economic effect of making the changes to UK law above be, once the EU derived regulation is done away with? In reality, not a lot and that's being as generous as I can be; in truth, losing the MCD from UK law would probably have zero economic effect. This is because in theory, removing all traces of the Mortgage Credit Directive should help stimulate house building in the UK, but of course, the main thing holding house building back in this country is not the regulation surrounding it but rather that there is a large political problem attached to house building that has nothing to do with regulation. Houses don't get built in the UK at nearly the rate that is necessary because of a combination of shire Tories not wanting them anywhere near them, urban lefties uniting against any new development for supposed green/community cohesion excuses, and basically it not being in any party's political interests to actually build new homes as opposed to just talking about doing so in vague terms. Removing the MCD restrictions would matter only if they were the only or even chief impediment to house building, when they probably wouldn't even make a list of the top 10 obstructions to development in the UK.

In conclusion, getting rid of all traces of the Mortgage Credit Directive is a good idea now that we're out of the EU, but the actual affect on house building in this country by doing so would be extremely minimal due to the fact that other, much larger factors are holding back house building. As a result, the economic result of doing this would be pretty much nil. And

remember, *this is the most intrusive, worst from a UK perspective EU Directive I could find in two years of looking.*

I have done the work, put in the hours and discovered that the ability to actively change the UK economy for good by eliminating EU regulation is almost non-existent. The one big exception to this is in the financial sector, which I didn't cover, but in any of what one might refer to as "normal" sectors of the economy - where a good or service is being sold to individual customers - the effect of losing EU regs wouldn't be positive and in fact, if it was done badly via sunset clauses or any other rash means, it would almost certainly have a negative economic effect via confusion and uncertainty.

The government seems to hang a lot on the idea that eliminating EU derived regulation will unlock billions from the economy. They are deluding themselves and the British public. While I never thought any regulatory upside from Brexit would be worth trading in the vast advantages of EU membership, it is still galling to know that even this small "Brexit benefit" is in fact non-existent.

Nick Tyrone