



## BRIEFING PAPER

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# European Union (Withdrawal) Bill

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### European Communities Act 1972.

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Make provision in connection with the enlargement of the European Communities to include the United Kingdom, together with (for certain purposes) the Channel Islands, the Isle of Man and Gibraltar.

Chapter 68.

17th October 1972.

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## Summary

The *European Union (Withdrawal) Bill* (the EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the *European Communities Act 1972* and removing the competence of European Union institutions to legislate for the UK. As such, the EUW Bill has been referred to as “the Great Repeal Bill”. The Bill provides for a complex mixture of constitutional change and legal continuity.

The EUW Bill follows the referendum result in June 2016, and the triggering of Article 50 on 29 March 2017 pursuant to the *European Union (notification of Withdrawal) Act 2017*. It is the most significant constitutional bill which has been introduced by the Government since the Bill for the *European Communities Act* itself in 1972.

The second reading debate on the EUW Bill will be held on 7 and 11 September 2017 in the House of Commons. The EUW Bill extends to England and Wales, Scotland and Northern Ireland. Regulations under clause 7 and 17 can also extend to Gibraltar.

### Taking back control

The Bill is a response to the decision taken by the electorate of the United Kingdom on 23 June 2016 to leave the EU. One of the stated aims of the successful campaign to leave the EU was to enable domestic political institutions to “take back control” of the laws that applied in the UK.

Clause 1 of this Bill repeals the *European Communities Act 1972* on the day that the UK leaves the EU. It returns to Parliament sole competence to legislate over policy areas where such competence is currently ceded to or shared with the EU.

The Bill provides that after exit day EU law no longer has supremacy over legislation passed by the UK Parliament and rulings made by UK courts. Laws made by Parliament post-Brexit will no longer be subject to the principle of the supremacy of EU law. It provides for legal certainty by establishing a mechanism to retain, for the time being, the corpus of EU law which presently applies to the UK, but domestic courts will, when interpreting retained EU law, no longer be bound to follow the judgments of the Court of Justice of the European Union handed down after exit day (clauses 5 and 6).

### Legal continuity

The Bill is designed to provide legal continuity during Brexit by copying over the entire body of EU law onto the UK’s post-exit statute book. Without the legislation, huge holes would open up within the statute book on exit day. In order to provide such stability, the Bill knits together a new post-Brexit constitutional and legal framework to replace that which has governed the status of EU law in the UK for the last 45 years.

The Bill creates a new category of domestic law for the United Kingdom: retained EU law. Retained EU law will consist of all of the converted EU law and preserved EU-related domestic law which was in force on the day before the UK left the EU. Some elements of EU law are expressly not to be retained, for example, the rights under the Charter of Fundamental Rights (clauses 2, 3, 4 and 5). Retained EU law may subsequently be amended, replaced or repealed by the UK Parliament.

The scheme’s approach to continuity relies on the creation of novel legal concepts that will become major new features of the post-exit day legal landscape. These novel

concepts, such as retained EU law, EU-derived domestic legislation, direct EU legislation, the supremacy of EU law are familiar in the sense that they are based on elements of our current arrangements, but will operate in ways that are fundamentally different from the concepts they will replace. The courts will eventually have to interpret these concepts and to decide how they fit within the exiting constitutional framework

### **Uncertainty and complexity**

Secondary legislation, under powers delegated to Ministers by the Bill, is central to the scheme of the Bill. Both the correction of retained EU law, to the extent that it functions effectively after exit day, and the implementation of any agreement to withdraw from the EU will be achieved through secondary legislation to be enacted under powers in the Bill. Seven further bills, each intended to implement substantive policy changes in UK law following withdrawal from the EU, were announced in the Queen's Speech in June 2017: it is anticipated that these and other "Brexit Bills" will also amend or replace retained EU law and implement the withdrawal agreement (assuming there is one) in specific policy areas.

Secondary legislation, also known as delegated legislation, can be used by the Government to make changes to the law using powers delegated by an act of Parliament. The use of secondary legislation provides flexibility in content and in timing. It also provides for some confidentiality in the exit negotiations. Under the provisions of the Bill, the Government will have the capacity to use secondary legislation to enact some aspects of the withdrawal agreement quickly, rather than having to use the more lengthy primary legislation procedures.

The Bill provides the legislative mechanisms to create the post-Brexit constitution and statute book rather than the substantive answers to questions as to what these will look like. These questions can only be answered as and when:

- the content of the withdrawal agreement (currently being negotiated) is known,
- any transitional arrangements are agreed,
- the Brexit Bills are published, and
- the statutory instruments that change retained EU law are produced.

The delegated powers within the Bill have attracted some comment for their wide-reaching nature. The Bill gives the Government powers to amend, if certain conditions are met, all retained EU law, including retained EU law which has been implemented in the UK through primary legislation. One of the main powers, in clause 7, is designed to enable the Government to change retained EU law so as to ensure that it operates effectively outside the EU. The power can also be used to change primary and secondary legislation that is not retained EU law, so long as the purpose of the change is to resolve a deficiency of retained EU law. The power to use of secondary legislation to amend primary legislation is known as a "Henry VIII" power.

Although many of these changes are likely to be technical in character, the way in which the powers are drafted does enable substantive policy changes to retained EU law. For example, it would be possible to replace redundant law with new rules and standards or create new public authorities to take on functions previously held by EU institutions (clauses 7 and 8).

Many of the changes to UK law required to implement any withdrawal agreement will be passed under this Bill through secondary legislation. Enacting these provisions would

grant the Government the legal authority to legislate for the implementation of the withdrawal deal in domestic law, subject to existing arrangements for parliamentary oversight of delegated legislation. This could, for instance, include any arrangements agreed on the rights of EU nationals.

The discretion the Bill gives to the Government to amend retained EU law by secondary legislation is necessarily very broad, since the provisions preserved and converted by other parts of the Bill may have to be amended significantly to give effect to the withdrawal agreement (clause 9).

There has been comment on the volume of secondary legislation that will be needed to implement Brexit. Scrutiny of all the regulations made under this Bill will be a legislative challenge on an unprecedented scale. There are estimated to be over 12,000 EU regulations to be adapted into UK law, some of which will require corrections to ensure there are no deficiencies in domestic legislation upon our exit from the EU. Further primary legislation (the Brexit Bills) and secondary legislation under powers claimed in those bills will also be required to implement the withdrawal agreement.

### **Devolution**

At present the devolved legislatures cannot legislate contrary to EU law. The Bill changes this restriction. Post-Brexit the devolved legislatures will not be able to legislate contrary to *retained* EU law (clause 11).

This may not amount to a major change in practical terms. However, in constitutional terms the basis of the restrictions will have changed. While currently the restriction is based on each devolved legislature being in a Member State of the EU, this Bill provides that, post-Brexit, the restriction would instead only be based on an Act of the UK Parliament.

Without this change, once the UK is no longer a Member State the devolved legislatures would be able to legislate in areas currently covered by EU law that was within devolved competence, such as agriculture. Seen in this way, the Bill effectively re-reserves to the UK Parliament these areas of competence, within competences which have otherwise been devolved.

# 1. Introduction

The [\*European Union \(Withdrawal\) Bill 2017-2019\*](#) was introduced to the House of Commons on 13 July 2017. It is due to have its second reading debate on Thursday 7 and Monday 11 September 2017. It is unquestionably a Bill of first class constitutional importance. Its committee stage will be taken in Committee of the whole House.

The Bill:

- repeals the *European Communities Act 1972* (ECA) on the day that the UK leaves the European Union - **clause 1** (section 2 of this briefing);
- retains domestic primary and secondary legislation that give effect to EU law obligations - **clause 2** (section 3 of this briefing);
- converts existing EU law that applies in the UK into domestic law - **clause 3** (section 3 of this briefing);
- saves rights based in EU law - **clause 4** (section 3 of this briefing);
- creates a body of law called “retained EU law”, which is made up of both converted and preserved EU law (section 3 of this briefing);
- exempts some EU law from being converted into domestic law – **clause 5** and **Schedule 1 and 6** (section 4 of this briefing);
- provides a number of instructions to the courts as to how retained EU law should be interpreted - **clauses 5 and 6** (section 5 of this briefing);
- creates a power to enable ministers to use secondary legislation to correct “retained EU law” in order to deal with any deficiencies arising from Brexit - **clause 7** (section 6 of this briefing);
- creates a power for ministers to implement the withdrawal agreement via secondary legislation - **clause 9** (section 7 of this briefing);
- creates a series of other delegated powers to enable government to address the legislative consequences of exiting the EU through delegated legislation (section 8 of this briefing);
- provides the parliamentary procedures that will apply to the delegated legislation made under the powers in the Bill – **Schedule 7** (section 9 of this briefing);
- makes changes to the primary legislation underpinning the devolution statutes to limit the power of devolved legislatures to amend retained EU law - **clause 11** (section 10 of this briefing);
- provides for some of the arrangements relating to the financial implications of the provisions in the Bill (section 11 of this briefing).

The Department for Exiting the European Union (DEXEU) has published [Explanatory Notes](#) to the Bill, a series of [factsheets](#) on the Bill's provisions and a [Delegated Powers Memorandum \(DPM\)](#) addressed to the House of Lords Delegated Powers and Regulatory Reform Committee.

An index of defined expressions is set out in **clause 15** of the Bill.

The Bill's progress can be followed on the [European Union \(Withdrawal\) Bill 2017-2019](#) pages on the Parliamentary website, which also provides relevant documents such as proposed amendments and versions of the Bill.

This introduction addresses a number of preliminary issues that are relevant to understanding the substance of the EUW Bill.

## 1.1 When is exit day?

Fundamental to the scheme of the EUW Bill is that there will be an exit day when the provisions of the Bill will take effect. **Clause 14(1)** of the Bill provides the Government with a power to appoint when exit day will be by regulation. The regulation made under this power will not be subject to any parliamentary procedure.<sup>1</sup> The DPM justifies this power, and the absence of parliamentary oversight, on the basis that the date of exit day is "dependent on the withdrawal negotiations with the EU".<sup>2</sup>

Exit day could be the day on which the EU Treaties cease to apply, but clause 14 does not require this to be the case. There are no express legal limits on the Government's discretion on the face of the power that could constrain how exit day is appointed.

Under Article 50 of the Treaty on European Union (TEU), the EU Treaties will cease to apply to a withdrawing state "from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification ... unless the European Council, in agreement with the Member States concerned, unanimously decides to extend this period".<sup>3</sup>

The Prime Minister, Theresa May, notified the European Council on 29 March 2017 of the UK's intention to withdraw from the EU. If there is a withdrawal agreement, the EU Treaties will cease to apply to the UK on the date the agreement enters into force.<sup>4</sup> This could in theory be after 30 March 2019, but the EU negotiating mandate says it should enter

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<sup>1</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 73.

<sup>2</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 72.

<sup>3</sup> The [Treaty on the European Union](#)

<sup>4</sup> [Letter to Donald Tusk from Theresa May](#), 29 March 2017.



into force no later than then (by midnight Brussels time, which will be 11pm in the UK).<sup>5</sup>

The Government has insisted that the UK will leave by 29 March 2019. But the reality is that neither the UK Government nor the EU knows when exit day will be. The date will depend on factors linked to the withdrawal negotiations:

- will there be a withdrawal agreement within the two-year negotiating period, or will the UK leave the EU without one?
- will the negotiating period be extended beyond the two years, perhaps because an agreement is in sight, but more time is needed?
- If there is a withdrawal agreement, will exit day be staggered, depending on the policy area, or extended or redefined by transitional provisions?

The Bill also appears to enable more than one exit day to be appointed.

**Schedule 7 Part 3 paragraph 13 (b)(ii)** prescribes that all powers in the Bill, including the power to appoint exit day, could be used “to make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas”. This could enable the Government to decide that exit day is one particular day for some parts of the Bill, but another day for others.

## 1.2 How much law would this Bill convert?

**Clauses 2, 3 and 4** would, when brought into force, convert and preserve several thousand legislative measures in the UK’s post-exit statute book. This section provides an overview of the scale of exercise.

Analysts and politicians have long argued over how much domestic legislation comes from the EU, and it is a difficult question to answer.<sup>6</sup>

For example, the number of EU regulations, one of the main forms of EU legislation, is set out below (these are figures accessed in mid-August 2017 and include the acts themselves and all related documents, including amending acts):

### Regulations

12,433 regulations

- [Regulation \(8674\)](#)
- [Implementing regulation \(3329\)](#)

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<sup>5</sup> [Annex](#) to the Recommendation for a Council Decision authorising the opening of the negotiations for an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 3 May 2017.

<sup>6</sup> House of Commons Library Research Paper 10/62, [How much legislation comes from Europe?](#) 13 October 2010, looks at the issues.

- [Delegated regulation \(426\)](#)
- [Financial regulation \(5\)](#)

The Bill does not specify which version of EU law it will incorporate, other than to say in **clause 3(4)** that it must be the English language version of “direct EU legislation”.

So while it will formally incorporate over 12,000 EU regulations, the intention is the amended legislation is considered as one with the legislation amending it - so approximately 7,000 pieces of EU legislation (comprising the body of EU regulations as amended prior to exit day) will be incorporated.

## Accessibility of retained EU law

The rule of law, a principle of the UK constitution, requires that the law must be accessible to the public.<sup>7</sup> Such is the scale of the law that is to be converted, and which will not be enacted on the face of any bill, that practical steps have to be taken to make this body of law accessible.

**Schedule 5** provides that the Queen’s Printer, now an official of the National Archives, must, before exit day, make arrangements to publish in the UK the following classes of legislative instrument, currently published in the Official Journal of the EU and elsewhere:

- EU regulations
- EU decisions
- EU tertiary legislation

**Schedule 5** also provides that the EU Treaties must be published. Judgments of the CJEU are authorised, but not required, to be published under this provision.

**Part 1 of Schedule 5** provides a power for ministers to make regulations to make exceptions to the duty to publish retained EU law.<sup>8</sup>

## 1.3 The constitutional status of converted retained EU law

It is not clear whether converted direct EU legislation (**clause 3**) and saved EU law rights (**clause 4**) are primary legislation, secondary legislation or something else entirely. EU-derived domestic law, whether primary or secondary, that is preserved and is to be classified as

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<sup>7</sup> “The law must be accessible and so far as possible intelligible, clear and predictable” as per Tom Bingham, *The Rule of Law* (2010) p37; Lord Diplock: “The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.” *Black-Clawson International Ltd. V Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 638 D.

<sup>8</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 109.

retained EU law, will not change its primary or secondary status by virtue of the provisions of this Bill.

**Schedule 1** provides the Government with the power to make secondary legislation to provide for the grounds on which the validity of retained EU law can be challenged in domestic courts post-exit day. From this provision, one might draw the inference that retained EU law has the characteristics of secondary rather than primary legislation. Primary legislation enacted by the UK Parliament cannot be ruled invalid by domestic courts.

**Schedule 8 paragraph 19** provides that, for the purposes of the *Human Rights Act 1998*, direct EU legislation is to be treated as primary legislation. This means that it cannot be ruled invalid on the basis that it breaches one or more rights in the European Convention on Human Rights (ECHR). Rights saved by **clause 4**, namely those in the Treaties, are not covered by **Schedule 8**. This raises a question as to whether the current hierarchy of EU law, where the Treaty sits above other forms of EU legislation, will have any relevance in the way in which EU retained law operates after exit day.

More broadly, the question of the status of converted direct EU legislation and saved EU law rights, and their relationship with other legislation, is significant for understanding how they will be scrutinised in the courts, as well as how Parliament will engage with this body of law after exit. If it is the case that retained EU law, or elements of it, sits outside existing categories of legislation, then it will be worth evaluating the implications for Parliament and courts.

## 1.4 The constitutional status of the Bill if enacted

If enacted the EUW Bill is likely to be treated as a constitutional statute by the courts, as per the High Court case of *Thoburn*.<sup>9</sup> This would mean that it would not be subject to implied repeal. Implied repeal is the rule of statutory interpretation applied by the courts which means that if Parliament has enacted two statutes which contain “irreducibly inconsistent” provisions, “the earlier statute is impliedly repealed by the later”.<sup>10</sup> In *Thoburn*, Lord Justice Laws established that “ordinary statutes may be impliedly repealed. Constitutional statutes may not”.<sup>11</sup>

The extent to which this degree of constitutional protection will be afforded to retained EU law, and in particular the law converted by **clauses 3 and 4**, is uncertain. A connected question is the extent to which secondary legislation made under the powers in this Bill, particularly those giving effect to any withdrawal agreement, will be subject to implied repeal. If retained EU law or the secondary legislation

<sup>9</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

<sup>10</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 37

<sup>11</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 63

made under the powers in this Bill are considered to be constitutional statutes, then this could require Parliament to outline in express terms any repeal of any rights that either protect.

Under the UK's existing constitutional arrangements, EU law rights are afforded a degree of constitutional protection by virtue of a combination of the ECA, the Treaties and the way both have been interpreted by the courts. As such Parliament can only legislate contrary to an EU law right if it does so expressly—as it is invited to do in this Bill.

The Supreme Court in *Miller* also provided that changes to constitutional legislation should be made by Act of Parliament:

We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.<sup>12</sup>

The Supreme Court did not, in that judgment, address the extent to which constitutional legislation can be amended by secondary legislation. In principle Parliament can expressly authorise such a power to amend the constitution and constitutional rights through secondary legislation. **Clauses 7 and 9** enable ministers to alter rights protected by retained EU law, including Treaty rights, through secondary legislation.

The constitutional status of retained EU law is addressed by **clause 5** of the Bill, which is examined in section 4 below.

### 1.5 Delegated powers and delegated legislation

Fundamental to the scheme of the EUW Bill is that it creates a set of delegated powers to enable ministers to change the statute book via secondary legislation in order to implement Brexit.

The Delegated Powers Memorandum lists 14 delegated powers;<sup>13</sup> the section of this briefing where each power is discussed is listed in brackets:

- **Clause 7/Schedule 2 Part 1** - Powers to deal with deficiencies in retained EU law (Section 6);
- **Clause 8/Schedule 2 Part 2** - Powers to comply with international obligations (Section 8.1);
- **Clause 9/Schedule 2 Part 3** - Powers to implement the withdrawal agreement (Section 9);
- **Clause 11/Schedule 3** - Power to make exceptions to limit on devolved competence to modify retained EU law (Section 11);

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<sup>12</sup> [\*R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union\* \[2017\] UKSC 5 Para 82.](#)

<sup>13</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), p2-5.

- **Clause 14** - Power to specify 'exit day' (Section 1.1);
- **Clause 17(1)** - Power to make consequential provision (Section 8.3);
- **Clause 17(5)** - Power to make transitional, transitory or saving provision (Section 8.4);
- **Clause 19** - Power to make commencement provisions (Section 8.5);
- **Schedule 1** - Power to provide for a right of challenge to the validity of retained EU law (Section 8.6);
- **Schedule 4 Part 1** - Powers to provide for fees and charges in connection with new functions (Section 11);
- **Schedule 4 Part 1** - Power to disapply consent requirements or prescribe additional functions in relation to which the devolved authorities can exercise the fees and charges power (Section 10);
- **Schedule 4 Part 2** - Power to modify pre-exit fees and charges (Section 10);
- **Schedule 5** - Power to make exceptions from duty to publish retained EU law (Section 1.2); and
- **Schedule 5** - Power to make provision about judicial notice and admissibility (Section 8.7).

## Delegated powers

Delegated powers are an established feature of the UK's parliamentary and constitutional arrangements. Each year thousands of statutory instruments, also known as secondary or delegated legislation, are made by Ministers under powers delegated to them by Parliament in primary legislation. That said, the parameters of the delegation of legislative authority, especially when they enable changes to primary legislation, are closely scrutinised in Parliament.

The delegated powers in this Bill are unprecedented in terms of both their legal scope and constitutional significance.

### Box 1: The House of Lords Select Committee on the Constitution's view on the use of Henry VIII powers

In their report on the *Legislative and Regulatory Reform Bill (2005-06)*,<sup>14</sup> the Constitution Committee recognised that delegated powers, and Henry VIII powers to amend primary legislation, were an established part of the UK's constitutional arrangements that were justifiable in certain circumstances.<sup>15</sup> Nonetheless, they identified three principled objections to the use of Henry VIII powers:

<sup>14</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06.

<sup>15</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 para 30.

- The first is that they “they risk undermining the legislative supremacy of Parliament”, an aspect of which that: “no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament”;<sup>16</sup>
- The second is that “parliamentary scrutiny of ministerial orders is less rigorous than scrutiny meted out to legislative proposals that are contained in bills, yet in this case the Minister will be amending or repealing primary legislation”;
- The third is that “they make the statute book complex and uncertain. When a Minister exercises a Henry VIII power to amend a provision in an Act of Parliament, the order by which that is done is delegated legislation and the amended provision in the Act of Parliament retains the character of delegated legislation and therefore is susceptible to challenge by judicial review”.<sup>17</sup>

The use of delegated powers leaves the Government with considerable flexibility to decide how to legislate. Generally speaking, such flexibility is not normally afforded to measures of constitutional significance. However, it is certainly arguable that the unprecedented circumstances of Brexit necessitate a degree of flexibility, both in terms of timing and substance, which exclusive reliance on primary legislation would not supply.

The express legal limits on a power constrain what the delegated legislation made under the power can be used to achieve. The powers in this Bill, particularly **clauses 7, 9 and 17**, are framed generously to provide maximum flexibility in legislating for Brexit. For example, as currently drafted **clause 9** could, theoretically, be used to remove the legal limits on the powers in the Bill after it is enacted. It is also legally possible that **Clause 7** could be used to implement substantive policy changes in order to respond to deficiencies in retained EU law.

That a power *can* be used in such a way does not mean that the Government *will* use the power in such a way.

In evidence to the House of Commons Exiting the European Union Committee on 14 December 2016, the Secretary of State for Exiting the European Union, David Davis, said any major or “material” changes to the law would be done through primary legislation, and not through delegated legislation.<sup>18</sup> He added “I don’t foresee major changes by SI”.<sup>19</sup>

Nevertheless, parliamentary committees have consistently argued that ministerial assurances are not a substitute for legal safeguards on the face of a power.<sup>20</sup> If Government is willing to reassure that a power will not be used to do something which a power expressly permits, then it is

<sup>16</sup> A V Dicey, *An Introduction to the Study of the Constitution* (1885). p xxxvi

<sup>17</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 para 32-33.

<sup>18</sup> Exiting the European Union Committee Oral evidence: The UK’s negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016.

<sup>19</sup> Ibid.

<sup>20</sup> For example see House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 para 23.

legitimate to ask why Parliament should grant a power that is not strictly required.

With powers of such constitutional significance as those in this Bill, the purpose and legal safeguards will be subject to close scrutiny.

## Secondary legislation

The parliamentary procedure that is used to make secondary legislation is determined by the procedure prescribed in the Act which contains the relevant delegated power. The procedures provided for in the EUW Bill are set out in **Schedule 7**. These are examined in detail in Section 9 of this briefing.

The House of Lords Select Committee on the Constitution recommended a set of “enhanced scrutiny procedures” that could be used to ensure that Parliament had the ability to adequately scrutinise delegated legislation under the Bill.<sup>21</sup> The Committee said that “there seems little doubt that Parliament will need to reconsider how it deals with secondary legislation”.<sup>22</sup> David Lidington, when Leader of the House of Commons, told the Committee that the Government may need to consider a “bespoke arrangement for handling” the scrutiny of delegated legislation,<sup>23</sup> but as currently drafted the Bill relies exclusively on existing forms of parliamentary scrutiny, namely the affirmative and the negative procedure.

The Hansard Society has suggested that a lack of a bespoke scrutiny arrangement would be to Parliament’s severe detriment, stating “If Parliament allows the government to proceed with what appears to be its approach, namely assigning negative and affirmative procedures, Parliament will be acquiescing in a significant transfer of legislative power to the executive”.<sup>24</sup>

In March 2017, the Government’s White Paper said that the proposed procedures in that paper represented “the beginning of a discussion between Government and Parliament as to the most pragmatic and effective approach to take in this area”.<sup>25</sup>

## How much secondary legislation will be required?

In its White Paper, *Legislating for the United Kingdom’s withdrawal from the European Union*, the Government estimated that around 800 to

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<sup>21</sup> Select Committee on the Constitution, 9<sup>th</sup> Report Session 2016-17, [The ‘Great Repeal Bill’ and delegated powers](#), para 100.

<sup>22</sup> Select Committee on the Constitution, 9<sup>th</sup> Report Session 2016-17, [The ‘Great Repeal Bill’ and delegated powers](#), para 89.

<sup>23</sup> Select Committee on the Constitution, [Oral evidence: The Legislative Process](#), Wednesday 14 December 2016, Q101.

<sup>24</sup> Procedure Committee, [Written evidence submitted by the Hansard Society \(GRB 032\)](#), HC 1010, 27 April 2017.

<sup>25</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#), Cm 9446, para 3.23.



1,000 Brexit-related statutory instruments would be required to implement the objectives of the Bill. As both the White Paper and the Factsheet point out, it is impossible to give a definitive figure because this will depend largely on the outcome of the withdrawal negotiations and other policy decisions.<sup>26</sup>

Scrutiny of all the regulations expected to be made under this Bill will be a challenge on an unprecedented scale for Parliament. Corrections will be needed to the 7000 regulations in force, as amended, which are to be converted as well as to all EU-derived domestic primary and secondary legislation. In addition, scrutiny of all regulations needed to implement the withdrawal agreement and other instruments under the other 12 powers in this Bill will be required. All these instruments will need to be enacted before exit day in order to take effect on that day.

## Judicial scrutiny of Henry VIII powers and secondary legislation

Secondary legislation can, in certain circumstances, be quashed by the courts following a process of judicial review. This reflects the distinction between the constitutional status of primary and secondary legislation. Legislation signed into law by Ministers rather than being enacted following passage through both houses of Parliament is not afforded the protection of parliamentary privilege. All the grounds on which judicial review may be brought are available to any application for review of against secondary legislation.<sup>27</sup>

In scrutinising the validity of secondary legislation, the courts will seek to enforce the express limits on the face of the power.<sup>28</sup> The courts can also imply limits upon delegated powers, so that the discretion to make secondary legislation afforded to ministers by a power can be narrower than the face of the provision suggests.

Lord Donaldson, then Master of the Rolls, outlined the approach of the courts to broadly-defined delegated powers to amend primary legislation:

The duty of the courts being to give effect to the will of Parliament, it is, in my judgment, legitimate to take account of the fact that a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the

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<sup>26</sup> Department for Exiting the EU, [\*Legislating for the United Kingdom's withdrawal from the European Union\*](#), 15 May 2017.

<sup>27</sup> *R (on the application of Javed) v Secretary of State for the Home Department* [2001] EWHC civ 789.

<sup>28</sup> In *ITV Broadcasting v TV Catchup limited Ltd*, the High Court noted that section 2(2) of the ECA should not be interpreted as restrictively as other Henry VIII powers, as it is a unique power for the purpose of implementing treaty obligations.



Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.<sup>29</sup>

For example, the principle of legality, as articulated by Lord Hoffman in the case of *R v Secretary of State for the Home Department Ex p Simms*,<sup>30</sup> would, if applied, mean that the courts would assume that Parliament, unless the Bill expressly legislated to do so, did not intend to delegate to the executive a power to infringe fundamental rights.

The broader the scope of the power, the greater the likelihood that the courts will interpret the power narrowly. This was confirmed by the Supreme Court in *Public Law Project*, a 2016 case in which Lord Neuberger endorsed the following analysis by Daniel Greenberg:

As with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.<sup>31</sup>

In the recent Supreme Court case of *Unison*, which ruled that a statutory instrument was *ultra vires*, Lord Reed explained how delegated powers are interpreted in the light of constitutional principles:

In determining the extent of the power conferred on the Lord Chancellor by section 42(1) of the 2007 Act, the court must consider not only the text of that provision, but also the constitutional principles which underlie the text, and the principles of statutory interpretation which give effect to those principles.<sup>32</sup>

In that case, the common law right of access to the courts meant that the power would enable a degree of intrusion on that right only "as is reasonably necessary to fulfil the objective of the provision in question".<sup>33</sup> How these limits might apply to the powers in this Bill is relevant when evaluating their scope.

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<sup>29</sup> *McKiernon v Secretary of State for Social Security*, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989.

<sup>30</sup> [2000] 2 AC 115, 131 HL.

<sup>31</sup> *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39 para 26; *Craies on Legislation* (10th ed (2015)), edited by Daniel Greenberg, para 1.3.11.

<sup>32</sup> *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 [2017] UKSC 51 para 65.

<sup>33</sup> *Ibid* 80

## 1.6 What will be the impact of subsequent Brexit bills?

The Government has promised to bring forward a number of bills in order to prepare for Brexit day. The Government has indicated that these bills will contain substantive policy changes in areas currently covered by EU law.

As such these bills will have an impact on how the provisions of this Bill, particularly **clauses 2, 3 and 4** take effect on exit day. For example, **clause 4** continues Article 21(1) on the *Treaty on the Functioning of the European Union* (TFEU), which contains EU citizenship rights that could be amended by the forthcoming Immigration Bill. The Government states that the Immigration Bill will “allow for the repeal of EU law on immigration, primarily free movement, that will otherwise be saved and converted into UK law by the Repeal Bill”.<sup>34</sup> Therefore these bills could mean that rights converted by the EUW Bill will be amended or repealed before exit day.

It is also highly likely that these bills will include delegated powers to enable substantive legislative changes implementing Government policies in particular areas, whether or not they are contingent on the withdrawal agreement, to be enacted through secondary legislation.

In the Queen’s Speech in June 2017 the Government announced that it would bring forward the following bills to implement the policy changes necessary to implement Brexit:

- Customs Bill
- Trade Bill
- Immigration Bill
- Fisheries Bill
- Agriculture Bill
- Nuclear Safeguards Bill
- International Sanctions Bill

### Brexit Bills: the Agriculture Bill

The Agriculture Bill will include “measures to ensure that after we leave the EU, and therefore the Common Agricultural Policy, we have an effective system in place to support UK farmers.” The Bill is intended to provide stability for farmers and also measures to protect the natural environment. The Government has pledged to match the £3 billion that farmers currently receive in CAP support until 2022.<sup>35</sup> Member States will agree a new CAP package for post-2020 and therefore the UK may

<sup>34</sup> [The Queen’s Speech and Associated Background Briefing](#) (21 June 2017) p12.

<sup>35</sup> Gov.uk, [The Unfrozen Moment – Delivering a Green Brexit](#), 21 July 2017 [accessed 16 August 2017].

need to vary its planned approach to agricultural support to account for this in the period from exit until 2022.

Farming Minister George Eustice has indicated that the UK can either “bring big elements” of the CAP into domestic legislation using the EUW Bill, effecting “a sort of rolling forward in the interim until we have planned what we want to do” or try and introduce something new and different, or at least starting to diverge, from the CAP from 2020.<sup>36</sup>

## Brexit Bills: the Customs Bill

**Clause 3** of the EUW Bill will convert the EU’s customs rules onto the post-exit statute book. These are set out in [Regulation 952/2013](#) and other Regulations.<sup>37</sup>

The Government has indicated that the forthcoming Customs Bill will make substantive amendments to existing law to provide:

- that the UK has a standalone UK customs regime on exit;
- flexibility to accommodate future trade agreements with the EU and others;
- that changes can be made to the UK’s VAT and excise regimes to ensure that the UK has standalone regimes on EU-exit.<sup>38</sup>

The Customs Bill will be preceded by a Customs White Paper.<sup>39</sup> It is possible that the Customs Bill will, in order to achieve the aims stated above, make changes to the EU regulations on customs converted by the EUW Bill. This will enable the UK to pursue an independent trade policy after Brexit (subject to any constraints imposed by any transitional period).

## 1.7 Extent

In **clause 18** the Bill is extended not only to England and Wales, Scotland and Northern Ireland, but also to Gibraltar (which is an Overseas Territory), Jersey, Guernsey (with Alderney and Sark) and the Isle of Man (which are all Crown Dependencies). The Bill has specific provisions on Gibraltar but does not mention the others. The Explanatory Notes clarify that:

repeals and amendments made by the Bill have the same territorial extent as the legislation that they are repealing or amending. For example, the ECA extends to and applies in Gibraltar and the three Crown Dependencies in a limited way. This

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<sup>36</sup> HL Paper 169, 20<sup>th</sup> report of the House of Lords European Union Committee, [Brexit: Agriculture](#), 3 May 2017.

<sup>37</sup> Set out on the European Commission website [here](#).

<sup>38</sup> [The Queen’s Speech and Associated Background Briefing](#) (21 June 2017) p11.

<sup>39</sup> HM Government, [Future customs arrangements: A future partnership paper](#), August 2017.

means its repeal extends to those jurisdictions to the same extent.  
[...]

Regulations made under powers in the Bill may have extraterritorial effect where they are being used to amend legislation which already produces a practical effect outside the UK.<sup>40</sup>

Only Gibraltar is part of the EU, though not fully.<sup>41</sup> Gibraltar and each of the Crown Dependencies implement EU law to the extent specified in the EU Treaties. Gibraltar has its own [European Communities Act 1972](#), Jersey its own [European Communities \(Jersey\) Law 1973](#), and similarly [Guernsey](#) and the [Isle of Man](#) have their own laws by which they adopt relevant EU law.

These equivalent European Communities Acts “will need to be repealed, and new legislation drafted to reflect any new relationship, and guaranteeing any vestigial rights and obligations as required”.<sup>42</sup>

The Crown Dependencies will prepare parallel legislation to the present Bill. They face similar questions about how to deal with EU legislation after Brexit, but on a smaller scale. Professor Andrew Le Sueur<sup>43</sup> outlined the issues to the Lords European Union Committee inquiring into Brexit and the Crown Dependencies. He had identified “107 different enactments in Jersey—that is, primary and secondary law—that use the words ‘European Union’”, and 105 different enactments for Guernsey. Directly applicable regulations posed the same problem of potential legal “black holes”. Le Sueur also pointed to the general issue of dealing with EU-inspired legislation:

The fourth category of legislation, which is quite difficult to identify, is where the law makes no express reference to the EU but has been inspired by the EU and is adopting very similar standards to the EU or very similar standards to the UK on a regulatory matter where the UK has been influenced by the EU for the purposes of creating some sort of equivalence. Identifying those will require a considerable amount of research.<sup>44</sup>

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<sup>40</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5–EN), para 66

<sup>41</sup> The EU Treaties apply to Gibraltar as a European territory for whose external relations the UK is responsible. Gibraltar is not in the Customs Union, Common Commercial Policy, Common Agriculture Policy, Common Fisheries Policy and the VAT regime. For information on Gibraltar and Brexit, see Commons Briefing Paper 7963, [Brexit and Gibraltar](#), 2 May 2017.

<sup>42</sup> [Written evidence](#) from the Isle of Man Government, 18 November 2016, Commons Justice Committee Inquiry on [The implications of Brexit for the Crown Dependencies](#), Tenth Report of Session 2016–17, 28 March 2017.

<sup>43</sup> Head of Law School, University of Essex.

<sup>44</sup> House of Lords European Union Committee, [Corrected oral evidence](#): Brexit: Crown Dependencies, 31 January 2017. See also 19<sup>th</sup> Report of Session 2016–17, HL Paper 136, [Brexit: the Crown Dependencies](#), 23 March 2017.

## 1.8 Financial implications

The Bill has implications for both spending and taxation. Some implications are immediate, others may be realised depending on how delegated powers are used.

The Queen's Printer will be required to publish relevant EU instruments and Treaties, which will have presumably modest immediate costs.

Delegated powers for dealing with deficiencies arising from withdrawal, complying with international obligations and implementing the withdrawal agreement could lead to fresh expenditure. Spending could also be incurred in preparing for anything arising from the Bill.

Ministers and devolved authorities will be able to introduce fees and charges on the EU functions they inherit post-exit. The powers could be used to create tax-like charges which go beyond covering the cost of providing a service to firms or individuals. In order to comply with international obligations, delegated powers could be used to impose taxation, but only where that is an appropriate way of preventing or remedying a breach of such obligations.

The Bill requires a Ways and Means resolution for the Commons to give consent to the parts of the Bill that involve taxes or other charges being made on the public. The ways and means resolution which the House is expected to vote upon should the Bill receive its second reading will authorise any such taxation or charge required by virtue of the Act.

The Bill requires a Money resolution for parts of the Bill that propose spending public money on areas that have not previously been authorised by an Act of Parliament. The money resolution which the House is expected to vote upon should the Bill receive its second reading will authorise any such expenditure incurred by virtue of the Act.

### Box 2: What are money resolutions and ways and means resolutions?

**Ways and Means resolutions** are used by the Commons to give consent to parts of a bill that will involve taxes or other charges being made on the public.

**Money resolutions** are required if a new bill proposes spending public money on something that hasn't previously been authorised by an Act of Parliament.

## 2. Repealing the European Communities Act 1972: clause 1

### 2.1 Summary

**Clause 1** of the EUW Bill repeals the *European Communities Act 1972* (ECA). The ECA is one of the most significant statutes ever passed by Parliament.<sup>45</sup> The Bill's provisions all follow directly from the need to replace the legal and constitutional framework provided by the ECA.

Over the past 40 years, EU law has flowed into our own legal systems through the ECA, acting as a "conduit pipe",<sup>46</sup> with the result that presently EU law is deeply embedded in our domestic legal system, as well our governance arrangements, in a number of policy areas.

Once the ECA is repealed on exit day, without the legislative measures proposed in this Bill, huge holes would open within the statute book. The EUW Bill attempts the difficult task of removing and replacing the pillars that underpinned the integration of EU law in the UK, while at the same time minimising changes to the substance of the statute book.

### 2.2 Overview of the European Communities Act 1972

The ECA is constitutionally significant in terms of both its substantive effect and the legislative form and procedure it contains.

- In terms of **substance**, the ECA has created a hierarchy of law within the United Kingdom's legal system, by making European Union law part of and supreme over United Kingdom law.
- In terms of **procedure**, the ECA contains a broad legislative power to enable changes to be made to the statute book via secondary legislation to give effect to EU law.

Further, the ECA's drafting was innovative in that its provisions affected subsequent statutes made by Parliament. In the event of a conflict between the ECA and a subsequent statute, unless the later statute has

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<sup>45</sup> In the High Court case of *Thoburn*, which concerned the role of EU law in the UK constitution, Lord Justice Laws said of the ECA: "It may be there has never been a statute having such profound effects on so many dimensions of our daily lives". *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

<sup>46</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, para 65.

expressly repealed the ECA, the provisions of the ECA ensure that EU law prevails over the relevant parliamentary enactment.

Parliamentary sovereignty is strictly speaking not affected by the ECA in the sense that it has always been possible for Parliament to legislate to repeal the ECA, as it is doing in this Bill.<sup>47</sup> The interpretation of the ECA in a number of important cases, such as *Factortame*,<sup>48</sup> *Thoburn*<sup>49</sup> and *Miller*<sup>50</sup> has nevertheless significantly changed the way in which our constitutional system is understood.

In order to understand the EUW Bill, sections 2(1) and 2(2) need to be considered.

## 2.3 Section 2(1) of the ECA – empowering directly applicable EU law

Certain provisions of the Treaties, EU Regulations and Decisions currently take effect in the United Kingdom via section 2(1) of the ECA.<sup>51</sup> This significant body of EU law is directly applicable, meaning it is effective and in force through the ECA without any further enactment.

### The Treaties

Section 2(1) of the ECA is responsible for making the EU Treaties, and all directly applicable EU law, enforceable in the UK.

This includes, for example, the right to free movement which is set out in Article 3(2) of the Treaty on European Union (TEU) and Articles 4(2)(a), 20, 26 and 45-48 of the *Treaty on the Functioning of the European Union* (TFEU).

#### Box 3: Article 157 TFEU on Equal Pay

Article 157 TFEU (ex Article 141 TEC and originally Article 119 TEC) provides that “Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied”. The EU Court of Justice established in *Defrenne* in 1976 that this Article was “directly applicable and may thus give rise to individual rights which the courts must protect”.<sup>52</sup> In *Barber* in 1990 the EU Court ruled: “Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay

<sup>47</sup> Although unilaterally repealing the ECA would raise questions about the UK’s obligations under international law.

<sup>48</sup> *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13 para 13.

<sup>49</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

<sup>50</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

<sup>51</sup> EU decisions also take effect through section 2 (1) but are not discussed here.

<sup>52</sup> Judgment 8 April 1976. *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*. Reference for a preliminary ruling.

referred to by that provision, without national or Community measures being required to define them with greater precision”.<sup>53</sup>

## EU regulations

The Government’s factsheet on the EUW Bill estimates that there are over 12,000 EU regulations in force.<sup>54</sup> This figure includes the regulations themselves and all related documents, such as amending regulations, delegated and implementing regulations.<sup>55</sup>

Article 288 TFEU defines an EU regulation as having “general application”, “binding in its entirety and directly applicable in all Member States”. A regulation’s “legal effects are simultaneously, automatically and uniformly binding in all the national legislations”.<sup>56</sup> So regulations are intended to apply directly in all Member States, without the need for further national implementing measures. However, it might be necessary to amend existing national provisions that are inconsistent with regulations. Sometimes further measures have been needed in the UK to implement an EU Regulation; for example, the *Open Internet Access (EU Regulation) Regulations 2016* implemented *EU Regulation 2015/2120* of 25 November 2015 concerning mobile roaming in the EU.<sup>57</sup> Further domestic legislation is permissible if it is envisaged by the regulation itself or is necessary to provide for offences or other sanction for breach of a requirement imposed by a regulation.

After exit day, once the UK is no longer a Member State and the ECA is repealed, these EU regulations would no longer have effect in the UK. As discussed in detail below, these rights will be preserved on the post-exit statute book by **Clause 3** of the Bill. Some of these regulations are enforced by domestic legislation, or soft law (non-binding guidance) measures that would not be lost on exit day.

## Decisions

Under Article 288 TFEU an EU decision is binding on those to whom it is addressed and may be directly applicable. They are bespoke and often require further implementation in the UK. For example, [Commission Decision 2009/431](#) of 29 May 2009 granting a derogation requested by the UK with regard to England, Scotland and Wales “pursuant to Council Directive 91/676/EEC concerning the protection of waters

<sup>53</sup> Judgment 17 May 1990, *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*. See also [Judgment](#) 31 March 1981 in *J.P. Jenkins v Kingsgate (Clothing Productions) Ltd*. Reference for a preliminary ruling in Case 96/80.

<sup>54</sup> Department for Exiting the EU, [The Great Repeal Bill: Factsheet 1](#)

<sup>55</sup> [Search criteria on Eur-Lex](#): Domain: EU law and related documents, Limit to legislation in force: True, Type of act: All regulations, Exclude corrigenda: True.

<sup>56</sup> Eur-Lex, [European Union regulations](#).

<sup>57</sup> [Open Internet Access \(EU Regulation\) Regulations 2016](#) [SI2016/ 607] and [EU Regulation 2015/2120](#).



against pollution caused by nitrates from agricultural sources” was implemented by [SI 2009/3160](#), the Nitrate Pollution Prevention (Amendment) Regulations, and subsequent [amendments](#).

Decisions are usually specific measures addressed to a particular Member State, a company or individual(s). They are adopted in a whole range of circumstances, for example:

- to enforce competition policy
- to institute a pilot action programme
- to authorise grants from one of the EU’s funds
- to allow an exemption from an existing measure
- to counter dumping from a third country.<sup>58</sup>

On the basis of the Court of Justice of the European Union’s (CJEU) case law, decisions may have direct effect.<sup>59</sup> Eur-Lex states that decisions “may have direct effect when they refer to an EU country as the addressee. The CJEU therefore recognises only a direct vertical effect”.<sup>60</sup>

### The EUW Bill and section 2(1) of the ECA

Absent any further legislative action, once the UK is no longer a Member State and the ECA is repealed, all the directly applicable EU law given effect by section 2(1) would no longer have effect in the UK. As discussed in detail below, **clause 4** of the EUW Bill (section 3.4 of this briefing) expressly preserves all “rights, powers, liabilities, obligations... which... are recognised and available in domestic law by virtue of section 2(1)” of the ECA on the post-exit statute book. Precisely how much law takes effect through section 2(1), and is therefore converted by **clause 4** of the EUW, is difficult to establish precisely.<sup>61</sup>

Some Treaty rights that take effect through section 2(1) of the ECA, for example the rights relating to protection against discrimination, are already given effect through the *Equality Act 2010*, and are therefore already protected by separate primary legislation. Legally this legislation does not need to be preserved, although this is the effect of **clause 2** (section 3.1 of this briefing) of the EUW.

**Clause 3** (section 3.2 of this briefing) converts all EU regulations in force immediately before exit day onto the post-exit day statute book. Without this provision these EU regulations would no longer have effect in the UK. EU decisions are converted by **clause 3**, subject to exceptions in **schedule 6**.

<sup>58</sup> *The Government and Politics of the European Union*. Seventh edition Neill Nugent p. 211, Palgrave Macmillan, 2010.

<sup>59</sup> For example, see [Case 9/70. Franz Grad](#).

<sup>60</sup> See judgment in Case C-156/91, 10 November 1992, [Hansa Fleisch](#).

<sup>61</sup> Section 2(1) also means that all legislation will “automatically be read as subject to, and construed in accordance with, the EU obligations as to, for example freedom of movement, freedom of establishment and the like” Daniel Greenberg, *Craies on Legislation* (2017) p1036.

Currently provisions of the EU Treaties sit at the top of the EU legal hierarchy. As a result of the supremacy of EU law, this means that all other EU law, such as directives, regulations and decisions, and domestic law, is interpreted in the light of the Treaties. It is not clear what status the preserved Treaty rights will have post-exit.

## 2.4 Section 2(2) of the ECA – implementing directives

The European Union also legislates through directives. Directives are not directly applicable in Member States. They require implementing legislation. In the United Kingdom this is often, though by no means exclusively, made under the power in section 2(2) of the ECA.

### Box 4: Directives

Directives are legally binding EU laws which usually apply in policy areas where there is less harmonisation. They set out a legal framework that the Member States have to follow, but leave it up to the Member States to implement in their own way. The national measures must achieve the objectives set by the directive and national authorities must communicate these measures to the European Commission. Failure to transpose a directive, or not transposing it fully or correctly, can lead to infringement proceedings before the CJEU.

Compared with EU regulations, directives are often detailed and more complex in nature, and can take a while to implement. For example, the [Free Movement Directive](#) is wide-ranging and required different national legislation in the Member States. It was adopted on 29 April 2004 with a transposition deadline of 29 April 2006. In England and Wales it is implemented by 14 SIs.<sup>62</sup> Transposition must take place by the deadline set when the directive is adopted, which is generally within two years.

Section 2(2) is an extremely broad statutory power. Hundreds of instruments have been made under this power. These can be identified through each instrument's preamble, which will refer to section 2(2) as the power under which it is made.<sup>63</sup>

In early December 2016, according to data collated from the [legislation.gov.uk](http://legislation.gov.uk) website, there were around 7,900 Statutory Instruments in force which implemented EU legislation.<sup>64</sup>

Some European Union Directives are implemented through free standing Acts of Parliament, and others may be implemented through delegated powers in other legislation.

<sup>62</sup> Halsbury's EU Implementator lists 17 in the hard copy edition and 14 in the on-line edition. In both cases some SIs listed are no longer in force or have been amended.

<sup>63</sup> Instruments can be made under more than one power.

<sup>64</sup> See Commons Briefing Paper 7867, [Legislating for Brexit: Statutory Instruments implementing EU law](#), 16 January 2017. The list of SIs excludes SIs of the Devolved Legislatures and is not guaranteed to be exhaustive. See also CBP 7943, [Legislating for Brexit: EU directives](#), 5 April 2017.

### The EUW Bill and section 2(2) of the ECA

Any existing secondary legislation made under section 2(2) alone would cease to have effect if the ECA were simply repealed.<sup>65</sup> As a consequence, in order to avoid gaps appearing in important areas of law, **clause 2** of the EUW Bill (section 3.1 of this briefing) saves this body of law so that it continues to operate after exit. Directives implemented by free standing acts of Parliament or via statutory instruments using other domestic law powers, other than those in the ECA, would not need to be saved, but are nonetheless preserved by **clause 2**.

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<sup>65</sup> The effect of a repeal is to render the law as if the repealed Act had never existed Tindal CJ in *Kay v Goodwin* (1830) 6 Bing. 576, 582.

## 3. Retained EU law: preserving and converting EU-derived law

### 3.1 Summary

The EUW Bill creates a new category of domestic law for the United Kingdom: **retained EU law**. Retained EU law will consist of all of the converted EU law and preserved EU-related domestic law which was in force on the day before the UK left the EU.

- **Clause 2** retains domestic primary and secondary legislation that give effect to EU law obligations; this body of law is to be known as 'EU-derived domestic legislation'.
- **Clause 3** converts existing EU law that applies in the UK into domestic law; this body of law is to be known as 'direct EU legislation'.
- **Clause 4** saves rights and obligations in EU law that take effect through section 2(1) of the ECA and that are not converted by **clause 3**.

Together these clauses create 'retained EU law'. The creation of this body of law is designed to ensure that the UK has a functioning statute book after exit day. Converting EU law and preserving existing EU-related domestic legislation that would otherwise be lost on repeal of the ECA 1972 (as discussed in Section 2) is intended to provide legal continuity during Brexit. Without these measures, there would be large gaps in the statute book in important areas of policy where the EU currently has competence, such as agriculture, environmental law and immigration.

### Balancing continuity and change

This section examines how the EUW Bill proposes to create a system of retained EU law through **clauses 2, 3 and 4**.

These clauses underpin the whole scheme of the Bill. They create novel concepts that will have far-reaching consequences for the UK's legal systems. When the UK is outside the EU it will not be possible to rely on the existing concepts that currently define how EU law works in the UK. However, as the Government intends for much of the substance of EU law to be continue after exit day (to be reviewed and amended if necessary in due course), new concepts are required to replace those supplied by the EU. The concepts proposed by the Government in clauses 2, 3 and 4 - "retained EU law", "EU-derived domestic legislation" and "direct EU legislation" - re-imagine familiar legal terminology in

order to capture a body of law which is liable to change significantly between now and exit day.

In order to assess the extent to which these provisions will provide certainty and continuity, it is worth considering the following:

- The Bill includes extensive powers to modify, including to repeal, provisions of EU law in order to correct deficiencies and give effect to the withdrawal agreement;
- Before exit day a number of bills covering areas of EU competence will be introduced to Parliament, including on immigration, customs and agriculture. Each of these bills will make important changes to retained EU law;
- The extent to which the Bill can provide continuity will depend on the content of the withdrawal agreement and in particular the nature of any transitional arrangements;
- Some EU law that is directly connected to EU membership will not be retained as it will no longer be relevant after exit day;
- Retained EU law will function differently after exit than it does currently;
- There is some uncertainty over the precise boundaries of what counts as retained EU law;
- There is some EU law, like the Charter of Fundamental Rights, that the Government has expressly stated will not be converted.

### 3.2 Clause 2: preserving EU-derived domestic legislation

**Clause 2(1)** preserves all “EU-derived domestic legislation” which is in force immediately before exit day. EU-derived domestic legislation is a new legal concept. **Clause 2(2)** defines EU-derived domestic legislation through four limbs to include measures:

- (a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,
- (b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act,
- (c) relating to anything—
  - (i) which falls within paragraph (a) or (b), or
  - (ii) to which section 3(1) or 4(1) applies, or
- (d) relating otherwise to the EU or the EEA

As **clause 1** of this Bill repeals the ECA, instruments made under section 2(2) ECA would be lost, and therefore need to be expressly saved if they are to continue in force post-exit day. This is the purpose of **clause 2(2)(a)**.

The instruments caught by **clause 2(2)(a)** will be straightforward to identify, as the instruments will state on their face whether they are made under section 2(2) ECA. Box 3 provides some examples of measures that would be saved.

#### Box 5: Examples of environmental law preserved by clause 2: water management and protection

The EU Water Framework Directive ([2006/60/EC](#)) provides a common framework for water management and protection in Europe. The Directive includes:

- aims to reduce pollution and achieve good chemical and ecological status for all water bodies by a set deadline; and
- requirements to integrate the management of water based on river basin areas.

It is mainly implemented by the following domestic legislation, which would be saved and preserved by **clause 2**:

- [Water Environment \(Water Framework Directive \(England and Wales\) Regulations 2003](#) (as amended)<sup>66</sup>
- [Water Environment and Water Services \(Scotland\) Act 2003](#) (as amended)
- [Water Environment \(Water Framework Directive\) Regulations \(Northern Ireland\) 2003](#) (as amended)

The domestic legislation contains a number of EU references by incorporating definitions and requirements directly from the Directive. For example the definitions of “environmental objectives” of a river basin district; and the “programme of measures” required for compliance require a read across to Articles 4 and 11 of the Directive respectively. Examples of requirements incorporated from the Directive include those for monitoring water status and those for the information that is expected to be included in river basin management plans. This legislation may well require corrections to enable it to function effectively after exit day.

More detailed information about water quality legislation and policy is set out in the [Library Briefing Paper on the Water Framework Directive: achieving good status of water bodies](#).

Parliament and Government have implemented EU law obligations through means other than section 2(2), including in free-standing Acts of Parliament and through other delegated powers. As such, **clauses 2(2)(b), 2(2)(c), 2(2)(d)** broaden the definition of “EU-derived” far beyond those instruments enacted under section 2(2) ECA in order to capture other domestic legislation that gives effect to a EU law obligation.

**Clause 2(2)(b)** covers more ground by capturing any enactment passed or operating for a *purpose* mentioned in section 2(2)(a) or (b) of the 1972 Act. According to the Explanatory Notes, the reference to “operates” here:

is designed to include legislation which was not specifically passed or made to implement our EU obligations (for example,

<sup>66</sup> There are also separate implementing legislation for the cross-border river basin districts: *Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003* and *Water Environment (Water Framework Directive) (Solway-Tweed River Basin District) Regulations 2004*.

because the EU had not legislated in that area at the time the legislation was made) but has since become part of the way in which we demonstrate compliance with EU requirements.<sup>67</sup>

As the High Court noted in *ITV Broadcasting v TV Catchup limited Ltd* section 2(2)(b) of the ECA allows for legislation to be enacted that is connected to a directive, but that is not necessary for the implementation of a directive, or which is consistent with but does not have the same purpose as a directive.<sup>68</sup>

**Clause 2(2)(c)** and **Clause 2(2)(d)** are particularly broad (“relating otherwise to the EU or the EEA”) and could potentially include primary and secondary legislation that would not be lost by repeal of the ECA.

## What is EU-derived domestic legislation?

Ordinarily, if domestic primary or secondary legislation is designed to implement an EU law obligation, a reference to the obligation will be made somewhere in the legislation. This will enable such provisions to be identified as being subject to **clause 2**, and thereby forming part of EU-derived domestic legislation and retained EU law.

However, it is not always the case that a specific provision can definitively be identified as EU-related. When Government departments transpose EU directives, they can either use ‘copy-out’ or the ‘rewrite’ technique, the latter sometimes with elaboration. Copy-out transcribes the directive into UK law with no additions or changes. Re-writing may augment the wording of the directive to provide greater clarity, for example, but this can result in over-implementation or ‘gold-plating’. Recent governments have preferred copy-out in order to avoid gold-plating, but a certain amount of EU-derived law may contain measures that go beyond the EU requirements. The four limbs of **clause 2(2)** are designed to capture domestic legislation that is connected to, but goes beyond, EU law requirements.

Whether a provision relates to the EU as per **clause 2(2)(d)** will not be straightforward to decide in certain cases. As such it will be difficult to compile a definitive list of all the enactments captured by **clause 2** and that make up “EU-derived domestic legislation”.

Only those enactments made under the power in section 2(2) of the ECA will fall upon the ECA 1972’s repeal, and so other enactments do not need to be preserved by this Bill to continue in force. For such an example see Box 6 below on the *Equality Act 2010*.

One reason for expressly preserving and including more enactments within the category “EU-derived domestic legislation” is that certain legal consequences will flow from their inclusion. For example, if a provision is defined as “EU-derived domestic legislation” it will be

<sup>67</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN), para 74

<sup>68</sup> [2001] EWHC 28 (Admin).

interpreted by the courts in accordance with the pre-Brexit case law of the CJEU.

**Clause 7**, as discussed in Section 6, enables changes to be made by regulations to cure “deficiencies with retained EU law”. This power can be used for two years after exit day. It can be used to amend all primary legislation, other than certain parts of the *Northern Ireland Act 1998* and the *Human Rights Act 1998*, and so is not limited to changes to retained EU law. However, the breadth of the definition of retained EU law has a direct bearing on the scope of **clause 7**; increasing the number of laws that could be “deficient” increases the potential circumstances that the power could be used in line with its purpose.

#### Box 6: Equality Act 2010

The *Equality Act 2010* would fall within the scope of **clause 2** to the extent that it demonstrates compliance with EU discrimination law.

The EU has long been active in the field of discrimination law. The *Treaty of Rome 1957*, which established the European Economic Community, contained provisions on nationality discrimination and on gender discrimination with regard to pay. Indeed, the UK’s original equal pay legislation - the *Equal Pay Act 1970* - was enacted in contemplation of the UK’s impending accession to the European Economic Community, which would have required it, per Article 119 of the *Treaty of Rome*, to maintain the principle that men and women should receive equal pay for equal work.

It is difficult to overstate the significance of EU law to domestic equality law; as one text puts it, EU equality directives “changed UK law more than the Equality Act did: by comparison, the provisions of the Equality Act are matters of detail”.<sup>69</sup> At present, EU discrimination law includes, among other things, Treaty obligations covering equal pay between male and female workers; a directive on equal treatment in the workplace in respect of disability, religion or belief, sexual orientation and age; a directive on race discrimination; and a directive on equal treatment between men and women in matters of employment and occupation. This body of EU law and the cases that interpret it, together with the *Equality Act 2010* insofar as it implements EU law, would form part of retained EU law, preserved by **clause 2**. In consequence, the Bill would provide for a large degree of legal continuity.

After exit, after the duty to comply with EU law is ended through the repeal of the ECA and the fact of the UK no longer being subject to the Treaties, the legal protection in international law currently afforded to those elements of the Act that implement EU law, will be removed.

Pursuant to **clause 5**, which would preserve the supremacy of EU law made before exit day, the *Equality Act 2010* would continue to be interpreted in light of the directives it implements. Under **clause 6**, relevant decisions of the CJEU handed down before exit day would continue to bind courts and tribunals, except the High Court, the Court of Appeal and Supreme Court, which could depart from retained EU case law in limited circumstances (see **clause 6(5)**). EU equality legislation and case law promulgated after exit day would not bind any court or tribunal, although courts and tribunals could have regard to it where they considered it appropriate to do so.

<sup>69</sup> *Blackstone’s Guide to the Equality Act 2010*, 2012, p5.



## 3.3 Clause 3: converting direct EU legislation

**Clause 3(1)** domesticates, or converts, “direct EU legislation” which is “operative” immediately before exit day into domestic law post-exit day.

Converting the law means taking over the entire text of the law, as it is, and placing it on the UK statute book, so that is available in law and can be enforced by citizens after exit. This law will not be enacted line-by-line, but will be published in the UK by the National Archives (**Schedule 5**).

“Direct EU legislation” is another new legal concept introduced by the Bill, and **clause 3(2)** explains what it is.

**Clause 3** is designed to catch a significant proportion of the EU legislation that is directly applicable in the UK through a combination of Section 2(1) ECA and the UK’s membership of the EU.

**Clause 3(2)** makes clear that “direct EU legislation” does not refer to all the directly applicable EU legislation currently enforced in the UK. Direct EU legislation includes:

- EU regulations;
- EU decisions;
- EU tertiary legislation (EU delegated and implementing measures);
- Annexes to the EEA agreement; and
- Protocol 1 to the EEA agreement.

**Clause 3(2)** outlines some exceptions to this wholesale conversion. EU legislation listed in Schedule 6 is exempt (see section 4.4 below), as are EU decisions addressed to a single member state that is not the UK, and enactments already covered by **clause 2**.

**Clause 3** does not convert the Treaties into domestic law, and as such they do not form part of “direct EU legislation”.

Read together, **clauses 2** and **3** save and convert a large amount of legislation in important policy areas. Box 7 highlights some examples of EU legislation that is carried over by clause 3.

### Box 7: Illustrative examples of direct (and tertiary) EU legislation which is to be converted (Clause 3)

#### *Chemicals*

The registration, evaluation, authorisation and restriction of chemicals Regulation ([No 1907/2006](#)) (known as REACH) aims to improve the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry. The Regulation places responsibility directly on industry to manage the risks from chemicals and to provide safety information on the substances.

The House of Commons Environmental Audit Committee published a report on the [Future of Chemicals Regulation after the EU Referendum](#) which found that the chemicals regulation framework established through REACH would be difficult to transpose directly into UK law, pointing to the fact that much of it relates to “Member State co-operation and mutual obligations, oversight and controls, and freedom of movement of products”. A Government Response to the report has not yet been published. There are also specific EU laws for specific groups of chemicals, such as pesticides and pharmaceuticals, which are not set out in this paper. More information is available on the [European Commission Chemicals webpage](#).

## When does EU law become operative?

This Bill does not allow EU law made after exit day to be converted into domestic law. **Clause 3(1)** explains only the direct EU legislation, as defined in **clause 3(2)**, which is “operative” immediately before exit day will be converted.

The concept of a law being “operative” is novel. **Clause 3(3)** defines “operative” as any provision which is stated to come into force at a particular time and then apply from a later date, a decision to which the person to whom it is addressed has been notified, or any provision in force before exit day.

EU regulations and decisions have their own rules which determine when they enter in force.

### EU regulations

EU regulations, which are addressed to all Member States, enter into force on the date specified in them, or if no date is specified, on the 20<sup>th</sup> day after their publication in the Official Journal of the EU (OJEU). But their effects, or some of them, may be operative from a later time. The Explanatory Notes to the Bill refer to this as “staggered application”.<sup>70</sup>

This approach gives legal force to the agreement to bring something into force later on, leaving actual application of the regulation until later.<sup>71</sup> In the EUW Bill an EU regulation or part of one which applies after exit day will not be converted.

### EU decisions

EU decisions can be addressed to one or several EU Member States, or one or several companies or individuals.<sup>72</sup> The party/parties concerned must be notified and the decision takes effect upon this notification.

<sup>70</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN), para 49

<sup>71</sup> For example, Council and EP [Regulation \(EU\) 2016/794](#) of 11 May 2016 ‘on the European Union Agency for Law Enforcement Cooperation (Europol)’ states in Article 77 that the regulation “shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*”, that it “shall apply from 1 May 2017”, but that “Articles 71, 72 and 73 shall apply from 13 June 2016”.

<sup>72</sup> E.g. the Commission’s [decision](#) to impose a fine on the software giant Microsoft for abuse of its dominant market position, where the only company directly concerned was Microsoft.

They may be published in the Official Journal of the EU, but publication does not mean formal notification is not needed. Notification is the only way to ensure the act is enforceable against the addressee (Article 297 TEU).

**Clause 3(3)** stipulates that it will only convert EU decisions which have been notified to an addressee – publication of the decision in the Official Journal of the European Union (OJEU) is not enough.

## What is tertiary legislation?

**Clause 3** does not use the customary EU terminology to distinguish between EU legislative and non-legislative acts. The Bill uses the term ‘tertiary legislation’ for EU implementing and delegated acts.<sup>73</sup> These are usually Commission (occasionally Council) regulations, directives or decisions and they are binding (either on all Member States or those to whom they are addressed). The Explanatory Notes point out that the distinction between legislative and non-legislative acts refers to the EU procedure for the adoption of the act, and not whether the act is legally binding.

Delegated acts are ‘non-legislative acts’ which supplement or amend certain non-essential elements of a legislative act (Article 290 TFEU). Examples of non-legislative acts include:

- Commission acts under Article 290(1) TFEU, e.g. Commission regulations in the field of agriculture;
- European Council and Council of the EU decisions under Article 31 TEU (CFSP decisions); and
- European Council decisions under Article 236 TFEU (Council configurations, presidency of Council configurations).<sup>74</sup>

So directly applicable EU ‘tertiary’ legislation will be converted into UK law, but other non-legislative acts such as Common Foreign and Security Policy (CFSP) and European Council decisions will not.

## 3.4 Clause 4: saving EU law rights

**Clause 4(1)** preserves any rights, powers, liabilities, obligations and restrictions currently “recognised and available” through section 2(1) of the ECA immediately before exit day, that are not also caught by **clause 3**. By contrast with **clauses 2 and 3**, **clause 4** is cast in general terms (“any rights...”) and does not attempt to define in precise terms which provisions of EU law are to be continued after exit.

The Explanatory Notes says that **clause 4(1)** includes “directly effective rights” in the EU Treaties.<sup>75</sup> **Clause 4** does not convert the EU Treaties

<sup>73</sup> For detailed information on these acts, see European Parliament Research Service blog, [Delegated and Implementing Acts](#), 24 September 2012.

<sup>74</sup> From: Christa Tobler, Jacques Beglinger, *Essential EU Law in Charts*, 2010.

<sup>75</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 97-89

wholesale into domestic law, in the way that **clause 3** converts EU regulations. The Explanatory Notes emphasise that this provision is intended to convert rights and obligations arising from the EU Treaties; it does not convert the text of the EU Treaties themselves.<sup>76</sup> This could affect the way that these rights are amended by regulations made under **clause 7** (see Section 6).

**Clause 4(1)** means that the default position is that, on exit day, directly enforceable provisions of the EU Treaties will become part of domestic law. For example, Article 157 TFEU, which provides for equal pay, will be preserved by **clause 4**. This is irrespective of whether the relevant right has been implemented by a provision of domestic law, as Article 157 has been via the *Equality Act 2010*, such provision are preserved separately by **clause 2**.

Treaty provisions that do not create such rights might also be caught by **clause 4(1)**: for example Article 267 TFEU, which provides that a domestic court can refer a question on the interpretation of EU law to the CJEU (and in certain contexts *must* make a referral). **Clause 6(1)(b)** explicitly provides that a UK court cannot make such a referral. One possible reading of this exclusion is that **clause 4(1)** does convert Treaty provisions that are not recognised as having direct effect or that otherwise would be redundant once the UK is no longer a Member State. As the clause does not expressly exclude such provisions - for example Article 20 TFEU, which provides the right to vote for the European Parliament - it could be presumed that these are continued by **clause 4(1)**. Such rights can be amended by the **clause 7** power, as the Explanatory Notes points out.<sup>77</sup>

An alternative reading of **clause 4(1)** ("recognised and available in domestic law") would suggest that provisions which do not have direct effect, such as those relating to the functioning of the EU's own institutions, and those that do not give rise to an enforceable right in domestic law, will not be converted. This reading is supported by the exclusion in 4(2)(b), which the Explanatory Notes state excludes the *direct effect* of Directives which have not been recognised by a court before exit day.<sup>78</sup>

Beyond the example of directly enforceable rights in the Treaties given in the Explanatory Notes, and rights in directives recognised by a court before exit day, it is not clear to what extent "recognised and available in domestic law" will act as a filter on what is carried over into post-exit domestic law by **clause 4(1)**. For example, could the CJEU's interpretation of the Treaties and the rights arising from judgments be converted by **clause 4(1)**? The way that the exceptions to **clause 4(1)** are framed in **clause 5(1)** and **Schedule 1** (which **clause 4(3)** expressly

<sup>76</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 88

<sup>77</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 91

<sup>78</sup> Only directly effective rights arising under an EU directive which have been recognised by a court or a tribunal will be converted into domestic law by clause 4: [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 92.

provides are the relevant exceptions) would imply that the Government envisages that this body of law is continued by **clause 4(1)**. **Clause 5(1)** provides that the principle of the supremacy of EU law does not apply to post-exit enactments. This appears to indicate that the case of *Costa*,<sup>79</sup> which established the principle of supremacy, is continued post-exit by **clause 4(1)**.

Further, the *Francovich* principle,<sup>80</sup> which provided that the damages for a state's failure to implement EU law should be available before national courts, and that state liability on the basis of the failure to implement a directive could be established in certain circumstances, is expressly excluded under provisions in **Schedule 1**.

Were it not for these exceptions, it might be assumed that case law and provisions relating to the functioning of EU law in a Member State could not be continued by **clause 4**, for the practical reason that they simply cannot be applied in the legal system of a non-Member State.

The exceptions point to an expansive reading of **clause 4(1)**, which would mean that it carries over all EU law currently available in the UK, apart from everything converted by **clause 3** and the exceptions explicitly identified in the rest of the Bill. Either way the precise boundaries of **clause 4(1)** appear uncertain.

Another uncertainty relates to the extent to which the existing hierarchy of EU law, whereby the Treaties and general principles of EU law as decided by the CJEU sit above other forms of EU legislation such as regulations, will continue.

**Clauses 5 and 6**, relating to the instructions regarding supremacy and the status of CJEU judgments, would imply that the current approaches to the internal hierarchy of EU law will continue. However, once the UK is outside the EU it is at least possible that these hierarchies could be changed by Parliament or challenged and changed in the courts.

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<sup>79</sup> Court of Justice of the European Union, *Flamino Costa v E.N.E.L*, 15 July 1964.

<sup>80</sup> [Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991](#).

## 4. Which EU laws will not be converted by the Bill?

### 4.1 Summary

This section of the paper examines **Clause 5(4) and (5)**, **Schedule 1** and **Schedule 6**, which exempt certain elements of EU law from being converted onto the post-exit day domestic statute book:

- **Clause 5(4)** exempts the Charter of Fundamental Rights from being converted into domestic law, and **clause 5(5)** sets out how pre-Brexit case law on the Charter would be read as a result. The Charter is one of the few specified substantive exceptions to the Bill's aim of continuity of EU law;
- **Schedule 1** supplements clause 5 and sets out further exceptions to the preservation and conversion of EU law provided for in clauses 2, 3 and 4;
- **Schedule 6** clarifies the exemptions excluded by **Clause 3**, which excludes some of the EU acquis from the preserving and converting provisions, where it does not apply to the UK.

This section also explains that '**soft law**' originating from the EU, in the form of guidance and other non-legislative measures, will not be converted into domestic law by the EUW Bill.

It should be re-stated here that the amount of EU retained law, as created by **clauses 2, 3 and 4**, that will be on the post-exit day statute book will be determined by the legislative measures passed after the Bill receives Royal Assent. Brexit bills and secondary legislation, under this Bill and other Brexit bills, will change various elements of retained EU law.

The exceptions set out on the face of this Bill, for example the principle set out by the CJEU in case of *Francovich*, which is excluded by **Schedule 1 paragraph 4**,<sup>81</sup> appear to create a presumption that all other comparable principles are preserved. For example, the principle set down in *Marleasing*, which provides that courts should interpret all domestic legislation, if at all possible, so as to comply with EU law, is not expressly excluded.<sup>82</sup>

<sup>81</sup> [Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991.](#)

<sup>82</sup> *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135.

## 4.2 Introduction

The Government's White Paper, [Legislating for the United Kingdom's withdrawal from the European Union](#), described the Government's decision "to convert the 'acquis' ... into UK law at the moment we repeal the European Communities Act".<sup>83</sup>

The *acquis communautaire* comprises the whole body or stock of EU law to date, including the Treaties, regulations, directives and decisions, judgments of the Court of Justice, declarations and resolutions adopted by the European Union, Common Foreign and Security Policy (CFSP) instruments, international agreements concluded by the European Union and those entered into by the Member States among themselves within the sphere of the Union's activities.<sup>84</sup>

In reality, it is impossible for the entire acquis, as it operates in a Member State of the EU, to be converted into the domestic law of a non-Member State. This was reflected by the Secretary of State for Leaving for the European Union in October 2016 when he stated that "the Great Repeal Act will convert existing EU law into domestic law, *wherever practical*" [emphasis added].<sup>85</sup>

The High Court's judgment in *Miller*, in October 2016, explained that a whole category of EU law rights could not be replicated in domestic law after exit, namely those associated with membership of "the EU club".<sup>86</sup> The judgment also pointed out that when EU law rights are capable of being replicated in domestic law after exit, they would operate differently, owing to different enforcement mechanisms that would apply outside the EU.<sup>87</sup>

## 4.3 Clauses 5(4) and 5(5): the EU Charter of Fundamental Rights

### Clause 5(4): the Charter will not be retained

Clause 5(4) of the Bill says 'The Charter of Fundamental Rights is not part of domestic law on or after exit day'. This is the one of the few specified exceptions to the Bill's aim of continuity of EU law.

The Government considers that the Charter would not be 'relevant' after Brexit, because it applies to the UK only when acting 'within the

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<sup>83</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 p 5.

<sup>84</sup> See European Commission [website](#) on enlargement and the acquis.

<sup>85</sup> Gov.uk, '[Government announces end of European Communities Act](#)', 2 October 2016.

<sup>86</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) para 61.

<sup>87</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) para 59.

scope' of EU law; and asserts that no substantive rights will be lost as a result of not retaining it.

### **Clause 5(5): how to read references to the Charter in case law**

**Clause 5(5)** states that references to the Charter in the pre-Brexit case law of either the CJEU or UK domestic courts are to be read as if they were references to the corresponding 'fundamental rights or principles' (undefined in the Bill) that are considered to exist irrespective of the Charter. This presumably refers to rights and principles set out both in retained EU law and in other human rights treaties that apply to the UK, which is asserted have been codified in the Charter.



### Box 8: the Charter

The EU Charter of Fundamental Rights is part of the EU's complex set of human rights obligations. It overlaps with other EU laws and international human rights treaties, and its 54 articles were intended to consolidate existing fundamental rights and principles relating to the EU. But it has also been considered innovative – for instance, disability, age and sexual orientation are specifically prohibited as grounds of discrimination, and it includes some modern rights such as the prohibition against reproductive human cloning.

The Charter now has the same legal force as the EU Treaties. It binds the EU institutions, but also the Member States (including the UK) whenever they are implementing EU law. It has direct effect in the UK as a result of the ECA and the Treaty on European Union (TEU). So when the UK is 'acting within the scope of EU law' it must act compatibly with the Charter, and UK primary legislation which conflicts with a directly effective right under the Charter must be set aside if it cannot be read compatibly with it.

Although the Charter incorporates or reflects the provisions of the Council of Europe's European Convention on Human Rights (ECHR), it is entirely separate from the ECHR. The Charter contains more rights than the ECHR does, but it applies in fewer circumstances, and it is enforced in a completely different way.

#### *Why is the Charter used in the UK courts?*

Individuals and businesses can bring cases in UK courts to uphold their rights under the Charter, and have been doing so increasingly, as it has some substantive and procedural advantages over ECHR claims under the Human Rights Act 1998.

For instance in the [ZZ](#) case the CJEU held that the Charter right to a fair hearing (Article 47) applied to deportation hearings, unlike the corresponding ECHR right (Article 6).<sup>88</sup>

Although the Charter applies to the UK only when it is acting within the scope of EU law, anyone with 'sufficient interest' can apply for judicial review based on the Charter whereas claims under the Human Rights Act can only be made when an individual is a 'victim' of a rights violation. Also stronger remedies are available for incompatibility with the Charter – including disapplying contrary provisions of UK primary legislation.

A recent example is the case of [Benkharbouche and anor v Embassy of the Republic of Sudan](#).<sup>89</sup> The Court of Appeal found that the applicants' right to a fair hearing under general principles of EU law as enshrined in Article 47 of the Charter was breached by the UK's State Immunity Act 1972, which had prevented them from accessing the courts to enforce their employment rights. The Court therefore disapplied the Act, which allowed their claim to proceed.

Currently, UK courts may – and sometimes must – make referrals to the CJEU to interpret the Charter (Article 267 TFEU). The CJEU could also be involved if the Commission took enforcement action against the UK in relation to the Charter.

#### *Objections to the Charter*

Objections to the Charter have largely been based on concerns that it is overly complex, that it could extend enforceable EU rights and obligations, and/or that the CJEU would take an expansionist approach to interpreting it.<sup>90</sup>

It was in response to such concerns that the UK and Poland succeeded in obtaining a Protocol on the Charter (Protocol 30 to the EU Treaties) which (in part) emphasises that the Charter is not to be interpreted as imposing new obligations on the UK. But Protocol 30 cannot be used to prevent the CJEU from defining the extent of EU rights contained in the Charter;<sup>91</sup> and it does not amount to an opt-out, as has sometimes incorrectly been thought.<sup>92</sup>

<sup>88</sup> Case C-300/11, 4 June 2013 (Grand Chamber)

Since the Charter gained direct effect in 2009, many decisions of the CJEU and the UK courts have relied on its provisions. For example, in a recent opinion on an EU-Canada agreement on transferring personal data outside the EU,<sup>93</sup> the Grand Chamber of the Court of Justice said that it would refer only to Charter Article 8 (protection of personal data), because that provision lays down the conditions for data processing in a more specific manner than Article 16 TFEU.<sup>94</sup>

## What rights and principles would be retained?

Under **clauses 2, 3 and 4** of the Bill, EU law that corresponds to many of the Charter provisions would be retained and could continue to be relied on in UK courts. For example, Charter Article 23 on equality between men and women is underpinned by Article 3 TEU and Articles 8 and 157 TFEU, as well as several directives.

**Clause 5(5)** states that ‘fundamental rights and principles’ that exist irrespective of the Charter will remain part of retained EU law. No further definition of these fundamental rights and principles.

Many Charter rights and principles form part of the ‘general principles of EU law’. Those general principles which have been recognised as such by the CJEU are to be retained – but only for the purposes of interpreting retained EU law (**clause 6(7)** and **Schedule 1 paras 2 and 3** – see below).

ECHR provisions that correspond to Charter provisions will not be affected by the Bill, as the Government has stated that it has no plans to withdraw from the ECHR (at least for the remainder of this Parliament).<sup>95</sup>

## What might be lost?

Although Charter rights currently apply only where the UK is acting ‘within the scope’ of EU law, it will not always be easy to identify what diminution there might be in the substance and scope of human rights protections. For example:

<sup>89</sup> [2015] EWCA Civ 33

<sup>90</sup> See Joint Committee on Human Rights, [The human rights implications of Brexit](#), 19 December 2016, paras 61-65. For academic analysis of accusations of CJEU ‘activism’ and ‘competence creep’ generally, see European University Institute, AEL 2013/9, Academy of European Law Distinguished Lectures of the Academy [To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice](#), Koen Lenaerts and José A. Gutiérrez-Fons.

<sup>91</sup> [R v David Davis MP et al](#) [2015] EWHC 2092 (Admin), para 10.

<sup>92</sup> See Angela Patrick, [Mapping the Great Repeal: European Union Law and the Protection of Human Rights](#), October 2016, para 53.

<sup>93</sup> [Opinion 1/15 on the transfer of Passenger Name Record data from the European Union to Canada](#), 26 July 2017 (Grand Chamber).

<sup>94</sup> See Lorna Woods (Professor of Internet Law, University of Essex), [‘Transferring personal data outside the EU: Clarification from the ECJ?’](#), EU Law Analysis blog, 4 August 2017.

<sup>95</sup> Department for Exiting the EU, [The Repeal Bill Factsheet 6: Charter of Fundamental Rights](#), July 2017.

- Many Charter provisions rephrase, update or extend the original sources used – for example the right to education (Charter Article 23) is extended to cover vocational and continuing training. This ‘new’ wording might no longer apply in the UK.
- Rights might be lost when retained EU law is amended by regulation under **clauses 7, 8 and 9** of the Bill, as these clauses have only limited human rights safeguards.
- The retention of general principles of EU law would have only a limited effect, because failure to comply with general principles of EU law could no longer be used as the basis for a right of action in domestic law in the UK, and or to disapply or quash legislation (**Schedule 1 para 3**).
- Charter provisions corresponding to a human rights treaty provision that the UK has not ratified, or has ratified but not made enforceable under domestic law, would no longer have even the limited enforceability provided indirectly by the Charter. For example, Charter Article 24 (the rights of the child) is based on the 1989 UN Convention on the Rights of the Child, which is only partially reflected in UK law.

Moreover, it is not clear how **Clause 5(5)** would work in practice when trying to determine what pre-Brexit case law referring to the Charter means after Brexit. Professor Steve Peers has suggested it would be “like trying to remove an egg from an omelette, because the judicial reasoning on the Charter and the EU legislation is intertwined”.<sup>96</sup> Where there are multiple underlying or corresponding rights and principles, it will be challenging for the courts to identify which one is in play in any particular case.

## What are the alternatives?

When the Bill was published, Keir Starmer, Labour’s Shadow Brexit Minister, said that incorporating the Charter was one of the six matters on which the Government would have to make significant concessions in order for Labour to vote for it.<sup>97</sup> The then Liberal Democrat leader, Tim Farron, also stated his support for the Charter.<sup>98</sup>

But it is not clear how a post-Brexit role for the Charter might be crafted that adapts the concept of being “within the scope” of EU law, does not over-complicate the human rights landscape, and also respects UK parliamentary sovereignty. For example:

- The Charter could be retained to apply to retained EU law and any future modifications to it. But this would mean some parts of

<sup>96</sup> Professor Steve Peers, [‘The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers’](#), EU Law analysis blog, 31 March 2017.

<sup>97</sup> [‘Labour vows to wreck Brexit process by voting against ‘Repeal Bill’ unless Theresa May makes major changes’](#), Independent, 13 July 2017

<sup>98</sup> [“‘Great repeal bill’ human rights clause sets up Brexit clash with Labour’](#), Guardian, 13 July 2017.

UK law continuing to be subject to a different human rights regime from the rest. And would it also cover any legislation required to implement the withdrawal agreement?

- Or it could even be extended, to apply to all UK law and institutions. But then its relationship with the Human Rights Act 1998 would be complicated.
- Would the primacy of the Charter and General Principles be maintained, and if so, over which domestic legislation?

Alternatively, various human rights 'standstill clauses' could be envisaged, for instance specifying that nothing in the Bill may infringe existing fundamental rights.<sup>99</sup>

In any case, it is important to remember that the courts protect fundamental rights under the common law (which includes customary international law). For instance, in the recent [\*UNISON case on employment tribunal fees\*](#), the UK Supreme Court stated that any attempt by the Government to hinder or impede the right of access to a court requires clear authorisation by Parliament.

## Residual effects of the Charter?

The UK must continue to comply with the Charter throughout the negotiations and when enacting any implementing legislation, wherever this is considered to be 'within the scope' of EU law.

The European Parliament has stated, in a resolution, that it will consent to the withdrawal agreement only if it complies with the Charter.<sup>100</sup> And the EU institutions will also have to ensure that in negotiating, signing and concluding any future relations agreements with the UK they are in a manner compatible with the Charter.

Moreover, it is likely to be the case that in areas where the UK wants to continue close cooperation with the EU, such as [exchanging data](#),<sup>101</sup> compliance with the Charter will be required in practice to ensure regulatory equivalence.

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<sup>99</sup> See for example [Repeal Bill: Liberty and Amnesty International UK's joint response](#), 13 July 2017.

<sup>100</sup> [European Parliament resolution of 5 April 2017](#) on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)).

<sup>101</sup> See Department for Exiting the EU, [The exchange and protection of personal data - a future partnership paper](#), 24 August 2017.

## 4.4 Schedule 1: supremacy, general principles and ‘*Francovich*’ damages

**Schedule 1** supplements clause 5 and sets out further exceptions to the preservation and conversion of EU law provided for in clauses 2, 3 and 4.

### How will the validity of EU law be challenged?

#### (para 1)

The EU Treaties allow challenges to the validity of EU legislation to be brought in the CJEU.<sup>102</sup> Schedule 1.1 seeks to prevent challenges to retained EU law being brought in domestic law after Brexit, but provides some circumstances where a challenge may be possible:

- if the CJEU has decided before exit day that the instrument in question is invalid, or
- if the challenge is of a kind described, or provided for, in regulations made by a Minister of the Crown.

Such ministerial regulations may allow challenges which before Brexit could have been made against an EU institution to be made against a public authority in the UK after Brexit.

Ministers might need to create new UK public authorities to do things that the EU institutions had previously done.

### General principles of EU law would have reduced effect (paras 2 and 3)

General principles are legal principles which have been recognised by the CJEU on a case-by-case basis as being particularly important in the EU legal order. They include principles such as legal certainty, legitimate expectation, proportionality, effectiveness and non-retroactivity. In the same way, the CJEU has also recognised certain fundamental rights as general principles. Additionally, [Article 6\(3\) TEU](#) now enshrines fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles.

General principles are applied by the CJEU and by national courts when determining the lawfulness of legislative and administrative measures within the scope of EU law. They are also used as an aid to interpretation of EU law. In the EU legal order they assume the same status as the Treaties. At present UK laws that are within the scope of EU law, and EU legislation (such as regulations and directives) that do not comply with the general principles, can be challenged and

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<sup>102</sup> See, for example, the Court’s [rejection](#) in May 2016 of challenges to the Tobacco Products Directive (Directive 2014/40/EU).

disapplied. Administrative actions taken under EU law must also comply with the general principles.

Under clause 6(7), many general principles of EU law that have been recognised as such by the CJEU at the time of Brexit will form part of retained EU law. However, under **Schedule 1 paras 2 and 3**, UK courts will no longer have the power to disapply domestic legislation on the grounds that it conflicts with these general principles. Nor could they form the basis of a judicial review of executive action or other legal challenge. They could only be used, like the pre-exit case law of the CJEU, to inform the interpretation by UK courts of retained EU law (clause 6). This is linked to the ending of the supremacy of EU law and rules established *inter alia* in *Francovich* and *Factortame*.

### No more ‘*Francovich*’ damages (para. 4)

**Schedule 1 paragraph 4** states that there is “no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*”.

**Paragraph 5** clarifies that in the Schedule 1 and clause 5 of the Bill, references to the principle of the supremacy of EU law, the Charter of Fundamental Rights, general principles of EU law or the *Francovich* rule refer to those references as they stand on Brexit day, “not as they will operate in the future”.<sup>103</sup>

#### Box 9: What is the *Francovich* rule?

The Court of Justice of the EU (CJEU) allows individuals, under certain conditions, the possibility of obtaining compensation for directives whose transposition is poor, delayed or non-existent.

In the *Francovich* case in 1991<sup>104</sup> the CJEU (then the ECJ) held that the Italian Government had breached its EU obligations by not implementing the Insolvency Directive on time, and was liable to compensate the workers' loss resulting from the breach. The Court further held that the damages for such breaches should be available before national courts, and that to establish state liability on the basis of the **failure to implement a directive**, claimants had to prove that:

- the law infringed was intended to confer rights on individuals;
- the breach was “sufficiently serious”, i.e. the Member State had manifestly and gravely disregarded the limits of its discretion;
- there was a direct causal link between State's failure to implement the directive and the loss suffered.<sup>105</sup>

The principle of State liability for damage caused to individuals by breaches of EC law was clarified five years later in the judgments in *Brasserie du Pêcheur* and in *Factortame* (1996), when it was extended to all cases of infringement and all State bodies responsible for the breach.

**Schedule 1 paragraph 4** has been seen by some as an attempt by the Government to water down rights to redress against the state,<sup>106</sup>

<sup>103</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para. 157.

<sup>104</sup> [Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991.](#)

<sup>105</sup> Factortame III, [Joined Cases C-46/93 and C-48/93: Brasserie du Pêcheur SA v Federal Republic of Germany; and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others](#) 5 Mar 1996.

<sup>106</sup> See, for example, The Times, 11 August 2017, [Brexit bill will remove right to sue government.](#)

although the Explanatory Notes add: “This provision does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions”.

Is the right in certain circumstances to sue the state in *Francovich* linked in principle as well as practice only to EU membership? This is the Government’s view: “The right to *Francovich* damages is linked to EU membership” and “will no longer be relevant after we leave”; but also that “After exit, under UK law it will still be possible for individuals to receive damages or compensation for any losses caused by breach of the law”.<sup>107</sup>

David Hart QC has pointed out that “In many areas of litigation, a claim relying on a provision of EU law may have more teeth than the equivalent domestic cause of action”.<sup>108</sup> He thinks that the “no *Francovich* damages” clause “seems to be a blatant way of Government seeking to avoid responsibilities for past breaches which is nothing to do with the underlying purpose of the Bill”, and:

The only tempering of this is for actions begun but not finally decided by a court before exit day: even further tucked away in Schedule 8, para.27.

Note that this scheme ignores when the breach of EU law might have occurred, and hence has obvious retrospective effect. Let us assume that government has been egregiously in breach of a Directive for some years, both before and after exit day.

Government escapes any liability under the *Francovich* principle for past and future breaches, unless the litigant has issued his claim before exit day. Cue flood of protective proceedings issued as exit day looms.<sup>109</sup>

But Hugh Bennett, deputy editor at BrexitCentral, thought disapplying *Francovich* was simply a “procedural step in leaving the EU”, and:

Clearly it would be absurd if the UK could be sued for failing to implement future EU directives passed after it has already left. However, it will not affect people’s rights to sue the government for breaking existing EU laws – the UK has the centuries-old practice of judicial review, which serves the same purpose in domestic law, with Gina Miller’s Article 50 case a recent high-profile example. And as the Withdrawal Bill incorporates all existing EU law into UK law, this just means that UK citizens will now be able to sue the government for breaking any EU laws directly through the UK legal system.<sup>110</sup>

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<sup>107</sup> [Politics Home, 11 August 2017](#)

<sup>108</sup> UK Human Rights blog, [On first looking into the Brexit Bill](#), 15 July 2017.

<sup>109</sup> UK Human Rights blog, [On first looking into the Brexit Bill](#), 15 July 2017.

<sup>110</sup> [DEBATE: Is it justified that citizens will lose the ability to sue government over failure to implement EU law?](#) Hugh Bennett and Gina Miller, CITYA.M., 14 August 2017.



Particular concerns have been raised with regard to environmental law<sup>111</sup> and workers' rights<sup>112</sup> after Brexit.

### Box 6: Enforcement of environmental law outside the EU

#### Claims relating to EU law

The Bill removes the right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*; and removes rights of action based on a failure to comply with any of the general principles of EU law (*Schedule 1, paras 4 and 3(1)*). Referring to these provisions of the Bill, David Hart QC "hoped that a fairer balance between past and future grounds for complaint emerges during the legislative process".<sup>113</sup>

Press reports have focused on environmental examples, such as air pollution, as an area in which claims relating to past breaches of EU law would not be possible after exit day.

#### Complaints to the European Commission

In addition to domestic rights of action for citizens to enforce their rights, the European Commission has a [standard complaints form](#) which any EU citizen can use free of charge (either online or by post) to submit a complaint against a breach of EU law by a Member State. The Commission assesses all complaints and, where appropriate, transfers them to a suitable problem-solving mechanism. This often involves discussion and negotiation rather than a formal infringement procedure.

This option is available for all EU law, but the majority of infringement proceedings have been brought in the environmental field. This is explained by the UK Environmental Law Association (UKELA) as being due to the often "unowned" and "diffusively spread" nature of the environment and environmental harms compared to other areas of EU law (such as employment rights) where specific individuals or bodies have clear interests to protect.<sup>114</sup>

When asked what will be in place after exit day, the Government has referred to existing provisions for regulators to enforce environmental laws; and specifically identified the judicial review process as a way that interested parties may bring legal action against the Government.<sup>115</sup> However, UKELA has argued that judicial review alone is "ill-suited" to replacing the supervisory role of the Commission, pointing to the costs involved as well as the loss of the less formal mechanisms such as discussion and negotiation.<sup>116</sup>

## 4.5 Schedule 6

**Clause 3** excludes some of the EU acquis from the preserving and converting provisions, where it does not apply to the UK. **Schedule 6** clarifies the exemptions.

### UK opt-ins and opt-outs

The UK has a number of opt-in and opt-out arrangements. **Schedule 6 paragraph 4** lists the EU Treaty protocols under which the UK is exempt

<sup>111</sup> See Blackstone Chambers, [Environmental law after Brexit: Breaching the Dam? Part 4: Public law causes of action and remedies](#), Isabel Buchanan, 1 Nov 2016.

<sup>112</sup> See [Independent](#), 11 August 2017.

<sup>113</sup> Environmental Law Foundation, [Blog by David Hart QC](#) on first looking into the Brexit Bill [accessed 14 August 2017].

<sup>114</sup> UKELA, [Brexit and Environmental Law, Enforcement and political accountability issues](#), July 2017 [accessed 14 August 2017].

<sup>115</sup> For example, see: [PQ HL6613](#) [on Environment Protection] 20 April 2017.

<sup>116</sup> UKELA, [Brexit and Environmental Law, Enforcement and political accountability issues](#), July 2017 [accessed 14 August 2017].



from aspects of EU law and policy. The Bill will therefore not convert EU laws where, under the provisions of these Protocols, they do not apply to the UK.

The UK has had an opt-out from the Schengen *acquis* (Protocol 19), Economic and Monetary Union (Protocol 15), police and criminal justice legislation adopted before the Lisbon Treaty came into force (Article 10 of Title VII, Protocol 36) and a case-by-case opt-in arrangement for aspects of the Area of Freedom, Security and Justice (Protocol 21 and the former Protocol on Title IV, Visas, asylum, immigration and other policies related to free movement of persons).

### Common Foreign and Security Policy

Title V and former Title V TEU deal with the EU's Common Foreign and Security Policy (CFSP). CFSP decisions are adopted by unanimity by Member States in the Council of the EU. They cover matters such as restrictive measures against third states or individuals (e.g. travel bans, asset freezes). The CFSP provides the broad scope of sanctions measures to be applied, and implementation may be both for the EU in matters falling within its competence (such as asset freezes), and for the Member States in other matters (such as visa bans).<sup>117</sup>

UK governments have consistently taken the view that the inter-governmental aspects of EU policy- and decision-making (CFSP and the former third pillar, Justice and Home Affairs - JHA) do not need to be incorporated into UK law under the ECA or amendments to it. For example, in the Bill linked to ratification of the Treaty of Nice, amendments in the second and third intergovernmental pillars of the TEU (CFSP and JHA), were outside the remit of the Bill, and, like other international treaties, were regarded as binding externally on the UK, but not enforced internally by British courts.

Similarly, in the current Bill, CFSP decisions under former and current Title V TEU are "exempt" EU instruments.

Sanctions against third states, businesses or individuals are implemented by a two-stage EU procedure. First, a CFSP decision under Article 29 TEU is adopted; then a regulation under Article 215 TFEU (restrictive measures). So EU sanctions are imposed by two distinct EU acts – one CFSP and one non-CFSP – which are linked. What is not clear under Schedule 6(1)(2) is whether, for example, the non-CFSP EU regulation imposing sanctions will be converted into UK law and retained, while the initial CFSP decision is not. The Government's April 2017 [White Paper](#) said "It is not possible to achieve this [impose and implement sanctions in order to comply with our obligations under the United Nations (UN) Charter and to support our wider foreign policy and national security goals] through the Great Repeal Bill, as preserving

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<sup>117</sup> UK Government's Review of the Balance of Competences, [Foreign Policy report](#), July 2013.

or freezing sanctions would not provide the powers necessary to update, amend or lift sanctions in response to fast moving events".<sup>118</sup> So the Government plans to publish an International Sanctions Bill containing "new legal powers that are compliant with our domestic legal system. These will enable us to preserve and update UN sanctions, and to impose autonomous UK sanctions in coordination with our allies and partners".

## 4.6 EU 'soft law' measures

The Bill will not convert or retain EU measures that are often referred to as 'soft law', such as communications, declarations, recommendations, resolutions, statements, guidelines and special reports of the EU institutions. These are not legally binding and are often taken forward informally through dialogue and negotiation among the Member States or between the EU institutions and Member States. But declarations can have interpretative effect. Soft law includes measures agreed using the Open Method of Coordination (OMC), a form of intergovernmental policy-making that does not result in binding EU legislation and does not require Member States to introduce or amend their laws. These measures are difficult to quantify as they often take the form of objectives and common targets, standard setting or self-regulatory measures, but they play a significant part in the 'Europeanisation' of national policy- and law making.

### Box 10: Financial services and soft law

In certain areas of economic activity, a large part of the 'law' is not composed of Acts or secondary legislation, but is instead Rules made by statutory bodies. Financial Services is a good example of this. Part X of the [Financial Services and Markets Act 2000](#) gives the Authority (the Regulator which for conduct is the Financial Conduct Authority and for supervision the Prudential Regulation Authority) general rule making powers. The legislation sets out what and who the rules apply to and the manner in which they must be arrived at – after consultation – and their publication.

Looking simply at the FCA, the Rules collectively form the [Handbook](#) which contains the complete record of FCA Legal Instruments and presents changes made in a single, consolidated view. If printed out the Handbook would stand metres tall. All regulated firms must comply with the rules set out in the Handbook. Dual-regulated firms will need to consider both FCA and PRA rules.

In the financial services sector, the FCA is at the end of a long chain of authority or law making process. Above them is the UK government, the EU and global bodies such as the [Financial Stability Board](#) and the [Financial Action Task Force](#) and ultimately decisions taken at G20 meetings by Heads of State.

EU Directives and Regulations passed to the UK to implement have been effected by a combination of secondary legislation and FCA rules. However, the FCA, in its own right is not a passive agent in the

<sup>118</sup> [Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions](#), Cm 9408, April 2017; see also [Government response, August 2017](#).

totality of law and rule making at the European level. The FCA engage proactively with both counterparts in the EU and with EU institutions and in the work of the European Supervisory Authorities (ESAs). It is the UK representative at the [European Securities and Markets Authority](#) and it participates actively in a wide range of groups developing policy and regulatory rules. It contributes to the work of the [European Banking Authority](#) and the [European Insurance and Occupational Pensions Authority](#) on issues within its competency. It contributes also to the consumer protection and financial innovation groups of all three ESAs.

## 5. Retained EU law: supremacy and the courts

A central aim of legislating for Brexit is to ensure that UK institutions have the final say over the laws that apply in the UK. The EUW Bill is designed to ensure that Parliament and domestic courts, rather than the EU's institutions, decide on the content and meaning of the law post-Brexit.

This section addresses:

- **Clause 5** – this provision addresses the role of the principle of the supremacy of EU law post-exit (the elements of clauses on the Charter of Fundamental Rights are covered in Section 4);
- **Clause 6** – this provision provides instructions to the courts on the relevance of judgments of the CJEU to the task of interpreting retained EU law post-exit.

One of the most significant constitutional effects of the Bill is to change the status of laws that originate from the EU. Once the UK is no longer a member of the EU, and the ECA is repealed, retained EU laws will no longer be supreme over laws made by Parliament. Laws made by Parliament after Brexit will no longer be subject to the principle of the supremacy of EU law (**clause 5(1)**).

In relation to the courts, this Bill provides that domestic courts will no longer be bound to follow the judgments of the CJEU handed down after exit day when interpreting retained EU law (**clause 6**).

It is at least arguable that both of these constitutional changes flow from the fact that the UK will no longer be a Member State of the EU rather than from any provisions of domestic legislation. In any event, the constitutional principle of parliamentary sovereignty is not contingent on primary legislation. This Bill represents a proposal for Parliament to use its sovereign legislative power, which undoubtedly persisted under the ECA, to change the status of EU law in the UK constitution.

Nevertheless, domestic constitutional provisions on the status and interpretation of retained EU law are necessary in order to provide legal clarity and continuity. The need to secure legal continuity means that the legislative solutions to the mandate for constitutional change provided by the referendum result are more complex than they might appear.

While the general principles of the supremacy of EU law and of binding decisions of the CJEU will both disappear on exit day, this Bill includes measures that ensure that retained EU law will continue to have priority over some domestic law (**clause 5(2)**), and that CJEU judgments will act as binding precedents in most domestic courts (**clause 6(3)**).

To understand how the new category of law created by clauses 2, 3 and 4 will operate, it is necessary to evaluate clauses 5 and 6, which provide instructions to the courts on the status and interpretation of retained EU law.

Just as the status of EU law was clarified by the courts, notably in *Factortame*,<sup>119</sup> it is likely the status of retained EU law and its relationship with other constitutional legislation will be tested in the courts.

Such a prospect was raised by Lord Neuberger, the current President of the Supreme Court, who warned in an interview to the BBC that the judiciary “would hope and expect” that Parliament would provide clear instructions to the courts on the subject of the role of judgments of the CJEU post-exit.<sup>120</sup> This might ultimately depend on the content of the withdrawal agreement, which is to be implemented by the power provided for in **clause 9** (see Section 7).

## 5.1 Clause 5: the supremacy of EU law

**Clause 5(1)** provides that the principle of supremacy of EU law does not apply to any legislation passed by Parliament after exit day.

One might think that this is not strictly necessary since, once the UK has left the EU, the supremacy of EU law will no longer apply upon the repeal of the ECA (**clause 1** of this Bill). Even if the ECA was not repealed, the principle would disappear, as that statute depends on the UK being a Member State of the EU and subject to the EU Treaties, and the Treaties only bind Member States of the EU.

On the other hand, it could be argued that **clause 5(1)** is necessary as **clause 4** converts the principle of the supremacy of EU law.<sup>121</sup>

Accordingly **clause 5(1)** is needed in order to create an exception to this general rule that in the event of a conflict between EU law and domestic law, the latter must give way to the former.

### Box 11: The Supremacy of EU Law

Though not written into the EU Treaties themselves,<sup>122</sup> the principle of the primacy of EU law over national law was established in the early case-law of the Court of Justice of the European Union (CJEU), notably in *Costa v ENEL* in 1964:

[...] in contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal system of the member States and which their courts are bound to apply. [...] The transfer by the States from their domestic legal systems to the Community legal systems of the rights and obligations

<sup>119</sup> *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13.

<sup>120</sup> [UK judges need clarity after Brexit - Lord Neuberger](#), BBC News, 8 August 2017.

<sup>121</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 94.

<sup>122</sup> The primacy of EU law, in accordance with the established case law of the CJEU, was confirmed in a Declaration (No. 17) attached to the Lisbon Treaty.

arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>123</sup>

In the *Factortame* cases in 1990 and 1991 the CJEU ruled that UK law was incompatible with the EC Treaty and the Common Fisheries Policy by discriminating against non-UK EC nationals. This led to the ‘disapplication’ of a UK Statute in accordance with the authority of the ECA. In order to comply with the Interim Order of the CJEU against the UK, the Government legislated to amend the Merchant Shipping Act 1988.

**Clause 5(2)** introduces a new legal hierarchy into the UK’s constitutional system (valid on any reading of **clause 5(1)**), whereby the supremacy of EU law can apply “so far as relevant” to enactments passed before exit day, but not over those passed after exit day. The Explanatory Notes explain that this enables the principle of supremacy of EU law to apply to retained EU law as it relates to other pre-exit day legislation “where relevant”.<sup>124</sup> The provision does not define “relevance”, but the Explanatory Notes state that the principle would not apply to legislation “which is made in preparation for the UK’s exit from the EU”.<sup>125</sup>

This would imply that the effect of **clause 5(2)** is to ensure that retained EU law has priority over all law enacted before exit, *including* that enacted between this Bill being enacted and exit day, but *excluding* that made in order to prepare for Brexit.

#### **If retained EU law is amended, does it remain supreme?**

**Clause 5(3)** addresses the issue of the status of a post-exit EU amendment to a retained EU law. **Clause 5(3)** outlines that a post-exit modification will not prevent the retained EU law from being accorded supremacy over pre-exit legislation, as long as the application of supremacy is “consistent with the intention of the modification”.

Courts will have to assess whether applying the principle of supremacy to a provision of retained EU law which has been amended is consistent with what Parliament intended when it enacted the amendment. Generally speaking, assessing the “intention of a modification” may prove difficult.

This is significant, as the question of whether a provision of retained EU law that has been modified by either subsequent primary or secondary legislation can continue to be supreme could potentially have important

<sup>123</sup> Court of Justice of the European Union, *Flaminio Costa v E.N.E.L.*, 15 July 1964

<sup>124</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 96

<sup>125</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 96

legal consequences. As such it will be important for a court, or anyone else, to be able to assess whether amendments to a Treaty right saved by **clause 4**, for example, continue to be supreme over all pre-exit legislation, or whether the extent of its modification has rendered it subject to the ordinary rules of statutory interpretation.

The Government has committed to provide Parliament with a memorandum accompanying each instrument made under clause 7 that will identify how the retained EU law operated, why and how it is being changed, and a statement that the regulations contemplated will do no more than is necessary.<sup>126</sup>

## 5.2 Clause 6: the jurisprudence of the CJEU

### The Court of Justice of the European Union

The Court of Justice of the European Union (CJEU), based in Luxembourg, is the highest judicial authority in the EU and is responsible for producing authoritative rulings on the meaning and interpretation of EU law. The CJEU's primary method of influence is through its authoritative interpretations of EU law, which the courts of Member States are bound to follow when interpreting EU law.

At present, the status of the CJEU in UK law is secured by section 3(1) of the ECA, which requires UK courts to follow the CJEU interpretation of EU law.

The Government has consistently maintained that removing the influence of the Court of Justice over the UK's legal system is one of the aims of Brexit.<sup>127</sup> On 2 October 2016, Theresa May said that the interpretation of law would no longer be via judges in Luxembourg but instead would be "by courts in this country".<sup>128</sup> The Government has also committed to limiting the impact of Brexit upon the legal systems in the UK, and as such has said that does not intend for the interpretation of retained EU law to be changed upon Brexit.<sup>129</sup>

### Clause 6

#### Post-exit CJEU judgments

**Clause 6(1)(a)** provides that domestic courts are not bound to follow judgments of the CJEU handed down after exit day. It does not prevent domestic courts from treating them as persuasive authority, as they may

<sup>126</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#) para 49.

<sup>127</sup> 'Theresa May's Conservative conference speech on Brexit', *Politics Home*, 2 October 2016.

<sup>128</sup> Ibid

<sup>129</sup> HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), Cm 9417 February 2017 para 2.3; Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.16.

currently treat judgments given by domestic courts in other jurisdictions.<sup>130</sup>

**Clause 6(2)** expressly permits a domestic court to refer to a post-exit CJEU judgment “if it considers it appropriate to do so”. The Bill does not offer any guidance as to the meaning of “appropriate” in this context. As noted above, in the absence of any statutory direction, UK courts regularly engage with the judgments of foreign courts, which they treat as persuasive and not binding.

For the past 40 years UK courts have co-operated with the CJEU on questions of interpretation relating to EU law. If a provision of retained EU law is not amended, and a question arises as to its interpretation in domestic courts after exit, and the CJEU has recently given a judgment on the meaning of that provision, then there may well be a strong incentive for the courts to take account of that judgment in a similar way as they did before exit. The principal difference will be that a UK court would not be bound by law to do so, and if the circumstances meant that it was not thought to be relevant they could decide on a different interpretative approach.

The Institute for Government (IfG) has highlighted a number of options that could enhance the clarity of clauses 6(1) and 6(2), including instructing the courts to ignore post-exit CJEU judgments or that they must treat post-exit judgments as persuasive.<sup>131</sup> In another report the IfG argued that ambiguity on this point “would risk leaving judges stranded on the front line of a fierce political battle”.<sup>132</sup>

Clauses 6(1) and 6(2) allow judges a degree of flexibility to decide how to use post-exit case law in the circumstances before them. Flexibility could be important to allow the courts to adapt to the relationship with the EU as it changes over time.

In August 2017, the UK Government published a Future Partnership Position Paper on the CJEU, in which it said it aims to end the “direct” jurisdiction of the court.<sup>133</sup> The paper acknowledges that it is possible that “account is to be taken of CJEU decisions”, “where there is a shared interest in reducing or eliminating divergence in how specific aspects of an agreement with the EU are implemented”.<sup>134</sup>

The nature of the withdrawal and future partnership deals will be crucial in determining the courts’ approach. These will be critical in

<sup>130</sup> A study of the Supreme Court’s case law 2009-2013 found that 31.3% of cases in that period cited foreign jurisprudence (77 out of 246 cases): Hélène Tyrrell, [The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court](#) (2014) p143.

<sup>131</sup> Raphael Hogarth, [How to answer Lord Neuberger’s call for clarity on the ECJ. Institute for Government](#) (10 August 2017).

<sup>132</sup> Ibid.

<sup>133</sup> Department for Exiting the EU, [Enforcement and dispute resolution - a future partnership paper](#) (2017) para 1.

<sup>134</sup> Department for Exiting the EU, [Enforcement and dispute resolution - a future partnership paper](#) (2017) para 46-51.



determining the areas in which there is a shared interest in reducing or eliminating divergence, or in which there is a shared interest in maintaining convergence.

#### Box 12: Section 2 of the *Human Rights Act 1998*

A relevant comparison could be made between clause 6(2) and section 2 of the *Human Rights Act 1998* which provides that the courts should “take account” of the judgments of the European Court of Human Rights. For a period the senior judiciary interpreted this provision to mean that domestic courts should not depart from the interpretive approach of the ECtHR.<sup>135</sup> This approach drew criticism from those responsible for designing the Act,<sup>136</sup> and the Supreme Court has since modified this approach.<sup>137</sup>

#### Pre-exit CJEU judgments

**Clause 6(3)** requires that UK courts post-exit will decide questions on the meaning of retained EU law “so far as it is unmodified” and “so far as... relevant” in accordance with any retained case law (which includes pre-exit CJEU judgments). The provision also requires UK courts to decide such questions by reference to retained domestic case law that is relevant to retained EU law, and retained general principles of EU law.

The precise boundaries of which CJEU judgments and domestic judgments are retained is defined by **clause 6(7)**. **Clause 6(7)** provides that retained EU case law is any principles or decisions laid down by “the European Court, as they have effect in EU law immediately before exit day and so far as they relate to” the laws converted by **clauses 2, 3 and 4** of this Bill and so long as they are not expressly excluded by **clauses 5** or **Schedule 1**. This means that the cases of *Costa* and *Francovich* would not form part of retained EU case law (Section 4.4).<sup>138</sup>

By contrast with **clause 6(2)** this is a relatively unambiguous direction to the courts designed to ensure that the meaning of retained EU law is not changed simply by the removal of the obligation on domestic courts to decide questions of EU law by reference to the case law of the CJEU. This is a measure designed to provide legal continuity. It is subject to some notable exceptions.

**Clause 6(4)** exempts the Supreme Court, and in certain circumstances the High Court of Justiciary in Edinburgh, from this duty. Instead, **clause 6(5)** provides that these courts should treat retained EU case law in the same way as they would their own case law.

<sup>135</sup> *Regina v. Special Adjudicator ex parte Ullah* [2004] UKHL 26 Lord Bingham

<sup>136</sup> Lord Irvine, the Lord Chancellor at the time the Human Rights Act was enacted criticised this approach: see [Lord Irvine: human rights law developed on false premise](#). The Guardian, 14 December 2011.

<sup>137</sup> *Manchester City Council v Pinnock* [2010] UKSC 45, Lord Neuberger: “This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law.”

<sup>138</sup> [Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991](#).

**Clause 6(6)** explains, in a similar formulation to **clause 5(3)**, that post-exit amendments to a provision of retained EU law do not prevent CJEU case law being relied upon for interpretation so long as doing so is “consistent with the intention of the modifications”. This will make ascertaining the intention of any amendment to retained EU law significant, and this will not always be straightforward. As mentioned above, this will put the onus on the Government to be clear about whether it intends for an amendment to a provision of retained EU law to change its status so that interpretation in accordance with CJEU case law is no longer appropriate.

Article 267 TFEU provides a mechanism whereby a national court can refer a question of the interpretation of EU law or Treaties to the CJEU.

**Clause 6(1)(b)** confirms that domestic courts cannot send a reference to the Court of Justice under Article 267 TFEU. Courts in countries outside the European Union cannot make references to the CJEU.

## 6. Delegated powers: clause 7 – the correcting power

### 6.1 Summary

This section examines **clause 7**, which grants Ministers the power to make statutory instruments to prevent, remedy or mitigate any “failure of” or “deficiency in” retained EU law arising from the UK’s withdrawal from the EU. It has been described as the “correcting” power.

Corresponding powers for the devolved administrations are set out in **Schedule 2, Part 1**.

The power is the necessary second step in the process of converting and retaining EU law on the post-exit day statute book.

The Government does not currently know all the changes that will be needed to ensure that retained EU legislation functions effectively when the UK leaves the EU. In certain policy areas, decisions have not been made as to what changes to retained EU law will need to be made before Brexit. Furthermore, in advance of the withdrawal agreement and any future trade deal, it is not yet certain which areas of retained EU law will need to be kept on the statute book and for how long.

**Clause 7** represents the Government’s request for Parliament to delegate legislative power to change the statute book so that retained EU law functions effectively after exit day. The Government’s case for delegation is based on the uncertainty over what changes will be needed, the volume of changes required and the speed at which they will need to be made.

The challenge for scrutinising this power will be assessing the extent to which it is possible to define what counts as a “failure” or “deficiency” of retained EU law. The Government requires a degree of flexibility in order to cover the scope of retained EU law, and there are a variety of reasons why changes might be needed. This scope and variety of legislative tasks in practice results in a power that, in legal terms, can be used to achieve a wide range of legislative changes, including establishing new public bodies, substantive policy changes and amendments to constitutional legislation in order to prepare for Brexit.

The power is limited by some significant legal constraints and subject to parliamentary oversight. Section 9 of this briefing discusses the arrangements for scrutinising secondary legislation made under this power.

Striking the right balance between granting Government the tools it needs to ensure the statute book functions after exit day, and enabling effective parliamentary and legal scrutiny of changes to law, is inherently difficult.

## 6.2 Breadth and scope of clause 7

The power that would be granted by this clause is wide. It has a broadly defined purpose with some restrictions that prevent it from being used for certain prescribed legislative tasks. The power can be used to amend primary legislation. As such it is a Henry VIII power (see section 1.5).

The breadth and scope of a delegated power is defined by its stated statutory purpose and the legal restrictions that accompany it. The House of Lords Select Committee on the Constitution has argued in its reports that the subject matter of a Henry VIII power should be drawn as narrowly as possible.<sup>139</sup>

The purpose and statutory limits are judicially enforceable, meaning that ministers use these powers knowing that if the limits are not followed, the secondary legislation can be quashed by the courts. As outlined above, it is important to note that the courts can imply limits on delegated powers, and are more likely to do so if the power is defined broadly.<sup>140</sup>

### Purpose of the correcting power

The purpose of the power is set out in **clause 7(1)**. The provision states that the purpose is to enable a Minister to make regulations “as the Minister considers appropriate to prevent, remedy or mitigate any failure of retained EU law to operate effectively, or any other deficiency in retained EU law” arising from Brexit. If the minister believes that the power is being used for one of the purposes as defined, then that could be sufficient.

Scrutiny of the purpose of the power is likely to focus on whether the drafting adequately reflects how the power is intended to be used. In December 2016, David Davis, the Secretary of State for Exiting the European Union, said that “material changes” would not be made by secondary legislation.<sup>141</sup>

The DPM suggests that the purpose of the power means that it is “limited to addressing failures of EU law to operate effectively or any other deficiencies which arise from withdrawal”.<sup>142</sup> The Memorandum also acknowledges that the power is not limited to “necessary” changes.<sup>143</sup> The power is wide, and the examples given in clause 7(2) of

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<sup>139</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 p16; House of Lords Select Committee on the Constitution, *Public Bodies Bill*, 4 November 2010, HL 51 2010-12, p3.

<sup>140</sup> Section 1.5

<sup>141</sup> Exiting the European Union Committee Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

<sup>142</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 34

<sup>143</sup> Ibid

how it might be used are non-exhaustive. This therefore raises the question of whether the power could be used to introduce substantive policy changes to replace retained EU laws that were considered to be deficient.

For example, as drafted **clause 7** could be used to amend legislation that is not caught by the definition of retained EU law. The legal restrictions on **clause 7**, discussed below, expressly cite those Acts that cannot be changed by the power. This would imply that it is legally possible, as the Explanatory Notes suggest,<sup>144</sup> that the power could be used to amend any legislation, except those Acts which are expressly excluded, so long as the purpose was to “prevent, remedy or mitigate” a deficiency of retained EU law.

The significance of the purpose is illustrated through the debate over the purpose of the power in the *Legislative and Regulatory Reform Bill 2005-06*.

**Box 13: The scope of the delegated powers in the *Legislative and Regulatory Reform Bill 2005-06***

In January 2006, the Government introduced *the Legislative and Regulatory Reform Bill* to the House of Commons. The Bill as introduced contained a delegated power to enable Ministers to change primary and secondary legislation for the purpose of “reforming legislation”.

The House of Commons Regulatory Reform Committee stated that the Bill provided “a concurrent general power to legislate without the constraints that primary legislation normally imposes”.<sup>145</sup> The House of Lords Constitution Committee stated that in this form the power would “have eroded the principal difference between an order made by a Minister under delegated powers and an Act of Parliament”.<sup>146</sup>

The Government responded by amending the Bill so that the enacted version claimed two narrower powers, each with a more precise purpose of “removing or reducing any burden” and “securing that regulatory functions are exercised in compliance with specific principles”. Each term was then further defined in some detail in the relevant section.<sup>147</sup>

The purpose of the Henry VIII power in the *Public Bodies Act 2011* provides another interesting contrast with **clause 7**. Section 8 (1) of the 2011 Act states that a Minister may make an order “only if the minister considers that the order serves the purpose of improving the exercise of public functions” and then lists a number of factors that the Minister should have regard to. The language of “only if the Minister considers” in connection with the purpose appears to be more constraining than

<sup>144</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 115

<sup>145</sup> House of Commons Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, p16.

<sup>146</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 p7.

<sup>147</sup> Section 1 and Section 2 of *Legislative and Regulatory Reform Act 2006*

“as the Minister considers appropriate” used in **clause 7**. In both cases the definition is subjective.

The DPM explains that the Government decided against restricting the purpose to changes that would be “necessary” to remedy a deficiency. The Memorandum explains that changes might be made to laws that would be functional even if they were not corrected, but still has what the Government considers to be a “deficiency”.<sup>148</sup>

**Clause 7(2)** gives various examples of deficiencies in EU law that seek to add clarity to the purpose of the power. **Clause 7(2)** expressly states that it is not an exhaustive list. These examples could inform how the power is interpreted in the courts, although in practice the drafting of the purpose is explicitly designed to provide flexibility.

**Clause 7(3)** provides some clarity on the meaning of a “deficiency” and the limits of the purpose of the power as currently defined. **Clause 7(3)** explains that retained EU law is not deficient because it has been changed by the EU post-exit. The DPM draws attention to the fact that a UK public authority that is transferred a legislative function by this Bill would not be bound by this limit and could choose to amend retained EU law to keep pace with changes to EU law.<sup>149</sup>

**Clause 7 (5)** says that the power can be used to transfer functions of EU entities to UK public authorities, and **clause 7(5)(b)** allows for the power to be used to create new public authorities. **Clause 7(5)(a)** allows for a new or existing UK institution to be transferred legislative functions.

**Schedule 7 paragraph 1(2)(f)** highlights that the power could be used to create new legislative functions, including Henry VIII powers, that can be transferred to UK institutions. Mark Elliott, Professor of Public Law at the University of Cambridge, describes this as a form of “delegated legislation on stilts”.<sup>150</sup>

**Clause 7(4)** states that regulations under this power could make any provision that could be made by Act of Parliament. This effectively means that the full breadth of Parliament’s legislative discretion, subject to explicit limits in **7(6)** and any implied by the courts, could in theory be delegated to Government by this clause.

The problem with this reading of **clause 7** is that if **7(4)** says that regulations made under it can do anything that could be done by an Act, such regulations are nonetheless secondary legislation, which is

<sup>148</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 34.

<sup>149</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 39.

<sup>150</sup> Mark Elliott, [The EU \(Withdrawal\) Bill: Initial Thoughts](#) (14 July 2017) Public Law for Everyone.

constitutionally fundamentally different in character, and can be ruled invalid on vires grounds.<sup>151</sup>

## The statutory limits on the correcting power

The scope of **clause 7** is also determined by the express legal limitations imposed upon it. Under **Clause 7(6)** regulations cannot:

- a. Impose or increase taxation;
- b. Make retrospective provision;
- c. Create a relevant criminal offence;
- d. Be made to implement the withdrawal agreement;
- e. Amend, repeal or revoke *the Human Rights Act 1998* or any subordinate legislation made under it, or
- f. Amend or repeal the *Northern Ireland Act 1998* (unless the regulations are made by virtue of paragraph 13(b) of Schedule 7 to the Bill or are amending or repealing paragraph 38 of Schedule 3 to the Northern Ireland Act 1998 or any provision of that Act which modifies another enactment).

In addition to the limitations imposed by clause 7(6), the courts presume that Parliament does not intend to legislate contrary to individual rights unless it expressly provides for this (known as the principle of legality).<sup>152</sup>

One of the justifications for the breadth of the power is to enable Government to wait until after the negotiations are concluded before introducing the relevant changes to the law. The Government, in the DPM, explains that it does not want to have to introduce primary legislation before negotiations are concluded that might “show our hand”.<sup>153</sup>

### What legislation can be changed?

**Clause 7(6)(e) and (f)** highlight the legislation that cannot be amended by the power, and therefore it could be presumed that all other Acts of Parliament, including those of constitutional significance, such as the *Parliament Acts 1911 & 1949*, the *Scotland Act 1998* and the *Fixed-term Parliaments Act 2011* could be changed by this Bill for the purpose of curing a deficiency of retained EU law.

<sup>151</sup> In *ITV Broadcasting v TV Catchup limited Ltd*, the High Court noted that section 2(2) of the ECA should not be interpreted as restrictively as other Henry VIII powers, as it is a unique power for the purpose of implementing treaty obligations

<sup>152</sup> *R v Secretary of State for the Home Department Ex p Simms* [2000] 2 AC 115, 131 HL

<sup>153</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 54

**Box 14: Comparison with Section 3 of the *Legislative and Regulatory Reform Act 2006***

The power in the *Legislative and Regulatory Reform Act 2006* had more express restrictions than Clause 7 of the EUW Bill. This power will necessarily be wider in scope than that in the 2006 Act. Equally express limits may strengthen the power in serving to define its role more clearly so as to clearly explain what it can or cannot be used for. The absence of express limits could see them imposed by the courts.

Under section 3 of the *Legislative and Regulatory Reform Act 2006*, the Minister can only issue an order if he is "satisfied that the following conditions are met":

- a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
- b) the effect of the provision is proportionate to the policy objective;
- c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- d) the provision does not remove any necessary protection;
- e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- f) the provision is not of constitutional significance

Professor Tarunabh Khaitan, from the University of Oxford, has argued that a limit on enacting changes of constitutional significance could be appropriate in the context of the powers in this Bill.<sup>154</sup> He argues that a "constitutional protection clause" would have the advantage of limiting the power without restricting the overall flexibility of the power, and might lessen the chances of the courts imposing a more maximalist restriction on using the power to enact measures with constitutional implications.

The Women and Equalities Committee's report, [Ensuring strong equalities legislation after EU exit](#), published on 28 February 2017, contained a recommendation that this Bill should contain an express protection for equalities legislation, so that the powers could not be used to weaken protections against discrimination. The report contained a number of examples of protection clauses that could be used to achieve this, including:

This [Act] [Order] shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by the terms of the Equality Act 2010, taking account of its application by the courts of England and Wales, at the date of the coming into force of this [Act] [Order].<sup>155</sup>

**The withdrawal deal**

**Clause 7(6)(d)** prevents the power being used to implement the withdrawal deal. This means that ministers must use the clause 9 power,

<sup>154</sup> T. Khaitan, 'A Constitution Protection Clause for the Great Repeal Bill?', U.K. Const. L. Blog (19th Jul 2017) (available at: <https://ukconstitutionallaw.org/>).

<sup>155</sup> Women and Equalities Committee, *Ensuring strong equalities legislation after the EU exit*, 28 February 2017 (2016-17 HC 799) p27.



which can only be used pre-exit day, whereas this power exists for two years post-exit day. As such this restriction prevents this power being used to circumvent the time-limit in the clause 9.

As the DPM explains, the outcome of the negotiations will affect what counts as a “deficiency”.<sup>156</sup> For example transitional arrangements might affect which corrections may need to be made.

To the extent that regulations made under **clause 9** amend retained EU law, which they are expected to do, it would be possible for the time-limit to be circumvented. Post-exit day, the **clause 7** power could then be used to amend laws implementing the withdrawal agreement, so long as they could be shown to be remedying a deficiency in retained EU law. It is not clear whether all regulations passed under **clause 9** would necessarily count as retained EU law, or whether that would limit any correction being made to them in any event.

### Could the limits be amended by regulation?

It should also be noted that the list of exceptions in clauses 7 and 9 are not absolute. If it were deemed to be necessary to take an action forbidden by the exceptions in order to implement the withdrawal agreement, it would be legally possible for the power in **clause 9** to be used to amend the exception out of the Act. In practical terms, as regulations are subject to parliamentary scrutiny, political reality means that such changes are unlikely to be politically possible even if legally achievable.

### The House of Lords Constitution Committee on the scope of the correcting power

On 7 March the House of Lords Constitution Committee published its report *The Great Repeal Bill and delegated powers*, which, while accepting the case for delegated powers, made a number of recommendations relating to the scope of any powers included in the Bill.

The Committee argued that it would be desirable if the powers were accompanied by an overarching restriction that limits the use of the powers to a “very limited number of purposes”.<sup>157</sup> The Committee suggested that the powers should only be used for the following purposes:

- so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework; and
- so far as necessary to implement the result of the UK’s negotiations with the EU.<sup>158</sup>

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<sup>156</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 34

<sup>157</sup> The House of Lords Select Committee on the Constitution, The ‘Great Repeal Bill’ and delegated powers, 7 March 2017 (9<sup>th</sup> report 2016-17 HL 123) para 44

<sup>158</sup> The House of Lords Select Committee on the Constitution, The ‘Great Repeal Bill’ and delegated powers, 7 March 2017 (9<sup>th</sup> report 2016-17 HL 123) para 50

The report also stressed the need to maintain a distinction between the “more mechanical act” of domesticating EU law, and the more discretionary process of amending EU law to implement new policies that were previously covered by EU competence. The Committee considered that this distinction ought to be reflected in the scope of the powers, so that legislation to give effect to new policies has to be done by the primary route.<sup>159</sup>

In practice, as the drafting of clause 7 illustrates, this distinction may be difficult to achieve, especially as technical changes can sometimes have important policy implications. Further, the Government might want to be able to enact “mixed motive” secondary legislation that not only corrects issues with EU-derived law, but also introduces policy change.<sup>160</sup>

## Sunset clause

**Clause 7(7)** provides a “sunset clause”, providing that no regulations may be made under the clause two years after exit day. [Sunset clauses](#) are provisions that mean that an Act, or particular provisions of an Act, lapse on a certain date or after a specified period of time.<sup>161</sup> Legislation without a sunset clause has a presumption of permanence. Sunset clauses are often used to enhance parliamentary supervision of a particular power. They are often added to in emergency legislation or Bills that are considered to include extraordinary legislative instruments.

As the body of retained EU law is fixed on exit day, this provides two years for an unchanging corpus of retained EU law to be modified under this clause. However, as different provisions can be made for exit day for the purposes of individual parts of the Bill, under **Clause 14(1)** and **Schedule 7, paragraph 16**, exit day for the purposes of this time limit could, in theory, be postponed indefinitely. **Clauses 9 and 17** could also be used to amend the sunset clause itself in order to extend the period when the power is available. As with the other legal limitations, the practical limit on an extension is political, in that such a change would be subject to intense scrutiny and is therefore unlikely to be attempted.

Combining a sunset clause with a Henry VIII power that can extend the life of a power, according to Professor Antonios Kouroutakis, from the IE Law School, can result in parliamentary procedures being circumvented.<sup>162</sup> If the sunset clause was not subject to amendment via secondary legislation, Parliament would have to approve new primary legislation to renew or extend its life.

<sup>159</sup> The House of Lords Select Committee on the Constitution, The ‘Great Repeal Bill’ and delegated powers, 7 March 2017 (9<sup>th</sup> report 2016-17 HL 123) paras 49 and 67

<sup>160</sup> Daniel Greenberg, “[Brexit and legislating for withdrawal: two steps forward...](#)” Practical Law UK, 4 April 2017

<sup>161</sup> For a detailed history and analysis the use of sunset clauses in the UK and elsewhere – see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (2017).

<sup>162</sup> Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (2017) p134.

## 6.3 How might clause 7 be used?

Other than the exceptions listed in **Clause 7(6)**, above, instruments under this clause would have the power to take any action if it is necessary in response to a deficiency in retained EU law. As noted above, **clause 7(2)** gives examples of what a deficiency is. The Clause explains that the instruments could be used if retained EU law:

- (a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,
- (b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,
- (c) makes provision for, or in connection with, reciprocal arrangements between—
  - (i) the United Kingdom or any part of it or a public authority in the United Kingdom, and
  - (ii) the EU, an EU entity, a member State or a public authority in a member State, which no longer exist or are no longer appropriate,
- (d) makes provision for, or in connection with, other arrangements which—
  - (i) involve the EU, an EU entity, a member State or a public authority in a member State, or
  - (ii) are otherwise dependent upon the United Kingdom's membership of the EU, and which no longer exist or are no longer appropriate,
- (e) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,
- (f) does not contain any functions or restrictions which—
  - (i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and
  - (ii) it is appropriate to retain, or
- (g) contains EU references which are no longer appropriate.

This statutory list is illustrative rather than exhaustive. It highlights the range of legislative changes that could be achieved through **clause 7**, from removing references to EU institutions to repealing whole regulations that might not work. The DPM summarises the main forms of change in the following terms:

- Removing redundant provisions;
- Transferring functions;

- Removing reciprocal arrangements;
- Amending inappropriate references.<sup>163</sup>

Some of the regulations under this clause will be technical changes. The Government has issued a number of examples of how the powers “might” be used in both the White Paper published in March 2017 and in the DPM. The DPM states that these examples should not be taken as examples of instruments that will be made.<sup>164</sup> The Government is not willing to say how the powers will be used as it wants to “protect the UK’s negotiating position”.<sup>165</sup> Further, it admits that in some areas “decisions might not have been taken as to how the powers in this Bill will be exercised”.<sup>166</sup>

At the time of writing it is not possible, as the Government states, to say which retained EU law might be amended or how. Further, **clause 7** indicates almost anything that could be done by an Act could be done by regulation, even if limited to the purpose of remedying deficiencies in retained EU law. This means that predicting how the power will be used is not possible, especially as there are likely to be “thousands of failures and deficiencies” that need correcting.<sup>167</sup>

Nevertheless, below we have identified examples of how the power could be used, based on information we have relating to what the power is for, and what areas of EU law are to be converted and preserved.

#### Example 1: The [Capital Requirements Regulation \(EU\) 575/2013](#)

This lays down uniform rules concerning general prudential requirements for credit institutions and investment firms. Coupled with the [Credit Institutions Directive \(EU\) 2013/36](#), it implements Basel III rules.

Clifford Chance, an international law firm, identified the need to replace the EU authorities (“Commission”, “European Banking Authority”, “European Systemic Risk Board”) with UK ones.<sup>168</sup> This would need to be considered in light of any decision on future equivalence. Clifford Chance also raise the issue of risk-weighting as an example of

<sup>163</sup> Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017 p12-17.

<sup>164</sup> Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017 para 5.

<sup>165</sup> Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017 para 4.

<sup>166</sup> Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017 para 4.

<sup>167</sup> Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017.

<sup>168</sup> Clifford Chance, *Brexit: What Will The Great Repeal Bill Do?* (2017) p11

complexity – should the Regulation post-exit day continue to treat Member States in the same way or should it treat them in the way that non-member states are currently treated?

**Example 2: The [Mesh Size and Thickness of Twine of Fishing Nets Regulation \(EC\) 517/2008](#)**

This lays down detailed rules regarding the determination of the mesh size and the assessment of the twine thickness of fishing nets by EU and national inspectors.

As the Government has announced its intention to introduce a Fisheries Bill, any directly applicable EU legislative acts under the Common Fisheries Policy are likely to change when a new regime emerges for the UK, and perhaps its devolved parts. Notwithstanding the Fisheries Bill and any future UK-EU agreement on fisheries, if this Commission Regulation is to be converted into UK law upon exit, it would only raise a few minor issues to be addressed, namely the various references to the EU, its institutions and its Member States, as well as the links with other EU legislation under the Commons Fisheries Policy.

Therefore, as this Commission Regulation is a small piece of a wider EU framework, it would be relatively straightforward to convert and future proof. For instance, if the common standard outlined in the Commission Regulation, the EC gauge, were to change, then the UK would have a choice as part of its broader fisheries policy. It could provide for a mechanism to amend the converted Regulation, or it could allow it to diverge.

**Example 3: The [Management Measures for the Sustainable Exploitation of Fishery Resources in the Mediterranean Sea Regulation \(EU\) 1343/2011](#)**

This lays down the rules for the application by the EU of the conservation, management, exploitation, monitoring, marketing and enforcement measures for fishery and aquaculture products established by the General Fisheries Commission for the Mediterranean (GFCM). This Regulation may no longer be relevant after exit. The UK will no longer be a contracting party to the GFCM Agreement through its membership of the EU. Nor is it currently a contracting party in its own right. However, if the UK decides to accede to the GFCM Agreement in future, for example on behalf of Gibraltar (which does have a Mediterranean coastline), it would presumably need to apply the Regulation, in which case a number of issues might need addressing depending on the future relationship with the EU:

- The various references to the EU, its institutions, its Member States.
- The links with other EU legislation under the Commons Fisheries Policy.
- The requirements regarding the EU Fleet Register number.
- The provisions on submitting reports, lists, notifications, applications and information to the EU Commission.

- The status of any future delegated and implementing acts the EU Commission is empowered to adopt.

**Example 4: The [Open Internet Access and Roaming Regulation \(EU\) 2015/2120](#)**

This has two key purposes. Firstly, it establishes common rules to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services and related end-users' rights. Secondly, it sets up a new retail pricing mechanism for EU-wide regulated roaming services to abolish retail roaming surcharges without distorting domestic and visited markets.

A number of issues would need addressing in this Regulation:

- The various references to the EU, its institutions (including the Body of European Regulators for Electronic Communications - BEREC), its Member States and national regulatory authorities.
- The links with other EU legislation in the areas of electronic communications and data protection.
- The provisions on submitting reports, notifications and information to the EU Commission.
- The suitability of the Regulation setting prices in EUR rather than GBP.
- The provisions on the EU Commission periodically reviewing implementing acts adopted under the Regulation in light of market developments.
- The requirements for the EU Commission and BEREC to produce regular reports and review the Regulation.
- Redundant features such as those on transitional provisions which have now expired.

Furthermore, both parts of the Regulation potentially pose policy challenges. The necessity of the first part, concerning net neutrality, could be dependent on the UK and the EU reaching agreement on data equivalence post-exit. Otherwise there would not be a need to maintain EU standards on data protection in net neutrality policy. As regards roaming, the UK may decide not to offer roaming to EU users in the UK and UK users in the EU. In the absence of a UK-EU post-exit agreement on caps at the wholesale level, UK operators could struggle to offer roam like at home to their users if EU operators charged a lot at the wholesale level.

## 7. Delegated powers: clause 9 – implementing the withdrawal agreement

### 7.1 Summary

This section examines **Clause 9**, which provides the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50(2) TEU.

**Clause 9** could have the most significant legal impact of all powers in the EUW Bill. The Government argues that the breadth of the power is needed in order for it to be “sufficiently flexible” to cover all the legislative measures that might be needed as a result of the withdrawal agreement.<sup>169</sup> The need for legislative flexibility means that Parliament is being asked to grant wide powers when there is little idea yet of how they might be exercised.

Although the content of the withdrawal agreement is currently uncertain, any agreement is likely to have wide implications for the UK’s legal system. In particular, it is likely to necessitate major changes to areas of retained EU law such as citizens’ rights, Irish border issues and dispute resolution. This is reflected in the relative lack of restrictions on the **clause 9** power. In turn, the question of what UK legislation is feasible is likely to influence the negotiations.

There is a potentially narrow timeframe in which the power may be used: after the agreement is concluded and before exit day. **Clause 9** could therefore be used to effect a number of significant policy changes via secondary legislation in a short timescale. The scarcity of time is central to the Government’s justification for using secondary legislation to implement the withdrawal agreement.

Regulations made under clause 9 would be subject to parliamentary scrutiny as provided by **Schedule 7 part 2 paragraph 6**.

The Government has indicated that any withdrawal agreement will also be subject to a vote on a motion in both Houses of Parliament before it is signed.<sup>170</sup> This process is separate from the procedures for ratifying treaties under the *Constitutional Reform and Governance Act 2010*.

**Clause 9** does not include any requirement that either House approves the withdrawal agreement before the power is used.

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<sup>169</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 62.

<sup>170</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.19

## 7.2 The purpose and scope of clause 9

The purpose of clause 9 is defined in **clause 9(1)** as to enable regulations to be made by Ministers “for the purposes of implementing the withdrawal agreement”. The agreement is defined by **clause 14** as an agreement “whether or not ratified” agreed with the European Union under Article 50(2) TEU. This confirms that the power could be used before the agreement is ratified.

The content of the withdrawal agreement is uncertain but it could include the following areas:

- citizens’ rights
- issues concerning the Irish border
- the financial settlement
- Euratom issues
- issues related to goods placed on the market before the UK's withdrawal
- on-going judicial and administrative procedures
- enforcement and dispute resolution procedures

**Clause 9(1)** does not limit the sort of legal changes that the regulations made under the power could achieve. As long as the regulation could be shown to be considered by the Government to be for the purpose of implementing the withdrawal agreement, then this power could be used to achieve it via secondary legislation.

Potential examples include:

- giving EU citizens who are living in the UK on a specified date the legal right to continue living here;<sup>171</sup>
- setting up new regulatory bodies; and
- providing for any continuing role for the CJEU under the withdrawal agreement.

**Could the clause 9 powers be used to implement any transitional arrangements, future relations agreements or even no deal?**

The purpose set out in **clause 9(1)** – combined with the definition of ‘withdrawal agreement in **clause 14(1)** – means that these powers can be used only for agreements made under Article 50(2) TEU. This could cover some transitional arrangements, but not future relations agreements. It could not cover any provisions necessary to leave the EU without a deal.

**Box 7: What might the withdrawal agreement say about enforcement and dispute resolution?**

<sup>171</sup> UK Government, [Technical note: implementing the withdrawal agreement](#) (2017).



Regulations under clause 9 to implement the withdrawal agreement could have **major implications for the UK's legal systems**.

Both sides in the negotiations recognise that mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be central to the whole agreement, and to any transitional period. These mechanisms could be one of the major areas of dispute.

The main question is **whether the CJEU will have any continuing role**, for enforcement of the agreement, interpreting its provisions or having its rulings taken into account.

The [EU position](#) sees CJEU jurisdiction as the only way of ensuring full and consistent application of things like [citizens' rights](#), and it is likely to insist on some kind of role for the CJEU where the agreement or any transitional arrangements replicate EU law. The EU is [constitutionally limited](#) because the CJEU asserts exclusive jurisdiction to give binding interpretations of EU law with effect for the EU legal order.

On the other hand, in a recent [UK 'future partnership' paper](#), the Government demands an end to the 'direct jurisdiction' of the CJEU for enforcement or dispute resolution, insisting that there are no precedents for this in relation to agreements with non-EU Member States. It has set out various alternative models, without saying which it prefers.

**Different mechanisms** are likely to be appropriate for different issues. While most individual complaints would probably continue to be dealt with by national courts, the withdrawal agreement might for example stipulate one or more of the following:

- An arbitration arrangement for state-level disputes between the UK and the EU
- A Joint Committee to track and/or resolve divergence between UK and EU law
- A special international court – similar to the [EFTA court](#) – dealing with requests from UK courts
- A specialised domestic tribunal dealing with such cases

The withdrawal agreement might also set out **some kind of role for the CJEU** and its case law, for instance:

- A system of references from UK courts or any new mechanisms to the CJEU, for binding interpretation of any EU law provisions in the agreement
- A requirement to take into account CJEU case law for any transitional arrangements that provide for the continued application of EU law
- A requirement to take into account CJEU case law for areas where the UK wants to retain regulatory equivalence (eg [data protection](#))
- Rules for [disputes pending](#) before the CJEU on exit day, and for EU law disputes where the facts arose before exit day

Many of these provisions would require regulations under **clause 9** – which could potentially amend **clauses 5 and/or 6** of the Bill on the effect of CJEU case-law after exit day.

## 7.3 Why is legislation needed?

Implementing legislation is needed largely because the withdrawal agreement would be an international treaty, which is usually taken to bind the UK Government only under public international law, and not

automatically give rise to any rights or obligations that individuals or businesses could enforce directly in UK courts.<sup>172</sup> This is often referred to as the 'dualist' (in contrast to 'monist') approach to international treaties. The Government's [Technical Note on implementing the withdrawal agreement](#) argues against making provisions in the withdrawal agreement directly enforceable under UK domestic law.

The incorporation of treaties through secondary legislation in such a manner is not a new concept. Double taxation treaties, for example, are enacted through secondary legislation (Orders in Council) made under the *Taxation (International and Other Provisions) Act 2010* and the *Finance Act 2006*, and are subject to the affirmative resolution procedure.

The Government will be bringing forward a number of Brexit Bills in order to make substantive policy changes in areas of EU competence.<sup>173</sup> It is not certain whether these Bills will also be used to implement the withdrawal agreement, or if they will contain powers that enable changes to be made in their respective subjective areas, for example customs and immigration. If such powers are included it is not clear how the work would be divided between those powers and the clause 9 power.

## 7.4 Power to amend Acts – including this one

**Clause 9(2)** confirms that the intended scope and purpose of the power is particularly wide as it states that regulations made under it can achieve anything that could be done by an Act of Parliament. It also states that these regulations could modify the provisions of the EUW Bill once enacted. **Clause 7(4)** does not include such a power.

The DPM indicates that this power to change the provisions of the Bill, as enacted, is needed as the negotiations could necessitate such changes. For example, the Government might want to extend the life of the power or change how it could be used. As discussed below this raises questions in terms of whether **clause 9** could be used to amend any legal limitations on the powers in the Bill, and in particular alter the sunset clauses. Moreover, this raises other questions over whether provisions on the functioning of retained EU law, or the status of CJEU judgments, could also be changed to reflect something agreed in the negotiations. Transitional arrangements could conceivably give rise to such changes. Any changes to the EUW Act itself would be subject to the affirmative procedure.<sup>174</sup>

<sup>172</sup> For a contrary view, see E Bjorge, 'Can unincorporated treaty obligations be part of English law?' [2017] Public Law 571.

<sup>173</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 58.

<sup>174</sup> Schedule 7 Part 2 Paragraph 6(2)(g)

## 7.5 Limits on the use of clause 9

The drafting of **clause 9** reflects the need for the Government to have maximum legislative flexibility to be able to make changes to the UK's legal system in order to implement any future withdrawal agreement. As **clause 9(2)** provides that the power can be used to amend the EUW Bill when it is enacted, which could in theory include the power to amend the limits on the powers itself, there is likely to be scrutiny of whether more effective express legal limitations can be included so as to clarify its intended scope.

### Express limitations

**Clause 9(3)** sets out the restrictions that apply to the power. Regulations made under it cannot:

- a. Impose or create taxation,
- b. Make retrospective provision,
- c. Create a relevant criminal offence, or
- d. Amend, repeal or revoke the *Human Rights Act 1998* or any subordinate legislation made under it.

**Clause 9(3)(d)** raises the question, as **Clause 7(6)(f)** does in relation to **clause 7**, of why the *Human Rights Act 1998* is singled out. The logic of such an express reference is that all other constitutional legislation could be modified by the power. The Government may not intend the power to make such changes. However, the Constitution Committee has argued that ministerial assurances as to the purpose of a power are not a substitute for legal safeguards.<sup>175</sup>

It is worth noting that **clause 7** is subject to the limit that it cannot be used to implement the withdrawal agreement. **Clause 9** has a shorter lifespan: **clause 7** will continue to exist for two years after exit day, whereas **clause 9** expires on exit day.

Although **clause 9** is a broad power, it will be subject to implied limitations of the common law, for example through the principle of legality.<sup>176</sup> It is legally possible for constitutional changes or changes to constitutional rights to be made through secondary legislation. However, the possibility of implied restrictions could be said to incentivise express articulation of the power's scope to amend constitutional laws and rights.<sup>177</sup>

As noted in relation to **clause 7**, the more extensive restrictions on previous enacted broadly framed powers, such as section 3 of the *Legislative and Regulatory Reform Act 2006*, could prove useful

<sup>175</sup> House of Lords Select Committee on the Constitution, *Growth and Infrastructure Bill* (2012-2013 HL 104) para 10.

<sup>176</sup> *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131

<sup>177</sup> T. Khaitan, 'A Constitution Protection Clause for the Great Repeal Bill?', U.K. Const. L. Blog (19th Jul 2017) (available at: <https://ukconstitutionallaw.org/>).

comparators. However, such comparisons are difficult in view of the unique circumstances of the withdrawal agreement. The Government is explicit in recognising that this power will be used to make changes that otherwise would be made by primary legislation, and is not limited to “technical” changes as **clause 7** is.

The Government justification for the lack of limits on this power, and its ability to make substantive policy changes, may also rest on the fact that the power will presumably only be used if the withdrawal agreement is approved by both Houses of Parliament through the promised vote on a motion on the final agreement before it is concluded. However, nothing in the Bill imposes such a restriction. Nevertheless, as the Government argues, only changes that give effect to the content of the withdrawal agreement can be made, and in that sense the content of the agreement is the principal legal limit on how it can be used.<sup>178</sup>

## 7.6 Status of regulations under clause 9

The question of *how* the withdrawal agreement is implemented in domestic law will be of particular importance.

The constitutional status of the regulations made under **clause 9** is potentially significant. For example, how they will be scrutinised in Parliament, enforced in the courts, the precise status of such regulations, and whether they will be subject to implied repeal, could all have important implications.

As the Supreme Court demonstrated in *Miller*, when an Act of Parliament gives effect to rights provided for in an international treaty, as regulations made under **clause 9** could, this can have important consequences for how the relevant domestic law is interpreted.<sup>179</sup> The status of **clause 9** and the regulations it produces could potentially be relevant to the negotiations.

### Box 8: An additional status for citizens’ rights?

During the Brexit negotiations, the UK Government will have to explain to the EU how it plans to implement a withdrawal agreement through domestic law and policy.

For example, on the issue of citizens’ rights, one of the EU’s concerns is that rights specified in UK domestic legislation and upheld by UK domestic courts could be altered by subsequent UK domestic legislation. This is part of the reason that it has [called for continued CJEU jurisdiction](#) in some areas.

The [UK response](#) is that it will continue to be bound by the withdrawal agreement as a matter of public international law.

<sup>178</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 64.

<sup>179</sup> [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5

## 7.7 Timeframe

Since regulations under **clause 9** are made for the purpose of implementing a withdrawal agreement, it will presumably not be possible to make such regulations until the agreement is concluded.

But **clause 9** does not specify whether a withdrawal agreement needs to be signed, nor whether either House needs to have consented to it, before these powers can be used.

Michel Barnier suggested on 6 December 2016 that the negotiations should be concluded by October 2018 to allow for ratification by the EU Council, European Parliament, and the UK before the end of the two-year time frame under Article 50 on 29 March 2019. Although Article 50 does not specify that a withdrawal agreement must come into force two years after notification of withdrawal, the EU's negotiating mandate said that it should.

This provides a relatively short time frame to implement the withdrawal agreement, assuming that 'exit day' as set by the Minister for the purposes of **clause 9** is 29 March 2019.

### Box 9: Possible timetable of negotiations and legislation

The interlocking timetable of negotiations and legislation could look something like this:

June 2017: Negotiations start

Summer 2017 to autumn 2018: Brexit bills go through Parliament

Autumn 2018: Negotiations end, UK Parliament votes on withdrawal agreement, EP votes on withdrawal agreement, withdrawal agreement signed

Winter 2018 to spring 2019: Secondary legislation implementing withdrawal agreement

Spring 2019: Withdrawal agreement laid before Parliament under Constitutional Reform and Governance Act 2010, withdrawal agreement approved by EU27 (qualified majority) and ratified by UK Government

29 March 2019: Withdrawal agreement and domestic legislation come into force. EU Treaties cease to apply to the UK.

A European Parliament briefing of February 2016 stated that the withdrawal agreement is not primary EU law, since it is concluded between the EU and the withdrawing state rather than between the latter and the rest of the Member States.<sup>180</sup> This means that the agreement could be challenged by a remaining Member State, by referral to the CJEU, which would lead to an even more challenging timetable.

## 7.8 Sunset clause

**Clause 9** is limited by a sunset clause in **9(4)** which provides that the power expires on exit day.

<sup>180</sup> EPRS, [Article 50 TEU: Withdrawal of a Member State from the EU](#), February 2016.

The Government will prescribe when exit day will be, under **clause 14(1)**, and also can set different exit days for different provisions (Schedule 7, para 13). Such changes are not subject to parliamentary oversight and so the life of the power could be extended by this ability to alter the exit day or set multiple exit days.

**Clause 9(2)** could enable the Government to change the terms of the sunset clause, for example should the withdrawal agreement require it, but that would be subject to parliamentary approval via the procedure provided by **Schedule 7 part 2 paragraph 6**.

## 7.9 Parliament's role in the content of a withdrawal agreement

### Debating implementation is not debating content

**Clause 9**, and any debates on regulations made under it, concern how a withdrawal agreement might be implemented. This is not the same as debating and agreeing the content of a withdrawal agreement. The two are equally important, but Parliament's role is very different. So it is important to make the distinction, particularly when the negotiations on the agreement and the debates on how to implement it are happening simultaneously:

- Parliament has no formal role in the negotiations. But while the withdrawal agreement is being negotiated, Parliament will be debating **clause 9's** far-reaching power for implementing its (as yet) unknown provisions.
- If an agreement is finalised, the Government has promised Parliament a vote on the content of the agreement, before it is signed.
- If that vote is 'yes', Parliament would then be involved with the secondary legislation under clause 9 to implement provisions of the withdrawal agreement. But probably not all of the agreement would require legislation.
- Finally, Parliament could have the opportunity to vote against (and delay) ratification of the agreement, under *the Constitutional Reform and Governance Act 2010* – although it does not have to hold a vote or even a debate at this stage.

Neither the promised Parliamentary vote before signing a withdrawal agreement, nor Parliament's power to delay ratification, would give Parliament a formal power to amend the terms of the withdrawal agreement.

### Vote on a motion before signing the agreement

The Government has promised a vote in both Houses on a motion on a withdrawal agreement. It intends this to be held when the withdrawal

agreement is finalised, but before it is concluded and signed (and before the European Parliament vote):

The Government have committed to a vote on the final deal in both Houses before it comes into force. This will cover both the withdrawal agreement and our future relationship with the European Union. I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded. We expect and intend that that will happen before the European Parliament debates and votes on the final agreement.<sup>181</sup>

This commitment does not appear in legislation – and the result of such a vote would also be politically rather than legally binding. The Government has stated that a ‘no’ vote would mean the agreement(s) would fall and the UK would leave the EU without any agreement. It does not intend to re-negotiate the agreement(s) in the event of Parliament voting no.<sup>182</sup>

The vote would not allow Parliament to propose amendments to a withdrawal agreement.

It is not clear whether this vote would have to take place before the powers in **clause 9** could be exercised.

## Treaty ratification under the Constitutional Reform and Governance Act

If – as seems highly likely – a withdrawal agreement is a treaty requiring UK ratification, the procedures of Part 2 of the [Constitutional Reform and Governance Act 2010](#) would apply.<sup>183</sup> These give parliamentary disapproval of treaties statutory effect, and effectively give the House of Commons a new power to block ratification. But they do not require Parliament to scrutinise, debate or vote on treaties (and it rarely does so).

The process is this:

- Once the treaty is signed, and all necessary domestic legislation put in place, the Government must **lay it before Parliament**. The Government may not ratify the treaty for the following 21 ‘sitting days’ (ie days when both Houses were sitting).
- Parliament does not have to do anything. But if within those 21 sitting days **either House resolves that the treaty should not be ratified**, by agreeing a motion on the floor of the House, the Government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.

<sup>181</sup> David Jones MP, Minister of State for Exiting the EU, [HC Deb 7 February 2017 c274](#)

<sup>182</sup> David Jones MP, Minister of State for Exiting the EU, [HC Deb 7 February 2017 c273](#)

<sup>183</sup> For more information on Parliament’s role in ratifying treaties, see Commons Library briefing paper 5855, [Parliament’s role in ratifying treaties](#), 17 February 2017.

- If the **Commons** resolves against ratification – regardless of whether the Lords did or not – a further 21 sitting day period is triggered from when the Government’s statement is laid. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification during this period, the process is **repeated**. This can continue indefinitely, in effect giving the Commons the power to block ratification.
- If there are no outstanding resolutions, the Government can **ratify** the treaty. Ratifying is when a State confirms that it is bound by a treaty that it has already signed.
- The treaty **enters into force** for the UK according to the provisions in the treaty.

Neither House has yet resolved against ratification of a treaty under these provisions, and there are limited options for how they can do so. Parliament can only oppose (or tacitly accept) treaties in full – it cannot amend them. And ratifying a treaty under the 2010 Act does not change UK domestic law on its own.

There have been some calls for a process that results in more debates and votes on treaties, perhaps involving the committees, but Parliament has so far been reluctant to set up new mechanisms for treaties. Many of the proposed amendments to the Bill that became the *European Union (Notification of Withdrawal) Act 2017* concerned Parliament’s role in the negotiating process or approving the final agreement, but none of them passed.<sup>184</sup>

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<sup>184</sup> See House of Lords Library Note LLN-2017-0009, [European Union \(Notification of Withdrawal\) Bill: Briefing for Lords Stages](#), 20 February 2017; House of Commons Library Briefing Paper 7922, [European Union \(Notification of Withdrawal\) Bill: analysis of Lords' amendments](#), 10 March 2017



## 8. Delegated powers: other powers

### 8.1 Summary

Delegated powers are fundamental to the scheme of the Bill and beyond the core powers in **clauses 7 and 9**, and the power to set the exit day in **clause 14 (1)** there are a number of other provisions that seek to delegate legislative authority to the Government. The Delegated Powers Memorandum lists a total of 14 delegated powers.<sup>185</sup> This section addresses the following powers:

- **clause 8**: power to make regulations to comply with international obligations;
- **clause 17(1)**: power to make consequential provision;
- **clause 17(5)**: power to make transitional, transitory or saving provision;
- **clause 19**: power to bring parts of the Bill into force;
- **schedule 1 para 1 (1)**: power to provide the grounds upon which the validity of a retained EU law can be challenged; and
- **schedule 5 part 2**: power to make regulations on judicial notice and evidential rules relating to retained EU law, EU law and the EEA agreement.

How the regulations made under each the powers in the Bill are to be scrutinised in Parliament, as proposed by **Schedule 7**, is discussed in Section 9 of this briefing.

### 8.2 Clause 8: complying with international obligations

**Clause 8** gives UK Government ministers the power, until two years after exit day, to make secondary legislation to prevent or remedy any unintended breaches of the UK's international obligations that might arise from Brexit.

Corresponding powers for the devolved administrations are set out in **Schedule 2 Part 2**.

#### The purpose of the power

The purpose of **clause 8** is to ensure that the UK continues to comply with its international obligations. It is to be used if (and only if) a

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<sup>185</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), p2-5.

minister believes that regulations are needed to “prevent or remedy any breach” of the UK’s international obligations caused by leaving the EU.

**Clause 8** is widely framed, and the Government explains that the power is necessary because **clause 7** can only be used when there is an identifiable deficiency in retained EU law. The **clause 8** power may have to be used when there is a potential breach of the UK’s international obligations and yet there is no relevant deficiency in retained EU law.<sup>186</sup>

## The scope and legal limits

Like clause 7, clause 8(2) allows Ministers to do anything that an Act of Parliament can do, save for the express limitations set out in 8(3), and any implied limitations applied by the courts.

Regulations to remedy or prevent a breach of the UK’s international obligations cannot, according to 8(3):

- (a) make retrospective provision;
- (b) create a relevant criminal offence;
- (c) be made to implement the withdrawal agreement; or
- (d) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.

These limitations are similar to those provided for in **clause 7**, with two exceptions. There is no express protection of parts of the *Northern Ireland Act 1998*, and these regulations can be used to impose taxation. The power to impose taxation can only be used “where that is an appropriate way of preventing or remedying a breach”.<sup>187</sup>

The limitation concerning the *Human Rights Act 1998* is identical to that which applies to clause 7, and serves to ensure the more limited time-span that applies to clause 9, which expires on exit day, is effective. This restriction, as with clause 7, does not prevent the content of the regulations made under clause 8 reflecting the content of the withdrawal agreement. The DPM explains that the Government is taking a power for this purpose precisely because it does not want to risk “showing its hand” to the EU. It states “it would be unwise to legislate in primary legislation to provide for implementation of our preferred negotiated outcome”.<sup>188</sup>

## Sunset clause

**Clause 8 (4)** provides a “sunset clause”, providing that no regulations may be made under the clause two years or more after exit day. This is

<sup>186</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 51.

<sup>187</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 53.

<sup>188</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 54.

the same as the sunset clause that applies to clause 7, in clause 7(7), and the same points raised in section 7.8 of this briefing paper apply.

## How might it be used?

The UK has agreed to some international obligations that it currently meets by implementing EU law. After exit day it might no longer be able to meet those obligations without amending domestic law. The Government's DPM gives an example:

For example, the UK is a party to the Council of Europe Convention on Transfrontier Television. However, a break clause (Article. 27) says that EU member states are to implement EU law instead - which is Directive 2010/13/EU (known as the Audiovisual Media Services Directive (AVMSD)). On this basis, the UK has never actually implemented the Convention, but implemented the AVMSD instead. Once we leave the EU, potentially even if we were to negotiate ongoing participation in the framework of AVMSD, we would regardless no longer benefit from the exemption in the Convention, as we would not be a member state. We could then be in breach of our international law obligations by not having implemented the Convention. We could use this power in clause 8 to implement it, which could involve changes other than to retained EU law.<sup>189</sup>

It is not always straightforward to establish whether the UK will be in breach of its international obligations after exit day. For example, some argue that to leave the EEA without breaching its international obligations the UK would need to issue a separate notification to leave the EEA. The UK is party to the EEA Agreement alongside the EU, and the Agreement has its own withdrawal provision that requires notification of withdrawal 12 months in advance.<sup>190</sup>

Former Treasury legal adviser Charles Marquand was recently quoted as saying 'A failure by the UK to give notice of its intention to leave would, I think, be a breach of the EEA Agreement'.<sup>191</sup> If this is correct, the Government could use this power to remedy the breach.

The UK Government's view is that once the UK leaves the EU, the [EEA Agreement](#) will automatically cease to apply to the UK, because the UK is a member of the EEA only by virtue of its membership of the EU. As such, **Schedule 8** of the Bill removes the domestic effect of the *European Economic Area Act 1993*.<sup>192</sup>

<sup>189</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 52.

<sup>190</sup> EEA Agreement Article 127.

<sup>191</sup> ['Brexit: UK risks an international court case over Theresa May's plans for leaving EU single market, say experts'](#), Independent, 11 August 2017.

<sup>192</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 269.

### 8.3 Clause 17(1)

Clause 17(1) contains a power to make consequential provisions “as the minister considers appropriate in consequence of this Act”.

#### The purpose of the power

The purpose of clause 17(1) is to enable the Government to make changes to primary and secondary legislation that might arise as a consequence of this Bill. The words “in consequence of this Act” create a broad and flexible statutory purpose in view of the Bill’s breadth, and the substantial changes it makes to the UK’s constitutional and legal frameworks.

The Government explains in the DPM that it is “unable to identify, at this early stage, all the possible consequential provisions required”.<sup>193</sup> The purpose of the power, according to the Memorandum, is to limit regulations made under it to changes that are a direct consequence of the content of the Bill, and cannot be used to make regulations arising from leaving the EU, which is served by other powers in the Bill. As the Bill covers almost every element of EU withdrawal, in terms of both the constitutional framework, and in terms of the substantive areas of law covered by EU law, it is difficult to see how this distinction will operate in practice.

The Government cites recent uses of similar “consequential” Henry VIII powers, including section 59 of the *Crime and Courts Act 2013* and section 92 of the *Immigration Act 2016*. None of the precedents cited are in Acts which are as constitutionally significant as this Bill. Furthermore, such is the uncertainty around how the powers in this Bill might be used, it is difficult to ascertain how the content of this Bill can be regarded as a limit on the scope of this power.

#### Legal limits

The principal legal limit, other than any supplied by the content of the Bill, is that under clause 8(3) the power cannot be used to modify primary legislation “passed or made” after the end of the Session in which the Bill is passed. Assuming the Bill is passed in this session, which began in June 2017 and is expected to last until May 2019, Acts made after its end could not be amended under clause 17 (1). This limitation does not apply to any secondary legislation enacted after the end of the current session. The memorandum does not explain why the end of the session is used as a limit, rather than exit day, which is used as reference point for most of the other powers in the Bill.

There are no express legal limits on the power in clause 17(1) that match or correspond to those imposed on clauses 7, 8 and 9. As noted in

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<sup>193</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 76.

relation to all the powers in the Bill, the absence of express limitations does not mean that the power is unconstrained, as such general powers can be interpreted narrowly by the courts.<sup>194</sup> Further specific limits which protect common law rights, such as access to justice, could be implied here.

The absence of legal limits on this power raises the question of whether this power could be used to circumvent the protections attached to the other powers. On that point, Schedule 7 Part 3 paragraph 14 explains that the fact that powers overlap—that more than one power can be used to achieve a particular legislative outcome—does not mean that the scope of one of those powers will be limited by another. For example, if changes could be made by either clause 9 (which gives the power to make regulations to bring the withdrawal agreement into effect) or clause 17, then the limits on clause 9 do not affect the scope of clause 17.

### How might this power be used?

The DPM explain that the power could be used to prescribe whether retained direct EU legislation should be treated as primary or subordinate legislation for the purposes of a particular enactment.<sup>195</sup> The Government adds that it “anticipates a large number of straightforward changes, including to primary legislation” will be needed as a consequence of the Bill.<sup>196</sup> There are no express limits that restrict the substance of the changes that might be needed as a consequence of this Bill.

## 8.4 Clause 17(5)

Clause 17(5) enables the Government to make regulations to provide for transitional provisions that might be needed as a result of this Bill coming into force. The Government cites two examples of how this power might be used. The first is that the power could be used to save section 2(3) of the ECA in respect of liabilities incurred while the UK was a Member State. The second is that the power could be used to make provision for CJEU court cases ongoing on exit day.

## 8.5 Clause 19

Clause 19 enables the Government to decide when the provisions of the Bill which do not come into force on the day that Act is passed should be commenced. For example, provisions such as clause 5 on the status

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<sup>194</sup> *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39 para 26

<sup>195</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 77.

<sup>196</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 78.

of retained EU law, can be commenced by regulations made under this power. The Government explains that “it may be sensible for parts of the Bill to commence at different times”.<sup>197</sup>

## 8.6 Schedule 1 Paragraph 1(2)(b) and 3

Schedule 1 paragraph 1(2)(b) and 3 is a power to enable the Government to provide the grounds upon which the validity of a retained EU law can be challenged.

At present, EU legislation can be declared invalid by the CJEU. Schedule 1 paragraph 1(1) provides that retained EU law cannot be challenged post-exit on the basis that before exit it was invalid. Regulations made under this power will enable challenges to retained EU law post-exit, and the content of the regulations will specify the grounds on which such a challenge can be brought.

This raises important questions about the status of retained EU law. For example, will the grounds of challenge apply to EU-derived domestic legislation preserved by **clause 2**? Will EU regulations converted by **clause 3** be considered to be secondary legislation capable of being quashed by UK courts through judicial review? If so, will the ordinary principles of judicial review apply and how will these interact with new grounds introduced by this power?

## 8.7 Schedule 5 part 2

Schedule 5 Part 2 creates a power to enable ministers to make secondary legislation on judicial notice—the ability for judges to take material into account in their decisions—and evidential rules relating to retained EU law, EU law and the EEA agreement. The power can be used to modify any enactment, except Acts made after the end of the current session (Part 2, paragraphs 4 (3) and (4))

The Government argues this power is needed to account for changes resulting from the repeal of the ECA and changes to “our legal landscape” following exit. The Government also points out that the procedural rules of criminal and civil law are determined by secondary legislation. It is likely to be used to replace existing powers contained in section 3 of the ECA.

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<sup>197</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 83.

## 9. Delegated powers: scrutiny in the UK Parliament

### 9.1 Summary

**Clauses 7, 8 and 9** of the Bill grant the Government new and unprecedented powers, but the methods that Parliament will use to scrutinise the resulting statutory instruments are well-known and common.

In all instances, the secondary legislation exercising the new powers has, once ‘made’—signed into law—by Ministers, the force of law as if passed by both Houses of Parliament, save that the actions of Ministers in making such legislation is subject to judicial review.

Where the power to make regulations in the Bill is subject to a form of parliamentary control, **Schedule 7** sets out the parliamentary requirements which must be satisfied before the regulations may be signed into law by a Minister or, if already signed, may continue in force. Where no form of control is specified in the Bill, there are no parliamentary requirements to be satisfied before the regulations may be made.

Any power conferred on UK Government Ministers to make regulations is exercisable by statutory instrument (**Schedule 7, paragraph 12**). This means that all regulations to be made as secondary legislation under these powers are statutory instruments governed by the procedures set out in the *Statutory Instruments Act 1946*. **Schedule 7** does not establish any novel requirements for parliamentary scrutiny or approval of the secondary legislation to be made by Ministers under the powers delegated in the Bill.

The procedures for Parliamentary approval or objection to secondary legislation under the *Statutory Instruments Act 1946*—including procedures which will apply to the secondary legislation to be created under the Bill—are set out in detail in Commons Briefing Paper 6509, [Statutory Instruments](#).

Technical scrutiny of statutory instruments laid before Parliament is undertaken for both Houses by the **Joint Committee on Statutory Instruments** (see box below).

Scrutiny of the merits of statutory instruments laid before Parliament is undertaken in the House of Lords by the **Secondary Legislation Scrutiny Committee**. There is no equivalent committee in the House of Commons.

This section of the briefing paper deals solely with the provisions in the Bill for control of secondary legislation in the UK Parliament. **Schedule 7** also contains procedures for scrutiny of regulations made by Ministers

in devolved administrations or by Ministers of the Crown and ministers of devolved administrations acting jointly.

#### Box 10: Outline of procedures for Parliamentary control of secondary legislation

Under the **affirmative procedure**, an instrument is usually laid before Parliament in draft and must be approved by both Houses before it may be made.<sup>198</sup>

In the Commons, affirmative instruments are usually referred automatically to a committee for debate, with the approval motion then being taken without debate in the Chamber: it is rare for an approval motion to be debated on the floor of the House. It is generally understood that the Government will not arrange for debate on an instrument until the Joint Committee on Statutory Instruments has considered the instrument and reported on it.

In the Lords, affirmative instruments are always debated. Although there is no set timing for such debates, under House of Lords Standing Order 72 no motion to approve a draft affirmative can be taken until the Joint Committee on Statutory Instruments has reported on the instrument.

Where there is particular urgency for an instrument to come into effect, the parent act may provide for a **made affirmative** procedure, whereby an instrument may be made by a Minister before it is laid before Parliament, but must be approved within a specified period in order to continue in force.

Under the **negative procedure**, a statutory instrument is laid before both Houses,<sup>199</sup> usually after being ‘made’ (ie signed into law). Either House may within 40 days pass a motion that the instrument be annulled: this triggers a procedure whereby the Sovereign will annul the instrument.

The instrument may come into force at any time after it is made and remains in force until it expires or is revoked (by another instrument) or annulled.

In the Commons, MPs may signify their discontent with an instrument by tabling a ‘prayer’—a motion requesting that the instrument be annulled. It is only effective if passed within the 40-day “praying time” stipulated in the 1946 Act. Such ‘prayers’ may result in the instrument being referred to a committee for debate: it is rare for them to be debated and voted on in the Chamber.

In the Lords, instruments under the negative procedure are only considered in the Chamber if a peer specifically requests a debate.

Source: House of Lords Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (HL (2012–13) 19) para 5

#### Box 11: Technical scrutiny of secondary legislation: the Joint and Select Committees on Statutory Instruments

Most statutory instruments subject to parliamentary procedure are examined by the Joint Committee on Statutory Instruments. The Commons Members of this committee sometimes sit separately (as the Select Committee on Statutory Instruments) to consider instruments laid before the Commons alone (usually dealing with financial matters).

The Joint Committee has the services of Counsel to the Speaker and the Counsel to the Lord Chairman of Committees available during its deliberations. The Joint and the Select Committees may, like other Select Committees, take oral or written evidence, but only from officials of the responsible Government Department on instruments they are considering.

<sup>198</sup> In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

<sup>199</sup> In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.



Some SIs (e.g. local orders not laid before Parliament) are not scrutinised by either Committee. Other instruments, which are not technically SIs but which may need an affirmative resolution, such as reports on local government finance special grants, draft codes of practice which have legislative effect and orders subject to special parliamentary procedure under the Statutory Orders (Special Procedure) Acts of 1945 and 1946 are examined.

These Committees do not consider the merits of any SI. They are responsible for ensuring that a Minister's powers are being carried out in accordance with the provisions of the enabling Act. They report to the House any instance where the authority of the Act has been exceeded, or any which reveal an "unusual or unexpected" use of the powers, or have been drafted defectively, or where the instrument might require further explanation. Reports of the committees are printed as House of Commons and House of Lords papers and are available on the websites of the two committees.

The Government is under no obligation to respond to reports of the Committees or to take corrective action, although made instruments are frequently amended, or revoked and replaced, by subsequent legislation as a consequence of JCSI or SCSi observations.

Source: Adapted from Commons Briefing Paper 6509, [Statutory Instruments](#), para 3.1.

## 9.2 Schedule 7: provisions for scrutiny of regulations made under the Bill

**Schedule 7** sets out the provisions for scrutiny by Parliament (and other devolved authorities) of regulations under the Bill and contains other general provisions about such regulations.

**Schedule 7, Part 1** deals with regulations which are to be made under the powers in clause 7 of the Bill. This clause gives Ministers the power to make regulations to deal with any deficiencies in primary or secondary legislation arising from the UK's withdrawal from the EU (see section 6 above). This part details criteria that determine whether regulations are to be subject to the **affirmative procedure**, which requires a vote in Parliament before the change to the law may enter into force, or the **negative procedure**, under which regulations do not require parliamentary approval before entering into force.

**Schedule 7, paragraph 1(2)** outlines the criteria for application of the **affirmative procedure**. Proposed regulations to correct deficiencies which contemplate any of the following require approval by both Houses before they may be signed into law:

- Establishment of a public authority in the United Kingdom.
- Provision for any function of an EU entity or public authority in a Member State to be exercisable instead by a public authority in the United Kingdom established by regulations under section 7, 8 or 9 or Schedule 2.
- Provision for any function of an EU entity or public authority in a Member State of making an instrument of a legislative character to be exercisable instead by a public authority in the United Kingdom.

- Imposition, or actions connected to imposition, of a fee in respect of a function exercisable by a public authority in the United Kingdom.
- Creation, or widening of the scope of, a criminal offence.
- Creation or amendment of a power to legislate.

**Schedule 7, paragraph 1(3)** provides that any other regulations to correct deficiencies shall, by default, be subject to the **negative procedure**, unless it has been determined that the affirmative procedure shall apply.

The Government, in the DPM, justifies this allocation of criteria on the basis that “principally mechanistic” changes are to be handled using the negative procedure.<sup>200</sup> The Government adds that in this case it considers that the status—primary or secondary—of the enacted legislation to be amended is immaterial to the level of parliamentary control: the substance of the change contemplated is to determine the procedure. The list of triggering criteria for the affirmative procedure in **paragraph 1(2)** represents changes to the law that in other circumstances would generally be made in primary legislation. Scrutiny of this provision is likely to focus on whether there could be substantive policy changes to be made that might not be caught by these criteria, and the discretion which Ministers may or may not use to designate the affirmative procedure for Parliamentary scrutiny of such changes. Once the Bill is enacted Parliament has no role in determining the procedure to apply.

**Schedule 7, paragraph 3** enables the **made affirmative procedure** to be used in cases where legislation requires urgent correction of a nature which would attract the affirmative procedure under paragraph 1(2) or where Ministers otherwise consider the affirmative procedure necessary. This procedure is a fast-track procedure which enables changes that would be caught by the affirmative criteria to be enacted into law *before* any parliamentary approval is secured. Regulations made under this procedure must be approved by each House within one month of coming into force, otherwise they cease to be legally valid.

**Schedule 7, paragraph 3(4)** does not define the number of days after which such regulations cease to have effect unless approved by resolution of each House. Schedule 1 to the *Interpretation Act 1978* defines “month” as a calendar month: so to remain in force the regulations would have to be approved within the calendar month following the date of laying. An instrument coming into force on 25 November 2019 would have to be approved by 24 December 2019.

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<sup>200</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 47.

The DPM emphasises that this procedure “might” only be used in “exceptional circumstances”.<sup>201</sup> **Schedule 7, paragraph 3** does not define what must qualify as such a circumstance.

Scrutiny of correcting regulations under **Schedule 7 part 1** will rely to an extent on explanatory material produced by the Government to explain how the proposals alter retained EU law, a point which was stressed by the Lords Constitution Committee. In the DPM, the Government commits to providing Parliament with a memorandum accompanying each instrument that identifies how the retained EU law operated, why and how it is being changed, and a statement that the regulations contemplated will do no more than is necessary.<sup>202</sup>

**Schedule 7, part 2** sets out the procedures for Parliamentary control of other powers to make regulations under the Bill:

- Regulations to enable challenges to the prior validity of retained EU law (Schedule 1, paragraph 1(2)(b)) are subject to the **affirmative procedure**. In urgent cases a **made affirmative** may be used.
- Regulations made under the following powers rely on the same criteria as those made under section 7 powers to determine what procedure is to be used:
  - Regulations under **clause 8** powers (implementing international obligations).
  - Regulations under **clause 9** powers (implementing the withdrawal agreement).
- Regulations under **paragraph 1 of Schedule 4** (power to provide for fees and charges for new functions) which impose a fee or charge in respect of a function exercisable by a public authority, or confer a power to make subordinate legislation any provision of that paragraph, are subject to the **affirmative procedure**. All other such regulations under Schedule 4 are subject to the **negative procedure**, unless a Minister determines otherwise. In urgent cases, a **made affirmative** may be used.
- Regulations under **paragraph 4 of Schedule 5** (power to make provision about judicial notice and admissibility) are subject to the **affirmative procedure**.
- Regulations under **clause 17(5)** (power to make transitional, transitory or saving provision) are subject to **no procedure**. However, **paragraph 10 of Schedule 7** allows a Minister, if it is appropriate, to make such regulations subject to the negative or affirmative procedures.

<sup>201</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 48.

<sup>202</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 49.

- Regulations under **clause 17(1)** (power to make consequential provision) are subject to the **negative procedure**.

The following powers to make regulations exist in the Bill, but are subject to no Parliamentary procedure:

- Regulations under **clause 19(2)** (power to make commencement regulations).

## 9.3 Parliament's scrutiny of secondary legislation

**Statutory Instruments debated in the House of Commons, Sessions 2012-13 to 2016-17**

| Session | SIs laid | SIs debated in<br>DLCs | Average length of<br>debate in DLCs<br>(hh:mm) | SIs debated on<br>the floor of the<br>House |
|---------|----------|------------------------|------------------------------------------------|---------------------------------------------|
| 2012-13 | 994      | 208                    | 00:29                                          | 10                                          |
| 2013-14 | 1173     | 224                    | 00:31                                          | 11                                          |
| 2014-15 | 1378     | 315                    | 00:23                                          | 27                                          |
| 2015-16 | 757      | 98                     | 00:23                                          | 19                                          |
| 2016-17 | 725      | 150                    | 00:23                                          | 10                                          |

Source: Sessional Returns and Public Bill Office figures

The scrutiny of statutory instruments in Parliament has come under criticism, particularly the processes used in the House of Commons, insofar as they are perceived to operate to the benefit of the Government rather than of Parliament. In their evidence to the Procedure Committee in the 2016–17 session, the Hansard Society said:

As long as the government can bring SIs into force without parliamentary scrutiny, and muster a majority of disengaged Members in the House of Commons for any requiring scrutiny, and the House of Lords maintains its self-denying ordinance in not vetoing an instrument, then many SIs will proceed regardless of whether there may be problems with them. Proof of this can be found in the number of correcting SIs the government brings forward each year to correct its earlier work. In the 2015-16 session, 35 correcting instruments were laid but in previous sessions it has been as high as 10% of the overall number of instruments laid in any one session. This is clearly not satisfactory in legal terms, but it also means a huge amount of precious parliamentary time – of both Members and staff – is wasted each year because of lazy consultation and sloppy drafting in Whitehall.<sup>203</sup>

The high profile of any changes that could be made to retained EU law by statutory instrument may mean that arguments regarding the level of scrutiny given to SIs will be revisited.

<sup>203</sup> Procedure Committee, [Written evidence submitted by the Hansard Society \(GRB 032\)](#), HC 1010, 27 April 2017.

Using secondary legislation to implement what some perceive to be substantive policy change has recently proved controversial, albeit that the power to make the change has been properly delegated by Parliament. For instance, when the *Education (Student Support) (Amendment) Regulations 2015* (S.I., 2015, No. 1951) were prayed against and debated in a Delegated Legislation Committee in January 2016, the Government was accused of trying to “sneak them through” via delegated legislation.<sup>204</sup> Several Labour MPs complained that the Government had not scheduled a debate on the floor of the House.<sup>205</sup> Despite the validity of the procedure used, several media outlets expressed disbelief that any such policy change could be enacted by statutory instrument.

Complaints regarding the amount of power that statutory instrument procedure gives to Ministers over Parliament are not new. In 1932 the Committee on Ministers' Powers—responding to concerns over the growth of delegated powers in the previous half century—said that “We doubt [...] whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused”.<sup>206</sup>

## Implications for the use of time in the House

In the Commons, it is generally in the gift of the Government to hold a debate on a statutory instrument on the floor of the House rather than in a delegated legislation committee. In general, secondary legislation is debated in a committee if at all and, if the instrument is subject to the affirmative procedure, a vote is then taken in the House without a debate.

In the case of negative instruments, Government control of debating time is even greater. While any MP can pray against a statutory instrument, it is generally in the gift of the Government whether to give any prayed-against instrument time in the House, whether in the main chamber or in a delegated legislation committee. However, it is possible for the Opposition to use time in Opposition Day to debate a motion to annul a statutory instrument.

In practice it is extremely rare for any SI subject to the negative procedure to be annulled by either House. The House of Commons last annulled a statutory instrument on 24 October 1979,<sup>207</sup> while the Lords annulled an SI on 22 February 2000.<sup>208</sup>

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<sup>204</sup> HC Deb [19 January 2016 Vol 604 Col 1294](#)

<sup>205</sup> [General Committee Deb 14 January 2016](#)

<sup>206</sup> Report of the Committee on Minister's Powers, April 1932, Cmd. 4060, p. 24.

<sup>207</sup> The *Paraffin (Maximum Retail Prices) (Revocation) Order 1979* (S.I. 1979/797)

<sup>208</sup> The *Greater London Authority Elections Rules* (SI 2000/208).

## Calls for bespoke arrangements for scrutiny of secondary legislation

The House of Lords Select Committee on the Constitution recommended a set of “enhanced scrutiny procedures” that could be used to ensure that Parliament has the ability to scrutinise secondary legislation adequately under the Bill. The Committee said “there seems little doubt that Parliament will need to reconsider how it deals with secondary legislation”.<sup>209</sup> The then Leader of the House, Rt Hon David Lidington MP, told the Committee that the Government might need to consider a “bespoke arrangement for handling” the scrutiny of delegated legislation.<sup>210</sup>

The Committee suggested the following possible arrangements:

- That the Minister sign a declaration in the Explanatory Memorandum to each SI stating it does no more than is necessary to ensure that the relevant part of EU law operates sensibly after exit day;
- That the Explanatory Memorandum to each SI sets out clearly what the current EU law does, and what effect any amendments will have on the law;
- That the Government make a recommendation for each statutory instrument in relation to the level of scrutiny it should undergo;
- That a parliamentary committee decide the level of scrutiny required for each SI laid under the Act (in effect, adopting the procedure used for Legislative Reform Orders);
- That where a relevant parliamentary committee determines that an SI amends EU law in a matter of significant policy interest or principle, it should undergo a strengthened scrutiny procedure.

In the DPM, the Government commits to providing Parliament with a memorandum accompanying each instrument that identifies how the retained EU law operated, why and how it is being changed, and a statement that the regulations contemplated will do no more than is necessary.<sup>211</sup> Other than this, there are no bespoke methods of scrutiny in the Bill.

In the White Paper on the Repeal Bill, the Government rejected the introduction of any bespoke methods of scrutiny, stating that “existing parliamentary procedures allow for Parliament to scrutinise as many or

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<sup>209</sup> Select Committee on the Constitution, 9<sup>th</sup> Report Session 2016-17, [The ‘Great Repeal Bill’ and delegated powers](#), para 89.

<sup>210</sup> Select Committee on the Constitution, [Oral evidence: The Legislative Process](#), Wednesday 14 December 2016, Q101.

<sup>211</sup> Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 49.

as few statutory instruments as it sees fit.”<sup>212</sup> The House of Lords Delegated Powers and Regulatory Reform Committee said that this statement “discloses a marked difference between theory and reality”.<sup>213</sup>

The Hansard Society suggested that a lack of a bespoke scrutiny arrangement would be to Parliament’s severe detriment, stating “If Parliament allows the Government to proceed with what appears to be its approach, namely assigning negative and affirmative procedures, Parliament will be acquiescing in a significant transfer of legislative power to the executive”.<sup>214</sup>

## Arrangements for amendment of secondary legislation laid before Parliament

Unlike a bill, statutory instruments cannot be amended by Parliament, save where provided for by the parent Act in extremely rare cases. In general, any piece of secondary legislation laid before Parliament is inviting Parliament to either accept or reject it outright. While the House of Lords does sometimes pass “regret motions”, these do nothing to stop the progress of an instrument.

This situation is part of the reason some stakeholders requested an enhanced scrutiny procedure for regulations under this Bill. The DPRRC said “Bearing in mind that delegated legislation is unamendable during its passage, a strengthened scrutiny procedure may provide a means of ensuring that Parliament retains some control over the content of more significant instruments”.<sup>215</sup>

This recommendation has not been taken up in the Bill. As a result, each House has few possible courses of action if Members are dissatisfied with the content of regulations laid before them. While the Government could lay another instrument before the House if a proposed instrument is rejected or withdrawn, this could exacerbate the already challenging timetable for secondary legislation under the Act.

There are provisions in the *Civil Contingencies Act 2004* and the *Census Act 1920* for allowing Parliament to amend statutory instruments, so the concept is not unknown in legislative drafting. The “super-affirmative procedure”, which provides for draft regulations to be laid in an amendable form prior to final approval, is also available and is provided for in several other Acts. It is not used in this Bill. The disadvantage of

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<sup>212</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#), Cm 9446, page 23.

<sup>213</sup> Delegated Powers and Regulatory Reform Committee, Thirtieth Report of Session 2016–17, [Second submission to the House of Commons Procedure Committee](#), HL Paper 164, para 18.

<sup>214</sup> Procedure Committee, [Written evidence submitted by the Hansard Society \(GRB 032\)](#), HC 1010, 27 April 2017.

<sup>215</sup> Procedure Committee, [Written evidence submitted by the House of Lords Delegated Powers and Regulatory Reform Committee \(GRB 014\)](#), 27 April 2017.

the super-affirmative procedure is that can be much slower than the normal statutory instrument process. Nevertheless, the DPRRC has said that “In the context of leaving the EU, [the super-affirmative procedure] could provide a useful half-way house between unamendable instruments and the full panoply of primary legislation”.

## Scheduling Commons debates under the negative procedure

**Debates on statutory instruments with a prayer to annul tabled against them**

| Session | SIs prayed against | No. debated in DLCs | No. debated on the floor of the House | Percentage prayed against and not debated |
|---------|--------------------|---------------------|---------------------------------------|-------------------------------------------|
| 2012-13 | 12                 | 4                   | 0                                     | 67%                                       |
| 2013-14 | 2                  | 1                   | 1                                     | 0%                                        |
| 2014-15 | 9                  | 0                   | 1                                     | 89%                                       |
| 2015-16 | 19                 | 5                   | 1                                     | 68%                                       |
| 2016-17 | 21                 | 5                   | 0                                     | 76%                                       |

Source: Sessional Returns

The majority of the statutory instruments that will be laid under the Bill are likely to be subject to the negative procedure, in which the instrument can have legal effect immediately and does not automatically receive a debate or vote in either House of Parliament.

In the White Paper, the Government claimed that “under the negative procedure, members of either House can require a debate”.<sup>216</sup> This is not strictly accurate. In the Commons it has been in the gift of the Government to grant a debate on an SI that has been prayed against by MPs, responding to requests from the Official Opposition and backbench MPs. It is relatively common for SIs that are prayed against not to be granted debates (see table below). The majority of instruments that are debated have their debate in a Delegated Legislation Committee—where the debate is on a motion “That the Committee has considered the instrument”—and not on the floor of the House, where debate would be on the substantive prayer. On occasion the Opposition has used part of the time allocated on an Opposition Day to provide for a vote in the House on a prayer against an instrument which had previously been debated in committee: there are no recent instances of the Government providing for such a vote in Government time.

It is possible for an opposition party to use time on an Opposition Day to arrange for debate on a prayer to annul a statutory instrument, or to vote on a prayer to annul a statutory instrument following a debate in

<sup>216</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#), Cm 9446, March 2017, para 3.21.



committee. This would require, however, a willing opposition party<sup>217</sup> with an available day allocated at the appropriate time.

The time allocated by the Backbench Business Committee could also be used to hold such debates or votes, although to date the Committee has not allocated any of the time under its control for this purpose.<sup>218</sup>

Without an agreed method of ensuring debates on controversial instruments, the existing system may be placed under substantial strain should opposition parties, or coalitions of backbench MPs, table large numbers of prayers objecting to regulations laid under the negative procedure.

## Capacity for handling secondary legislation

The Government's White Paper on Legislating for Brexit provided the following prediction:

We currently estimate that the necessary corrections to the law will require between 800 and 1,000 statutory instruments. This is in addition to those statutory instruments that will be necessary for purposes other than leaving the EU. Ultimately though, it is not possible to be definitive at the outset about the volume of legislation that will be needed, as it will be consequent on the outcome of negotiations with the EU and other factors.<sup>219</sup>

The volume of statutory instruments is likely to be unprecedented for instruments made under a single Act. It is estimated that over 17,000 EU legislative measures currently in force in the UK—either regulations with direct effect or directives transposed into UK law—may need to be altered in order to be converted to retained EU law.<sup>220</sup> The Government, in the White Paper for the Repeal Bill, suggested that between 800 and 1,000 SIs would be necessary to achieve this, conceding that this figure is uncertain and dependent on the outcome of negotiations.<sup>221</sup>

This would represent around a year's additional workload of statutory instruments to be dealt with before exit day, assuming that exit day for these purposes falls in March 2019. The chart below shows the current

<sup>217</sup> Not all Opposition Days are allocated to the second-largest opposition party.

<sup>218</sup> It is not known whether any applications for the use of time in this way have been made to the Committee.

<sup>219</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#), Cm 9446, para 3.19.

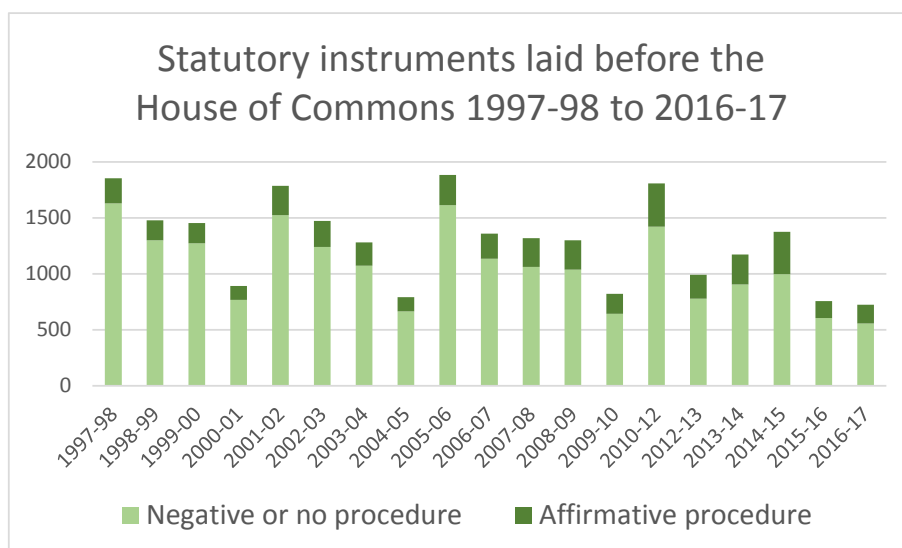
<sup>220</sup> The total number of EU directives, regulations, decisions and international agreements (or similar) in force in 20 subject categories **was 20,506**. The data was compiled from the Eur-Lex Directory of [EU legislation in force](#) (accessed on 5 May 2017). It includes 2,104 International agreements/ treaties/arrangements, protocols, conventions, Exchange of Letters, MoUs, CFSP and JHA common position and joint positions, but excludes delegated and implementing laws (around 3,200), amending laws and other non-binding instruments. So without the international agreements, and taking into account some duplication across the 20 categories, the figure is around 17,500 - 18,000, based on data on Eur-Lex

<sup>221</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#), Cm 9446, para 3.19.

number of statutory instruments laid before the House of Commons in each session of the last 20 years. The normal business of Government will continue to require secondary legislation, though it is likely that exit legislation will increasingly take priority.

With regard to the Joint Committee on Statutory Instruments, Daniel Greenberg, House of Commons Counsel for Domestic Legislation, has said that “it is reasonable to assume that the present resources of the JCSI in terms of support, capability and experience should suffice to deal with the work arising from Brexit”.<sup>222</sup>

Similarly, the Secondary Legislation Scrutiny Committee said that they would not see the laying of between 800 and 1,000 additional instruments in the period to early 2019 as an “overwhelming increase” in workload, but that there were “clear implications for our capacity”.<sup>223</sup>



An additional 800 to 1,000 instruments in addition to the level in 2015-16 and 2016-17 would not bring the number of statutory instruments to unprecedented levels.

It is not yet known how many and what proportion of these instruments are likely to be subject to the affirmative procedure, and therefore—for the House of Commons—what the actual impact will be on the number of delegated legislation committees appointed from week to week to consider such instruments prior to the relevant approval motions being taken in the House. It is also not yet possible to quantify the number of instruments subject to the negative procedure which will give rise to prayers and demands for scrutiny through debate in delegated legislation committee or on the floor of the House.

The pressures on actual debating time in Parliament is therefore less likely to be an issue, compared to the pressure on the ability of MPs to

<sup>222</sup> House of Commons Procedure Committee, [Written evidence submitted by the counsel for domestic legislation \(GRB 29\)](#), HC 1010, 26 April 2017.

<sup>223</sup> House of Commons Procedure Committee, [Written evidence submitted by the Secondary Legislation Scrutiny Committee \(GRB 30\)](#), HC 1010, 26 April 2017.

give effective scrutiny to legislation that is subject to the negative procedure.

# 10. Devolution

## 10.1 Summary

The EUW Bill amends the three main devolution Acts to reflect the UK's withdrawal from the European Union.

Devolution is covered in **clauses 10 and 11**, and in **Schedules 2 and 3**.

**Clause 11** concerns the legislative competence of the devolved legislatures, while **Schedules 2 and 3** concern executive competence.

**Schedule 3** also includes some other matters. (The sole purpose of **clause 10** is to give effect to **Schedule 2**.)

The Bill replaces restrictions on devolved competence arising from the UK's international obligations under the EU Treaties with new restrictions based solely on Act of the UK Parliament (**clause 11**).

The Bill creates fewer rights for devolved legislatures and executives to modify retained EU law than apply to their UK counterparts. This change is justified by the UK Government as a way of continuing existing restrictions while decisions are taken on where common policy approaches are needed.

Devolved legislatures and executives will not be able to act in a way that is incompatible with EU law, with exceptions for Ministers correcting deficiencies, complying with international obligations, or implementing the withdrawal agreement. They will remain bound by EU law unless and until the UK Parliament agrees to them gaining power to modify it.

The Bill therefore also contains a power for the UK Government, with agreement from the UK Parliament and relevant devolved legislature, to lift the new restrictions on competences in **clause 11** and **Schedule 3, Part 1**. This power would enable areas of competence to be transferred to the devolved legislatures by Order in Council, once agreement had been reached between the UK Government and the relevant devolved authorities.

The Bill also provides powers for devolved Ministers in **Schedule 2** that correspond broadly to those for UK Ministers in **clauses 7, 8 and 9**. They will be able to modify retained EU law (apart from direct law) to correct deficiencies, to implement international obligations, and to implement the withdrawal agreement. Devolved ministers can exercise these powers independently subject to certain restrictions, including that all of the contents must be within competence. However, the same powers are given concurrently to UK Ministers.

The Government's White Paper of March 2017 had suggested that there would be a significant increase in the decision-making power of the devolved administrations, and that former EU frameworks would be subject to decisions by democratically elected representatives.

The First Ministers of Scotland and Wales have described the Bill as a “power-grab”,<sup>224</sup> and their Governments have drawn attention to the democratic mandates of their own institutions, which they believe are neglected by the Bill.

## 10.2 Clause 11: legislative competence

**Clause 11** deals with the restriction of EU law on legislative competence.

At present EU law creates a limit around the competence of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. They may not legislate in a way that is incompatible with EU law. For instance, an Act of the Scottish Parliament is “not law” insofar as any of its provisions are “incompatible [...] with EU law”.<sup>225</sup> Virtually identical provisions are in place for Northern Ireland and Wales.<sup>226</sup>

This is because the UK Government is bound by EU law, and must therefore ensure that nothing incompatible is passed within the UK.

**Clause 11** changes this for each devolved legislature in turn.

### Scottish Parliament

For the Scottish Parliament **clause 11(1)** changes the restriction from an Act not being law if it is incompatible with EU law to an Act not being law if it breaches a restriction in a new sub-section (4A) to s29 of the *Scotland Act 1998*. Read with new sub-sections (4B) and (4C), this provides that an Act of the Scottish Parliament may not modify retained EU law, nor may it create the power to do so through subordinate legislation, unless the modification would have been within the Parliament’s legislative competence immediately before exit day. The kind of modifications that would be allowed include choosing how to implement a framework directive.

Since the Scottish Parliament’s legislative competence before exit day is restricted by the requirement to comply with **EU law**, not retained EU law, the effect of these provisions is that the Parliament may not modify retained EU law in a way that would be incompatible with EU law immediately before exit day.

There is no explicit statement as to the role of the CJEU in giving interpretations of this EU law. The provisions in **clause 6** might cover this matter, although those are explicitly concerned with the interpretation of retained EU law, as defined, whereas the competence of the Scottish Parliament is constrained so as to require compatibility with EU law immediately before withdrawal. This is a slightly different body of law (**clause 5 and Schedule 1** define aspects of EU law that are not retained – see Section 4).

<sup>224</sup> Nicola Sturgeon and Carwyn Jones, [Joint Statement](#), 13 July 2017.

<sup>225</sup> *Scotland Act 1998*, s29(2)(d)

<sup>226</sup> *Northern Ireland Act 1998*, s6(2)(d), *Government of Wales Act 2006*, s108(6)(c)

The Government may allow other modifications by Orders in Council. This means that matters can be released from the lock of compatibility with EU law over time.

The Orders in Council will be subject to approval by each House of Parliament and by the Scottish Parliament. **Schedule 3, para 21** inserts the new Order-making powers into a table in Schedule 7 to the *Scotland Act 1998*, which sets out the procedures for various Orders made under that Act. It provides that they will follow the Type A procedure, which is approval by a resolution of each House of Parliament and of the Scottish Parliament.

## National Assembly for Wales

The changes to the legislative competence of the Welsh Assembly are very similar to those for the Scottish Parliament (see above) but there is a further point of interest.

The EU law restriction is contained at the moment in s108 of the *Government of Wales Act 2006*. This provides that an Act of the Assembly “is not law” (s108(2)) if, among other things, it is “incompatible with ... EU law”.<sup>227</sup>

Once s3 of the *Wales Act 2017* enters into force, the numbering will change: the provision will be contained in s108A(1) (“not law”) and s108A(2)(e) (“incompatible with EU law”).

**Clause 11(2)(a)** of the EUW Bill amends s108A, which will replace s108 in the 2006 Act. New sub-section 108A(8), which has to be read with s108A(9) and (10), changes the restriction in the same way as for the Scottish Parliament, with one technical difference. The *Government of Wales Act 2006* does not have a table for Order-making procedures, so the Bill includes a direct statement that the Orders in Council to release subject matters from the compatibility lock have to be approved by each House of Parliament and by the Assembly.

This change applies only to new s108A of the 2006 Act, not to s108 as it stands.

New s108A will enter into force once s3 of the *Wales Act 2017* is commenced. This is due to be by regulation, subject to consultation with the Welsh Ministers and Presiding Officer, under s71 of the 2017 Act.

The Secretary of State for Wales, Alun Cairns, has begun his consultation over commencement of s3, with a view to bringing it into

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<sup>227</sup> *Government of Wales Act 2006*, s108(6)(c)

force in April 2018.<sup>228</sup> The EUW Bill assumes that this will have occurred before the EUW Bill enters into force.<sup>229</sup>

## Northern Ireland Assembly

The provisions for Northern Ireland are virtually identical to those for Wales, with **clause 11(3)** inserting new sub-sections (6) to (9) into s6 of the *Northern Ireland Act 1998*. These work in the same way as the new provisions for the National Assembly for Wales, so that legislation may not breach a new restriction not to modify retained EU law except in ways that were within competence immediately before exit day. This may be lifted by Orders in Council if drafts are approved by each House of Parliament and by the Assembly.

## Release from compatibility: consent for Orders

As mentioned, it is possible for the UK Government to release matters from the retained EU law compatibility requirement. This is under the new provisions inserted into the devolution Acts by **clause 11** of the Bill.<sup>230</sup>

This is designed to be used in the event that an agreement is reached either to abandon a common framework across the UK, or to modify an existing EU framework, for instance to create a UK-wide agricultural policy. However, there is nothing in the Bill to guarantee that the UK approach will be changed or abandoned, nor to determine how the discussions leading to that would be conducted.

A point to note is that any lifting of this requirement will alter devolved competence. So, if an alternative UK framework were agreed on, say, agriculture, and as a result the devolved legislatures were no longer bound to legislate on agriculture in a way that was consistent with retained EU law, their competence would have been changed.

If this were done by statute, it would trigger the Sewel Convention, and consent would be sought. However, under the provisions in the Bill these changes will be made by Orders in Council, which are not subject to the Sewel Convention. That is why the Orders in Council need to be

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<sup>228</sup> [Letter by Rt Hon Alun Cairns MP to Elin Jones AM](#), Presiding Officer, National Assembly for Wales, reproduced by Elin Jones on National Assembly website. See also, "[Wales devolution date set for April 2018](#)", Alun Cairns says," *BBC News*, 17 July 2017.

<sup>229</sup> Under c17(1) of the present Bill a Minister of the Crown may make regulations that make such provision as s/he considers appropriate as a consequence of the Bill. This would seem to provide the power to commence s3 of the 2017 Act, should the commencement process under that Act become problematic. Also, under c17(2), such consequential regulations may modify any provision of any enactment. This might provide the power to modify the commencement arrangements for s3.

<sup>230</sup> New s29(4C) in the *Scotland Act 1998*, new s108A(10) in the *Government of Wales Act 2006*, and new s6(8) in the *Northern Ireland Act 1998*.

approved by the relevant devolved legislature as well as by both Houses of Parliament, creating an alternative consent mechanism.<sup>231</sup>

## 10.3 Clause 10 & Schedule 2: executive competence

**Schedule 2** sets out the power of “devolved authorities” to correct deficiencies in domestic devolved legislation that arise from withdrawal from the EU, to remedy potential breaches of international obligations, and to implement the withdrawal agreement. These are Henry VIII powers: regulations using these powers may make “any provision that could be made by an Act of Parliament”.<sup>232</sup>

Devolved authorities are devolved Ministers plus Northern Ireland departments, which have some regulation-making powers.<sup>233</sup> For ease of reading the text below uses the term “devolved Minister”. The powers of UK Ministers overlap with these devolved powers: the two sets of powers are concurrent.

### Corrective power

Under **Schedule 2, paragraph 1(1)**, a devolved Minister may make regulations

to prevent, remedy or mitigate –

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.

Under **Schedule 2, paragraph 1(2)**, this power may also be exercised jointly with UK Ministers.

The power to make these regulations may not be delegated, except for rules of procedure for courts and tribunals.

The parallel power for UK Ministers is set out in **clause 7** of the Bill (see Section 6). This includes a two-year sunset clause: regulations may not be made more than two years after exit day. The sunset clause is applied to devolved Ministers by **Schedule 2, paragraph 1(3)**.

### Conditions on corrective power

The conditions on this power are set out in **Schedule 2, paragraphs 2 – 8**. The main ones are as follows:

- **Schedule 2, paragraph 2**, limits the power to regulations of which all the provisions are within the devolved competence of the relevant Ministers. This means provisions that, if contained in an Act, would be within the legislative competence of the relevant

<sup>231</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 37

<sup>232</sup> Sch 2, paras 1(3), 13(3), and 21(3).

<sup>233</sup> Clause 14(1)



Parliament/Assembly, ignoring the restriction on compatibility with retained EU law. It also means provisions that, if contained in subordinate legislation, do not go beyond the subject matter of the original subordinate legislation, and comply with other similar technical restrictions.<sup>234</sup> Devolved Ministers could use this second possibility where the existing subordinate legislation had been made under powers that would go beyond the legislative competence of the relevant legislature by virtue of the restrictions in the Bill.

- **Schedule 2, paragraph 3**, prevents the use of this corrective power to modify retained **direct** EU law (EU regulations or the retained rights set out in c4). In other words, the corrective power applies only to EU-derived domestic legislation. This is a lesser power than that given to UK Ministers, who may modify retained direct EU law. In addition, the devolved Ministers may not make modifications which would be inconsistent with UK modifications of retained direct EU law. According to the Explanatory Notes, this means that if the UK Government modifies an EU regulation, and the devolved Ministers are responsible for the enforcement legislation, they will have to modify their legislation in a way that conforms to the new modified UK regulation.<sup>235</sup>
- **Schedule 2, paragraph 5**, requires consent from a UK Minister for any corrective regulations coming into force before exit day, or which remove reciprocal arrangements between the UK and the EU or its Member States.
- **Schedule 2, paragraph 6**, requires consent from a UK Minister if that would be needed for an Act of the devolved legislature covering the same subject matter. The same requirement applies to corrective regulations on subject matter that ordinarily requires joint exercise or consultation before a devolved Act could be passed (**paragraphs 7 and 8**).

## International obligations

Devolved Ministers gain the power to make regulations to prevent or remedy any breach of international obligations that might arise from withdrawal from the EU. This, with its conditions, is set out in **Schedule 2, paragraphs 13-20**. The UK Ministers' equivalent power is in **clause 8**. The devolved powers are subject to a two-year time limit, under **para 13(6)**, as are the UK powers.

## Withdrawal agreement

Devolved Ministers also gain the power to make regulations "appropriate for the purposes of implementing the withdrawal agreement." This is in **Schedule 2, para 21**, and the various conditions on the power are in **paras 21 to 26**, which make up **Part 3 of Schedule 2**.

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<sup>234</sup> The full definition of "devolved competence" is in Sch 2, paras 9-12.

<sup>235</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 161.

The UK Ministers' equivalent power is in **c9**. Both the devolved and UK powers on the withdrawal agreement apply up to exit day.

There are some limits to the regulations, set out in **sub-para 21(4)**. They may not:

- impose or increase tax,
- make retrospective provision,
- create criminal offences with a sentence of more than two years, nor
- confer the power to legislate (except for making rules of procedure for a court or tribunal).

In addition they may not amend the *Human Rights Act 1998* and its subordinate legislation, nor may they amend the present Bill and its subordinate legislation, except for subordinate legislation made by the same devolved Ministers.

Other conditions include that all provisions of the regulations must be within the competence of the authority making them. "Competence" here, and for the implementation of international obligations, is defined in **Schedule 2, paragraphs 18-20**. It differs on a purely technical basis from the definition of competence for corrective regulations in **Schedule 2, paragraphs 9-12**.

In addition, there is no power to modify retained direct EU legislation.<sup>236</sup> Regulations must not confer the power to make the equivalent of EU tertiary legislation, and they need the consent of a UK Minister to make provision on quotas between different parts of the UK in respect of international obligations or the benefits arising from them.

### Particular case of Northern Ireland Act 1998

As mentioned in Section 6 of this Paper above, UK Ministers will be able to make corrective regulations to deal with deficiencies in EU law arising from withdrawal, but, among other things, these may not amend or repeal the *Northern Ireland Act 1998* (subject to some exceptions). This restriction does not apply to the power of UK Ministers to make regulations to implement the withdrawal agreement.

This is replicated for the powers of devolved Ministers (i.e., Northern Ireland Ministers). **Schedule 2, paragraph 1(3)** provides that the same restrictions set out in **clause 7** on UK Ministers apply to the powers of devolved Ministers. So the Northern Ireland Ministers, like their UK counterparts, will not have the power to make corrective regulations amending or repealing the *Northern Ireland Act 1998* going forward, but they will have the power to make regulations affecting that Act as part of the implementation of the withdrawal agreement.

The protection of the *Northern Ireland Act 1998* from corrective regulations reduces the risk of contention over compatibility with the

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<sup>236</sup> Schedule 2, paras 22 and 23

Good Friday Agreement. Presumably, the lack of protection in respect of implementing the withdrawal agreement is an acknowledgement of the role of the Irish Government within the negotiations over withdrawal from the EU and the potential veto it (like the other EU Member States) will hold.

### Box 12: Common Agricultural Policy (CAP)

The CAP is a useful example of EU law on a devolved matter which will fall to the UK after withdrawal, under the terms of the present EUW Bill. It is an important part of the law on agriculture, a devolved matter, but one which devolved Ministers will not be able to amend.

Agriculture is not listed in Schedule 5 to the *Scotland Act 1998*, which lists matters reserved to the UK; it is listed in Schedule 7 to the *Government of Wales Act 2006* as a devolved competence; and it is not listed in Schedules 2 or 3 of the *Northern Ireland Act 1998*, which list excepted and reserved (non-devolved) matters. As a result, it is devolved in all three places. However, in practice, agricultural policy is heavily determined by the CAP, and devolved bodies have little scope for radical change. If the UK left the EU and did not legislate to the contrary, agriculture would fall within the competence of the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, and changes could be made. The present EUW Bill offsets this. It retains the existing lock of compatibility with EU law. While this can be changed for England, or for the UK, by the UK Parliament, devolved legislatures and Ministers will not have the power to modify the type of EU law (direct law) that makes up the CAP. This is by virtue of **clause 11** and **Schedule 2, paragraphs 3, 15 and 23**.

The CAP is underpinned by a legislative framework of four Basic Regulations with associated delegated and implementing acts for the period 2014-2020 in line with the EU budget cycle. They provide options for direct payments (including specific farming practices specified for environmental benefits), rural development funding and market measures which extend the Single Market to agriculture and consist of:

- Support for rural development (Regulation (EU) No 1305/2013),
- Financing, management and monitoring of the CAP (Regulation (EU) No. 1306/2013)
- Rules and options for Direct Payments (linked to environmental requirements) Regulation (EU) No 1307/2013
- Single Common Market Organisation (SCMO) (Regulation (EU) No.1308/2013)

The Bill would convert these EU regulations, as they have effect, immediately before exit day. However, whether these regulations are in place on exit will be dependent on how the UK decides to transition out of the CAP and the EU/UK negotiations regarding trade will affect the market measures.

Whilst, the EU Regulations are directly applicable, they afford some discretion to Member States to adapt the arrangements for the implementation of direct payments to their own particular circumstances. In addition, in the last CAP reform, the UK was successful in arguing for 'regions' to implement the CAP directly and implementation of the CAP is devolved.

Devolved Ministers will not have the power to modify Regulations, such as those governing the CAP, nor to confer functions to make the equivalent of EU tertiary legislation (delegated and implementing acts).

A separate Agriculture Bill was announced in the [Queen's Speech](#) which could potentially alter the arrangements going forward.

## Limit of EU law

In the same way that the competence of the devolved legislatures is limited by the requirement to abide by EU law, so is that of the devolved Ministers. They may not make subordinate legislation nor act in a way that is incompatible with EU law.

**Schedule 3** changes this.

The relevant provision for the Scottish Government is in section 57 of the *Scotland Act 1998*:

(2) A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible [...] with EU law.

Under **Schedule 3, para 1**, of the Bill that provision is modified.

Incompatibility with EU law is replaced with modifying retained EU law, and “any other act” has been dropped. Under new sub-section 57(4) of the 1998 Act, a member of the Scottish Government has no power “to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.”

Under new sub-section 57(5) this does not apply to modifications that are within the legislative competence of the Scottish Parliament, to the making of regulations under the Bill itself (for correction, international obligations or implementing the withdrawal agreement), or to the levying of fees for new functions connected with withdrawal.

In addition, as with legislative competence, the UK Government may remove this restriction from particular subject matters by Order in Council. This Order-making power is subject to approval by each House of Parliament and by the Scottish Parliament, under **Schedule 3, para 21**.

The provisions for Wales, in **Schedule 3, para 2**, are the same as for Scotland. The present restriction is in s80(8) of the *Government of Wales Act 2006*. **Para 2** replaces this with new sub-sections 80(8), 80(8A) and 80(8B).

Northern Ireland is covered by **Schedule 3, para 3**, where the provisions are the same as for Wales. They amend s24 of the *Northern Ireland Act 1998* by omitting the sub-section that contains the existing restriction, and adding three new sub-sections.

## 10.4 Analysis and reaction

### UK Government

The UK Government’s position is that this set of arrangements for devolved institutions retains the existing restrictions on devolved competence, it continues the existing scope for local implementation, and it allows the restrictions to be lifted in the event either that an agreement is reached that the common framework of EU law is not

needed, or that an alternative UK framework is to be established.<sup>237</sup> It is “intended to be a transitional arrangement while decisions are taken on where common policy approaches are or are not needed”.<sup>238</sup>

The UK Government sees merit in taking conscious UK-wide decisions about whether to retain common policy frameworks. Once the constraint of EU law is removed, there would be potential for the laws applying in different parts of the UK to diverge to a greater extent than at present. The UK Government wants to guard against this possibility in certain respects.

In her speech to the Scottish Conservative conference on 3 March 2017, Prime Minister Theresa May stated that,

We must take this opportunity to bring our United Kingdom closer together.<sup>239</sup>

She addressed the question of devolved powers in areas covered by EU law:

[...] we must avoid any unintended consequences for the coherence and integrity of a devolved United Kingdom as a result of our leaving the EU.

These matters, devolved but strongly subject to EU law, raise several issues that prompt further exploration:

- There might be value for all parties in creating a shared UK framework, for instance to ease international negotiations on these subjects.
- The devolved institutions might seek a strengthened role in feeding into such negotiations, and greater transparency over ongoing talks.
- There would be questions about the balance of the voices creating the framework. The UK level has greater power, not least through the sovereignty of Parliament, but the UK is also the only representative for England and its interests. While the UK Government will stress that it also represents Scottish, Welsh and Northern Ireland interests, that responsibility is shared with devolved representatives in a way that does not apply to England.

The White Paper, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446, gave the following model for framework issues:

When the UK leaves the EU, the powers which the EU currently exercises in relation to the common frameworks will return to the

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<sup>237</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) paras 33-38.

<sup>238</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 34.

<sup>239</sup> Taken from [ScottishConservatives.com](#).

UK, allowing these rules to be set here in the UK by democratically-elected representatives.<sup>240</sup>

It laid emphasis on the value to the integrity of the UK economy of having a common framework:

As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained. Examples of where common UK frameworks may be required include where they are necessary to protect the freedom of businesses to operate across the UK single market and to enable the UK to strike free trade deals with third countries. Our guiding principle will be to ensure that no new barriers to living and doing business within our own Union are created as we leave the EU.

To provide the greatest level of legal and administrative certainty upon leaving the EU, and consistent with the approach adopted more generally in legislating for the point of departure, the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary. Whilst these discussions are taking place with devolved administrations we will seek to minimise any changes to these frameworks. We will work closely with the devolved administrations to deliver an approach that works for the whole and each part of the UK.<sup>241</sup>

The White Paper also suggested that the devolved governments would gain power from this process:

It is the expectation of the Government that the outcome of this process will be a significant increase in the decision making power of each devolved administration.<sup>242</sup>

## Devolved institutions

At present devolved competence is restricted because the UK Government has international obligations to abide by EU law. In future it will be restricted by EU law but solely as a consequence of an Act of the UK Parliament. While this appears to be a technical difference it has two implications:

- Devolved institutions will not have the power that UK institutions will have to change laws derived from the EU going forward: Brexit will not bring (back) control, at least in the short term.

<sup>240</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.2.

<sup>241</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.3-4.4.

<sup>242</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.5.

- The retention of common frameworks could be seen as an effective centralisation of power, with the UK Government emphasising its responsibilities for the whole country, whereas the democratically-elected devolved Governments felt that they had responsibility in devolved matters, endorsed in referendums and elections. This bites in Scotland and Northern Ireland, where the majority of voters did not vote to leave.

The Explanatory Notes state that “devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law.”<sup>243</sup>

The devolved institutions had, however, anticipated the continuation of power on matters that are presently devolved but covered in practice by EU law. The prospect of UK controls replacing EU ones has caused concern in the devolved countries.

The First Ministers of Scotland and Wales, Nicola Sturgeon and Carwyn Jones, issued a [joint statement](#) on 13 July 2017. They drew attention to what they regarded as shortcomings in the present Bill, calling it a “naked power-grab”, and saying,

The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and National Assembly for Wales.

On 9 August 2017 the Scottish Government issued a [further statement](#), following a meeting with representatives of the UK Government. Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, reiterated the concern about devolved matters returning to the UK level, and stated that the Scottish Government would not recommend that consent be given to the Bill as it stands:

The bill as currently drafted is impractical and unworkable. It is a blatant power grab which would take existing competence over a wide range of devolved policy areas, including aspects of things like agriculture and fishing, away from Holyrood, giving them instead to Westminster and Whitehall.

That means that unless there are serious and significant changes to the proposed legislation, the strong likelihood is that the Scottish Parliament will vote against the repeal bill.<sup>244</sup>

A [report](#) by the Welsh Assembly research service pointed to a number of inferior powers in the Bill for Welsh institutions. In particular, it drew attention to the restriction mentioned above on the competence of the Assembly going forward, which applies also to the Scottish Parliament and Northern Ireland Assembly:

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<sup>243</sup> [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 34.

<sup>244</sup> *Brexit Bill talks: Scottish Government to recommend consent is rejected*, Scottish Government press release, 9 August 2017.



[The Bill] imposes a “freeze” on the legislative competence of the National Assembly for Wales and other devolved parliaments. Essentially, the Assembly will still have to legislate within the bounds of EU law, as it existed immediately before the UK withdraws (or within EU-based law that the Bill has converted into UK law). This restriction will continue for an indefinite period. The restriction does not apply to the UK Government and Parliament, who will be able to pass new laws that change existing EU requirements after the UK exits. In areas where policy is devolved – like agriculture or the environment – this means that the UK Government and Parliament could remove former EU rules for England, whereas the Assembly would not be able to do so for Wales.<sup>245</sup>

The briefing also referred to the incapacity of Welsh Ministers to modify retained direct EU law, in contrast to UK Ministers, pointing out that direct EU law includes much of the law on agriculture, which is a devolved matter (see Box 19 above).

Finally, it pointed out that “wherever the Bill gives a power to devolved Ministers, it gives the same power to UK Government Ministers.” It went on,

The Assembly’s Chief Legal Adviser states that this means that ‘London could step in and make law for Wales on devolved matters’. The Bill doesn’t stipulate that this would be subject to the agreement of the Welsh Government or the Assembly – although in some cases, constitutional conventions would normally require such consent to be sought.<sup>246</sup>

The Scottish Parliament was in recess when the Bill was published, but a [report on the Bill by the Parliament’s research service](#), SPICe, was published on 24 August 2017.<sup>247</sup> Among other things, it noted the views of Professor Michael Keating of the University of Aberdeen, that the reservation to the UK of former EU powers in devolved matters:

[...] introduces a principle that has, so far, been applied sparingly in the UK, of administrative devolution without legislative powers. It moves us closer to a hierarchical model of devolution, in which the broad principles are set in London and the details filled in across the nations.<sup>248</sup>

The SPICe paper argued:

In practical terms, Professor Keating’s suggestion of a hierarchical model of devolution is not that different from the current system

<sup>245</sup> *What does the EU (Withdrawal) Bill mean for Wales and devolution?*, N Moss, 17 July 2017.

<sup>246</sup> *What does the EU (Withdrawal) Bill mean for Wales and devolution?*, N Moss, 17 July 2017.

<sup>247</sup> *The European Union (Withdrawal) Bill: implications for Scotland*, SB17-54, I McIver and F McGrath, 24 August 2017.

<sup>248</sup> *“To devolve or not to devolve,”* on *The UK in a Changing Europe* blog, M Keating, 19 July 2017.



of EU competences where the broad principles of policy are set at EU level and Scottish Ministers are responsible for administering those policies. However, between the UK Government and Scottish Government, it will alter the balance of control in a significant number of areas.<sup>249</sup>

Nicola Sturgeon and Carwyn Jones said in their joint statement that they could not recommend consent to the Bill:

On that basis, the Scottish and Welsh Governments cannot recommend that legislative consent is given to the Bill as it currently stands.

They concluded:

We have explained these points to the UK Government and have set out what we consider to be a constructive way forward in the spirit of co-operation, based on the involvement of, and respect for, devolved institutions.

Unfortunately, the conversation has been entirely one-sided. We remain open to these discussions, and look forward to coming to an agreed solution between the governments of these islands.<sup>250</sup>

## 10.5 Legislative consent

If legislative consent were not given by the Scottish Parliament and/or the Welsh Assembly, this would not present a legal impediment to the Bill.

The right of the UK Parliament to legislate on devolved matters is stated in the *Scotland Act 1998* and the *Government of Wales Act 2006* (and also in the *Northern Ireland Act 1998*, although the Assembly is not currently sitting). This is largely for the avoidance of doubt: as a matter of constitutional principle, parliamentary sovereignty entails that amendments can be made to the devolution arrangements by the UK Parliament.

Scottish Government Minister Michael Russell, in the statement mentioned above, acknowledged this point:

To be clear, [refusal of consent] would not block Brexit and we have never claimed to have a veto over EU withdrawal.<sup>251</sup>

There would, however, be a significant political cost. Successive UK Governments have followed the Sewel Convention, whereby they do not normally invite Parliament to legislate on devolved matters nor on the scope of devolved powers without consent.

The Sewel Convention is only a convention, with political not legal force. It was given statutory form in the *Scotland Act 2016* and the *Wales Act*

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<sup>249</sup> [The European Union \(Withdrawal\) Bill: implications for Scotland](#), SB17-54, I McIver and F McGrath, 24 August 2017, p10.

<sup>250</sup> <https://news.gov.scot/news/eu-withdrawal-bill> (13 July 2017).

<sup>251</sup> *Brexit Bill talks: Scottish Government to recommend consent is rejected*, Scottish Government press release, 9 August 2017.

2017, but the Supreme Court has held (in the *Miller* case, concerning the use of Article 50 TEU) that it did not have legally binding consequences and remained a political convention. There is more information on this point in the library briefing paper [European Union \(Notification of Withdrawal\) Bill](#), CBP 7884, 30 January 2017.

## Mechanics of consent

The mechanics of legislative consent are set out in the [Memorandum of Understanding and Supplementary Agreements](#)<sup>252</sup> between the UK Government and devolved executives, in [Devolution Guidance Notes](#) 8 (Northern Ireland), 9 (Wales) and 10 (Scotland), and in the standing orders of the devolved legislatures, with minor variations.

In general, the process follows a common pattern. The UK Government first approaches the devolved administration to request consent. The devolved administration then prepares a memorandum explaining why it thinks consent is or is not expedient, and this is normally passed to a relevant subject committee. That committee prepares a report for the legislature to consider in plenary. Following a debate, the devolved legislature votes on a motion to give consent, and, if passed, the Clerk of that legislature informs the Clerk of the House. Consent is usually sought before a bill reaches the final amending stage in the House of Parliament into which it was first introduced, but there is no set time at which consent is needed, other than the practical point that it must be before the final opportunity to amend the Bill in Parliament.

A bill could become subject to consent as a result of amendment, and it is also possible for bills that have already gained consent to be amended in a way that goes beyond that consent, in which case consent to the amendments might be needed.

DGN 10 sets out this process with regard to Scotland:

Where the provisions are of major significance in the Bill, there should have been prior consultation with the Scottish Executive on these and the LP paper should indicate that it will be possible to confirm at Second Reading that the Scottish Parliament has consented.<sup>253</sup>

It goes on to indicate that amendments may need to be taken into account:

During the passage of legislation, departments should approach the Scottish Executive about Government amendments changing or introducing provisions requiring consent, or any other such amendments which the Government is minded to accept. It will be for the Scottish Executive to indicate the view of the Scottish Parliament.<sup>254</sup>

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<sup>252</sup> [Memorandum of Understanding and Supplementary Agreements](#), October 2013, para 14

<sup>253</sup> [Devolution Guidance Note 10](#), para 9

<sup>254</sup> [Devolution Guidance Note 10](#), para 18

There have been examples of bills that were delayed for some time while amendments were agreed in order to gain consent. For instance, the *Scotland Act 2012* was subject to two consent motions either side of Scottish Parliament elections, with about a year between them and a substantial package of amendments. Nevertheless, this is the exception, and in general:

The Scottish Executive can be expected to deal swiftly with issues which arise during the passage of a Bill, and to recognise the exigencies of legislative timetables (eg when forced to consider accepting amendments at short notice). Nevertheless since the last opportunity for amendment is at Third Reading in the Lords or Report Stage in the Commons the absence of consent should not be a bar to proceeding with the Bill in the interim.<sup>255</sup>

The [consent motions passed in the Scottish Parliament](#) are listed on its website, and [the motions in the current Assembly in Wales](#) are also listed on its website, along with a [longer-term monitoring service](#).

Refusal of consent has been rare, and it is hard to draw any meaningful conclusions as to what would happen next. The test would be whether the UK Government felt that there were greater merit in securing the Bill as it stands, and accepting potentially strong discontent from the devolved institutions, or in respecting the democratic mandates of those institutions and seeking compromise on the Bill, presumably in the form of amendments that would secure consent.

## Relevance of the popular mandate

As mentioned above, the UK Government's March 2017 White Paper mentioned the role of democratically elected representatives in reshaping EU law. People in Scotland, Wales and Northern Ireland have multiple layers of democratic representation. Each of the devolved institutions was approved in a referendum, in 1997 for Scotland and Wales, and in 1998 for Northern Ireland by means of the referendum on the Good Friday Agreement, and there have been successive elections since. The mandate of the Welsh Assembly includes two referendums, the original referendum on devolution and the referendum in 2011 on a move to the present system of legislating.

David Rees, Chair of the Welsh Assembly's External Affairs Committee, alluded to this point:

On first reading, it appears as though the UK Government may be using Brexit as cover to prevent the Assembly from using powers it currently holds after we leave the European Union.

It may also pave the way for the UK Government to set policies for Wales in areas that are currently devolved - for example in agriculture and fisheries. If, after further analysis, we conclude that this is the case, then it would be gravely concerning. It would be

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<sup>255</sup> [Devolution Guidance Note 10](#), para 19

going against the findings of our report on the White Paper associated with this Bill.

As we stated in our [recent report](#), this Bill is being introduced following next to no consultation with the Welsh Government and no prior consultation with the Assembly. If this Bill does seek to constrain the Assembly's powers, then it could be seen as undermining devolution and the democratic will of the Welsh people, as expressed in the 2011 referendum on full law-making powers for Wales.<sup>256</sup>

Michael Russell also drew attention to the democratic mandate of the Scottish Parliament:

But UK Ministers should still be in no doubt – to override a vote of the Scottish Parliament and impose the EU Withdrawal Bill on Scotland would be an extraordinary and unprecedented step to take.

What is now needed is a recognition from the UK Government that the bill as drafted cannot proceed. It should be changed to take account of the very serious concerns expressed by the Scottish and Welsh Governments.

The current proposals are a direct threat to the devolution settlement which the people of Scotland overwhelmingly voted for in 1997.<sup>257</sup>

On 18 July 2017 the National Assembly for Wales held a debate on the Bill, passing a resolution that it was “wholly unacceptable in its current form” and that a separate Welsh continuity Act should be published:

To propose that the National Assembly for Wales:

1. Notes the UK Government's European Union (Withdrawal) Bill.
2. Believes:
  - a) it is wholly unacceptable in its current form; and
  - b) all necessary steps must be taken to protect the interests of Wales and the constitutional position and powers of the National Assembly, including the publication of a continuity bill.<sup>258</sup>

Carwyn Jones explained his position, referring to “the huge challenge that the Bill represents to the devolved settlement as it's developed over the course of the last two decades.”

He reiterated the point about the popular mandate:

This is rooted, let's remind ourselves, in popular consent. The 2011 referendum, for example, saw a large majority vote in favour of giving this National Assembly primary legislative powers. [...] [The Bill is] an attempt to take back control over devolved policies such

<sup>256</sup> [Brexit Bill could undermine the “will of the Welsh people”](#), National Assembly for Wales news release, 13 July 2017.

<sup>257</sup> *Brexit Bill talks: Scottish Government to recommend consent is rejected*, Scottish Government press release, 9 August 2017.

<sup>258</sup> [National Assembly for Wales Record of Proceedings](#), 18 July 2017.

as the environment, agriculture and fisheries—not just from Brussels, but from Cardiff, Edinburgh and Belfast.

[...]

The Bill seeks to put in place, with no limitations, qualifications or so-called sunset clauses, new constraints on this National Assembly's ability to legislate effectively after Brexit on matters where we currently operate within legislative frameworks developed by the EU. If this Bill is passed in its current form, we will be prevented from legislating in any way that is incompatible with retained EU law. Existing EU law will be frozen, with only the UK Parliament being allowed to unfreeze it. In practice, this will provide a window for the UK Government to seek parliamentary approval to impose new UK-wide frameworks in devolved areas such as agriculture, the environment and fisheries.<sup>259</sup>

Mr Jones described the Bill as “the thin end of a very big wedge” and projected an image of the future as he saw it:

If we accept this, how long would it be before the UK Government would start to argue for UK-wide frameworks for health and education on the basis of its unique role in representing the whole UK and the importance of devolution not getting in the way of a global Britain? After all, if the price that the United States demands for a quick trade deal is to give private companies enhanced rights to deliver NHS care, why should the National Assembly and the Welsh Government be allowed to stand in the way? That would be their argument.

He touched on the point made by Michael Russell about the lack of a devolved veto on EU withdrawal, and focused instead on his concern over the centralisation of power in a post-EU UK:

This is not about trying to prevent, undermine or complicate Brexit. It's about resisting an attempt to recentralise power to Westminster and Whitehall and turn the clock back to the 1980s.

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<sup>259</sup> Ibid.

## 11. Financial implications

The Bill has implications for both spending and taxation. Some implications are immediate, while others may be realised depending on how delegated powers are used.

The Queen's Printer will be required to publish relevant EU instruments and Treaties, which will have immediate but presumably relatively modest costs.

Delegated powers for dealing with deficiencies arising from withdrawal, complying with international obligations and implementing the withdrawal agreement could give rise to new spending. Spending could also be incurred in preparing for anything arising from the Bill.

Ministers and devolved authorities will be able to introduce fees and charges on some EU-functions they inherit post-exit. The powers could be used to create tax-like charges, which go beyond covering the cost of providing a service to firms or individuals.

In order to comply with international obligations delegated powers could be used to impose taxation, but only where that is an appropriate way of preventing or remedying a breach.

### 11.1 Spending

#### Immediate implications from printing

**Clause 13** and **Schedule 5** require the Queen's Printer to publish EU instruments that could form part of the law converted by the Bill and particular key Treaties. This ensures that retained EU law is accessible after exit day.

#### Delegated powers: potential for spending

Use of the delegated powers in the Bill are likely to result in associated spending.

The Henry VIII powers in **Clauses 7 to 9** and **Schedule 2** mean that there is significant potential for provisions to be made that involve spending. As discussed in Sections 6, 7 and 8, the Henry VIII powers allow secondary legislation to be used to make provisions that can be made by an Act of Parliament. The clauses in question address:

- dealing with deficiencies arising from withdrawal (**Clause 7**)
- complying with international obligations (**Clause 8**)
- implementing the withdrawal agreement (**Clause 9**)

**Schedule 2** provides corresponding powers for devolved authorities.

At this stage it isn't possible to say how much spending may be required as a result of the delegated powers. The extent to which the powers are used will depend on the outcome of negotiations between

the UK and EU and on policy decisions not yet taken. However, any statutory instrument made by a Minister as a result of powers in the Bill will have an accompanying explanatory memorandum which will discuss any financial implications.

### Preparatory spending

**Clause 12(2)** allows Ministers, government departments and appropriate devolved authorities to carry out the spending required to prepare for anything that can be done through the Bill's delegated powers, before the provision is made. This means that all preparatory spending can be properly incurred after the Bill's Royal Assent. Without the clause some spending, for instance on preparing for a new body established by secondary legislation under the Act, may not be allowed until the secondary legislation has been made.

### Spending incurred as a result of the Bill

**Clause 12(3)(a)** provides that any spending incurred by Ministers, government departments, or relevant public authorities as a result of the Bill will be funded from money provided by Parliament. **Clause 12(4)** ensures that the same applies to any other provisions made under the Bill or any other enactment.

Some provisions in the Bill may lead to increased spending under other legislation. Where this is the case, **Clause 12(3)(b)** provides that the additional spending will be funded by Parliament. **Clause 12(4)** ensures that the same applies to any other provisions made under the Bill or any other enactment.

## 11.2 Taxes and other revenues

### Powers to charge fees or other charges

**Schedule 4**, which is given effect by **Clause 12(1)**, provides powers to Ministers and devolved authorities to introduce fees and charges for new functions post-exit. It also provides that fees and charges for functions provided pre-exit can continue to be amended in the same way post-exit.

At this stage it isn't possible to say how the powers will be used. This will depend on the outcome of negotiations between the UK and EU and on policy decisions not yet taken. It is therefore not possible to estimate how much may be raised through the imposition of new or amended fees or charges.

#### New functions

**Part 1 of Schedule 4** provides Ministers and devolved authorities with the power to impose fees or charges where public authorities are taking on previous EU functions or new functions created to deal with deficiencies or breaches of international obligations, or to implement the withdrawal agreement. The fees can be used to mitigate the burden on the general taxpayer of the new functions. The power could be used

to create tax-like charges, which go beyond covering the cost of providing a service to firms or individuals.

**Part 1 of Schedule 4** allows new schemes to be designed and introduced. The power allows authorities to determine how the charge or fee is calculated, collected and spent. Ministers and devolved authorities can confer the power to public authorities.

**Paragraph 3** says that Ministers can only set fees or charges or confer the power with the consent of the Treasury. Devolved authorities can use the power in accordance with their own procedures for managing public money.

### Continuing functions

Numerous fees and charges have been made using powers in the European Communities Act (ECA) and section 56 of the Finance Act 1973<sup>260</sup> in connection with EU obligations. Part 2 of Schedule 4 ensures that where the service continues to be provided post-exit, those fees and charges can be amended in the same way as they were pre-exit.

### Delegated powers

Delegated powers for complying with international obligations (**Clause 8** and Part 2 of **Schedule 2**) allow secondary legislation to be used to impose or increase taxation. This will only happen where imposing or increasing taxation is an appropriate way to prevent or remedy a breach of international obligations. The delegated powers are time limited to two years after the day the UK exits the EU.

Other delegated powers in the Bill (**Clause 7**, **Clause 9** and Parts 1 of 3 of **Schedule 2**) have restrictions that prevent them being used to impose or increase taxation. Such restrictions have not been applied to Clause 8 and Part 2 of Schedule 2.

### Existing powers to make secondary legislation

Paragraph 3 of **Schedule 8** allows any power to make, confirm or approve secondary legislation that exists before exit day to be used to modify retained direct EU legislation. This includes any that could impose or increase fees or charges.

## 11.3 Resolutions

The Bill requires a Ways and Means resolution for the Commons to give consent to the parts of the Bill that involve taxes or other charges being made on the public.

The Bill requires a Money resolution for parts of the Bill that propose spending public money on areas that have not previously been authorised by an Act of Parliament.

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<sup>260</sup> Pre-exit, section 56 of the Finance Act 1973 provided a specific power for fees or other charges, such as levies, connected to EU obligations.



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