



BRIEFING PAPER

Number 7793 2 May 2017

# Legislating for Brexit: the Great Repeal Bill

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European Communities Act 1972.

**A N A C T**

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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 UK Government triggered Article 50 on 29 March 2017, beginning the formal process of negotiating the UK's withdrawal from the European Union (EU). Leaving the EU will require major changes to the statute book and to the UK's constitutional framework.

In October 2016, the Prime Minister [announced](#) plans to introduce a "Great Repeal Bill" in the next Queen's Speech, which will repeal the *European Communities Act 1972* (the ECA) and incorporate (convert or transpose) EU law into domestic law, "wherever practical".<sup>1</sup> The Government has indicated that these legal changes within the Bill would take effect on the day that the UK officially leaves the European Union.

The Great Repeal Bill will be a major new piece of constitutional legislation, which aims to end the supremacy of EU law in the UK, and maximise legal certainty and stability during the Brexit process. The Great Repeal Bill has not yet been published but is expected very soon after the Queen's Speech on 19<sup>th</sup> June 2017.

In March 2017, the Government published [Legislating for the United Kingdom's withdrawal from the European Union](#), a White Paper on the Great Repeal Bill (hereafter the White Paper). The White Paper sets out how the Government will approach the challenge of legislating for Brexit, whilst at the same time providing legal certainty during the withdrawal process.

The Government has stated that the Great Repeal Bill is an important part of the plan to deliver a "smooth and orderly" Brexit.<sup>2</sup> It is not yet known whether the UK will seek to secure "interim" or "transitional" arrangements as part of the withdrawal negotiations. The detail of any such arrangements is likely to have a major influence on the nature and timing of any changes brought about through this Bill. For example, the UK could agree to match EU regulatory standards in a particular policy area for a period of time, post-Brexit, as part of any transitional arrangements.

This briefing addresses each of **three main elements** of the Great Repeal Bill:

- The repeal of the ECA (Section 2);
- The transposition of EU law (Section 3);
- The proposed use of delegated powers (Section 5).

In addition it considers the complex interaction with **devolution**, including the possibility of consent motions from the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly, the mechanisms for coordination with the devolved administrations, and the replacement of EU framework legislation on matters of devolved competence such as agriculture or fishing (Section 6).

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<sup>1</sup> HC Deb 10 October 2016 c40

<sup>2</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.1

The briefing also covers how the Bill might address the status of EU-derived law post-Brexit, and in particular the judgments of the Court of Justice of the European Union (Section 7).

Leaving the European Union does not necessarily require all EU law to be removed from the statute book. One of the stated aims of the Great Repeal Bill is to prevent black holes appearing in the statute book. By converting EU law into domestic law, the Bill will ensure that gaps in the law are not created on the day UK leaves the EU and directly-applicable EU law ceases to apply. The Government has already indicated that the intention is to retain EU related legislation in certain areas, such as employment law.<sup>3</sup>

These plans have raised constitutional and legal questions, including:

- Will the Bill seek to remove references to EU institutions and agencies from the EU law which it transposes into domestic law? (Section 4);
- Will the Bill include powers to enable ministers to make changes to the converted “acquis” after the UK leaves the EU? (Section 5);
- How will any delegated powers included in the Bill be defined or limited to the Government’s stated intentions? (Section 5);
- Will the Bill require a legislative consent motion from the devolved legislatures? (Section 6);
- Will the Bill define how domestic courts should interpret the judgments of the Court of Justice of the European Union (CJEU) after the UK leaves the EU? (Section 7)

### **What kind of Bill is expected?**

The Government has outlined that the Great Repeal Bill will be a simple Bill, which will not contain substantive policy changes itself. The Bill will provide the “legal nuts and bolts” necessary for leaving the EU.<sup>4</sup> The Bill will seek to convert EU law into domestic law wholesale and therefore is unlikely to refer to the specific EU laws to be domesticated.

The Government has indicated that the Bill will be designed to re-establish Parliament’s control over law-making by repealing the ECA and to provide some certainty over the content of the statute book while the UK negotiates its exit from the EU.

The Bill will rely on delegated powers to enable the Government to adapt all EU law, including that converted by the Bill, so that it is fit for purpose on Brexit day.

The House of Commons Library has estimated that 13.2% of UK primary and secondary legislation enacted between 1993 and 2004 was EU related. The review of all EU-related legislation, as well as that which will be transposed by the Great Repeal Bill, makes this potentially one of the largest legislative projects ever undertaken in the UK. The White

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<sup>3</sup> [Brexit: employment law](#), Commons Library Briefing Paper CBP 7732, 10 November 2016; Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 p16

<sup>4</sup> This was how Sir Robert Grant-Ferris, the Chairman of the Ways and Means, referred to the European Communities Act 1972 when it was being debated in Parliament, HC Deb 29 February 1972 c269

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Paper indicates that the corrections will require between 800 to 1000 statutory instruments.<sup>5</sup>

The Government wants to ensure that the right balance is struck between the need for scrutiny and speed in dealing with these statutory instruments. It billed the White Paper as the “start of a discussion between Government and Parliament” as to the most pragmatic and effective approach to achieving this.

The House of Commons Procedure Committee started investigating the delegated powers likely to be claimed by the Great Repeal Bill in February 2017 and has published its [evidence](#) received to-date.

This legislative challenge is further complicated by the need to co-ordinate the parliamentary legislative process with the withdrawal negotiations, both in terms of the substance of the changes and the timescale. This could very much narrow the parliamentary window available to the Government to pass many of these instruments.

### Repealing the ECA

Since the enactment of the ECA in 1972, EU law has been a major part of the UK’s constitutional and legal framework. EU law is currently incorporated into the UK’s legal system in a number of different ways. For example, the EU Treaties and EU Regulations are incorporated into domestic law by the ECA and are therefore directly applicable, whereas EU directives are largely given effect by statutory instruments under the ECA. They will need to be “saved” by the Great Repeal Bill.

Repealing the ECA is necessary to change the status of EU law within the UK constitution. The Great Repeal Bill will need to replace the ECA with an equivalent framework that reflects the UK’s new relationship with EU law.

### The challenges of converting EU law into domestic law

A question raised by the Great Repeal Bill is how much of the law which is currently directly applicable, for example EU Regulations and certain provisions in the Treaties, will be transposed into UK law. The Government’s answer, in its White Paper on the Bill, is that all directly applicable EU law will be converted.<sup>6</sup>

As the High Court noted in *Miller* (the judicial review challenge on triggering Article 50), some EU law cannot be replicated in United Kingdom domestic law, for example the right to seek a reference from the Court of Justice of the European Union (CJEU).<sup>7</sup>

The White Paper explains that the Bill will not “copy out” EU regulations individually. Instead it is expected that the Bill will transfer them wholesale.<sup>8</sup> The White Paper indicates that directly applicable rights in the EU Treaties will also be incorporated into domestic

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<sup>5</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.19

<sup>6</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.4

<sup>7</sup> *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). Hereafter cited as [2016] EWHC 2768 (Admin)

<sup>8</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.8

law by the Great Repeal Bill.<sup>9</sup> The White Paper outlines an important exception to this rule, the [EU Charter of Fundamental Rights](#) 'will not be converted into UK law by the Great Repeal Bill'.<sup>10</sup>

### Box 1: EU-derived legislation

The House of Commons Library has produced a series of briefings setting out the legislation, currently in force in the United Kingdom, which is derived from our status as Member States of the EU. Together these papers list a significant proportion of the body of law that the White Paper refers to as EU-derived legislation, and that is likely to be part of EU-derived law post-Brexit:

- CBP No. 7863, [Legislating for Brexit: directly applicable EU law](#) 12 January 2017 (EU regulations)
- CBP No. 7943, [Legislating for Brexit: EU directives](#) 5 April 2017
- CBP No. 7867, [Legislating for Brexit: Statutory Instruments implementing EU law](#) 16 January 2017
- CBP No. 7850, [Legislating for Brexit: EU external agreements](#) 5 January 2017

### Ensuring the “operability” of EU law

The EU law converted into domestic law and the existing EU-related legislation, namely that which has given effect to the UK's obligations under the Treaties, will need to be adjusted so that it operates effectively post-Brexit. The Government White Paper on the Bill explains that there are “a variety of reasons” why wholesale transfer of EU law will not be sufficient.<sup>11</sup> These include where the relevant legislation refers to EU institutions, or relies on reciprocal arrangements with EU Member States. The Government's initial assessment has shown that a “very significant proportion of EU-derived law” will require adjustment to ensure it works after Brexit day.<sup>12</sup> The Great Repeal Bill will include delegated powers to enable such changes to be made by Ministers pre- and post-Brexit.<sup>13</sup>

### Delegated powers

The Government has stated that the Great Repeal Bill will contain delegated powers enabling Ministers to give effect to two of the Bill's most significant purposes:

- To make adjustments to EU-derived law so that it operates effectively post Brexit;
- To give effect to the outcome of the withdrawal negotiations.<sup>14</sup>

When the Great Repeal Bill is being debated in Parliament, the Government will not know either all the technical adjustments needed, or the outcome of the negotiations. As such

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<sup>9</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.11

<sup>10</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.23

<sup>11</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.3

<sup>12</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.5

<sup>13</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.7

<sup>14</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.24

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the Government's case for these powers is likely to be based on the need for flexible legislative powers that cover multiple scenarios, and that can be used to make a large number of changes in a limited timeframe.

When the delegated powers in the Great Repeal Bill are debated in Parliament there is likely that there will be much scrutiny of:

- Whether the delegated powers are limited in scope by any purpose or subject-based restrictions;
- The parliamentary procedure specified by the Bill to enable the secondary legislation to be made. The White Paper states that the Bill will provide for "the negative and affirmative procedures to be used and that the affirmative procedure may be appropriate for the more substantive changes (i.e. requiring debate and approval by both Houses).<sup>15</sup>

The Government has stated that significant policy changes will be underpinned by subsequent primary rather than secondary legislation.<sup>16</sup>

The House of Lords Select Committee on the Constitution, in its report on the Government's proposals, published on 7 March 2017, made a number of recommendations relating to delegated powers, including that the powers in the Bill should be limited to particular purposes; and that there should be a special procedure for scrutinising orders made under the Bill that enables a strengthened procedure to apply to orders with significant policy implications.<sup>17</sup>

### Devolution

Legislating for Brexit will have significant implications for Scotland, Wales and Northern Ireland.

By transposing all directly applicable EU law (leaving aside some items that cannot be carried over for logical reasons, as mentioned above) the Great Repeal Bill will effectively implement a range of provisions that are within devolved competence (eg agriculture). This would require consent from the devolved legislatures, so long as the Sewel Convention is respected.

The Government's White Paper indicates that where EU law frameworks have ensured common UK approaches in areas of devolved competence, the Government will seek to introduce UK legislative frameworks to replace those provided by the EU.<sup>18</sup>

Agriculture and fisheries are frequently cited as examples of areas of EU competence, which are currently devolved, that might benefit from UK-wide framework legislation. It is not yet known whether the Great Repeal Bill will seek to make any changes to devolved

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<sup>15</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.22

<sup>16</sup> HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), Cm 9417, January 2017, p10 para 1.8

<sup>17</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) p3-4

<sup>18</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.4



competence in order to reflect the need for such frameworks: to be effective, they would need to be protected from continuing devolved competence that might lead to them being amended in ways that vary across the UK. The White Paper indicates that the devolved executives will continue to be responsible for the implementation of these frameworks.<sup>19</sup>

In relation to the delegated powers in the Bill, the White Paper states that the ministers of the devolved governments will be given powers to make changes to EU-derived law in areas of devolved competence, matching those given to UK ministers.<sup>20</sup> An alternative approach would be to restrict the Bill to reserved matters and leave the devolved legislatures to create their own continuation Bills. It is not impossible that a mixed approach might be taken, for instance if a devolved administration feels that a UK continuation provision is inadequate.

Relations between the UK and devolved administrations in respect of withdrawal from the EU are primarily conducted through a sub-committee of the Joint Ministerial Committee, known as JMC (EN). The JMC has attracted criticism from Scotland and Wales (Northern Ireland is not currently represented because of the political hiatus there).

### **The courts and the status of EU law**

The Great Repeal Bill's removal of the ECA from the statute book will mean that the UK courts will no longer, after Brexit, give general primacy to EU-derived law over domestic law. The domestic courts will not be obliged to follow the judgments of the CJEU given after Brexit, nor will they be able to refer questions of EU law to the Luxembourg Court.

The White Paper states that EU-derived law will, post-domestication and post Brexit, have a distinct status. The White Paper indicates that the EU-derived law will have primacy over other domestic law enacted *before* the UK leaves the EU.<sup>21</sup> Legislation enacted after Brexit will have primacy over all EU-derived law.

The CJEU will continue to be influential in UK courts post Brexit. The White Paper states that to enable consistency of interpretation, the judgments of the CJEU pre-Brexit will have the status of UK Supreme Court judgments.<sup>22</sup> The pre-Brexit judgments of the CJEU will therefore represent binding precedent unless the Supreme Court decides otherwise.

It is not yet known how the domestic courts will approach judgments of the CJEU given *post-Brexit*. In the absence of clear instruction from Parliament, the UK courts could continue to refer to post-Brexit CJEU judgments to guide interpretation of relevant EU-derived law.

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<sup>19</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

<sup>20</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.6

<sup>21</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.20

<sup>22</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.16

# 1. The Great Repeal Bill

The Great Repeal Bill has not yet been published.

In March 2017, the Government published a White Paper on the Bill confirming that it would do three main things:

- Repeal the *European Communities Act 1972* (ECA);
- Transfer European Union law applicable in the United Kingdom on Brexit day into domestic law;
- Create delegated powers to enable the government to amend technical issues in EU-related legislation so that it operates effectively post-Brexit **and** to change the law to reflect the content of any withdrawal agreement under Article 50.

The Bill represents a historic change to the UK constitution.

The Bill will provide the legal apparatus necessary for the process of disentangling the European Union's role within the UK's legal and political structure, as well as a framework for the functioning of EU-derived law post-Brexit. To this extent the Bill could mirror the structure of the ECA, which provided the legislative basis for the relationship between EU law and domestic law.

The main difference is that the development of the EU, and the profound nature of integration between the EU and the UK means that unlike the ECA, the Great Repeal Bill cannot dramatically detach the two systems overnight. Transitional arrangements are necessary to achieve a "stable and smooth" Brexit.<sup>23</sup> The details of any transitional arrangements, and the withdrawal agreement are not yet known. The Government has committed to providing stability and certainty in the sense that the law will not change dramatically on Brexit day.

The Great Repeal Bill will enable a large number of amendments to the statute book designed to ensure that the law of the United Kingdom does not change more than is necessary on the day the UK leaves the EU.

Shifting the basis of the law, from the EU legal order to the UK statute book, is a necessary first step in this legislative project. The Great Repeal Bill is just one part, albeit a major one, of the multi-phase legislative project, which is legislating for Brexit. It is a process that will involve hundreds of statutory instruments and a number of Bills, in both Westminster and the devolved legislatures, as well as possible changes to the devolved settlements themselves, and which will reflect the substance of agreements struck between the UK Government and the EU.

On 29 March 2017, the Prime Minister, triggered the Article 50 process, beginning the formal process of negotiating the UK's exit from the European Union. The outcome of the negotiations will have a direct influence on how the Great Repeal Bill changes domestic

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<sup>23</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 p5

law. In this sense the Bill operates, in the terms of the Supreme Court's judgment in *Miller*, as a new "conduit pipe" for the UK's new relationship with the EU.

## The Prime Minister's Speech to the Conservative Party Conference (2016)

In October 2016, the Prime Minister, Theresa May, announced at the Conservative Party Conference that the Government would bring forward a Great Repeal Bill to give effect to the UK's decision to leave the EU taken in the referendum on 23 June 2016. She labelled it a "historic Bill" to be included in the next Queen's Speech (May 2017) which will:

... mean that the 1972 Act, the legislation that gives direct effect to all EU law in Britain, will no longer apply from the date upon which we formally leave the European Union. And its effect will be clear. Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end<sup>24</sup>

The Bill's other main purpose would be to provide legal stability and continuity during the withdrawal process:

As we repeal the European Communities Act, we will convert the 'acquis' – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate. And let me be absolutely clear: existing workers' legal rights will continue to be guaranteed in law – and they will be guaranteed as long as I am Prime Minister.<sup>25</sup>

## The White Paper on the Great Repeal Bill

On 30 March 2017, the Government published its White Paper on the Great Repeal Bill. The White Paper does not contain draft clauses, as the House of Lords Select Committee on the Constitution had recommended, but does contain nearly 30 pages of explanation of the Government's approach to legislating for Brexit. The substance of the White Paper is examined in the subsequent sections of this briefing.

The White Paper confirmed a number of significant features of the Government's plans.

### General structure

The White Paper implied that the Bill will have a relatively simple structure, and indicates the Bill's aims will be predominantly limited to enabling changes to the law "necessary to ensure the law continues to function properly".<sup>26</sup>

The Bill will not tackle substantive policy areas in detail. Directly applicable EU law will not be "copied out", instead all regulations will be transposed in one go by a general

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<sup>24</sup> 'Theresa May's Conservative conference speech on Brexit', Politics Home, 2 October 2016

<sup>25</sup> 'Theresa May's Conservative conference speech on Brexit', Politics Home, 2 October 2016

<sup>26</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.21

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provision that provides that all EU law that applied at the time the UK leaves will continue to apply, post-Brexit, unless Parliament provides otherwise.<sup>27</sup> Some of the most significant substantive effect of the Bill, for example giving effect to a potential withdrawal deal, could be achieved through the delegated powers included in the Bill.

### Consequential primary legislation

The White Paper states that where major changes are needed in areas currently within the EU's competence, primary legislation will be introduced after the Great Repeal Bill has been enacted, with "a number of further bills" promised over the next two years.<sup>28</sup> The White Paper stated that these will include a customs bill and an immigration bill.<sup>29</sup> The White Paper does not indicate whether these bills will also include delegated powers to enable the Government to cover a range of possible outcomes to the negotiations.

This fits with the Secretary of State for Exiting the EU's evidence to the Exiting the European Union Committee, in December 2016, Mr Davis outlined that the Great Repeal Bill would be "simple", and that any major or "material changes" to the law would be done through subsequent primary legislation, and not through statutory instruments.<sup>30</sup> Mr Davis indicated that there will need to be legislation consequential on the Great Repeal Bill that will need to be enacted before "the conclusion of the negotiation".<sup>31</sup> In his evidence he cited the examples of migration, fisheries and agriculture, where Bills might be required.

On 20 March 2017 David Jones MP Minister of State at the Department for Exiting the European Union, said in evidence to the European Scrutiny Committee that the Great Repeal Bill will focus on "practicalities", and policy changes will be "effected by standalone legislation".<sup>32</sup>

The promise of consequential primary legislation means that some of the preserved *acquis*, converted by the Great Repeal Bill, might not be in force on the day after Brexit day. Primary legislation enacted after the Great Repeal Bill, on for example immigration, which comes into force on Brexit day could depart from any EU law that the Great Repeal Bill converts into domestic law.

### The status of EU law

By repealing the ECA 1972, the Great Repeal Bill intends to change the status of EU law in the UK "ending the general supremacy of EU law".<sup>33</sup> Whilst this is clear, the White Paper

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<sup>27</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.8

<sup>28</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 paras 1.21-1.22

<sup>29</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 paras 1.21-1.22

<sup>30</sup> [Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU](#), HC 815, 14 December 2016

<sup>31</sup> *Ibid*

<sup>32</sup> David Jones MP, European Scrutiny Committee [Oral evidence: EU-UK relations in preparation for Brexit](#), HC 791 Monday 20 March 2017

<sup>33</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.19

shows that in practice the status of EU-derived law post-Brexit may be more complex. EU-derived law will continue to take precedence over laws enacted before Brexit day.<sup>34</sup>

Judgments of the Courts of Justice of the European Union (CJEU) handed down pre-Brexit will, post-Brexit, have the status of a UK Supreme Court judgment.<sup>35</sup> This means it will be regarded as binding unless the Supreme Court itself departs from it, which it will only do for good reason. This is to ensure some continuity and certainty in the way that EU-derived law is interpreted. It raises the question of how the courts will treat judgments of the CJEU given post-Brexit, and in particular whether the Great Repeal Bill will provide a clear instruction as to whether UK courts can take account of such judgments when interpreting EU-derived law.

Both these points, on the status of EU-derived law and CJEU judgments, the White Paper indicates that the Great Repeal Bill will contain specific instruction to the domestic courts on each point.

### **Delegated powers**

The proposed inclusion of delegated powers, particularly those used to amend primary legislation, has generated much interest in Parliament.

The White Paper makes the case for such powers, emphasising the scale of the changes required to ensure that the statute book functions effectively (the “operability” issue). The White Paper confirms that conversion will not be sufficient and that detailed surgery of the statute book is required on a large scale: “it is clear that a very significant proportion of EU-derived law for which Government departments are responsible will not function appropriately if EU law is simply preserved”.<sup>36</sup>

The White Paper explains that the delegated powers in the Bill are also intended to enable the Government to implement the withdrawal agreement by secondary legislation.<sup>37</sup> It explains this process would be separate from, but presumably coordinated with, the vote in both Houses on the final agreement.

The White Paper suggests that the powers included in the Great Repeal Bill will be broadly framed so as to enable the Government “to make all of the necessary amendments to the statute book within the timeframe determined by the EU withdrawal process”.<sup>38</sup>

The Government states the purpose of the power should be limited, so that policy change unrelated to dealing with the effectiveness of EU-related legislation cannot be done through the power in the Great Repeal Bill.<sup>39</sup> The White Paper does not explain precisely

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<sup>34</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.20

<sup>35</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.16

<sup>36</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.5

<sup>37</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.18

<sup>38</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.15

<sup>39</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.17

## 14 Legislating for Brexit: The Great Repeal Bill

how the power will be limited so as to only enable changes that give effect to both “operability” and the outcome of the negotiations.

### Parliamentary procedure

The Government is proposing to use existing negative and affirmative procedures to enact secondary legislation under the Bill, but indicates that it is willing to engage with Parliament as to the choice of procedure to get the appropriate balance between scrutiny and speed.<sup>40</sup>

### How will the Great Repeal Bill affect devolution?

The White Paper emphasises the value to the integrity of the UK economy of having a common UK framework, which avoids creating “new barriers to living and doing business within our own Union”.<sup>41</sup> It states that EU frameworks will be replaced by UK legislation.<sup>42</sup> Such frameworks would include those for agriculture and fisheries. The White Paper outlines that the UK Government will negotiate with the devolved nations as to how these frameworks will operate, and explains that they expect “the outcome of this process will be a significant increase in the decision making power of each devolved administration”.<sup>43</sup> This suggests greater powers for the devolved Ministers, but does not mention the legislatures.<sup>44</sup>

### Likely features of the Bill

The mechanics of the Bill are likely to be a significant part of the debate on the Bill. From what has been announced so far, it is conceivable that the Bill will contain the following features:

- Provisions to “save” secondary legislation made under section 2(2) of the ECA – to prevent them disappearing them on the repeal of the ECA;
- A broadly framed provision which transfers all directly applicable EU law into domestic law on Brexit day – sometimes referred to as a “continuance clause”;
- A commencement provision – enabling the Bill’s provisions to come into force on the day the UK leaves the EU;
- Delegated powers (sometimes referred to as Henry VIII powers) – enabling ministers to make changes to primary and secondary legislation to ensure that all converted EU law continues to function effectively once the UK has left the EU; and to make changes to give effect to any withdrawal agreement;
- A parliamentary procedure to enable parliamentary scrutiny of delegated legislation made by ministers under the powers in the Bill;

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<sup>40</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.19

<sup>41</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

<sup>42</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.4

<sup>43</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

<sup>44</sup> Devolution issues are discussed in more detail in Chapter 6

- A legislative instruction to the courts as to the status of EU-derived law and the interpretive relevance of judgments of the CJEU;
- A schedule which lists primary legislation to be repealed as it is no longer required, such as the *European Union Act 2011*.

## 2. Repealing *the European Communities Act 1972*

The role of EU law within the United Kingdom's constitutional and legal system is secured by the *European Communities Act 1972* (ECA). The Great Repeal Bill will repeal the ECA. David Jones MP Minister of State at the Department for Exiting the European Union, has said that the repealing the ECA is the "primary objective" of the Great Repeal Bill".<sup>45</sup>

The ECA is one of the most significant Acts passed by Parliament in the 20<sup>th</sup> Century. In the High Court case of *Thoburn*,<sup>46</sup> 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.<sup>47</sup>

As such the repeal of the ECA amounts to a major change to the UK statute book.

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 creates a hierarchy of law within the United Kingdom's legal system, by making European Union law part of and supreme over United Kingdom law (see Box 2 below for relevant case law).
- In term 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 expressly repealed the ECA, the provisions of the ECA ensured that EU law prevailed over the relevant parliamentary enactment.

This section provides a summary of the ECA's most significant provisions, namely **sections 2(1), 2(2), 2(4) and 3(1)**.

It also considers case law that engages with those provisions, and some relevant commentary on the implications of repealing the ECA.

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<sup>45</sup> David Jones MP, European Scrutiny Committee [Oral evidence: EU-UK relations in preparation for Brexit](#), HC 791 Monday 20 March 2017

<sup>46</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

<sup>47</sup> *Ibid* 62



## 2.1 Section 2(1) – empowering EU law

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); Articles 4(2)(a), 20, 26 and 45-48 of the Treaty on the Functioning of the European Union (TFEU).

Section 2(1) also means that all legislation enacted by Parliament, including that enacted after the ECA, will be read and interpreted as to give effect to the provisions of the Treaties.

In the devolution statutes, compliance with EU law is stated expressly, and in certain Acts that implement directives, but it is worth emphasising that all legislation made after the 1972 Act was made in the context of section 2(1). Section 2(1) could also be considered a Henry VIII power in the sense that it empowers bodies outside Parliament, in this case the European Union's institutions, to legislate for the United Kingdom, for example through regulations, which are directly applicable.<sup>48</sup>

When the ECA is repealed, the Government's stated intention is to convert all of the *acquis*, including these rights into domestic law. Some Treaty rights, 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.

Equally, post Brexit day, it may not be practical for some of the transposed *acquis* to remain on the statute book. Any withdrawal agreement could change how some Treaty provisions operate in the UK, for example the right to free movement, and the delegated powers in the Bill could mean that parts of the converted *acquis* are not in force on Brexit day.

### ***R (on the application of Miller and another) v Secretary of State for Exiting the European Union*** – The ECA and domestic legal rights

On 24 January 2017, the Supreme Court rejected (by a majority of 8 to 3) the Government's appeal against the November 2016 High Court ruling, and stated that Ministers "require the authority of primary legislation" in order to give the Article 50 notice.<sup>49</sup>

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<sup>48</sup> N Barber and A Young 'The Rise of Henry VIII Clauses and their Implications for Sovereignty' *Public Law*, 113, 2003, p122

<sup>49</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

A central pillar of the majority's reasoning was the status and nature of the ECA.

The Government had argued that the ECA was not the source of domestic legal rights. Instead the Act was a conduit for rights and obligations that were "contingent" on the Government's exercise of the prerogative in conducting foreign affairs.

The majority judgment disagreed. The justices accepted that the ECA acts as a "conduit pipe" by which EU law was "grafted onto" UK law, and that the ECA is not *the originating* source of EU law. However, the Supreme Court also judged that the effect of the ECA was to constitute EU law as an "independent and overriding source of domestic law".<sup>50</sup>

The judgment outlined that triggering Article 50 would mean EU law is no longer a source of domestic law after Brexit, irrespective of whether Parliament repeals the ECA through the Great Repeal Bill:

If ministers give Notice without Parliament having first authorised them to do so, the die will be cast before Parliament has become formally involved. To adapt Lord Pannick's metaphor, the bullet will have left the gun before Parliament has accorded the necessary leave for the trigger to be pulled. The very fact that Parliament will have to pass legislation once the Notice is served and hits the target highlights the point that the giving of the Notice will change domestic law: otherwise there would be no need for new legislation.<sup>51</sup>

For such a change to be brought about by ministerial decision alone, the judgment explained, would be inconsistent with the ordinary application of "basic concepts of constitutional law",<sup>52</sup> namely Parliamentary sovereignty:

...the continued existence of the conduit pipe, as opposed to the contents which flow through it, can be changed only if Parliament changes the law.<sup>53</sup>

The majority did not accept that the Great Repeal Bill would provide sufficient authority, because the Great Repeal Bill is a necessary consequence of the decision to trigger Article 50.<sup>54</sup> The majority also pointed out that legal rules transposed by the Great Repeal Bill will not necessarily have the same meaning as they did when the UK was a member of the EU as they will have a "different status".<sup>55</sup> The courts will not be bound to follow the interpretation of the CJEU, and therefore EU

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<sup>50</sup> Ibid para 65

<sup>51</sup> [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5, para 94

<sup>52</sup> Ibid para 82

<sup>53</sup> Ibid para 84

<sup>54</sup> Ibid para 94

<sup>55</sup> Ibid para 80

law rights transcribed could be interpreted differently than they would have been when the UK was a member of the EU.<sup>56</sup>

## The European Union (Notification of Withdrawal) Act 2017

As a consequence of this ruling, Parliament enacted the European Union (Notification of Withdrawal) Act 2017. This legislation is relevant to evaluating the legal effect of the Great Repeal Bill's proposed repeal of the ECA.

The Act has only one operative section:

### 1. Power to notify withdrawal from the EU

(1) The Prime Minister may notify, under Article 50(2) of the Treaty on European Union, the United Kingdom's intention to withdraw from the EU.

(2) This section has effect despite any provision made by or under the European Communities Act 1972 or any other enactment.

The Government triggered Article 50, [through a letter from the Prime Minister to European Council President Donald Tusk](#), on 29 March 2017.

### Impact on the ECA

The European Union (Notification of Withdrawal) Act 2017 does not repeal the ECA. However, the logic of the Supreme Court's judgment would imply that the EU (NoW) Bill provides the necessary legal authority for EU law to no longer be directly applicable on the day that the UK leaves the EU. This, according to the Supreme Court, as noted above, is a consequence of triggering Article 50:

As Lord Pannick QC put it for Mrs Miller, when ministers give Notice they will be "pulling ... the trigger which causes the bullet to be fired, with the consequence that the bullet will hit the target and the Treaties will cease to apply".<sup>57</sup>

The wording of Section 1(2) of the EU (NoW) Act indicates that the provision could have implications for the ECA "despite any provision made by or under the European Communities Act 1972 or any other enactment". These words appear to be designed to limit the possibility of a judicial review challenge to the use of the power in clause 1(1). The direct reference to the ECA is probably to avoid any doubt over Parliament's intention in relation to any rights stemming from the ECA.

During debate on the Bill in the House of Lords, Lord Hope of Craighead, a Crossbench peer and former Supreme Court Judge, raised the point that the EU (NoW) Act may not provide enough legislative

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<sup>56</sup> Ibid para 80

<sup>57</sup> [R \(On the application of Miller and another\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5, para 36

authority for withdrawal from the EU.<sup>58</sup> Lord Hope pointed out the 2017 Act does not necessarily provide authority for the conclusion of an agreement with the EU, implying that further primary legislation might be required to satisfy the conditions in *Miller*.

The '[Three Knights' opinion on Article 50](#), published by the law firm Bindmans shortly before the Lords considered the Bill (see section 3.8 below) argued that there is a UK constitutional requirement for an Act of Parliament to give effect to a withdrawal agreement, or to authorise withdrawal from the EU without an agreement.

The 'Three Knights' opinion has been criticised by some legal experts, particularly on the basis that it is not compatible with the Supreme Court in *Miller*.<sup>59</sup>

The Government also disagrees, and the White Paper on the Repeal Bill, explains that Parliament's approval will be sought, it will be on a motion rather than on a Bill.<sup>60</sup> As such the legal changes necessitated by the withdrawal agreement will be done through secondary legislation, under a power created by the Great Repeal Bill.<sup>61</sup> Parliament's approval of such a power could therefore provide *legislative* authority for the Government to implement any withdrawal agreement, subject to the agreement on the planned motion.

## 2.2 Section 2(2) – Implementing directives

The European Union also legislates through directives. Directives are not directly applicable in Member States, they require implementing legislation, and in the United Kingdom this is often made with the power in section 2(2) of the ECA.

Section 2(2) is an extremely broad statutory power. The power enables ministers to enact statutory instruments to give effect to EU law. When read with 2(4), it is what is known as a Henry VIII power, as it enables the executive legislation to make changes to primary legislation if necessary. This power is subject to some limitations, including that it cannot be used to impose or increase taxation or to make provisions with retrospective effect.<sup>62</sup>

The unusual breadth of the power is partly due to the range of subjects that it can be used to legislate upon, namely those in which the EU has

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<sup>58</sup> HL Deb 20 February 2017, c23

<sup>59</sup> See for example Mark Elliott, [The 'Three Knights Opinion' on Brexit: A response](#) Public Law for Everyone 17 February 2017"

<sup>60</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

<sup>61</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.17

<sup>62</sup> Para 1 of Schedule 2 of the European Communities Act 1972

competence to act. Most Henry VIII powers are limited by subject matter. As the Minister for the Bill explained when the power was before Parliament in February 1972:

As for the future, our obligations will result in a continuing need to change the law to comply with non-direct provisions, and to supplement directly applicable provisions, and it is not possible in advance to specify the subjects which will have to be covered.<sup>63</sup>

Under this power the Government can decide whether or not Parliament's approval is required, depending on whether an affirmative or negative resolution procedure is used for the instrument in question.

There have been hundreds of instruments made under this power, and 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>64</sup>

It is important to emphasise that some European Union Directives are implemented by free standing acts of Parliaments, and not section 2(2). (Section 4 below provides some examples).

Section 2(2) of the ECA demonstrates that the Government of the day recognised that more changes were required than could reasonably be included in one Act of Parliament. Furthermore, a legislative mechanism was needed to enable future adjustments to be made to law in the United Kingdom to give effect to EU legislation.

The precise breadth of the power in section 2(2) has been examined in the courts. It is worth noting that in *ITV Broadcasting v TV Catchup limited Ltd*, the High Court noted that section 2(2) should not be interpreted as restrictively as other Henry VIII powers, as it is a unique power for the purpose of implementing treaty obligations.

The courts might treat the powers in the Great Repeal Bill similarly, particularly designed to implement any withdrawal agreement. Otherwise the principle, outlined by Lord Neuberger in the *Public Law Project* case in 2016, that broad Henry VIII powers will be construed narrowly, to uphold parliamentary supremacy, will apply.

## What will happen to secondary legislation made under the ECA when the Act is repealed?

Any existing secondary legislation made under section 2(2) alone would cease to have effect if the ECA were simply repealed.

The effect of a repeal is to render the law as if the repealed Act had never existed,<sup>65</sup> which would mean that instruments made under the ECA would no longer be legally valid. As a consequence, in order to

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<sup>63</sup> HC Deb 15 February 1972 vol 831 cc264-377

<sup>64</sup> Instruments can be made under more than one power.

<sup>65</sup> Tindal CJ in *Kay v Goodwin* (1830) 6 Bing. 576, 582

avoid gaps appearing in important areas of law, these instruments will need to be “saved” by provisions in the Great Repeal Bill to ensure that they continue to operate. This can either be done specifically by the Bill, or if section 2(2) is replaced by an identical or a very similar statutory power, in which case the *Interpretation Act 1978* will save the secondary legislation made under the ECA.<sup>66</sup>

EU law implemented via statutory instruments using other domestic law powers, rather than the ECA, would not need to be saved.

*Craies on Legislation*, edited by Daniel Greenberg, Counsel for Domestic Legislation in the House of Commons, notes that when EU law ceases to have effect as a result of repeal by the EU and a process of EU administrative law, any UK legislation solely reliant on Section 2(2) is no longer legally effective.<sup>67</sup> As such if the UK left the EU without repealing the ECA, this legislation would need to be saved to continue in force.

### 2.3 Section 2(4) – Supremacy of EU law

Section 2(4) of the ECA ensures that section 2(1) and 2(2) take effect over any legislation made before or after the enactment of the ECA. Section 2(4) clarifies the relationship between EU law and other statutory enactments:

The provision that may be made under subsection (2) above includes... any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section...<sup>68</sup>

The impact of these words is outlined by Lord Bridge’s judgment in the seminal case of *Factortame*, an extract of which is set out in Box 2 below. Repealing this provision will clarify that EU law will no longer be supreme, and will not have primacy over subsequent legislation enacted by Parliament in the event of conflict.

The White Paper on the Great Repeal Bill indicates that this provision will be replaced with an alternative that provides that EU-related laws have priority over other laws enacted before the UK leaves the EU. One question this raises is how primary and secondary legislation enacted after the Repeal Bill, but before Brexit, designed to provide for policy divergence from EU law will be dealt with under this replacement for section 2(4).

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<sup>66</sup> *Interpretation Act 1978*, Section 16

<sup>67</sup> *Craies on Legislation*, D Greenberg (ed) (9<sup>th</sup> edition 2008) p842

<sup>68</sup> *European Communities Act 1972*, Section 2(4)

## 2.4 Section 3(1) – the status of the Court of Justice of the EU

The status of the Court of Justice of the European Union (CJEU) in UK law is secured by section 3(1) of the ECA. The provision requires UK courts to follow the CJEU interpretation of EU law.

The Government's announcements regarding the Great Repeal Bill have emphasised that one of its aims is to secure the authority of the UK's courts.<sup>69</sup> The White Paper outlines that the Bill will provide specific instructions to the courts on the status of CJEU judgments. Judgments given before Brexit day will have the status of judgments of the UK Supreme Court, in order to provide certainty and consistency in the interpretation of EU derived law.<sup>70</sup> But this raises the question if the UK Courts will also have instruction as to the status of CJEU judgments post-Brexit.

### Box 2: UK and CJEU case law on the Supremacy of EU law

The implications of the provisions in the ECA have emerged through the courts' interpretation in the major cases on the status of EU law.

#### The Supremacy of EU Law

Though not written into the EU Treaties themselves,<sup>71</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 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>72</sup>

#### The early domestic case law on the relationship between EU law and domestic law

<sup>69</sup> HM Government, [The United Kingdom's exit from and new partnership with the European Union](#), Cm 9417 February 2017 para 2.2

<sup>70</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.16

<sup>71</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.

<sup>72</sup> Court of Justice of the European Union, *Flaminio Costa v E.N.E.L.*, 15 July 1964

It was not immediately clear how courts in England and Wales would approach the issue of supremacy. In 1979, Lord Denning considered the impact of the ECA in an equal pay case *Macarthy Ltd v Smith*.

Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty [of Rome] or any provision in it or intentionally of acting inconsistently with it and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.<sup>73</sup>

This implied that the courts would be bound ultimately by a UK Act of Parliament even if it contradicted the terms of the EU Treaties and EU law. However, more recently the ECA, like the *Human Rights Act 1998* (HRA), has been deemed to possess a higher constitutional status than other UK laws (see *Thoburn*, below). In *Stoke-on-Trent City Council v B & Q Plc*, Justice Hoffmann went further than Lord Denning in outlining the supremacy of EU law:

The [EC] Treaty is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the European Economic Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the provisions of the Treaty on the matters of social and economic policy which it regulated. The entry into the Community was in itself a high act of social and economic policy, by which the partial surrender of sovereignty was seen as more than compensated by the advantages of membership.<sup>74</sup>

### *Factortame (No2)*

The seminal case of *Factortame* provided circumstances for the impact of the ECA on parliamentary sovereignty to be fully outlined. In short, the case concerned a conflict between the *Merchant Shipping Act 1988* case and EU law. According to an orthodox application of parliamentary sovereignty, the 1988 Act would prevail over the relevant EU law, which owes its authority to the earlier statute the ECA, which was enacted in 1972. Lord Bridge explained why this was not the case:

Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be prohibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.<sup>75</sup>

### The ECA as a “constitutional statute”?

In the case of *Thoburn*, Lord Justice Laws in the High Court provided an in depth analysis of the role of the ECA in the UK constitution. In that case, LJ Laws described the ECA as “a constitutional statute”. This status, according to LJ Laws, meant that the 1972 Act could not be impliedly repealed. This meant that a subsequent Act, which did not expressly repeal the 1972 Act, could not override any incompatible European Union legislation:

(1) All the specific rights and obligations which EU law creates are by the ECA incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any

<sup>73</sup> *Macarthy Ltd v Smith* [1979] 3 AER 325 at 329c-d

<sup>74</sup> [1990] 3 CMLR 31

<sup>75</sup> *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13 para 13



of these rights and obligations is abrogated or must be modified to avoid the inconsistency. This is true even where the inconsistent municipal provision is contained in primary legislation.

(2) The ECA is a constitutional statute: that is, it cannot be impliedly repealed.

(3) The truth of (2) is derived, not from EU law, but purely from the law of England: the common law recognises a category of constitutional statutes.

(4) The fundamental legal basis of the United Kingdom's relationship with the EU rests with the domestic, not the European, legal powers. In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental or constitutional right guaranteed by the law of England, a question would arise whether the general words of the ECA were sufficient to incorporate the measure and give it overriding effect in domestic law. But that is very far from this case.

I consider that the balance struck by these four propositions gives full weight both to the proper supremacy of Community law and to the proper supremacy of the United Kingdom Parliament. By the former, I mean the supremacy of substantive Community law. By the latter, I mean the supremacy of the legal foundation within which those substantive provisions enjoy their primacy. The former is guaranteed by propositions (1) and (2). The latter is guaranteed by propositions (3) and (4). If this balance is understood, it will be seen that these two supremacies are in harmony, and not in conflict.

According to LJ Laws' interpretation in *Thoburn*, parliamentary sovereignty was not impinged by the ECA.

LJ Laws' approach to the ECA was recently developed by the Supreme Court in the case of *HS2*. Lord Neuberger and Lord Mance explained, even though it was not necessary to decide the case, how the courts might approach a conflict between two different constitutional statutes:

11. Under the European Communities Act 1972, United Kingdom courts have also acknowledged that European law requires them to treat domestic statutes, whether passed before or after the 1972 Act, as invalid if and to the extent that they cannot be interpreted consistently with European law: *R v Secretary of State, Ex p Factortame Ltd (No 2)* [1991] 1 AC 603. That was a significant development, recognising the special status of the 1972 Act and of European law and the importance attaching to the United Kingdom and its courts fulfilling the commitment to give loyal effect to European law. But it is difficult to see how an English court could fully comply with the approach suggested by the two Advocates General without addressing its apparent conflict with other principles hitherto also regarded as fundamental and enshrined in the Bill of Rights. Scrutiny of the workings of Parliament and whether they satisfy externally imposed criteria clearly involves questioning and potentially impeaching (i.e. condemning) Parliament's internal proceedings, and would go a considerable step further than any United Kingdom court has ever gone.

12. The United Kingdom has no written constitution, but we have a number of constitutional instruments. They include Magna Carta, the Petition of Right 1628, the Bill of Rights and (in Scotland) the Claim of Rights Act 1689, the Act of Settlement 1701 and the Act of Union 1707. The European Communities Act 1972, the Human Rights Act 1998 and the Constitutional Reform Act 2005 may now be added to this list. The common law itself also recognises certain principles as fundamental to the rule of law. It is, putting the point at its lowest, certainly arguable (and it is for United Kingdom law and courts to determine) that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation.<sup>76</sup>

<sup>76</sup> *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3

## 2.5 Is the repeal of the ECA necessary?

Once the United Kingdom leaves the European Union and is no longer a Member State, section 2(1) of the ECA will no longer be effective. As such some have argued that the repeal of the ECA is not legally necessary.

Mark Elliott, Professor of Public Law at the University of Cambridge, has written that repealing the ECA is legally unnecessary:

... the ECA only gives effect and priority to such EU laws as are, at any given point in time, binding upon the UK thanks to its EU Treaty obligations. Post-Brexit, the UK will have no such obligations, and the ECA will therefore give effect and priority to no EU law whatever.<sup>77</sup>

Similarly, Kenneth Armstrong, Professor of European Law at the University of Cambridge submitted that it is “paradoxical” for the UK to repeal the ECA and then seek to replicate the effect of section 2(1) through the expected mass transposition of directly applicable EU law.<sup>78</sup>

Others argue that repealing the ECA is both required and desirable. Sir William Cash MP has argued that repeal of the ECA is necessary to give effect to the outcome of the referendum:

Brexit does not just mean Brexit. Brexit means repeal of the European Communities Act 1972. This is as axiomatic as it is fundamental. The vote to leave the European Union followed from the enactment of the European Union Referendum Act 2015 whereby Parliament deliberately and expressly gave the British people the right to decide the question as to whether to remain in or to leave the European Union. This decision is not only binding in a political sense but also, by virtue of the application and outcome of that enactment, is binding in a constitutional and legal sense. I say this because the voluntary enactment of the European Communities Act 1972, as clearly expressed by Lord Bridge in the Factortame case of 1991, which took us into the then European Community, now the European Union, was specifically put on the line by the question laid down in the Referendum Act of 2015. This question was crystal clear – ‘Should the United Kingdom remain a member of the European Union or leave the European Union?’ The British people decided to leave and the only way in which that vote to leave can be implemented is to

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<sup>77</sup> Mark Elliott [Theresa May's "Great Repeal Bill": Some preliminary thoughts](#), *Public Law for Everyone* (3 October 2016)

<sup>78</sup> Kenneth Armstrong, 'On your marks, get set LEAVE! The technical challenge of the Great Repeal Bill' *LSE Brexit Blog*, October 2016

repeal that 1972 Act. What Parliament did voluntarily in 1972, we can reverse by repeal of that 1972 Act. We can and must.<sup>79</sup>

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<sup>79</sup> Sir William Cash MP, 'Brexit does not just mean Brexit. Brexit means repeal of the European Communities Act 1972', Bill Cash's [European Journal](#), 15 September 2016

### 3. Challenges for converting European Union law to domestic law

The Government has indicated that the Great Repeal Bill will seek to convert all of the *Acquis Communautaire*, in the form which it applies on the day before the UK leaves the EU, into domestic law. The *Acquis Communautaire* comprises all the EU's treaties and laws, and the case law of the CJEU, in the first instance.

The Government is doing this as the alternative, just repealing the ECA, would leave large holes in the statute book.

However, this approach raises a number of questions and practical challenges.

- How will EU laws, currently directly applicable via the provisions of the ECA itself, be converted?
- How will the transposition be phased?
- How do we deal with laws that rely on and refer to EU institutions and mechanisms that we may no longer be part of?
- How will the consequential Brexit-related primary legislation engage with the converted EU law?
- Will the converted *acquis* be updated in line with changes made by the EU *after* Brexit day?

A number of these questions have now been addressed by the Government's White Paper on the Great Repeal Bill. For example we now know that directly applicable EU law will not be "copied out", but instead that EU regulations will be converted wholesale.<sup>80</sup>

The Secretary of State for Leaving for the European Union hinted at the complexities of this task in October 2016 when he stated that "the Great Repeal Act will convert existing EU law into domestic law, *wherever practical*" [emphasis added].<sup>81</sup>

The Secretary of State Department for Environment, Food and Rural Affairs, Andrea Leadsom highlighted some of these challenges when she explained, in October 2016, that two-thirds of the applicable EU

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<sup>80</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.8

<sup>81</sup> Gov.uk, ['Government announces end of European Communities Act'](#), 2 October 2016

environmental law will be able to be converted with some “technical changes”, but that “roughly a third won’t”.<sup>82</sup>

The White Paper explains that technical issues and some gaps will be addressed by secondary legislation under the Bill, and other areas, requiring major policy change, will be done through further primary legislation.<sup>83</sup>

At this stage it is not clear how many Bills there will be, when they will be introduced, and what impact they will have on the way in which the converted *acquis* applies on the day the UK leaves the EU. Much will depend on the outcome of the negotiations and the nature of any transitional arrangements agreed. Transposition will have to be carefully phased, in this sense will be a multi-stage process, which will be coordinated with the negotiations with the EU.

It is possible that EU law as it currently operates now, will be subject to some significant changes via both primary and secondary legislation before the UK leaves the EU. It is also possible that the substance of the law will largely remain the same, and only certain laws inherently connected to Membership, such as voting in EU elections, will be changed and come into force on Brexit day. The Government has emphasised the need to provide for stability and certainty, which would point towards the latter.

This section explores the challenges and practical difficulties that might arise from the transposition of the EU *acquis*.

### 3.1 Which EU laws will be transposed?

The White Paper explains that all directly applicable EU law, as it stands at the moment of the UK’s exit will be converted into domestic law.<sup>84</sup>

A significant body of EU law, namely certain provisions of the Treaties and EU Regulations, currently take effect in the United Kingdom via section 2(1) of the ECA. This body of EU law is directly applicable, meaning it is effective and in force through the ECA without any further enactment. For example, Article 157 TFEU provides for equal pay for equal work between men and women and Regulation (EC) No 78/2009 on the type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users.<sup>85</sup>

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<sup>82</sup> [Environmental Audit Committee Oral evidence: The Future of the Natural Environment after the EU Referendum](#), HC 599, 25 October 2016

<sup>83</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.21

<sup>84</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.24

<sup>85</sup> [Regulation \(EC\) No 78/2009](#) of the European Parliament and of the Council of 14 January 2009 on the type-approval of motor vehicles with regard to the protection of pedestrians and other vulnerable road users

If these provisions are not converted to UK law, then unless they are covered by existing legislation, they will no longer be law after Brexit day. This could risk the creation of legal “black holes”. As Box 3 below explains, in certain areas of EU competence, domestic law is entwined with EU law. As such if the relevant EU falls away some domestic law would not be able to function effectively. The Government’s stated aim behind the Great Repeal Bill is to avoid the creation of black holes. This explains the intention to transpose, *wholesale*, all of the directly applicable EU law that applies in the UK on Brexit day.

### Box 3: How EU law is embedded in UK law – Environmental law

Colin Reid, Professor of Environmental Law at the University of Dundee, has outlined the different ways in which EU law environmental law is embedded in domestic law.<sup>86</sup> His analysis provides a good starting point for understanding the challenges of transposition.

1. All relevant law is set out in directly applicable EU law (for example Treaty provisions and EU regulations). Relatively rare as supporting domestic measures are normally required.
2. All relevant law, which is based on the need to comply with EU obligations, is set out in self-contained UK legislation, for example the *Pollution Prevention and Control (Scotland) Regulations 2012* (SSI 2012/360) reg.64 which is based on the Directive on public access to environmental information (Dir. 1990/313).
3. Most relevant law, which is based on the need to comply with EU obligations, is set out in UK legislation (largely self-contained), but with occasional references to EU measures, for examples: *Environmental Assessment (Scotland) Act 2005*. The Act contains references to EU law, but according to Reid, the Act “can be made to work without EU elements”.
4. Relevant domestic legislation, which is based on the need to comply with EU law, but *relies* on references to EU law to make sense. Reid cites the example of *the Waste Management Licensing (Scotland) Regulations*, SSI 2011/228 reg.2, which depends on the definition of “waste” contained in the EU Waste Directive (Dir. 2008/98).
5. Domestic legislation that is primarily designed to support directly applicable EU law. Reid cites the example of the *Control of Trade of Endangered Species (Enforcement) Regulations 1997*, SI 1997/1372, which he explains are designed to enforce EU Regulations that set out which species are covered.<sup>87</sup>

Professor Sionaidh Douglas-Scott, Anniversary Chair in Law, Co-Director at the Centre for Law and Society in a Global Context, has drawn the analogy with the need for “continuance clauses” in former colonies and cites the example of section 4(1) of *The Jamaica (Constitution) Order in Council 1962*.<sup>88</sup> That provision ensured that all laws in force in Jamaica immediately before the appointed day continued in force on and after that day.<sup>89</sup>

<sup>86</sup> Colin Reid, Brexit: challenges for environmental law (2016) *Scots Law Times* p143-144

<sup>87</sup> Ibid

<sup>88</sup> S Douglas-Scott, ‘The Great Repeal Bill: Constitutional Chaos and Constitutional Theory’, *UK Constitutional Law Association*, 10 October 2016

<sup>89</sup> [The Jamaica \(Constitution\) Order in Council 1962](#), Section 4(1)

A great deal of EU law is already transposed in UK domestic law. As outlined in section 4 of this briefing, there are many Acts of Parliament which give effect to EU law, for example the *Consumer Protection Act 1987*. EU law has also been transposed by statutory instruments made under section 2 (2) ECA and other statutory powers. The Great Repeal Bill may contain statutory powers to enable Ministers to adjust this body of domestic law to render it effective and compatible with the outcome of negotiations with the EU. Some of this legislation, for example those statutes governing the conduct of elections for the European Parliament, might be repealed by the Great Repeal Bill, either on the face of the Bill or through the powers it contains.

### **The White Paper on the Great Repeal Bill**

The White Paper provides some detail on the EU law that will be preserved on the post-Brexit statute book by the Great Repeal Bill. The White Paper explains that all EU regulations will be converted into UK law.<sup>90</sup> These regulations will not be identified or listed in the Bill itself.

This continues the approach of the ECA of using a provision to link an entire body of law to the UK's legal system. A critical difference is that only regulations in force on the day before the UK leaves will continue to apply post-Brexit. This means that the Great Repeal will transplant a static body of law rather than creating a "conduit" for future law produced by the EU.<sup>91</sup> Any updates that are to be made to EU-related law post-Brexit, will need to be enacted individually by Parliament. In practical terms arrangements will have to be made to make this body of law, currently available through the EU's legal database, accessible in the United Kingdom.

The White Paper also appears to draw a distinction between different forms of directly applicable EU law. There is no mention of the EU treaties being converted wholesale, instead the White Paper explains that "rights in the EU treaties that can be relied on directly in court by an individual" will be incorporated into UK law.<sup>92</sup> This could imply that a separate provision might convert directly applicable treaty provisions, although these are unlikely to be identified individually.

The White Paper also suggests that all of the provisions of the EU treaties, as they stand on the day before the UK leaves, will continue to

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<sup>90</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.4

<sup>91</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

<sup>92</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.11

be able to be used by the courts to interpret EU derived law post-Brexit.<sup>93</sup>

Judgments of the CJEU given pre-Brexit will also be given the same status of binding precedent as UK Supreme Court judgments.<sup>94</sup>

EU law which has already been converted into domestic law, for example legislating implementing directives and statutory instruments made under section 2(2) of the ECA, will not need to be transposed and the White Paper explains that these will be “preserved” by the Bill.<sup>95</sup>

### 3.2 Which EU law might not be transposed?

The Government has consistently states that “the same rules and laws will apply on the day after exit as on the day before”.<sup>96</sup> In this sense the Great Repeal Bill is not engaged in a process of working out which elements of EU law are desirable from a policy perspective. Instead the Government has emphasised that the aim of the Bill is to provide continuity and certainty. The Prime Minister has indicated that the process of transposition will ensure that there is no “cliff edge” on Brexit day.<sup>97</sup>

The focus on continuity should not obscure the fact that there will be important changes to the statute book and EU-derived law passed between now and Brexit day, including to the EU law which the Great Repeal Bill will convert into domestic law. These changes will not come into force until Brexit day.

There are four main categories of change that are likely to occur, although the timing and methods are not yet clear.

#### Technical changes via secondary legislation

The White Paper outlines that the delegated powers in the Bill will be used to make technical changes to the way that EU-related operates. For example, by re-allocating regulatory functions from EU institutions to UK institutions or ministers. This is what Mr Davis implied during his evidence to the Exiting the EU Committee, on 14 December, set out that the Bill will convert the entire body of EU law currently in force “pretty much – not quite – untouched into British law”.<sup>98</sup> So while the White

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<sup>93</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.10

<sup>94</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.16

<sup>95</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.5

<sup>96</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 p5

<sup>97</sup> Theresa May Speech, [The government’s negotiating objectives for exiting the EU: PM speech](#), Lancaster House, 17 January 2017

<sup>98</sup> [Exiting the European Union Oral evidence: The UK’s negotiating objectives for its withdrawal from EU](#), HC 815, 14 December 2016



Paper states that all EU regulations will be converted by the Great Repeal Bill, by the time the Bill comes into force, some of this law is likely to be amended by secondary legislation to address technical flaws. Some of these technical changes could affect the way the law works.

An important point about the timing of these corrections is that the EU law in force in the UK will continue to be updated, through the ECA 1972, until the moment we leave the EU and the Act is repealed, and so corrections will need to be on a rolling basis as and when the EU law comes into force, in preparation for Brexit day.

### **Consequential primary legislation**

It is also possible that the promised consequential primary legislation might be used to amend areas currently covered by EU law. This is especially likely for EU law in areas where the Government has indicated Bills are likely: customs, agriculture, fisheries and immigration.<sup>99</sup> Many of these changes, as Mr Davis explained in his evidence to the Committee, would need to be made before the ratification of the withdrawal agreement.<sup>100</sup>

### **Withdrawal negotiations**

Changes will also be made to the converted *acquis* as a result of negotiations with the EU. For example, some directly applicable provisions depend on co-operation with Member State and the EU itself, namely those concerning the Four Freedoms (Free Movement of Goods, People, Services and Capital). The way in which these provisions operate will depend on the UK's negotiations with the EU. As Kenneth Armstrong, Professor of European Law at the University of Cambridge, outlined in October 2016:

It is far from clear what it would mean to “convert” this into UK law post-Brexit, not least because such a legal device could not, of course, create obligations for other EU states towards the UK; that can only be achieved by whatever withdrawal and subsequent agreements might be negotiated.<sup>101</sup>

According to Professor Douglas Scott from Queen Mary University of London, this may present challenges for transposition:

...any EU provisions translated into UK law relating to trade or co-operation with the EU (eg transfer of prisoners serving sentence in EU prisons, or recognition and enforcement of judgments) will only be workable if the EU and UK reach an agreement on the matter. Would this be a matter for Withdrawal Negotiations

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<sup>99</sup> Ibid

<sup>100</sup> Ibid

<sup>101</sup> Kenneth Armstrong, On your marks, get set LEAVE! The technical challenge of the Great Repeal Bill, *LSE Brexit Blog*, October 2016

under Article 50? And what happens if agreement is not reached?<sup>102</sup>

This in part explains why the Government has stated that the Great Repeal Bill will contain powers for ministers to make adjustments via statutory instruments: to give the Government “the flexibility to take account of the negotiations with the EU as they proceed”.<sup>103</sup> These powers could enable Minister to adjust the *acquis* to fit the outcome of the negotiation. This raises implications for the nature of the powers in the Bill, as Sir Stephen Laws, former First Parliamentary Counsel, explained in July 2016:

...the less that is known about the terms (of the withdrawal agreement) while the legislation is passing, the more permutations have to be covered and the wider the debate on them will be able to range. The legislation, even if it goes beyond a simple patch, will probably still need to include very wide powers to make subordinate legislation: to allow for different potential outcomes from the negotiations, and generally for the widespread nature of the required changes. The wider the powers the greater the potential for controversy during the Bill’s passage.<sup>104</sup>

Fourthly, as the Government accepted before the High Court in *Miller*, there are some directly applicable EU laws which stem from the UK’s membership of the EU, which will not be able to be transposed. For example, those that enable citizens to stand for election as MEP. Equally, the laws enabling courts to refer a question to the Court of Justice of the European Union will not be able to be transposed. The White Paper notes that “much of the content of the treaties will become irrelevant once the UK leaves the UK”.<sup>105</sup>

## The Charter of Fundamental Rights

The Government’s White Paper states that – in an exception to the general rule – the [EU Charter of Fundamental Rights](#) ‘will not be converted into UK law by the Great Repeal Bill’.<sup>106</sup>

The Charter covers a wide range of human rights, and since the Treaty of Lisbon it has had ‘the same legal value’ as the EU Treaties. It applies to the EU institutions, and also to EU Member States when acting within

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<sup>102</sup> S Douglas-Scott, ‘The Great Repeal Bill: Constitutional Chaos and Constitutional Theory’, *UK Constitutional Law Association*, 10 October 2016

<sup>103</sup> Gov.uk, ‘[Government announces end of European Communities Act](#)’, 2 October 2016

<sup>104</sup> S Laws, ‘Article 50 and the political constitution’, *UK Constitutional Law Association*, 18 July 2016

<sup>105</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.9

<sup>106</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.3

the scope of EU law. It would no longer apply directly to the UK after withdrawal.

The White Paper gives several arguments for not converting the Charter into UK law:

- As the Charter applies to EU Member States only when they are acting within the scope of EU law, its relevance to the UK will be 'removed' by the UK's withdrawal from the EU.
- The Charter should not be used to bring challenges against the Government over EU rights like the right to vote or stand as a candidate in European Parliament elections that will be lost as a result of withdrawal from the EU, or as the basis for striking down UK legislation after withdrawal.
- As the Charter was not designed to create any new rights or alter the circumstances in which individuals could rely on fundamental rights, removal of the Charter from UK law 'will not affect the substantive rights that individuals already benefit from in the UK'.

The White Paper goes on to set out how existing case law on the Charter would be interpreted by the UK courts after withdrawal.<sup>107</sup> It suggests that any reference to the Charter would be effectively expunged, and only the 'underlying rights' that are reflected in the Charter would continue to be relevant:

2.25 As EU law is converted into UK law by the Great Repeal Bill, it will continue to be interpreted by UK courts in a way that is consistent with those underlying rights. Insofar as cases have been decided by reference to those underlying rights, that case law will continue to be relevant. In addition, insofar as such cases refer to the Charter, that element will have to be read as referring only to the underlying rights, rather than to the Charter itself.<sup>108</sup>

The reference to 'cases [that] have been decided' presumably refers to both UK and CJEU decisions.

### **Does the Charter extend beyond 'underlying rights'?**

There has been considerable debate over whether the Charter simply restates existing rights in the UK or creates new ones.

The Charter has 54 articles containing rights similar to those under the ECHR. It also contains various additional rights, such as freedom of movement for EU citizens within the EU, data protection and various social rights. Many of these underlying rights exist elsewhere in EU law, some of which will be converted into UK law. Others already exist in UK

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<sup>107</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.25

<sup>108</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.25

law, or in international agreements to which the UK is a party (including the entirely separate European Convention on Human Rights).

But the Charter also arguably introduced new rights and principles that were not contained in previous EU law, for instance on human cloning, founding schools, and elderly and disabled people:

Thanks to the Charter, EU Law recognizes the prohibition of human cloning as part of the fundamental right to physical integrity (article 2.2.d). There is nothing in EU secondary law on schools, but the Charter enshrines the freedom to found educational establishments (article 14.3). And there is a very important right conferred on nationals of non-EU Member States that are authorized to work in the EU: the right to working conditions equivalent to those of citizens of the Union (article 15.3).

... the Charter recognizes the rights of the elderly “to lead a life of dignity and independence and to participate in social and cultural life”...

... Article 26 of the Charter recognizes the right of persons with disabilities “to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community”...<sup>109</sup>

A December 2016 report on human rights and Brexit, from the Joint Committee on Human Rights, cited data protection rights and privacy as an example of ‘the sort of additional rights which might be lost if EU law were no longer applicable’.<sup>110</sup>

### Remedies

The Charter has also allowed some new remedies.

In particular, the UK courts can in some circumstances enforce rights under the Charter that are not otherwise directly enforceable (because they are set out in international human rights treaties but not in other EU laws or UK domestic legislation).

Also, because the Charter has the same status as the EU Treaties, the UK courts must currently disapply any domestic legislation that conflicts with a directly-effective provision of the Charter.<sup>111</sup> This is a more powerful remedy than a ‘declaration of incompatibility’ under the Human Rights Act 1998.

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<sup>109</sup> Daniel Sarmiento, ‘[The Great Repeal Bill and the Charter of Fundamental Rights – not a promising start](#)’, *Verfassungsblog*, 31 March 2017

<sup>110</sup> Joint Committee on Human Rights, [The human rights implications of Brexit](#), 19 December 2016, para 67 ff

<sup>111</sup> *European Communities Act 1972* s2(1)

Furthermore, compensatory damages for breaches of EU law can be granted as of right, whereas they are discretionary under the 1998 Act.

### **Could substantive rights be affected by removing the Charter from UK law?**

As EU lawyer Jorren Knibbe summarises the White Paper's provisions, 'national courts, when they interpret EU law which is preserved in the UK post-exit, are to ignore the effect which the Charter would have had on that interpretation'.<sup>112</sup>

Could that affect substantive rights, despite the Government's assertion that it will not? The analysis above suggests the rights could be lost in at least six possible scenarios:

- 1 There is no 'underlying right' – ie the Charter created a new right.
- 2 The underlying right is contained in an EU law that is not converted into UK law.
- 3 The underlying right is in a human rights treaty that the UK has not ratified.
- 4 The underlying right is in a human rights treaty that the UK has ratified but not made part of domestic law.
- 5 The underlying right arose only as a result of the interpretation of the Charter by the UK courts.
- 6 The underlying right arose only as a result of the interpretation of the Charter by the CJEU.<sup>113</sup>

On the last point, Professor Steve Peers of the University of Essex argues that it would be impractical to try to remove references to the Charter from the CJEU's reasoning:

Since many such rulings refer to other EU laws and interpret them in light of the Charter, there will in effect be an odd requirement to keep following part of a ruling but not all of it. But this will be like trying to remove an egg from an omelette, because the judicial reasoning on the Charter and the EU legislation is intertwined.<sup>114</sup>

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<sup>112</sup> Jorren Knibbe, Guildhall Chambers, '[Brexit: White Paper on the Great Repeal Bill – some initial points of interest](#)', 31 March 2017

<sup>113</sup> See Daniel Sarmiento, '[The Great Repeal Bill and the Charter of Fundamental Rights – not a promising start](#)', Verfassungsblog, 31 March 2017

<sup>114</sup> Steve Peers, '[The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers](#)', EU law analysis blog, 31 March 2017

### 3.3 What practical issues could arise as a result of the transposition of EU law?

Aside from the question of *which* of those currently directly applicable laws will be kept, there is also the question of *how* they will be transposed so that they work effectively post-Brexit.

The White Paper provides a number of important answers to this question. As has been noted above, transposition of directly applicable regulations and treaty provisions will be converted wholesale, and will not be copied out individually by the Great Repeal Bill.<sup>115</sup>

The White Paper outlines that the process of conversion alone will not be sufficient to prepare the statute book for Brexit day:

There is a variety of reasons why conversion alone may not be sufficient in particular cases. There will be gaps where some areas of converted law will be entirely unable to operate because we are no longer a member of the EU. There will also be cases where EU law will cease to operate as intended or will be redundant once we leave. In some cases EU law is based on reciprocal arrangements, with all member states treating certain situations in the same way. If such reciprocal arrangements are not secured as a part of our new relationship with the EU, it may not be in the national interest, or workable, to continue to operate those arrangements alone.<sup>116</sup>

The Government cites the examples of such issues as references to “EU law” in legislation, references to EU institutions and requirements to share information with EU institutions.<sup>117</sup>

For example, the European Medicines Agency (EMA) is responsible for evaluating medicinal products, and is directly referred to in the relevant EU regulations.<sup>118</sup> Professor Sionaidh Douglas-Scott identifies questions arising from this scenario:

Post Brexit, would the UK continue to accept decisions by a relocated EMA until a new British equivalent had been set up, which could take several years? If there were a British equivalent, there would also have to be arrangements for mutual recognition of UK and EU agency decisions, otherwise applicants would face extra costs of going through two agencies. This may sound

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<sup>115</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 paras 2.4 and 2.11

<sup>116</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.3

<sup>117</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 p20-21

<sup>118</sup> For example: [Regulation \(EC\) No 726/2004](#); See also HC Library Briefing, [EU Agencies and post-Brexit options](#) (28 April 2017; CBP 7957)

technical, but such matters will arise with literally hundreds of EU provisions, requiring thought, time, expertise and cost before the law will be workable.<sup>119</sup>

Similar scenarios will emerge where the EU law in question relies on continuing interaction with EU institutions. For example, a regulation may provide for the Commission to provide subordinate legislation.

#### **Box 4: The EU's Regulation on prudential requirements for credit institutions (the CRR, 575/2013/EU)**

Clifford Chance, a leading international law firm, has outlined some of the potential issues arising from the corrections that might be needed to a particular EU Regulation that will be converted by the Great Repeal Bill: The Regulation on prudential requirements for credit institutions (CRR, 575/2013/EU):

As to the substance of the CRR, in various places the CRR requires action by the European Banking Authority and the European Commission (eg the EBA must develop regulatory standards under articles 18(7), 25(4) and 143(5), which may then be adopted by the Commission as delegated legislation). In total, the word Commission appears 334 times in the CRR, and there are 387 references to the EBA, 234 references to the member states and a mere 26 references to the ESRB. Each of these references needs to be considered, as well as the measures already taken by the various EU institutions upon which powers are conferred. Should the UK continue to apply these measures, perhaps in the pursuit of equivalence, and, if so, what legislative status they should have, or should power simply be transferred to the PRA, HM Treasury or another body established for the purpose to make new rules, perhaps initially based on the EBA's current rules?

Another example of complexity relates to risk weightings. Under the CRR, exposures to central governments and central banks generally carry a risk-weighting of 100%, subject, for example, to a different assessment by an EU-approved credit reference agency (articles 114(1) and (2) and 135), but exposures to member states' central governments and central banks in their own currencies carry a risk weighting of 0% (articles 114(3) and (4)). Should the CRR, when enacted into UK law, continue to treat member states in the same way or should it treat them in the way that non-member states are currently treated? What about credit reference agencies (largely regulated by ESMA under Regulation (EC) No 1060/2009 on credit reference agencies)?<sup>120</sup>

#### **Using secondary legislation to correct the law**

The White Paper explains that where these types of issues are identified secondary legislation could be used to correct the law by, for example, replacing references to EU institutions with a UK body, or by adapting the provision to remove the interactions with the institutions. Each provision will require its own tailored solution depending on the drafting, and the level of interaction with the EU that it requires. Some will be straight-forward, others less so.

In some cases, a technical solution may not be possible, for example if a new body or whole new framework is required, in which case primary legislation may have to be used. Even where a technical solution is

<sup>119</sup> S Douglas-Scott [The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?](#), 10 October 2016

<sup>120</sup> Clifford Chance, [Brexit: What Will The Great Repeal Bill Do?](#) (2017) p11

possible, as the examples cited by the Government indicate, such as deciding which body to reallocate responsibilities to, or how a particular concept is defined, there will be a range of options for the government to decide between, including extra-legal agreements or concordats, sometimes referred to as soft law

After the Great Repeal Bill is enacted, the process of converting EU law will continue through these statutory instruments that correct technical deficiencies. At the same time it is expected that the UK Government will be introducing primary legislation that introduces policies that diverge from current EU law.

As Daniel Greenberg, a leading expert in legislation, being able to identify which statutory changes are engaged in the process of converting the EU, and “disentangling” dependence on the EU, and those engaged in policy divergence will be increasingly important.<sup>121</sup> It is possible that primary legislation and secondary legislation could have “mixed motives”, and in such cases distinguishing the different elements will depend on the information accompanying the relevant provisions.<sup>122</sup>

The White Paper explains that the EU law that will be converted will be that which applies in the UK “the moment before we left the UK”.<sup>123</sup> Taking a snap shot at a particular moment has the advantage of providing some certainty and clarity. Nevertheless, the timing raises some potential issues over the transcription process. The Government could decide that it would be desirable to convert regulations that come into force immediately after Brexit. Equally the Government could decide that there are particular regulations enacted by the EU just before the UK leaves that it does not want to convert into UK law. In either case secondary legislation could be used to adopt or repeal the particular regulation in question.

The UK Government could introduce further primary or secondary legislation, post-Brexit that enables EU-related law to be updated in line with changes made in the EU. For example, a withdrawal agreement or the future relations agreement could lead to further domestic legislation containing an over-arching provision that enables the converted acquis to be updated, in specific areas, in line with changes made by the European Union post-Brexit.<sup>124</sup>

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<sup>121</sup> Daniel Greenberg, “[Brexit and legislating for withdrawal: two steps forward...](#)” Practical Law UK, 4 April 2017

<sup>122</sup> Ibid

<sup>123</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.4

<sup>124</sup> Daniel Greenberg, “[Brexit and legislating for withdrawal: two steps forward...](#)” Practical Law UK, 4 April 2017



## 4. Other primary legislation that implements EU law

The Great Repeal Bill's repeal of the *European Communities Act 1972* would not remove all EU law from the United Kingdom's statute book as Parliament has enacted a large amount of primary and secondary legislation, independently from the ECA, in order to give effect to European Union law.

Each year Parliament enacts a number of Acts which contain provisions that give effect to European Union legislation. The House of Commons Library has estimated that 13.2% of UK primary and secondary legislation enacted between 1993 and 2004 was EU related.<sup>125</sup> For example, the [Consumer Protection Act 1987](#) and the [Consumer Rights Act 2015](#), both refer and give effect to EU directives.

This body of law will face similar issues to those identified in relation to the directly applicable EU law which will be transposed. Some provisions may have to be amended in order to be effective post-Brexit, in order to reflect the changes agreed in negotiations with the EU. Other provisions may need to be amended in order to ensure that they are effective post-Brexit day. For example, whether to:

- Preserve references to European Union institutions and agencies;
- Whether to update the provisions in order to keep pace with changes made to the regulatory framework by the European Union after Brexit;
- How to reflect changes to the UK's relationship with EU institutions in this body of law post-Brexit;
- Whether to continue to rely upon relevant guidance from EU institutions on the interpretation of legislation based on EU law.

These same issues also apply to secondary legislation implementing EU law.

The White Paper on the Great Repeal Bill indicates that the powers in the Bill will enable the Government to correct any technical issues in EU-derived law, including references to EU law in UK primary and secondary legislation implementing EU law obligations.<sup>126</sup>

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<sup>125</sup> For more information on the amount of UK legislation that originates from Europe: see [HC Library EU Obligations: UK implementing legislation since 1993 \(CBP 07092\) \(2015\)](#) and [HC Library How much legislation comes from Europe? \(10/62\) \(2010\)](#)

<sup>126</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 Chapter 3

The White Paper also indicates that all primary and secondary legislation giving effect to EU law, and enacted prior to Brexit day, will be preserved by the Great Repeal Bill.<sup>127</sup> In particular, secondary legislation enacted under section 2(2) of the ECA will be “saved” by the Bill, as otherwise they would fall away when the ECA is repealed.<sup>128</sup>

Some legislation which gives effect to EU law obligations, for example the *Equality Act 2010*, which gives effect to European Union legal norms will be able to continue to function without amendment. The *Equality Act 2010* was designed as a free standing piece of legislation, and its aims and effect extend beyond EU law obligations. A number of Acts of Parliament that give effect to EU obligations will, like the *Equality Act 2010*, function effectively post-Brexit without amendment.

The White Paper on the Great Repeal Bill outlined that Brexit should not mean that there is a change in the way that this law is interpreted in the courts.<sup>129</sup> Once the UK leaves the EU, Parliament will be free to amend this legislation. It is also possible that Parliament may choose to enact changes to this body of law that will come into force on the day the UK leaves the EU, through the powers under the Great Repeal Bill or under subsequent primary legislation.

## 4.1 Primary legislation implementing EU law

Some examples of primary legislation that might need to be adapted after Brexit day are set out in Table 1 below. There are many more but this table indicates the range of legislation which likely to be affected.

**Table 1: Primary legislation that gives effect and refers to EU law**

UK legislation	Relevant EU legislation	Example of interlinking provision
<a href="#"><i>Wildlife and Countryside Act 1981</i></a>	Council Regulations 338/97/EC	Section 1, as it applies in Scotland, provides that a person is not guilty of a wildlife offence if the person has behaved in accordance with Council Regulation 338/97/ EC on the protection of species of wild fauna and flora.

<sup>127</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.5

<sup>128</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.5

<sup>129</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 2.14

<a href="#"><u><i>Environmental Protection Act 1990</i></u></a>	Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste	Section 75 of the 1990 Act defines "Waste" by reference to the definition in the Waste Framework Directive (2009/98/EC)
<a href="#"><u><i>Trade Marks Act 1994</i></u></a>	Council Directive 89/104/EEC	Section 3 (4) of the 1994 Act provides that a trade mark shall not be registered in the United Kingdom if it is prohibited by EU law
<a href="#"><u><i>Competition Act 1998</i></u></a>	Article 101 and 102 of the TFEU	Section 60 of the 1998 Act provides that UK courts should determine questions of interpretation of the relevant provisions in a manner that is consistent with EU law and the jurisprudence of the CJEU.
<a href="#"><u><i>Pollution Prevention and Control Act 1999</i></u></a>	Council Directive 89/104/EEC	Section 3 (e) of the 1999 Act provides that the definitions used in that section are the same as those provided by Council Directive 96/61/EC.
<a href="#"><u><i>The Extradition Act 2003</i></u></a>	European framework decision of the Council of 2002/584/JHA	Section 215 of the 2003 Act provides that the list of conduct in Schedule 2 corresponds to that set out in article 2.2 of the framework decision.
<a href="#"><u><i>The Communications Act 2003</i></u></a>	The Communication Directives (Directive 2002/19/EC; Directive 2002/20/EC; Directive 2002/21/EC Directive 2002/22/EC)	Section 24 requires OFCOM to supply information to the Secretary of State to enable the information to be given to the European Commission in line with Article 25 of the Framework Directive 2002/20/EC.

## 5. Delegated powers

The Government has stated that the Great Repeal Bill will delegate statutory powers to enable Ministers to make changes, by secondary legislation (also referred to as delegated legislation, subordinate legislation, or statutory instruments) , to the statute book in order:

- To correct technical issues in EU-related legislation so that it functions effectively post-Brexit; and
- To give effect to any withdrawal agreement with the EU.<sup>130</sup>

On the date that the Bill is introduced, the Government will not know the outcome of the negotiations with the EU: nor will it know all the changes that will be needed to ensure that EU-derived legislation functions effectively when the UK leaves the EU.

To account for these unknowns, the Government will claim broadly framed delegated powers in the Bill in order to empower Ministers to make changes to the statute book. The combination of uncertainty and the potential for the need to make changes at short notice, for example, in the window between the conclusion of negotiations and the day the UK leaves the EU, means there is a strong case for the use of delegated powers to legislate for Brexit.

In evidence to the Exiting the European Union Committee on 14 December 2016, Mr Davis suggested that the Great Repeal Bill would be “simple”, and that any major or “material changes” to the law would be done through primary legislation, and not through delegated legislation.<sup>131</sup> He added “I don’t foresee major changes by SI”.<sup>132</sup>

Major policy changes, the White Paper on the Great Repeal Bill promises, will be enacted by number of further bills in the two years before Brexit day.<sup>133</sup> The promise of these Bills is likely to lead to intense scrutiny of the balance struck between primary and secondary legislation in legislating for Brexit.

The White Paper outlines that the purpose of the Bill, and of the powers which will claim, is to “convert EU law into UK law”.<sup>134</sup> At the same time the White Paper states that those powers could be used to make “adjustments to policy” consequential on leaving the EU, and to

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<sup>130</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.12

<sup>131</sup> [Exiting the European Union Oral evidence: The UK’s negotiating objectives for its withdrawal from EU](#), HC 815, 14 December 2016

<sup>132</sup> Ibid

<sup>133</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.21

<sup>134</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.10

implement any withdrawal agreement. Both of these purposes might be considered part of the process of converting EU law into UK law. Nevertheless, these aims indicate that the powers in the Great Repeal Bill could give the Government some discretion to make policy changes via secondary legislation.

Identifying which provisions and instruments form of the domestication process, and which form part of the process of introducing new policies to replace those formerly supplied by the EU, will not always be straightforward. Some powers and instruments under the Bill may even be characterised as “mixed motive”, which both enable both technical changes as part of the conversion process *and* the introduction of new policy.<sup>135</sup> As the Government puts it in its White Paper, there is “inevitably a degree of discretion” in the process of domesticating EU law.<sup>136</sup>

Even if the powers are framed so that they can only be used by Ministers to ensure that EU-related legislation operates effectively, the potential scale of technical changes needed could mean that the powers included are nonetheless relatively significant. A “technical” change, if it entails the reallocation of regulatory function, or the replacement of a defective provision, could have important policy consequences. Any power to implement the withdrawal agreement could, for example, enable important changes to how immigration rules apply to EU citizens. Equally, such changes could be made through a separate standalone Bill. The Government is likely to ask for a degree of flexibility to cover for different scenarios.

The Government’s White Paper on the Bill promises that the delegated powers will be subject to limitations, including:

- Powers limited to specifically defined purposes and certain named constraints on the face of the Bill, both of which can be enforced by the courts;
- Parliamentary procedures that enable “effective parliamentary oversight” of the order-making powers; and
- Time-limits on the powers themselves, known as sunset clauses, so that the powers expire, unless renewed by Parliament.<sup>137</sup>

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<sup>135</sup> Daniel Greenberg, “[Brexit and legislating for withdrawal: two steps forward...](#)” Practical Law UK, 4 April 2017

<sup>136</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.10

<sup>137</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 3.14

### What are delegated powers?

Delegated powers are legislative powers, set out in primary legislation, that enable Ministers, and therefore the Government, to make secondary legislation. Secondary legislation is often used to enable the Government to enact detailed statutory provisions. Secondary legislation is drafted in Government departments. Parliament's means to scrutinise delegated legislation depends on the procedure specified in the "parent Act" (the legislation that contains the delegated power).

It is worth noting that, unlike primary legislation, secondary legislation can be ruled legally invalid by the courts, if it is found to fall outside the powers (*vires*) delegated in the parent Act.<sup>138</sup> This makes the drafting of the powers particularly important, as any limits and purposes set by Parliament in the primary legislation can be enforced in the courts.

### Why is the use of delegated powers criticised?

In certain contexts the use of delegated powers can be controversial. Arguably most controversial are delegated powers that enable ministers to amend primary legislation via secondary legislation: these are known as "Henry VIII powers".<sup>139</sup>

Henry VIII powers are seen by their critics as transferring legislative power from Parliament to Government. This is in part because secondary legislation generally receives less overt scrutiny in Parliament than primary legislation. Henry VIII powers are thus often viewed as considered a means to facilitate Government circumvention of the full legislative process, which the executive would otherwise require in order to enact primary legislation.

In the case of legislation that derives from EU obligations in areas where legislative power is otherwise devolved, the potential introduction of UK ministerial power to vary such law causes special concern in devolved

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<sup>138</sup> *R (on the application of The Public Law Project) (Appellant) v Lord Chancellor (Respondent)* [2016] UKSC 39

<sup>139</sup> 'Henry VIII clauses' appear to have emerged in their modern form in the late 19<sup>th</sup> century and had been so dubbed, in the view of the Donoughmore Committee on Ministers' Powers of 1932, "because that King is regarded popularly as the impersonation of executive autocracy.". It was then considered that they could have resembled the provisions of the 1539 *Act of Proclamations* (31 Henry VIII, c.8), though even in 1932 the comparison was considered far-fetched. The 1539 Act enabled Henry VIII to legislate through proclamations and ensured these were enforceable in the courts. Specifically, it provided that the King with the advice of his council "may set forthe at all tymes by auctoritie of this Acte his proclamations", and these shall be obeyed, "as though they were made by Acte of Parliament". However, restrictions in the Act did not render proclamations the equal of statutes; and the King's proclamations could not alter existing Acts of Parliament. The powers contained in the *Act of Proclamations* were therefore different to 'modern-day' Henry VIII clauses, which enable the amendment of primary legislation using secondary legislation.

The *Act of Proclamations* was repealed in 1547 (1 Edward VI, c.12).

institutions. During a debate in the House of Commons on exiting the EU and workers' rights, Mark Durkan MP (SDLP, Foyle) raised questions concerning both Henry VIII powers and devolution:

The right hon. Gentleman refers to the great repeal Bill, which is in essence the great download and save Bill for day one of Brexit. Who controls the delete key thereafter as far as these rights and key standards are concerned? Is it, as he implies, this House? Would any removal of rights have to be done by primary legislation, or could it be done by ministerial direction? And where is the position of the devolved Administrations in this? These matters are devolved competencies; will they be devolved on day one?<sup>140</sup>

### **Why are delegated powers likely to be included in the Great Repeal Bill?**

Parliament only has a limited time to enact any changes necessary in order to be ready for Brexit day.

The Government's White Paper on the Bill argues that secondary legislation is necessary for legislating for Brexit. Resolving the technical issues arising from the process of converting EU into domestic law would "require a prohibitively large amount of primary legislation".<sup>141</sup> The White Paper states that the Government estimates that there will need to be "between 800 and 1000 statutory instruments" enacted to make these technical changes.<sup>142</sup>

During evidence to the Exiting the European Union Committee on 14 December 2016, Mr Davis explained that secondary legislation would be necessary to adapt the statute book to life outside the EU:

There will also be some secondary legislation to go through and I expect that to be quite technical. It will not be at all contentious but it will still require time, and there is a fair amount of it. We have been in the Union for 40-something years and we have got a lot of law—many thousands of pages of statutes—that depends on it and much of it is coined in ways that relate to European institutions or guidances that will no longer be there, so we will have to do that as well. Some of that is very technical and will take time. We have to ensure we have the time to do that.<sup>143</sup>

Mr Davis' evidence and the White Paper appear to indicate that the primary purpose of the powers in the Bill will to enable the Government to make changes to the statute book to ensure that any EU-related law,

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<sup>140</sup> HC Deb 7 November 2016 c1318

<sup>141</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 para 3.11

<sup>142</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 para 3.19

<sup>143</sup> [Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU](#), HC 815, 14 December 2016

particularly that which may have been transcribed, operates effectively post-Brexit. The White Paper indicates that the powers will be drafted so as to constrain the way in which the power can be used:

Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU.<sup>144</sup>

A potential challenge is that it might prove difficult to define what counts as a “technical” change designed to deal with said “deficiencies”, and, indeed, to limit policy changes solely to addressing deficiencies in existing legislation. Further, the Government might want the powers to be available for other purposes, including to enact “mixed motive” changes with both technical and policy aims.

The other major reason given for the inclusion of delegated powers in the Great Repeal Bill is to provide for the outcome of the negotiations.<sup>145</sup> The powers in the Bill will ensure that the substance of any withdrawal agreement can be given effect in UK domestic law in time for Brexit day. If a withdrawal agreement with the EU is reached, it could contain important matters such as the rights of the EU citizens in the UK, the rights of UK citizens in the EU and the nature of any transition arrangements. The implementation of this agreement could therefore involve important changes to statute book—and these changes may need to be made in a relatively short timeframe. For example, they could need to be made after the agreement is signed, and after votes have been held in the Commons and the Lords, but before the date the UK officially leaves the EU.

Sir Stephen Laws QC, former First Parliamentary Counsel, has argued that it would be “constitutionally irresponsible” for the Government to begin the withdrawal process without having a legislative scheme in place to ensure the statute book functions effectively on Brexit day.<sup>146</sup> The Government is under a duty, Laws notes, to prevent “legal chaos” occurring. He claims that another advantage of enacting these powers as early as possible is to ensure, so far as is possible, that the Government is not obliged to accept concessions during the negotiations because of a requirement for a long lead time for implementation.

As delegated powers have been central to the legislative scheme used to facilitate the UK’s EU membership, namely through section 2(2) of

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<sup>144</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.17

<sup>145</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.12

<sup>146</sup> S Laws, ‘Article 50 and the political constitution’, UK Constitutional Law Association, 18 July 2016



the ECA, it is inevitable that they would form part of the legislative apparatus needed to give effect to the UK's exit from the European Union, especially given the timescale.

The Bill might include a number of separate delegated powers. For example, the Bill could include one power to cover technical deficiencies and another to give effect to the withdrawal agreement. This means they could also be used, as Laws outlines above, to make changes arising from the negotiations. As such, even if the Government's intention is to rely on primary legislation for major changes to the statute book, the Government may wish to use any delegated powers in the Bill to make policy changes arising from the withdrawal agreement.

### **Why is the use of delegated powers in the Great Repeal Bill likely to be controversial?**

It is therefore expected that the delegated powers in the Great Repeal Bill will include broadly-framed Henry VIII powers. Laws predicts that the Bill will probably include "very wide powers to make subordinate legislation: to allow for different potential outcomes from the negotiations, and generally for the widespread nature of the required changes".<sup>147</sup>

Concerns over the constitutionality of Henry VIII powers have been growing in recent years, and their use in this legislation—which has the ostensible purpose of empowering Parliament, and which represents a major constitutional change—is likely to provoke extensive debate.

One of the most notable recent critiques of Henry VIII powers was made by Lord Judge, former Lord Chief Justice of England and Wales and at present a member of the House of Lords Select Committee on the Constitution, in a [lecture](#) given in April 2016. He argued that the increasing use of Henry VIII powers damages the sovereignty of Parliament. Lord Judge argued that such powers should only be used in a national emergency. Each Henry VIII power, he claimed is a "self-inflicted blow" that boosts the power of the executive.<sup>148</sup>

Some constitutional scholars - for example, Nick Barber and Alison Young, both Professors of Law at Oxford University - argue that Henry VIII powers can "have a positive role to play in the constitution".<sup>149</sup> They do acknowledge that there are acute concerns for parliamentary sovereignty when Parliament enacts Henry VIII powers, as they

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<sup>147</sup> S Laws, 'Article 50 and the political constitution', UK Constitutional Law Association, 18 July 2016

<sup>148</sup> Rt Hon Lord Judge, '[Ceding power to the Executive: the Resurrection of Henry VIII](#)', King's College London lecture, 12 April 2016

<sup>149</sup> N Barber and A Young 'The Rise of Henry VIII Clauses and their Implications for Sovereignty' *Public Law* [2003] 113

represent a potential limit on the power of future Parliaments and create a risk “that as yet unthought of statutes will be overturned through the exercise of the delegated power”.<sup>150</sup>

However, Barber and Young argue that in certain contexts Henry VIII powers are necessary in order to make a particular constitutional arrangement workable. For example, the devolution statutes grant to the devolved legislatures the “ability to amend statutes of the UK Parliament that have yet to be passed” and this gives to the Scottish Parliament and the Northern Ireland Assembly “a limited power with which to defend their position in the constitution”.<sup>151</sup>

The scope, and the propriety of the Henry VIII powers claimed by the Government will depend on the context of the Bill and its purpose. The precise form of drafting matters. At this stage it is not yet known how delegated powers will be used in the Great Repeal Bill. For example: it is not known whether the scope of any powers will be confined to the purpose of repatriating EU law or, or whether they might enable changes to be made to reflect any withdrawal agreement. Critics of the powers inside and outside Parliament are likely to focus on how the powers are drafted, and in particular:

- whether the powers are limited to a particular purpose or subject matter;
- whether the powers are framed by particular limitations - for example, preventing the powers being used to infringe or restrict individual rights;
- whether the powers are to be limited by a sunset or sunrise clause; and
- what parliamentary procedure is to be used to enable parliamentarians to scrutinise and constrain the exercise of powers in the Bill: negative, affirmative or super-affirmative.

Each of these questions is addressed below.

### **When might the powers be used?**

A general matter of interest in relation to the delegated powers in the Bill will be the timing of their proposed use. The White Paper on the Great Repeal Bill states that the Government will time limit the powers in the Bill: this is discussed below.<sup>152</sup>

Any delegated powers in the Bill could be used from the moment they were enacted to begin the process of adapting EU related legislation in advance of the UK leaving the EU. The Government has indicated in the

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<sup>150</sup> Ibid

<sup>151</sup> Ibid

<sup>152</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (March 2017) Cm 9446 para 3.25

White Paper that the powers will be used to ensure that the transfer of EU law takes place immediately after exit from the EU has occurred, but that the powers will also be used to make policy changes arising from any withdrawal agreement.

For example, if the powers are used to give effect to any withdrawal agreement, there are a range of possibilities:

- Secondary legislation could be introduced into Parliament after the withdrawal treaty is signed, but before any withdrawal treaty is presented to Parliament for ratification;
- Secondary legislation could be introduced as and when the relevant points are agreed during the negotiation process;
- Secondary legislation could be introduced into Parliament after the Treaty is ratified but before the so-called "Brexit day";
- Secondary legislation could be introduced after the UK formally leaves the EU.

None of these options are mutually exclusive, and the Government may wish to use the powers at any or all of the various times indicated above. The secondary legislation is likely to be drafted so as to come into force when the UK leaves the EU.

As the Government will have to propose legislation to cover multiple scenarios, it may not be possible to know in advance the timing of how the powers will be used, and how, when used, they will be subject to any specific time-limits or sunset clauses included in the Bill.

## 5.1 The breadth and scope of delegated powers

The breadth of delegated powers is determined by how they are drafted, and in particular, whether the power claimed is to be restricted to a particular purpose. When past Governments have claimed broad delegated powers, debate in both Houses has often focused on whether the powers should be amended so as to limit their use to a particular purpose. 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>153</sup>

The scope of the powers in the Great Repeal Bill are likely to be broad. They need to be able to make changes to EU-derived law, both primary and secondary. As the competences of the European Union,

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<sup>153</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

whether exclusive or shared, extend over many important policy areas, including, for example: social and market regulation, employment law, competition law, the environment and data protection, the powers will cover a number of important policy areas set out in primary legislation. For some commentators, such as Professor Sionaidh Douglas-Scott, this will make the nature of powers in the Great Repeal Bill particularly problematic:

The use of Henry VIII clauses to repeal EU law is particularly repugnant, given that EU law has created vast networks of rights and obligations, whose subject matter – eg social policy, discrimination law, or fundamental rights – covers many matters central to individual liberty, and their repeal or amendment, even by means of primary legislation, would be highly controversial.<sup>154</sup>

These concerns are likely to prompt calls to restrict the scope of the powers in the Bill so that they cannot be used to amend particular areas of primary legislation.

## The White Paper

The White Paper on the Great Repeal Bill states the Government will include limits on the scope of the delegated powers in the Bill. The precise drafting of the scope of the powers is likely to generate intense scrutiny in both Houses.

The White Paper indicates that the powers will be drafted so as to constrain the way in which the power can be used, so that they cannot be deployed to enact policy changes that are not connected to exiting the EU.<sup>155</sup> This suggests that the powers will be drafted so that they can only be used for specified purposes.

In practice, the scope of the powers will be determined by how the powers are designed. For example, the Bill could contain one large power which could be used for any purpose connected to leaving the EU. Alternatively, the Bill could contain a series of powers, each with its own specific scope. For example the Bill could include a power enabling “technical” amendments designed to make converted EU law work effectively post-Brexit, and another to enable the withdrawal agreement to be implemented. A potential problem with this approach is that it might not be considered sufficiently flexible to cover the range of circumstances that secondary legislation might be required for. Further, it may prove difficult to define what counts as a “technical” change designed to deal with said “deficiencies”. Similarly, a power to

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<sup>154</sup> S Douglas-Scott, ‘The Great Repeal Bill: Constitutional Chaos and Constitutional Theory’, *UK Constitutional Law Association*, 10 October 2016

<sup>155</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.17

implement a specific agreement might also be considered too narrow for the purpose of legislating for Brexit.

The White Paper notes that the power “will be wide in terms of the legislation to which it can be used to make changes”.<sup>156</sup> The power will allow ministers to make changes to all EU-derived law: all existing legislation implementing EU obligations, and all that which will be converted by this Bill.<sup>157</sup> The paper also endorsed the House of Lords Constitution Committee’s finding that Brexit will “necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit”.<sup>158</sup>

## The House of Lords Constitution Committee

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>159</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>160</sup>

The report also stresses 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>161</sup>

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<sup>156</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.16

<sup>157</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.16

<sup>158</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.13

<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) para 44

<sup>160</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

<sup>161</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

In practice, 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. Such an approach might not work if the powers are defined too narrowly.

## Context

The use of broadly framed delegated powers (including Henry VIII powers) is (evidently) not new. The Donoughmore Committee, established to investigate the appropriateness of the increasing use of secondary legislation, indicated in its report, published in 1932, that without a clear purpose it is difficult for Parliament to assess whether the orders made under the power claimed will be suitable for primary or secondary legislation, and for the courts to determine Parliament’s intended limits on the use of powers.<sup>162</sup>

This is significant, because in the absence of express intention the courts are likely to interpret the delegated powers narrowly. Lord Donaldson, then Master of the Rolls, outlined the approach of the courts to broadly-defined powers to change 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 Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.<sup>163</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>164</sup> would, if applied, mean that the courts would assume that Parliament did not intend to delegate the power to the executive to infringe fundamental rights.

The broader the scope of the power, the greater risk 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

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<sup>162</sup> The Earl of Donoughmore (Chair), Report of the Committee on Ministers’ Powers, Cmd 4060, April 1932

<sup>163</sup> *McKiernon v Secretary of State for Social Security*, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989

<sup>164</sup> [2000] 2 AC 115, 131 HL

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>165</sup>

Assuming that the courts will not treat these powers in the same way they treated section 2 of the ECA (see Section 2.2 above), the Government will be mindful of possible judicial review challenges to instruments made under the Great Repeal Bill, and this might strengthen the case for greater specificity of purpose in drafting of the powers.

### ***The Legislative and Regulatory Reform Bill 2005-2006***

There was considerable debate over the Government's claim of delegated powers – ostensibly for regulatory reform purposes — in the *Legislative and Regulatory Reform Bill 2005-06*, eventually enacted as the *Legislative and Regulatory Reform Act 2006*. This debate provides an example of how the scope of powers have been analysed in Parliament.

#### **Box 5: 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>166</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>167</sup>

The Government responded by amending the Bill so that the enacted version claimed two narrower powers, each with a more specified purposes 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>168</sup>

<sup>165</sup> Public Law Project Para 26; *Craies on Legislation* (10th ed (2015)), edited by Daniel Greenberg), para 1.3.11

<sup>166</sup> House of Commons Regulatory Reform Committee, *Legislative and Regulatory Reform Bill*, 6 February 2006, HC 878 2005-06, p16

<sup>167</sup> House of Lords Select Committee on the Constitution, *The Legislative and Regulatory Reform Bill*, 8 June 2006, HL 194 2005-06 p7

<sup>168</sup> Section 1 and Section 2 of *Legislative and Regulatory Reform Act 2006*

## 5.2 Statutory limits on delegated powers

Delegated powers, particularly Henry VIII powers, can also be restricted by statutory limits that impose restrictions on how the powers are used.

The White Paper explains that the Government “will consider” whether the limits on the power in section 2 of the ECA should also be imposed on the power(s) in the Great Repeal Bill.<sup>169</sup>

The Constitution Committee’s report on the Great Repeal Bill recommended that restrictions be imposed on the delegated powers in the Bill. The Committee also recommended that the Government list those actions that *cannot* be undertaken under the powers in the Bill.

During debate on the *Legislative and Regulatory Reform Bill*, a number of safeguards were added to prevent the powers being used for certain ends.<sup>170</sup> Section 3 of the 2006 Act requires that certain conditions be met before the powers may be used:

- (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.

The 2006 Act also contains a statutory restriction, in Section 8, which prevents the powers it contains being used to repeal either the *Human Rights Act 1998* or the 2006 Act itself.

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

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<sup>169</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.17

<sup>170</sup> For a detailed account of how Parliament scrutinised *The Legislative and Regulatory Reform Bill*, see P. Davis, ‘The significance of parliamentary procedures in control of the executive: the passage of Part 1 of the Legislative and Regulatory Reform Act 2006’ [2007] Public Law 677



contained a number of example 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>171</sup>

## Sunset clauses

Sunset clauses are another important form of legal limitation on delegated powers.

The White Paper explains that the Government will time-limit the delegated powers in the Bill so that they would not “exist in perpetuity”.<sup>172</sup> [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>173</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. Antonios Kouroutakis explains:

The inclusion of a sunset clause in emergency legislation is considered a safeguard, since, where one is used, Parliament has frequent opportunities to debate the continuance of the Act and review its merit.<sup>174</sup>

A good example of such a provision is section 29 of the *Anti-Terrorism, Crime and Security Act 2001*.

The Donoughmore Committee, established to investigate the appropriateness of the increasing use of secondary legislation, recommended in its report, published in 1932, that all Henry VIII powers should be subject to a time limit of one year from the passing of the Act.<sup>175</sup> A number of recent Acts containing notable Henry VIII powers has included sunset clauses. For example section 12 of the Public Bodies Act 2011 has the effect of limiting the effect of the powers in the Bill, so

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<sup>171</sup> Women and Equalities Committee, *Ensuring strong equalities legislation after the EU exit*, 28 February 2017 (2016-17 HC 799) p27

<sup>172</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 3.25

<sup>173</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>174</sup> Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (2017) p140

<sup>175</sup> The Earl of Donoughmore (Chair), *Report of the Committee on Ministers’ Powers*, Cmd 4060, April 1932 p65

that they cease to apply to the public bodies listed in the schedules five years after the Act came into force.<sup>176</sup>

The Government's commitment to including time-limits in the Great Repeal Bill responds to a point made Baroness Fookes (Chair of the House of Lords Delegated Powers and Regulatory Reform Committee) in evidence to the Lords Constitution Committee:

I see a possibility of using sunset clauses far more extensively. That would be in the sense that you would say, "Right, we will give you—the Government—the power you need to do X, Y and Z, but, at the end of a certain period of time, that will come to an end and you will have to produce something fresh".<sup>177</sup>

The Constitution Committee's report on the Great Repeal Bill notes that the utility of sunset clauses will depend on how the powers in the Bill are formulated. For example, if the powers are limited to a particular purpose(s) such as implementing the withdrawal agreement, then time-limitations might not be needed. Alternatively, if the powers are broadly framed and enable the process of amended EU-derived law to be changed post-Brexit, then Parliament may want to consider how sunset clauses can limit Government's discretion over time.<sup>178</sup>

Prior to Brexit day the delegated powers may need to be used to legislate quickly to ensure that the domestication of EU works effectively. However, after Brexit day, the case for the powers might be weakened, and the Committee suggests that sunset provisions could be used to ensure that primary legislation is required after a certain point in time.<sup>179</sup>

Sunset clauses can apply to individual statutory instruments. The then Chairman of the Delegated Powers and Regulatory Reform Select Committee, Lord Dahrendorf, argued in 2005 that all secondary legislation should contain a sunset clause or a "severe review clause",<sup>180</sup> though this approach has not generally been adopted in drafting.

The Enterprise and Regulatory Reform Act 2013 inserted section 14A into the Interpretation Act 1978. This now provides that sunset

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<sup>176</sup> Antonios Kouroutakis points out that combining Henry VIII powers and sunset clauses can sometimes give the impression of "non-forceable termination", as the Government can use the power to extend the time-limit, Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (2017) p136

<sup>177</sup> Baroness Fookes (Chair of the House of Lords Delegated Powers and Regulatory Reform Committee) in an evidence session held by the Lords Constitution Committee on 25 January 2017, Q130

<sup>178</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 73

<sup>179</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 73

<sup>180</sup> HL Deb 6 June 2005 vol 672 col 754.

provisions can be included in any statutory instrument even if the relevant enabling power does not expressly enable time-limits.<sup>181</sup>

## 5.3 Parliamentary control of delegated powers

Parliament's control of the delegated legislation made by Ministers under delegated powers is determined by the procedure specified in the parent Act. Since 1946 these procedures have largely been standardised into two forms of parliamentary control over the order-making power, via the procedures specified by the *Statutory Instruments Act 1946*: the negative and the affirmative resolution procedures (see Box 6).

### The White Paper on the Great Repeal Bill

The White Paper on the Great Repeal Bill sets out that the Government intends to use existing types of statutory instrument procedure.<sup>182</sup> This appears to indicate that the Government is opposed to introducing a new form of procedure for the purpose of Parliamentary control of delegated legislation under the Great Repeal Bill.

The White Paper indicates that the Bill will allow secondary legislation making "substantive changes" to primary legislation to be subject to the affirmative procedure, and more "mechanical" changes to be made via instruments subject to the negative procedure.<sup>183</sup> How this will be done is not yet clear. The White Paper outlined that the Government intends to negotiate with Parliament on a mechanism that strikes the right balance between "the need for scrutiny and the need for speed".<sup>184</sup> The Procedure Committee in the 2015–17 Parliament commenced an inquiry into these matters which was curtailed by Dissolution: it reported its evidence to the House and made a strong recommendation for the relevant committees to be set up early in the new Parliament in order to discuss these procedural issues with the Government.<sup>185</sup>

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<sup>181</sup> *Craies on Legislation* (11th ed (2017)), edited by Daniel Greenberg, para p508

<sup>182</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 para 3.21

<sup>183</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 para 3.22

<sup>184</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 para 3.23

<sup>185</sup> House of Commons Procedure Committee, *matters for the Procedure Committee in the 2017 Parliament*, 2 May 2017, (7<sup>th</sup> Report 2016–17 HC 1091) paras 3-17

## The House of Lords Constitution Committee

The Constitution Committee's report on the Great Repeal Bill makes a number of recommendations on the procedure for making secondary legislation under the Bill.

The Committee noted that scrutinising the secondary legislation made under the Bill is going to present Parliament with an "unprecedented challenge".<sup>186</sup>

The Committee argues that to mitigate the constitutional risks of the delegated powers in the Bill, there are number of steps that should be taken relating to the procedure.

### Information supplied by Government

The Committee stresses the importance of the explanatory material, supplied by Government to accompany each instrument, in terms of facilitating effective scrutiny. Each instrument should be accompanied by an Explanatory Memorandum, which contains a declaration by the Minister that the instrument does no more than necessary to achieve either of the Bill's two main aims: ensuring EU-derived law operates effectively and implementing the withdrawal agreement.<sup>187</sup>

The Committee also recommended that the Explanatory Memorandum should set out how the instrument will affect the EU-derived law that it seeks to change.<sup>188</sup> In particular, outlining how the EU law functions pre-Brexit, how the amendment will change the law post-Brexit, and why the changes are needed. Explaining how a particular instrument is disengaging from EU law obligations will be of particular interest to Members, but identifying the precise nature of the disengagement particularly if it is combined with policy changes, may be difficult to identify. This information will also assist the process of allocating which scrutiny procedure should apply.

The Committee recommended that the Explanatory Memorandum should contain a recommendation from Government as to the appropriate level of scrutiny.<sup>189</sup>

### Parliamentary scrutiny

A parliamentary committee or committees will then consider the Explanatory Memorandum and examine whether the level of scrutiny

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<sup>186</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 74

<sup>187</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 102(1)

<sup>188</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 102(2)

<sup>189</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 102(3)

recommended by Government is appropriate.<sup>190</sup> This sifting process will enable the relevant committees to decide whether an instrument has policy implications that merit a strengthened scrutiny procedure.

## Context

The [Cabinet Office Guide to Making Legislation](#) advises Departments to consider the appropriate level parliamentary scrutiny for the powers in a bill, and to outline the justification for the powers to be submitted to the House of Lords Delegated Powers and Regulatory Reform Committee.<sup>191</sup>

Daniel Greenberg, Counsel for Domestic Legislation in the House of Commons and a former Parliamentary Counsel, notes it is one of the themes of the reports of that Committee that a bill that makes a power subject to negative procedure should be subject to an affirmative one.<sup>192</sup> The difference between the two has been outlined by the Committee in their Report: *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*.<sup>193</sup>

### Box 6: Affirmative or negative procedure?

Under the **negative procedure**, a statutory instrument is laid before both Houses<sup>194</sup>, usually after being 'made' (i.e. 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 are only considered in the Chamber if a peer specifically requests a debate.

Under the **affirmative procedure**, an instrument is usually laid before Parliament in draft and must be approved by both Houses<sup>195</sup> before it may be made.

In the Commons, affirmative instruments are usually referred automatically to committee for debate, with the approval motion then being taken without debate in the Chamber: it is rare for an approval

<sup>190</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 102(5)

<sup>191</sup> The matters that should be covered in the memorandum to the Delegated Powers and Regulatory Reform Committee are set out in the Committee's [Guidance for Departments](#) (July 2014)

<sup>192</sup> D Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament*, 2011, p207

<sup>193</sup> House of Lords Delegated Powers and Regulatory Reform Committee, *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*, 5 July 2012, 2012-13 HL 19

<sup>194</sup> In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.

<sup>195</sup> In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

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.

Source: Delegated Powers and Regulatory Reform Committee, Special Report: *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (2012-2013 HL 19) para 5

## Enhanced Parliamentary control of the exercise of Henry VIII powers

When a bill has included the claim of a significant Henry VIII power, the Delegated Powers and Regulatory Reform Committee has often argued for the inclusion of an enhanced procedure that allows for more parliamentary involvement than the affirmative procedure.

There are a number of different versions of these “enhanced” procedures.<sup>196</sup> A common feature of many of them is that they allow proposals for legislation to be laid before Parliament, following which the relevant committee tasked with scrutiny of the secondary legislation may consult and recommend changes before a final version is presented for approval.<sup>197</sup> For example, the powers in the *Legislative and Regulatory Reform Act 2006* are subject to a form of what is generally known as a ‘super-affirmative’ procedure.

In simplified form this type of procedure normally contains four basic features:

- a requirement for a proposed order to be laid before Parliament (possibly following public consultation) for scrutiny by committees of both Houses;
- a report by each committee on the proposal, which may recommend amendments;
- an opportunity for the government to amend the order in the light of that scrutiny;
- the laying of a draft order for further scrutiny, followed by approval by both Houses.

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<sup>196</sup> The Hansard Society has reported that in 2015 that there 11 versions of “enhanced” procedure. See R Fox and J Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, 2014 p5

<sup>197</sup> For a full analysis of the differences see the [Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers](#) p8

A particular feature of the procedure under the *Legislative and Regulatory Reform Act 2006* is that it enables the Minister to recommend that the proposed delegated legislation be subject to either the negative, affirmative or specified super-affirmative procedure, depending on the subject matter of proposed change to the law. The procedure then enables the Regulatory Reform Committee in the Commons to recommend whether the procedure proposed by the Government should be varied.<sup>198</sup>

Daniel Greenberg describes the super-affirmative procedure as an “elegant and effective” solution to the problem of supervising secondary legislation that should be subject to a similar level of parliamentary input as primary legislation.<sup>199</sup> At the same time, he notes that the procedure “erodes the advantages” of the delegated legislation procedure, and therefore risks putting off departments making minor changes that could bring real improvements.<sup>200</sup> Greenberg also notes that often undue emphasis is placed on the procedure, when Parliament ought properly to direct its attention as to whether “the matter is appropriate for delegation at all”.<sup>201</sup>

Joel Blackwell, Senior Researcher at the Hansard Society, has speculated that the Great Repeal Bill might contain a new variation of “enhanced” procedures for delegated legislation. Blackwell argues that the super-affirmative procedure used by the *Legislative and Regulatory Reform Act 2006* does not offer an appropriate model for the Great Repeal Bill:

...it can take between 11 and 18 months to complete a Legislative Reform Order, negating the advantages of legislating with speed and flexibility rather than putting the matters on the face of the Bill. As a result, only 31 Legislative Reform Orders have been laid since the legislation received Royal Assent in 2006. Given the scale of the legislative exercise now facing Parliament as a result of Brexit, it is hard to imagine that this route will therefore offer a viable solution to the problem. But at present, the only alternatives are the less stringent processes afforded to powers subject to the negative or affirmative scrutiny procedures both of which generally favour the executive. In short, neither scrutiny approach is satisfactory at the best of times, but it will certainly not meet the needs of the Brexit legislative overhaul.<sup>202</sup>

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<sup>198</sup> For more detail on the procedure used in the *Legislative and Regulatory Reform Act 2006* see the Regulatory Reform Committee’s explanation:

<http://www.parliament.uk/business/committees/committees-archive/regulatory-reform-committee/regulatory-reform-orders/>

<sup>199</sup> Greenberg, *Laying Down the Law*, 2011, p209

<sup>200</sup> *Ibid.*, p209

<sup>201</sup> *Ibid.*, p211

<sup>202</sup> J Blackwell, ‘Will the Great Repeal Bill be another ‘Abolish Parliament’ bill?’, Hansard Society Blog, 20 October 2016

As a result Blackwell argues that an overhaul of how Parliament scrutinises secondary legislation is needed. Without a new procedure, Blackwell argues that the Bill is likely to empower the Government at the expense of Parliament.<sup>203</sup>

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<sup>203</sup> For more information on the Hansard Society's research on delegated legislation see: R Fox and J Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation*, 2014



## 6. Devolved institutions and the Great Repeal Bill

There is some uncertainty in relation to how the Great Repeal Bill, and subsequent UK legislation on Brexit, will engage with the UK's devolution framework.

David Davis, Secretary of State for Exiting the European Union, has said that the legislation connected to the UK's withdrawal from the EU must work for the whole of the UK.<sup>204</sup> The UK Government has said that it is committed to working closely with devolved administrations to get the best possible deal for all parts of the UK.<sup>205</sup> At the same time, Mr Davis has warned that "no one part of the UK can have a veto over our exit."<sup>206</sup>

There has been criticism of the primary mechanism for involvement by devolved administrations, the Joint Ministerial Council, and its EU negotiations sub-committee. This is discussed in sub-section 6.6 below.

In January 2017, the Secretary of State for Scotland, David Mundell, suggested that the consent of the Scottish Parliament would be sought for the Great Repeal Bill.<sup>207</sup> Consent is discussed in sub-section 6.2

The Scottish Government and the Welsh Government have each indicated that they will resist any attempt to legislate for new reservations to their respective competences, and those of their legislatures.<sup>208</sup> Both have also stated that the Bill should be subject to the consent of their respective legislatures under the Sewel Convention.

### 6.1 The White Paper

The White Paper on the Great Repeal Bill addresses devolution. It does not give a clear commitment on the possible use of the Sewel Convention. However, it does provide some indication of how the UK Government will approach devolution related matters in legislating for Brexit.<sup>209</sup>

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<sup>204</sup> HC Deb 10 October 2016, c41

<sup>205</sup> Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (March 2017) Cm 9446 p8

<sup>206</sup> HC Deb 10 October 2016, cc40-2

<sup>207</sup> "[Mundell: Holyrood to be consulted on Great Repeal Bill](#)," *BBC News*, 26 January 2017

<sup>208</sup> See section 6.2

<sup>209</sup> For a Scottish perspective on the White Paper, see SPICe (the Scottish Parliament Information Centre) Briefing Iain McIver, [The White Paper on the Great Repeal Bill – Impact on Scotland](#), 27 April 2017 SB 17/29

In brief, the White Paper:

- States that the UK Government will legislate to replace frameworks currently supplied by EU law with equivalent UK frameworks.<sup>210</sup>
- Indicates that this will occur “in parallel” with “intensive discussions with the devolved administrations” on how the common frameworks will need to be adapted for life outside the EU.<sup>211</sup>
- Argues that the Great Repeal Bill will lead to a significant increase in the decision making power of each devolved administration”.<sup>212</sup>
- States that the Bill will enable Ministers in devolved administrations to amend EU-derived law.<sup>213</sup>

Taken together, these points suggest greater powers for the devolved Ministers, rather than the legislatures.

The White Paper emphasises the Government’s view of the value to the integrity of the UK economy of having a common UK framework, which avoids creating “new barriers to living and doing business within our own Union”.<sup>214</sup>

However, the White Paper leaves open some questions on the Great Repeal Bill’s engagement with devolution.

For example, will the Bill seek to remove the provisions in the devolution Acts that provide that the devolved legislatures and ministers must comply with EU law?

In relation to the delegated powers granted to the Ministers in devolved Governments in order to correct EU-derived law, it is not yet clear what limitations and scrutiny procedures will apply, and whether these will be the same as those that apply to the powers granted to UK Ministers. The White Paper states the powers granted will be “in line” with any power granted to UK ministers.<sup>215</sup>

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<sup>210</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (March 2017) Cm 9446 para 4.4

<sup>211</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (March 2017) Cm 9446 para 4.4

<sup>212</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

<sup>213</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (March 2017) Cm 9446 para 4.6

<sup>214</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

<sup>215</sup> Department for Exiting the European Union, Legislating for the United Kingdom’s withdrawal from the European Union (March 2017) Cm 9446 para 4.6

These and other questions relating to the Great Repeal Bill and devolution arising from the White Paper are addressed below.

## 6.2 Consent

The UK Government observes the Sewel Convention, under which it does not normally invite the UK Parliament to legislate on devolved matters or on the scope of devolved powers without gaining consent from the relevant devolved legislature.<sup>216</sup>

This Convention was reflected in statute in the *Scotland Act 2016* and the *Wales Act 2017*.<sup>217</sup> The Supreme Court held in the Miller judgment that the Convention is not legally binding. This does not necessitate that the Government abandons it: the Convention has been applied as a political undertaking in the past.

Indeed, in January 2017, the Secretary of State for Scotland, David Mundell, suggested that consent would be sought for a Great Repeal Bill:

The bill has not been published, so you can't be definitive, but given the Great Repeal Bill will both impact on the responsibilities of this parliament on and on the responsibilities of Scottish ministers, it's fair to anticipate that it would be the subject of a legislative consent process.<sup>218</sup>

In March 2017, the Secretary of State for Exiting the European Union, speaking in the House of Commons following publication of the White Paper, responded to a question from Joanna Cherry on the question of consent. Mr Davis said:

At this stage we do not know, because we do not know the final format of the Bill. That is the simple truth.<sup>219</sup>

As discussed below in sub-section 6.5, the Scottish Government believes that consent should be sought, while the Welsh Government believes it may be necessary, depending on the detail of the Great Repeal Bill.

The Government may seek legislative consent motions from Scotland, Wales and Northern Ireland if the Great Repeal Bill either makes provision on a devolved subject or affects the scope of devolved powers. This might happen if it:

- changes EU law going forward that is currently part of the devolved body of law

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<sup>216</sup> See [The "Sewel Convention"](#), SN 2084, 25 November 2005, and next footnote.

<sup>217</sup> *Scotland Act 2016*, s2, *Wales Act 2017*, s2. For discussion see also [Scotland Bill 2015-16](#), CBP 7205, 4 June 2015, and [Wales Bill 2016-17](#), CBP 7617, 13 June 2016.

<sup>218</sup> ["Mundell: Holyrood to be consulted on Great Repeal Bill,"](#) *BBC News*, 26 January 2017

<sup>219</sup> [HC Deb 30 March 2017](#)

- treats as a UK matter any EU law that relates to a devolved matter, including by “rolling over” that law so that it continues in force
- removes from the devolved legislatures the requirement to abide by EU law, thus changing devolved competence

These options are discussed further immediately below.

**Box 7: The Supreme Court on Sewell in *Miller* [2017]<sup>220</sup>**

The Supreme Court (*Miller*, 24 January 2017): the Sewel Convention, is a political convention that does not give rise to a legal obligation that can be enforced in the courts.

Scottish Government Minister Michael Russell:

“Yesterday’s ruling demonstrates how empty were the assurances that we are a partnership of equals and that the Scotland Act 2016 would represent a new UK settlement.”

(SP OR 25 January 2017 c17-18)

David Davis: the judgment would not diminish UK Government’s “commitment to work closely with the people and administrations of Wales, Scotland and Northern Ireland as we move forward with our withdrawal from the European Union”

(HC Deb 24 January 2017 c162)

### 6.3 Will a Great Repeal Bill make provision on devolved subjects?

Until the detail of the Bill is known is difficult to know if legislation will be required.

If, as the White Paper implies, the Bill provides for a continuing effect in respect of EU law on devolved matters, then this would imply that consent motions would be required from the devolved legislatures so long as the Government chooses to abide by the Sewel Convention. This is because the UK Parliament would still be legislating on devolved matters, even though the effect would be to preserve the status quo.

Equally if, on the other hand, the Bill changed any existing EU law on devolved matters, then it would also be doing something that usually brings the Sewel Convention into play.

However, the Sewel Convention, even in its statutory form, includes a rider that the Government will not “normally” legislate with regard to devolved matters without consent.

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<sup>220</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

The question then arises as to whether withdrawal from the EU “normal”? There is little precedent to go on. *The Northern Ireland (Ministerial Appointments and Regional Rates) Bill 2016-17* was a recent example of a Bill concerning a devolved matter (setting regional rates), for which consent was not sought, but the reasoning there was largely to do with the absence of a functioning Executive and Assembly in Northern Ireland and the need to take action swiftly.

It will therefore be a political matter whether the Sewel Convention is in play. In legal terms the power of the UK Parliament to legislate on devolved matters without consent is a matter of parliamentary sovereignty, and it is stated in the devolution statutes.<sup>221</sup>

If consent were sought it might be withheld or the process of securing consent might introduce scope for leverage and delay. Equally, not using the Sewel Convention would bring its own political issues and would raise objections in the devolved institutions.

On 27 April 2017 the Minister of State at the Department for Exiting the European Union, David Jones, responded to a parliamentary question on whether the Government would legislate on devolved matters before the UK leaves the EU:

We have regular discussions with ministerial colleagues, including my right hon. and learned Friend the Attorney General. We fully respect the Sewel convention and have been working closely with the devolved Administrations, particularly through the Joint Ministerial Committee on EU Negotiations.<sup>222</sup>

Mr Jones added that whether or not consent would be sought would depend on “the form and content of the great repeal Bill”.<sup>223</sup>

## What about legal frameworks?

A particular example of the continuation of EU law has attracted attention from politicians and commentators, and is discussed in the White Paper: the “repatriation” of powers which are currently devolved but subject to extensive EU legal frameworks.

Agriculture and fishing are well-remarked examples of policy areas which are devolved but in which EU law plays a prominent part. Ministers in Scotland, Wales and Northern Ireland may implement EU law locally on these matters.<sup>224</sup>

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<sup>221</sup> *Scotland Act 1998*, s28(7), *Government of Wales Act 2006*, s107(5), *Northern Ireland Act 1998*, s5(6)

<sup>222</sup> [HC Deb 27 April 2017 c1209](#)

<sup>223</sup> [HC Deb 27 April 2017 c1209](#)

<sup>224</sup> Sionaidh Douglas-Scott [The ‘Great Repeal Bill’: Constitutional Chaos and Constitutional Crisis?](#), 10 October 2016

Professor Sionaidh Douglas-Scott drew attention to this in a paper for the Scottish Parliament's European and External Relations Committee in October 2016:

The aim of the [Great Repeal] Bill is to convert EU law into national law. However, a good part of EU law relates to competences that have been devolved – for example, in the case of Scotland, devolved competences include: agriculture, fishing within Scottish waters, public procurement, environmental law, as well as others. If the 'Great Repeal Bill' translates EU law on matters that have been devolved into UK law this could amount to legislation on devolved areas.<sup>225</sup>

However, Professor Alan Page, of Dundee University, has argued that relatively few EU competences are devolved to Scotland. He gives a rationale for this in that both the Unions in question, the UK and the EU, are based on and tend to legislate for single markets:

The main conclusion that emerges from this analysis is that most existing EU competences are reserved to the UK Parliament. If we ask why that should be the case, the answer is to be found in the fact that the devolution settlement, like the European Union, is based on a 'single market' in goods, persons, services and capital. There is therefore a considerable degree of overlap between EU competences and reserved matters.<sup>226</sup>

Professor Michael Keating, Chair in Scottish Politics at the University of Aberdeen, writing on the UK in a Changing Europe blog, suggests there are good reasons for adopting common UK frameworks:

There are practical arguments for some UK-wide frameworks. Agriculture, fisheries and environment are mostly devolved, but agriculture and fisheries trade and international agreements in all three fields are reserved. It is not possible to make a clear distinction between the internal and external aspects.

Any free trade agreement on agriculture would have to include provisions on agricultural support and subsidies, as would UK membership of the World Trade Organization. Free trade in agriculture within the UK would require agreement on subsidies to ensure a level playing field. The external effects of environmental rules imply both international and intra-UK cooperation.<sup>227</sup>

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<sup>225</sup> Sionaidh Douglas-Scott, *The "Great Repeal Bill"*, Briefing Paper for Scottish Parliament's European and External Relations Committee, 9 October 2016, p4, para 7

<sup>226</sup> Alan Page, [The implications of EU withdrawal for the devolution settlement](#) (2016) p4

<sup>227</sup> Michael Keating, [More powers to Scotland, Wales and Northern Ireland, or power grab?](#) UK in a Changing Europe Blog, 31 March 2017

### Government approach and the White Paper

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 seems to want to offset 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>228</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 will need 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, and the UK is the only representative for England and its interests. The UK level will stress that it also represents Scottish, Welsh and Northern Ireland interests, but that is a shared responsibility in a way that does not apply to England.

The White Paper gives 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 UK, allowing these rules to be set here in the UK by democratically-elected representatives.<sup>229</sup>

It lays emphasis on the value to the integrity of the UK economy of having a common framework:

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<sup>228</sup> Taken from [ScottishConservatives.com](http://ScottishConservatives.com)

<sup>229</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

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.<sup>230</sup>

The White Paper states that “the Government intends to replicate the current frameworks provided by EU rules through UK legislation.”

The White Paper does not, however, reveal whether the replication of these frameworks will be done through the Great Repeal Bill itself or through separate subject-specific legislation.

If it is the former, the delegated powers in the Bill could be used during the negotiations with the EU, by both the UK Government and the devolved administrations, to adjust EU-derived law, including the converted common frameworks, in expectation of a smooth transition on withdrawal. The Government casts the aim as being to create arrangements that work “for the whole and each part of the UK”.<sup>231</sup>

This will mean that the UK Parliament would legislate on competences that are currently devolved. This is the type of move that usually engages the Sewel Convention, meaning that the devolved legislatures would normally be asked for consent. That in turn might increase the urgency of gaining devolved support for the path forward after transposition of the frameworks.

The White Paper also indicates that there will be “intensive discussions” with the devolved executives over where frameworks should be retained, what they should be, and where they are not necessary.<sup>232</sup> In line with the rest of the Bill, the continuation of these frameworks would be more or less in full at first, and then subject to discussion and potential change.

Following publication of the White Paper, the Scottish Government published a news release in which the Minister for UK Negotiations on Scotland’s Place in Europe, Michael Russell, criticised the proposed way in which powers repatriated from Brussels would be treated:

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<sup>230</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

<sup>231</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.4

<sup>232</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.4



For the UK government to seek to impose legislative frameworks on these areas would be to take the unprecedented step of extending its powers over Scotland and must not take place. The Scottish Parliament's competences must not be diminished as a result of Brexit.<sup>233</sup>

Statutory steps might be needed if the durability of any UK framework were to be assured.

If the subject matter remained devolved, then a framework could be altered by any of the devolved legislatures, notwithstanding its having been embodied in a UK statute. It would be necessary either to reserve the framework itself, or to make the statute that implements it a protected enactment. Each of the founding devolution statutes includes a category of protected enactments, which the devolved legislature may not amend.

Tobias Lock, Senior Lecturer in EU law at the University of Edinburgh, addressed this in a piece for the Scottish Centre on European Relations in April 2017:

The distribution of powers under the Scotland Act 1998 and comparable legislation for Wales and Northern Ireland remains: agriculture, the environment, etc remain devolved. This means that, in order for the Great Repeal Bill to protect the enactment of EU law relating to those areas from being amended by the devolved legislatures, the bill will need to make express stipulation to this effect. The result would be that substantive changes to this legislation can only be made at the UK level or with its consent.<sup>234</sup>

The White Papers suggest that the devolved governments will 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>235</sup>

This suggests greater powers for the devolved Ministers, but does not mention the legislatures.

In relation to correcting EU-derived law, the White Paper proposes that devolved Ministers should gain the power to make changes in those areas that fall within devolved competence.<sup>236</sup>

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<sup>233</sup> Scottish Government, [Great Repeal Bill](#), 30 March 2017

<sup>234</sup> Scottish Centre on European Relations, [The Great Repeal Bill and the Challenge of Bringing Laws Home](#), T Lock, 3 April 2017

<sup>235</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

<sup>236</sup> Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.6

## 6.4 Will a Great Repeal Bill change the scope of devolved powers?

There is a question as to whether the Sewel Convention might come into play where legislation relating to withdrawal from the EU removes specific responsibilities from devolved institutions or removes the general requirement to comply with EU law.

The competences of the devolved legislatures and executives are circumscribed by EU law, and some positive responsibilities are placed upon the executives to implement that law. This is shown in Box 7 below. There is an argument that the removal of these features on leaving the EU would *prima facie* alter devolved competence, and, insofar as it involved UK legislation, would therefore require consent from the devolved legislatures under the Sewel Convention.

Whether consent motions would be needed for the Great Repeal Bill on this ground would depend on the detailed legislative provisions.

### Box 8: EU law limits devolved competence

An Act of the Scottish Parliament is “not law” insofar as any of its provisions are “incompatible [...] with EU law” (*Scotland Act 1998*, s29(2)(d)).

Virtually identical provisions are in place for Northern Ireland and Wales (*Northern Ireland Act 1998*, s6(2)(d), *Government of Wales Act 2006*, s108(6)(c)).

This means that EU law creates a limit around the competence of the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales.

Likewise, devolved Ministers may not make subordinate legislation or act in a way that is incompatible with EU law (eg, *Scotland Act 1998*, s57(2)).

In addition, devolved ministers have the power to implement EU directives locally (eg, *Scotland Act 1998*, s53).

If a Great Repeal Bill removed the requirement for the devolved institutions to respect EU law, then there would be a strong argument in favour of consent being sought. The respect of EU law shapes all of the legislation that devolved institutions make, so the removal of that requirement would be a major change in competence. However, a counter-argument could be made that foreign and EU affairs are reserved, and the change in competence would be a natural consequence of withdrawing from the EU.

If, on the other hand, separate Bills were introduced to amend the devolution statutes to take account of the consequences of EU withdrawal, including by removing the requirement to comply with EU law, then those Bills would fall within the scope of the Sewel

Convention, if the Government chose to abide by it. This is because they would effect changes in devolved competence.

Mick Antoniw AM, Counsel General in the Welsh Government, made a statement to the Welsh Assembly in November 2016 on the question of consent and the use of Article 50 TEU, in which he made comments relevant to a Great Repeal Bill:

The legislative competence of the Assembly and the powers of the Welsh Ministers are both currently directly linked to the continuing application of the European treaties. When the United Kingdom withdraws from the European Union, it may be that the Government of Wales Act 2006, our framework for devolution, will need to be amended. The established constitutional arrangements for legislative consent motions will apply in relation to any legislation by Parliament to amend the Act. The Welsh Government would expect to be consulted on any such amendment, and the role of the Assembly will be carefully considered.<sup>237</sup>

Mark Elliott, Professor of Public Law, University of Cambridge, is one commentator who has argued that the Great Repeal Bill may have to make changes to the devolution settlements which would be likely to require consent:

Such motions will be needed — politically and constitutionally, albeit not as a matter of strict law — because the Great Repeal Bill will presumably address not just the repeal of the ECA but also the amendment of the devolution legislation, which presently forbids devolved bodies from breaching EU law. By constitutional convention, however, the UK Parliament does not normally legislate so as to adjust the scope of devolved authority without the devolved legislatures' consent. There is, of course, a strong possibility that such consent would be withheld by the Scottish Parliament. But if, by the time such consent is requested, the Article 50 two-year clock is already running, the withholding of consent would be incapable of placing an insuperable obstacle in the way of Brexit.<sup>238</sup>

The Scottish Parliament's European and External Affairs Committee made the following comment in March 2016:

The Committee heard that the process of the UK leaving the EU would raise the question of whether devolution legislation would need to be amended to take account of the UK's departure from the EU. It also heard that a modification of the powers of the Scottish Parliament would require its legislative consent. The question of whether the legislative consent of the Scottish Parliament would be sought, and whether that consent would be

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<sup>237</sup> [National Assembly for Wales Record of Proceedings](#), 8 November 2016

<sup>238</sup> Mark Elliott Theresa May's "Great Repeal Bill": Some preliminary thoughts, Public Law for Everyone (3 October 2016)

given is a political one and could have significant constitutional implications.

In the event of the UK leaving the EU, and the repeal of the European Communities Act 1972, the Committee notes that the Scottish Parliament's legislative competence, and the Scottish Government's executive and policy competence, will be extended as they will be able to legislate in fields where the European Union had previously had competence.<sup>239</sup>

The UK Government's White Paper states that legislating for Brexit represents "an opportunity to determine the level best placed to take decisions" on issues formerly within the competence of the EU. For Tobias Lock, University of Edinburgh, this is an indication of the UK Government's willingness to re-open discussions on devolved competences.<sup>240</sup>

However, in the short-term, the desire to maintain legal and regulatory continuity post-Brexit means that the focus will be translating the EU frameworks into UK law with minimal changes, a point emphasised by the UK Government in the White Paper.<sup>241</sup>

## 6.5 Devolved responses to Brexit

### Scotland's place in Europe – The Scottish Government's White Paper

In December 2016, the Scottish Government published [\*Scotland's Place in Europe\*](#).<sup>242</sup>

The paper sets out that the Scottish Government expects the Great Repeal Bill to be subject to a legislative consent motion:

Any provisions in the UK Government's so-called "Great Repeal Bill" about matters within devolved competence, or altering the competence of the Scottish Parliament or Government, will also require the consent of the Scottish Parliament.<sup>243</sup>

The paper also states that the Scottish Government will be seeking new powers to be devolved in areas of EU competence that are currently reserved.<sup>244</sup>

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<sup>239</sup> [\*EU reform and the EU referendum: implications for Scotland\*](#), SP Paper 978, 19 March 2016, text box, p49

<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 4.5

<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 4.4

<sup>242</sup> Scottish Government, *Scotland's Place in Europe* (December 2016)

<sup>243</sup> Scottish Government, *Scotland's Place in Europe* (December 2016) para 176

<sup>244</sup> *Ibid*

The paper argues that “repatriated competences” from the EU should be the responsibility of the Scottish parliament.<sup>245</sup> It also signals that it would resist any attempt reserve “repatriated competences” such as agriculture, fisheries, education, health, justice and environmental protection.<sup>246</sup>

## Securing Wales’ Future: The Welsh Government and Plaid Cymru White Paper

On 23 January 2017, the Welsh Government and Plaid Cymru published a White Paper on Brexit, [Securing Wales’ Future](#).

The paper outlined that the Great Repeal Bill “may require” the legislative consent of the National Assembly for Wales.<sup>247</sup>

More significantly, the paper stated that the Welsh Government would resist any attempt to resist any attempt to limit the competence of the National Assembly:

the Bill may significantly impact, intentionally or not, on the legislative competence of the National Assembly for Wales, and our core standing policy is that the UK exit from the EU must not result in devolved powers being clawed back to the UK Government. Any attempt to do so will be firmly resisted by us. We await sight of the detail UK Government’s Bill to inform further thinking about whether the Parliamentary Bill adequately reflects the devolution settlement. If, after analysis, it is necessary to legislate ourselves in the National Assembly for Wales in order to protect our devolved settlement in relation to the Bill, then we will do so.<sup>248</sup>

The idea of protecting the Assembly’s competence through legislation has been referred to by the External Affairs and Additional Legislation Committee as a “Continuation Bill”.<sup>249</sup> Such a Bill could aim to restate the existence of all domestic law applicable to Wales derived from EU law, pre-empting the repeal of the ECA and the Great Repeal Bill. However, the Committee pointed out that such a Bill would not protect EU related law for two reasons:

- Parliamentary sovereignty – the UK Parliament could repeal the Assembly Act;
- UK Government Ministers currently hold legislative powers to amend or revoke laws affecting devolved policy areas in Wales

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<sup>245</sup> Ibid

<sup>246</sup> Ibid

<sup>247</sup> Welsh Government and Plaid Cymru, [Securing Wales’ Future](#) (January 2017) p28

<sup>248</sup> Ibid

<sup>249</sup> External Affairs and Additional Legislation Committee, [Implications for Wales of leaving the European Union](#), January 2017 para 297

that are based on EU law. The Assembly could not remove those powers without the UK Ministers' consent.<sup>250</sup>

## 6.6 Joint Ministerial Committee

Discussions between the UK, Scottish, Welsh and Northern Ireland executives take place primarily in the Joint Ministerial Committee, although there have also been some bilateral meetings.

A sub-committee has been established, known as the JMC (EN) (EN stands for EU Negotiations). This was agreed at the JMC in October 2016:

The Prime Minister restated the UK Government's commitment to full engagement with the Scottish Government, the Welsh Government and Northern Ireland Executive on the UK's exit from the European Union. Ministers discussed how the constituent parts of the United Kingdom should work together to ensure that the interests of all parts of the United Kingdom are protected and advanced, and to develop a UK approach and objectives for the forthcoming negotiations. They agreed to take forward multilateral engagement through a new Joint Ministerial Committee on EU Negotiations to be known as JMC (EN) which would have the following terms of reference:

### *Working together in EU Negotiations*

*Through the JMC(EN) the governments will work collaboratively to:*

- *discuss each government's requirements of the future relationship with the EU;*
- *seek to agree a UK approach to, and objectives for, Article 50 negotiations; and*
- *provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and,*
- *discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.*<sup>251</sup>

The meetings of the JMC are not regular. According to the UK Government dates are "agreed by consensus across the four governments."<sup>252</sup> Michael Ellis, Deputy Leader of the House of Commons, said:

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<sup>250</sup> External Affairs and Additional Legislation Committee, [Implications for Wales of leaving the European Union](#), January 2017 paras 300-301

<sup>251</sup> [Joint Ministerial Committee communique](#), 24 October 2016

<sup>252</sup> WQ 66931, 7 March 2017

We established the Joint Ministerial Committee on European Negotiations, chaired by the Secretary of State for Exiting the European Union, which has met four times since its inception in November. The Joint Ministerial plenary, chaired by the Prime Minister personally, has also met twice—in October and January—and there has also been substantial bilateral engagement between Ministers.<sup>253</sup>

Since the referendum, the JMC(EN) has been meeting monthly, with other meetings of officials in between.<sup>254</sup>

Communiqués have been issued from the following JMC meetings since the EU referendum:

*Joint Ministerial Committee:* [24 October 2016](#); [30 January 2017](#)

*JMC (EN):* [9 November 2016](#); [7 December 2016](#)

Following the Prime Minister's statement on the European Council on 14 March 2017, Hywel Williams (Plaid Cymru) raised criticism of the JMC(EN) mechanism:

I was glad to hear the Prime Minister say that she has been working with the devolved Administrations, but I was also slightly puzzled because the "Joint Ministerial Committee on Exiting the EU is less organised than a community council".

Those are not my words, but those of an actual participant: the Welsh Government Minister Mark Drakeford. How is she ensuring that the interests of the devolved Governments are reflected in the Article 50 notification?

Mrs May responded:

The Joint Ministerial Committee process has been operating for some months at various levels and has brought UK Government Ministers together with the three devolved Administrations to discuss issues that have been raised on both sides, including looking at the Welsh Government's paper on Wales's particular concerns, which are being taken into account.<sup>255</sup>

David Anderson raised the matter again on 19 April 2017:

The JMC is supposed to be the platform through which the devolved Administrations have their voices not just heard but responded to. The Secretary of State paints a rosy picture, but he is not listening to those voices. Northern Ireland voices are not being heard at the moment, because they are not allowed to attend. From what we have heard this morning, the Scots are saying clearly that their voice is being ignored. The Welsh feel, at

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<sup>253</sup> HC Deb 15 March 2017, cc169-70WH

<sup>254</sup> HC Deb 1 March 2017, c283

<sup>255</sup> HC Deb 14 March 2017, c192

best, less than impressed. Will the Government give this body the teeth it needs, put it on a statutory footing and let it do its job properly?

David Mundell responded:

The purpose of the JMC is to bring together the UK Government and the devolved Administrations, and to work together to formulate our position as we go forward in the negotiations. I very much regret the fact that the Northern Ireland Executive have not been able to be politically present in recent times—we all want that situation to be brought to a conclusion—but the meetings have been robust and, I believe, certainly in terms of the actions that have flowed from them, constructive.<sup>256</sup>

The Labour Party attempted to amend the *European Union (Notification of Withdrawal) Bill* during its committee stage to include a statutory role for the JMC. Jenny Chapman moved New Clause 4, which began with the following:

(1) In negotiating and concluding any agreements in accordance with Article 50(2) of the Treaty on European Union, Ministers of the Crown must consult, and take into account the views of, a Joint Ministerial Committee at intervals of no less than two months and before signing any agreements with the European Commission.<sup>257</sup>

Brexit Minister Robin Walker rejected the amendment on the grounds that the JMC was not a legislative or statutory body and the amendment would undermine its role as a “neutral forum for confidential discussions”.<sup>258</sup>

He commented that:

engaging with the devolved Administrations and discussing their priorities is exactly what the Joint Ministerial Council on EU negotiations was set up for. It brings together the constituent parts of the United Kingdom to discuss each Government’s requirement for the future relationship with the EU, and to seek a UK approach to and objectives for article 50 negotiations. ....

## 6.7 Delegated powers and devolution

The White Paper stated that Ministers in the devolved administrations would be granted powers to amend EU-derived law that falls within devolved competence. The paper added that these powers would be “in line” with those granted to UK ministers.<sup>259</sup> The White Paper did not

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<sup>256</sup> HC Deb 19 April 2017, c659

<sup>257</sup> [HC Deb 6 February 2017, c129](#)

<sup>258</sup> [HC Deb 6 February 2017 c183](#)

<sup>259</sup> Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#) (March 2017) Cm 9446 para 4.6



explain in any detail how the delegated powers in the Great Repeal Bill would work in relation to the devolved administrations and legislatures.

This is important as the Sewel Convention does not apply to secondary legislation, so even the convention of gaining consent would not apply in this instance.

Professor Alan Page (Professor of Public Law, University of Dundee) has drawn attention to this:

At the moment there is no requirement of the Scottish Parliament's consent to UK subordinate legislation implementing EU obligations in the devolved areas; nor is the Parliament routinely informed about such legislation. In my view, this represents a significant gap in the framework of Scottish parliamentary control over UK law making in the devolved areas, which the Scottish Parliament should be alert to the need to address.<sup>260</sup>

In October 2016 Secretary of State for Scotland, David Mundell, gave evidence to the Scottish Parliament's Culture, Tourism, Europe and External Relations Committee. He was asked about the possibility of Scottish law that was EU law being repealed by secondary legislation in the UK Parliament. He replied,

On the Scots law issues, I envisage the two Governments working very closely together to ensure that there are no legal difficulties—firstly, that the body of existing EU law continues to apply from the day that the UK leaves the EU, so that we do not reach a situation where there is any uncertainty as to what the law is. That will be a key component of the great repeal bill.

There have already been initial discussions with the Scottish Government's legal advisers on how that process can best be taken forward, because it is complex. The process will go forward on the basis of co-operation. There is no suggestion that laws that have been passed here at Holyrood would in some way be overridden by decisions taken at Westminster.<sup>261</sup>

The Convener, Joan McAlpine, pressed him on the role for the Scottish Parliament, and Mr Mundell gave an undertaking:

I am happy to give you an undertaking that no laws will be changed of the type that you refer to without consultation with this Parliament.<sup>262</sup>

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<sup>260</sup> Alan Page [Brexit: the implications for the devolution settlement](#) Centre on Constitutional Change (2016)

<sup>261</sup> [Evidence](#), 27 October 2016

<sup>262</sup> Ibid

## A new process for enabling co-ordination?

The House of Lords Select Committee on the Constitution's report, *The Great Repeal Bill and delegated powers*, published before the White Paper, recommended that the Government should clarify how the use of delegated powers will be coordinated between the UK Government and the devolved administrations.<sup>263</sup>

The Committee expressed concern that an effective coordination plan was needed to manage the new interfaces created by Brexit, so as to ensure that consistency is maintained and issues are not missed in the process of adapting EU-derived law.<sup>264</sup>

There are examples of delegated powers on the statute book that enable coordination between the UK Government and the devolved institutions. It might be that a similar process could be created for some delegated powers under the Great Repeal Bill.

For instance, the *Scotland Act 1998* includes 12 methods for passing secondary legislation, listed in its Schedule 7, three of which provide a role for the UK and Scottish Parliaments together.

Type A provides as follows:

**Type A:** No recommendation to make the legislation is to be made to Her Majesty in Council unless a draft of the instrument

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(a) has been laid before, and approved by resolution of, each House of Parliament, and

(b) has been laid before, and approved by resolution of, the Parliament.

Types F and H also allow for concurrent procedures but are based on a negative approach whereby the instrument may be annulled by resolution of either House of Parliament or of the Scottish Parliament.

Type A procedure is applied, for instance, to Orders under section 30 of the 1998 Act, which are used to vary the list of reservations in Schedule 5.<sup>265</sup>

It is also used for the transfer of additional functions under section 63, and this itself allows functions to be transferred in three ways. Functions may pass from a UK minister to the Scottish ministers fully, or concurrently, or the UK minister may be able to exercise powers only with agreement or following consultation:

<sup>263</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 121-122

<sup>264</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 121-122

<sup>265</sup> Other examples include adding new devolved taxes (s80B)

(1) Her Majesty may by Order in Council provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable—

(a) by the Scottish Ministers instead of by the Minister of the Crown,

(b) by the Scottish Ministers concurrently with the Minister of the Crown, or

(c) by the Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers.

## 6.8 Three Great Devolved Repeal Bills?

The devolved legislatures may see a need to create legislation of their own to continue the effect of EU law after the UK's withdrawal from the EU.

As with the UK itself, the devolved nations will experience particular complexity in respect of any reciprocal arrangements or indeed other types of relationship (for instance, quota regimes) to which they are party.

Reciprocities depending on EU membership would be hard to translate into domestic law *en bloc* (as in, "all former EU law continues in force under this Act").

The Scottish Parliament's European and External Relations Committee addressed some of these points in its report, [EU reform and the EU referendum: implications for Scotland](#), in March 2016:

Some EU directives relate to matters devolved to the Scottish Parliament under the Scotland Acts and have been transposed by the Scottish Government in subordinate legislation. In these cases, the decision to retain, repeal or amend this legislation would be the responsibility of the Scottish Government and the Scottish Parliament. This could result in greater policy divergence between the constituent parts of the UK where currently EU law gives effect to a large degree of policy coherence. Furthermore, if the Scottish Government wished, it could continue to voluntarily comply with EU law in devolved areas.<sup>266</sup>

In Scotland's case it may wish to shadow EU law to support rapid re-entry in the event of independence from the UK. It is certainly likely that the devolved legislatures will want to implement legislation of their own that commences at the point of departure, for instance to guarantee rights and give local remedies for infringement. Sionaidh Douglas-Scott foresaw the possibility of a more thorough "Great Continuation (Scotland) Act":

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<sup>266</sup> SP Paper 978, 19 March 2016, para 110, p41

It is conceivable (as in the case of the Welsh Agricultural Sector Bill) the Scottish Parliament might produce its own legislation on devolved matters formerly the province of EU law. Such an ASP (a 'Great Continuation Act'?) might affirm the continuation in Scottish law of all areas previously a matter of EU law that fell within its devolved competence.<sup>267</sup>

Such devolved legislation would depend on the nature of the withdrawal agreement.

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<sup>267</sup> [\*The "Great Repeal Bill" and issues of legislative consent\*](#), Briefing Paper for Scottish Parliament's European and External Relations Committee, 9 October 2016, p6, para 14

## 7. The Courts

The UK Government has stated that one of the aims of the Great Repeal Bill is to end the jurisdiction of the Court of Justice of the European Union (CJEU) over the UK.<sup>268</sup> Once the UK is no longer a member of the European Union, domestic courts will no longer be obliged to abide by the rulings of the CJEU.

The Government has also stated that the Bill will end the “general supremacy of EU law”.<sup>269</sup> Once the ECA is repealed, the courts in the United Kingdom will therefore no longer be under a general statutory obligation to give effect to EU law over and above domestic law.

One of the core functions of the Great Repeal Bill, in constitutional terms, is to provide domestic courts with clear instructions as to the post-Brexit status of EU-derived law and the judgments of the CJEU.

### **The Great Repeal Bill’s instructions to domestic courts**

The White Paper outlines that the Great Repeal Bill will contain provisions on both the status of judgments of the CJEU and EU-derived law, which will replace currently provided by the ECA. In both cases, the provisions will aim to reflect the UK’s new relationship with EU law, but also provide for legal arrangements that maximise stability and consistency.

At present, the principal enforcers and interpreters of EU law are domestic courts.<sup>270</sup> The EU’s constitutional framework, as set out in the EU Treaties and judgments of the CJEU requires that EU law, and its enforcement, is internalised within each Member State’s legal system.

Over the past 40 years the judiciary and the legal profession have built up considerable experience and expertise in EU law. The judiciary, and the legal profession, will be required post-Brexit to use this expertise to interpret and apply EU-derived law under the new constitutional framework provided by the Great Repeal Bill.

The Government’s Brexit White Paper, *The United Kingdom’s exit from and new partnership with the European Union*, published in February 2017, has outlined that preserved EU law post-Brexit should continue to

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<sup>268</sup> Theresa May’s Conservative conference speech on Brexit’, *Politics Home*, 2 October 2016 ; See also HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), Cm 9417 February 2017 para 2.3

<sup>269</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 2.19

<sup>270</sup> The EU legal principle of Direct Effect, means that EU law can be enforced by domestic courts.

be interpreted as it is currently.<sup>271</sup> The domestic courts will have to give effect to this desire to maintain consistency, while also giving effect to the fact that large body of law, EU-derived law, will have a new constitutional status post-Brexit day.

In relation to the status of EU-derived law post-Brexit, the White Paper states that this body of law will be accorded primacy, by the Great Repeal Bill, over domestic law enacted before Brexit.<sup>272</sup> This to be distinguished by the “general supremacy” currently supplied by the ECA.<sup>273</sup>

The White Paper outlines that the Bill will provide that CJEU judgments, given before Brexit day, will have the status of UK Supreme Court judgments.<sup>274</sup> The judgments of the CJEU will bind UK courts, unless the Supreme Court says otherwise. This suggests that the Bill will not provide a general obligation to maintain parallel interpretation, so UK courts, when faced with a question of relevant EU-derived law, will be free to depart from any judgment of the CJEU given post-Brexit.

### **The challenge for domestic courts**

The Government’s proposed legislative scheme will mean that, post-Brexit, the day the UK leaves the EU (Brexit day) will be an extremely significant point of reference within the legal system. Post Brexit when the UK courts are addressing questions of interpretation arising from EU-derived law, the courts will have to consider the date of the authorities before them, both in terms of statutes and case law, in order to establish the correct approach to be taken. As Alison Young, Professor of Law at the University of Oxford noted in April 2017, the White Paper indicates that the Great Repeal Bill will replace a “hierarchy based on principle” with by a “hierarchy of time”.<sup>275</sup>

The Great Repeal Bill will create a new, and unique body of law: EU-derived law. This law will be made up of all the law made by the UK to give effect to its membership of the EU, and all that law converted and amended by the Great Repeal and other Brexit legislation during the Article 50 window that amend EU-derived law. In practical terms, the post-Brexit day EU-derived law, including all the preserved regulations, some of which might be amended, and relevant CJEU judgments, will

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<sup>271</sup> HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), Cm 9417 February 2017 p10

<sup>272</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 2.20

<sup>273</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 2.19

<sup>274</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 paras 2.14-2.16

<sup>275</sup> Alison Young, ‘The White Paper on the Great Repeal Bill: Part I – Good News’, Oxford Human Rights Hub, 10 April 2017

need be made widely accessible to the legal community, including the judiciary.

This body of law, post-Brexit will present the UK courts with a novel interpretive challenge. The domestic courts will have to consider the instructions on primacy and the status of CJEU judgments in the Great Repeal Bill, but may also have to develop their own interpretive principles. It is difficult to predict how they might approach these questions in advance.

The courts will give effect to any precise instructions given by Parliament, and are likely to seek to prioritise certainty and stability. This will inevitably leave room for the courts to decide certain matters not covered by clear unambiguous legislative instructions. For example, the courts could decide, in the absence of instruction to the contrary from Parliament, not to depart from the interpretation of the CJEU given post-Brexit, on question of EU-derived law.

This section provides a brief analysis of the CJEU's current role, and how it might change (with respect to the UK) after Brexit day. The section also addresses how the UK courts' approach to interpreting EU-derived law might be addressed by the Great Repeal Bill.

## 7.1 The CJEU and the UK

The Court of Justice of the European Union was established in 1952 and is situated in Luxembourg.

The Court is responsible for interpreting EU law to make sure that it is applied in the same way in all EU Member States. It also settles legal disputes between national governments and EU institutions.

In certain circumstances, the CJEU can be used by individuals, companies or organisations to take action against an EU institution, if they feel it has somehow infringed their rights.

The CJEU has jurisdiction to make rulings and give opinions in matters concerning alleged breaches of the EU Treaties or EU law. In relation to the UK, it cannot directly overturn a domestic law, but it can, and does, rule that a UK law is incompatible with the UK's EU obligations.

A well-known example of this occurred in the *Factortame* case in 1992.<sup>276</sup> The Appellate Committee of House of Lords (then the UK's highest judicial authority) ruled that the effect of UK law had to be suspended ("disapplied") because it conflicted with EU law. This judgment, which confirmed the impact of the ECA 1972, and the primacy of EU law over domestic, was given after the CJEU had

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<sup>276</sup> *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13

confirmed that EU law required domestic courts to set aside an incompatible rule of national law, following a reference from the House of Lords.<sup>277</sup>

When the courts ruled that EU law is incompatible with domestic law, the UK Government must do something to remedy the situation and comply with the relevant judgment, by amending, repealing or 'disapplying' the law, or part of it, that is incompatible. If the UK does not act to remedy the situation, the CJEU can impose a heavy fine.<sup>278</sup>

### The CJEU relationship with domestic courts

There is no 'appeal' as such from a national court to the CJEU. 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.

In these cases the national court suspends proceedings, and once the CJEU has given its ruling, the national court resumes its proceedings and gives judgment in the light of the EU Court's preliminary ruling. The process usually takes around 16 months. The example of the *Factortame* case, discussed above, is a good example of this procedure in action.<sup>279</sup>

The Article 267 procedure is one of the most important elements of the Treaty, and it is central to the CJEU's ability to influence the operation of EU law in domestic legal systems. The procedure enables the CJEU to develop the key principles of EU law relating to the interaction between EU law and domestic law, such as supremacy and direct effect.

The CJEU's principal method of influence over domestic courts in Member States is through its definitive interpretation of questions of EU law. When a domestic court is faced with a question of EU law, the courts follow the interpretive approach of the CJEU if there is a clear precedent. When novel questions of EU law arise in domestic courts, they are referred to the CJEU through the Article 267 procedure.

After Brexit, the UK's courts will no longer need or be able to make references to the CJEU under the Article 267.

The White Paper on the Great Repeal Bill outlines that judgments of the CJEU delivered pre-Brexit will, post-Brexit, have the binding force of UK Supreme Court judgments. This shows that even in the absence of the Article 267 procedure, the interpretive approach of the CJEU will continue to have significant influence in domestic courts.

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<sup>277</sup> *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*. - Case C-213/89.

<sup>278</sup> To date the UK has not incurred such a fine for failure to implement an EU obligation

<sup>279</sup> *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13



That the major judgments of CJEU on the general interpretative principles of EU law will continue to bind domestic courts' approach to questions of EU-derived law post-Brexit. These will include landmark judgments in the development of EU law. For Alison Young, Professor of Law at the University of Oxford, this approach is to be welcomed as indicates that the domestic courts will continue to be able draw on the CJEU jurisprudence on the general principles of EU law, and this would reduce fears "of an immediate erosion of rights".<sup>280</sup>

While the White Paper proposals on the CJEU emphasises continuity, it is possible that the influence of the CJEU could change significantly post-Brexit. Post-Brexit, if the opportunity arises, the Supreme Court could rule that particular judgments of the CJEU given pre-Brexit should no longer be treated as binding precedents. Equally, Parliament could legislate in the Article 50 window to exclude particular judgments, so it is not yet certain if, or for how long, the full range of pre-Brexit CJEU jurisprudence will bind post-Brexit. This body of pre-Brexit binding CJEU jurisprudence, as it is adapted, could develop into its own unique body of precedent within the UK's legal system.

Even if the judgments of the CJEU given post-Brexit are no longer binding on the UK's courts, it may be practical to continue to follow their interpretive guidance. A point made by Davor Jancic, Lecturer in Law at Queen Mary University of London:

This wish to guarantee coherent interpretation of EU-derived rights in the UK before and after Brexit indicates that UK courts might decide to follow post-Brexit ECJ judgments on pre-Brexit EU law. However, replacement UK legislation would not need to be interpreted in light of ECJ case law.<sup>281</sup>

Absent the ability to refer an ambiguous question of EU law to the CJEU, the domestic courts will have to decide how to approach difficult questions of interpretation that arise from the transposed EU law. One option put forward by Kenneth Armstrong is that a general principle of "interpretive homogeneity" should apply post Brexit, so that UK courts continue to interpret EU law in the same way as the CJEU post-Brexit, even though they are not under an obligation to do so.<sup>282</sup> Davor Jancic submits that in practice UK courts may have some important incentives to follow such an approach:

As long as UK law is substantively the same as EU law, there could be room for reciprocity and seamless cooperation based on the

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<sup>280</sup> Alison Young, '[The White Paper on the Great Repeal Bill: Part I – Good News](#)', Oxford Human Rights Hub, 10 April 2017

<sup>281</sup> Davor Jancic, '[Why the European Court of Justice isn't going away](#)' LSE Brexit Blog 25 April 2017

<sup>282</sup> Kenneth Armstrong, '[The Taming of Control – the Great Repeal Bill](#)', Brexit Time Blog, 30 March 2017

equivalence of regulatory regimes. However, risks arise as soon as UK courts start interpreting UK law at variance with EU law and ECJ case law, because this would cause substantive regulatory divergence between UK and EU law. This is particularly important for the financial services sector. The more UK and EU law drift apart, the lower the chance of British finance companies retaining single market access based on equivalence.<sup>283</sup>

Under this approach, the courts would then wait for Parliament to correct any of EU-derived law if it wishes to change the way it is interpreted and applied by the CJEU.

The White Paper's proposed solution of according binding status to judgments of the CJEU pre-Brexit day could give rise to interesting interpretive dilemmas in for domestic courts interpreting EU-derived law post-Brexit. For example, if a UK court is interpreting an EU-derived law, on which there has been a post Brexit CJEU judgment, which departs from or differs from a pre-Brexit CJEU judgment, then it is likely that the UK court would be bound to follow the pre-Brexit judgment and depart from the latest interpretive approach of the CJEU, which would apply in the rest of the EU. If the question reached the Supreme Court, then the Supreme Court could decide to depart from the pre-Brexit CJEU judgment in order to adopt an approach in line with a post-Brexit CJEU judgment. Ultimately, the approach of the courts will depend on the precise instructions provided by Parliament.

A relevant comparison could be made with 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>284</sup> This approach drew criticism from those responsible for designing the Act,<sup>285</sup> and the Supreme Court has since modified this approach.<sup>286</sup>

### The CJEU's role in the EU

Under Article 258 of the Treaty for the Functioning of the European Union (TFEU), the EU Commission can bring infringement proceedings against a Member State for a failure to fulfil an obligation under the

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<sup>283</sup> Davor Jancic, [Why the European Court of Justice isn't going away](#) LSE Brexit Blog 25 April 2017

<sup>284</sup> *Regina v. Special Adjudicator ex parte Ullah* [2004] UKHL 26 Lord Bingham

<sup>285</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>286</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

Treaties. The final stage of this procedure is for the Commission to refer proceedings to the CJEU for determination. After Brexit, the UK will no longer be subject to such proceedings.

Article 19(1) of the Treaty on European Union (TEU) tasks the Court with ensuring that in the “interpretation and application of the Treaties the law is observed”. However, the CJEU’s role in the EU’s institutional framework is, for some, controversial.<sup>287</sup>

The CJEU has been criticised for playing a major role in driving European integration, and in particular strengthening the role of EU law within national legal systems.<sup>288</sup> The CJEU’s purposive approach to interpretation, and in particular its development of the central principles of EU law, such as supremacy and direct effect, has provoked accusations that the CJEU operates as a “political” actor.<sup>289</sup>

Sir Francis Jacobs, former Advocate General of the CJEU, argues that such accusations are “probably based on unfamiliarity with the very notion of constitutional jurisprudence”, which he claims is not the same in all Member States.<sup>290</sup>

Post-Brexit, the UK will, when it is no longer a Member State will no longer be subject to the jurisdiction of the CJEU. This will happen irrespective of the content of the Great Repeal Bill.

Even if the Government is clear that the UK is leaving the jurisdiction of the CJEU, the Government has made clear, in the White Paper on the Great Repeal Bill and elsewhere, that it is not opposed to the continued influence of CJEU judgments in the UK’s legal system post-Brexit.

## 7.2 Domestic courts and EU law

Under EU law, it is the domestic courts of Member States that are primarily responsible for the enforcement and interpretation of EU law.

The White Paper indicates that the Great Repeal Bill will contain provisions, aimed at domestic courts, on the status of EU-derived law post-Brexit. The White Paper states that this body of law will be accorded primacy over domestic law enacted before Brexit.<sup>291</sup> This to be

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<sup>287</sup> For example – Sir Patrick Neil, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum 1995)

<sup>288</sup> For an outline of such criticisms see Paul Craig and Gráinne de Búrca, *EU Law; Text, cases and Materials* (6<sup>th</sup> ed 2015) p63-66

<sup>289</sup> Ibid

<sup>290</sup> Francis Jacobs, ‘Is the Court of Justice of the European Communities a Constitutional Court?’ In *Constitutional Adjudication in European Community and National Law* by D Curtin and D O’Keefe (eds) (1992) p 32

<sup>291</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 2.20

distinguished by the “general supremacy” currently supplied by the ECA.<sup>292</sup>

These changes to the formal legal status of EU law within the UK will not mean that EU law is no longer influential within domestic courts. In particular, when a court is faced with a provision of domestic law which is based on EU law, the domestic courts may continue to make reference to the underlying EU law in order to aid interpretation. The UK Government has emphasised a desire to maintain continuity of interpretation post-Brexit. The extent to which the courts are able to provide such continuity will depend on the precise nature of the drafting of the instructions provided to the courts in the Great Repeal Bill.

Under the existing arrangements, the courts will often look to underlying EU basis of domestic legislation which gives effect to UK obligations under the ECA and the EU treaties. The extent to which that practice will be able to continue is not yet clear. In March 2016, Sir David Edward, a former judge at the CJEU, in evidence to the House of Lords Select Committee on the EU, said:

Under the current system of law, the courts are to interpret implementing legislation in light of the directive. If the directive no longer applies, you have to consider, “Do I have enough in the existing legislation for the courts to proceed without looking at the directive, or am I to instruct the courts to construe it in the light of the directive as if the directive applied?” There are many nitty-gritty legal complications; it is more than simply repealing the 1972 Act.<sup>293</sup>

As Daniel Greenberg, a leading expert on legislation, notes, in *Craies on Legislation*, even when the relevant domestic law exists as a “self-sufficient text”, it is often necessary to refer to the underpinning EU provision.<sup>294</sup> Lord Walker of Gestingthorpe, in his judgment in *Royal & Sun Alliance* [2003] explained how the courts utilise the underlying EU law when interpreting domestic law that implements EU law:

Value added tax (“VAT”) is essentially an EU tax, imposed by Member States in compliance with EU legislation, of which the most important is the Sixth Directive (EC Council Directive 77/388/EEC). Member States give effect to the EU legislation (and in particular, the Sixth Directive) by national legislation, in the case of the United Kingdom the Value Added Tax Act 1994 (“the 1994 Act”) and the Value Added Tax Regulations 1995 (SI 1995/2518)

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<sup>292</sup> Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union* (March 2017) Cm 9446 para 2.19

<sup>293</sup> *The process of withdrawing from the European Union*, HL 138 2015-16, 4 May 2016, evidence on 8 March 2016, [Evidence session 1](#), question 5

<sup>294</sup> *Craies on Legislation*, D Greenberg (ed) (9th edition 2008) part 5

("the Regulations"). In this appeal neither side has suggested that the United Kingdom government has failed to implement the Sixth Directive correctly. Nevertheless it is convenient to make some references to it (as well as to the 1994 Act and the Regulations) since the general scheme of the national legislation can sometimes be better understood by reference to the Sixth Directive.<sup>295</sup>

As the White Paper indicates that the Treaties and the judgments of the CJEU will continue to be sources of interpretation on questions of EU-derived law, it would appear that the Great Repeal Bill is aiming to ensure interpretive continuity post-Brexit.

How long it is possible to maintain interpretive continuity will depend on a number of factors, including how the UK Supreme Court interprets both the instructions in the Great Repeal Bill and the judgments of the CJEU pre-Brexit. More importantly, it will depend on the extent to which EU-derived law is changed in the Article 50 window by the primary and secondary legislation that will follow the Great Repeal Bill. It is presumed that such legislation would not be subject to the rule that EU-derived law takes primacy over primary legislation enacted before Brexit. Such legislation, including the Great Repeal Bill, will come into force on Brexit day, and therefore will not be "pre-Brexit law".

The "hierarchy of time" that the Great Repeal Bill will create, as the White Paper suggests, will mean that the courts will need to develop clear criteria as to what counts as EU-derived law. Once an EU-derived law is amended by the post-Brexit Parliament, it will lose its primacy over pre-Brexit non-EU derived law. How these rules work in practice is likely to be tested in the domestic courts, who will then have to develop interpretive principles to apply the proposed "hierarchy of time" and any other instructions provided by Parliament.

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<sup>295</sup> *Royal and Sun Alliance Insurance Group Plc v. Customs and Excise* [2003] UKHL 29

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