LEGISLATING FOR THE UK'S WITHDRAWAL FROM THE EU

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The European Union (Withdrawal) Bill was published by the Government in July 2017 and is the key piece of UK domestic legislation that will implement Brexit.

In this briefing, we explain the main features of the Withdrawal Bill, how it will impact on UK law and the important scope and interpretation issues that it raises.

Repeal of the European Communities Act

The principal purpose of the Bill is to repeal the European Communities Act 1972, which gives effect and priority to EU law in the UK, thereby formally reasserting the sovereignty and independence of domestic law. The Government had published a White Paper in March 2017, *Legislating for the United Kingdom's withdrawal from the European Union* (the "**White Paper**") proposing a "Great Repeal Bill". The now less dramatically titled European Union (Withdrawal) Bill (the "**Withdrawal Bill**") is the vehicle for that legislation. The Government has also published detailed draft explanatory notes for the Bill ("**Explanatory Notes**").

Importing EU Law into UK Law

In order to avoid a large vacuum in UK law when EU law ceases to apply, the Withdrawal Bill is intended to preserve and convert into domestic law the whole body of EU law applying to the UK at the time it leaves the EU. The actual language used in the draft Bill is, however, considerably less clear than the accompanying Explanatory Notes and will require attention on its passage through Parliament if legal clarity and certainty are to be achieved. The draft also contains hidden surprises, in particular a provision in Schedule 1 removing virtually all ability for the UK courts to give effect to general principles of EU law, such as proportionality and legal certainty, potentially even in cases about pre-Brexit matters. This would change the rules of public law enforcement significantly and may limit the ability of the courts to apply EU case law more generally, despite the Government's stated intentions.

"Henry VIII" Powers to change statutes by secondary legislation

The Withdrawal Bill also proposes to create extensive powers for the Government to make secondary legislation which amends Acts of Parliament as well as existing secondary legislation. These powers include, not just a time limited right to adjust retained EU law to make it fit for purpose in a domestic context, but also wide consequential

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powers to amend legislation in addition to specific powers to implement any leaving agreement and to ensure compliance with the UK's ongoing international obligations.

1. The Purposes of the Withdrawal Bill

The European Communities Act

The European Communities Act 1972 (the "**ECA**") was enacted to provide for the UK's accession to what is now the EU. It provides the legal basis on which EU law has effect as national law in the UK. The principal purpose of the Withdrawal Bill is therefore to repeal the ECA.

Section 2(1) of the ECA provides for any rights and obligations created by the EU Treaties, and all directly applicable EU law (that is typically EU Regulations), to be given legal effect in the UK without the need for any further legislative measures by the UK Parliament.

Section 2(2) of the ECA introduces a broad statutory power that enables ministers to enact statutory instruments giving effect to EU law that is not directly applicable. Those powers are the source of the implementing legislation necessary to give legal effect to EU Directives, which require Member States to ensure that their national laws have specified effects. Some EU Directives are implemented by Acts of Parliament but the majority are given effect to through secondary legislation using the power in Section 2(2) and/or powers under other Acts.

The ECA also gives priority to EU law over UK law (Section 2(4)) and requires UK courts to follow the CJEU's interpretation of EU law (Section 3(1)).The Court of Justice of the European Union ("**CJEU"**) interprets EU law so that it can be applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.

Role of the Withdrawal Bill in the implementation of Brexit

The Government's intention to introduce a 'Great Repeal Bill' was first announced in October 2016, in order to give effect to the referendum result of 23 June 2016 and "return sovereignty to the sovereign institutions of the UK". The Withdrawal Bill's primary effect of repealing the ECA will be a powerful symbolic step towards achieving this, because the ECA is the piece of legislation that first brought the UK into what is now the EU.

Effect of repeal of the ECA without replacement

In isolation, the legal consequence of repeal of the ECA would be that all EU legislation currently applying in the UK by virtue of the ECA (under Section 2(1) or 2(2)) would cease to have effect. EU law would also cease to have supremacy over UK law and the UK courts would no longer be bound by rulings of the CJEU when dealing with questions of EU law. Certain domestic law derived from EU Law would not be affected, in particular any EU legislation enacted by Parliament through provisions in Acts of Parliament without reference to ECA. The effect of a simple repeal would therefore not be sufficient to deal with the legal consequences of Brexit.

Why the Withdrawal Bill preserves EU law

To avoid the sweeping effects of simple repeal, giving rise to a significant risk of unforeseen consequences and major gaps in the law, and because of the short legislative timeframe before Brexit, the Government has chosen to preserve EU rules as part of UK law, subject to a number of qualifications. It is proposing that the Withdrawal Bill should not only repeal the ECA, but also preserve and convert into domestic law the whole body of EU law applying to the UK immediately before the UK leaves the EU, to the extent it has not already been implemented domestically. This means that directly effective EU law, such as Regulations, will be preserved as well as all provisions in UK primary and secondary legislation implementing EU law. Over time, it is anticipated that these retained laws will be replaced with purely domestic law.

Why extensive amendments to retained laws are needed

Many hundreds of references and provisions in current UK domestic legislation need to be amended to reflect Brexit – such as references to the European Union which currently assume that the EU includes the UK, and provisions based on the powers of European Union institutions which will not exist for UK purposes after Brexit. In order to deal with the amendments that will be needed to domestic UK legislation, (including the EU law converted into domestic law), the Withdrawal Bill does not attempt to make those amendments itself, but instead contains sweeping powers to amend all domestic legislation via statutory instruments (see section 5 below).

Exit day

The Withdrawal Bill uses the term "**exit day**" as the date on which the ECA will be repealed. This is just defined in the Bill as a date to be specified by the Government, but the Explanatory Notes confirm that it is intended to be set as the beginning of the day on which the UK leaves the EU.

2. Transposition of EU law into domestic law

EU law operates in the UK in a number of different ways and the Withdrawal Bill contains complex provisions for dealing with whether and how that EU law will continue in UK domestic law after Brexit.

EU Treaties

The EU Treaties are the primary source of EU law. In the White Paper, the Government stated that those Treaty rights that can be relied on in court by individuals will be incorporated into UK law, except for those derived from the Charter of Fundamental Rights. The exclusion of the Charter is largely because the Charter duplicates the rights under UK law arising from the UK's adoption of the European Convention on Human Rights, to which the UK remains committed. However, while the Withdrawal Bill (Clause 5(4)-(5)), quite clearly excludes the Charter of Fundamental Rights and preserves equivalent provisions such as those derived from the European Convention on Human Rights, its language on incorporation of other rights derived from the EU Treaties is less clear than the Explanatory Notes would lead one to expect (see the discussion of Section 3 below).

EU Regulations

Some types of EU legislation, in particular EU Regulations, have effect under the national laws of the Member States without the need for specific implementing legislation. The Government estimates that there are currently around 12,000 EU Regulations in force. Once the UK leaves the EU they will cease to have effect in the UK. Therefore, to avoid large gaps in the UK statute book, Clause 3 of the Withdrawal Bill provides that certain directly applicable EU laws will be converted into UK law. It does this by simply stating that *"direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day*". In terms of EU Regulations, "**direct EU legislation**" is defined (in Clause 14(1)) for this purpose to include:

- EU Regulations of the type referred to in Article 288 of the Treaty on the Functioning of the European Union **("TFEU")**, the vast majority of which are made by the Council of Ministers and the European Parliament acting together on a proposal from the European Commission. These are akin to European statute law and can only be made with the majority vote of the European Parliament. The Withdrawal Bill defines each of these as an "**EU regulation**".
- Regulations which fall within the Withdrawal Bill's definition (in Clause 14(1)) of "**EU tertiary legislation**". These are delegated legislation made mainly by the EU Commission (and sometimes by the Council of Ministers acting alone) pursuant to Article 291(2) of the TFEU for the purpose of implementing EU Regulations, EU Decisions or EU Directives. An implementing Regulation has direct effect, but its content is within the control of the Commission, not the Council of Ministers or Parliament. Its adoption process does, however, require consideration by a Committee on which all the Member States are represented (pursuant to Regulation (EU) 182/2011), and that Committee has blocking power on some of the more important implementing Regulations. Implementing Regulations are therefore similar in nature to a UK Statutory Instrument. The definition also includes Regulations under Article 290 of the TFEU: these will be distinguished by the word "delegated" in their title and are limited in scope by the piece of EU legislation under which they are made.

It is only those EU Regulations and other legislation that are "operative" before the exit day which will be incorporated into UK law. Clause 3(3) defines this to mean only those that are both in force and already in application on the exit day – so EU Regulations which have been published in the Official Journal and are in force prior to the exit day but are not yet in effect in Member States will not be incorporated.

Regulations made under powers given in specific Treaty provisions (eg Articles 103 and 105(3) in the competition law section of the TFEU) are not expressly mentioned in the Withdrawal Bill's definition of direct EU legislation. It is not clear if this is intentional, or because the draftsman thought all these specific Treaty provisions would result in Regulations falling within one of the definitions described above. Some of these specific Treaty provisions may, however, give the Commission rather wider powers than it has under Articles 290-291 and so may fall outside the definitions in the Bill that refer only to these articles. We think it would be wise to extend the definitions in the Withdrawal Bill to expressly cover Regulations made under specific powers in the EU Treaties. This could easily be done by including Regulations made under specific Treaty powers within the definition of "EU tertiary legislation".

Clause 14 of the Withdrawal Bill defines all direct EU legislation which becomes part of domestic law under Clause 3, including any amendments made to it, whether before or after exit day, as "**retained direct EU legislation**".

Status of retained EU legislation

While Clause 3 of the Withdrawal Bill therefore provides for the conversion into domestic law of EU Regulations, Implementing Regulations and Delegated Regulations, as well as some other EU legislative acts and decisions, they are not to be either written into the UK statute book as if they were Acts of Parliament or expressly equated to UK statutory instruments. The proposed amendments to the Interpretation Act 1978 in Part 2 of Schedule 8 of the Bill do not include retained direct EU legislation as UK legislation, only any UK amending legislation. Instead, in Part 1 of Schedule 8, any references to any EU Regulation or EU tertiary legislation in UK legislation are preserved and deemed to be a reference to that Regulation or legislation as incorporated into UK law.

From Schedule 8 to the Bill (in particular paragraph 3) it appears that the Government probably intends to treat all retained direct EU legislation as subordinate legislation and allow existing powers to amend legislation to be applied to them where the context permits even though EU Regulations contain law intended to work at the level of primary legislation. This would in some contexts mean that the proposed limitations on the powers to amend the retained law (discussed in section 5 below) would have little or no effect. Although this would allow greater freedom for Government to deal with retained EU law going forward, free of the two year time limit for amendment contained in Clause 7 of the Bill, it would also facilitate a rapid divergence of UK and EU law, and potentially radical change to substantive law, without significant Parliamentary scrutiny.

Clause 4(2) of the Bill excludes the direct EU legislation incorporated into domestic law by Clause 3 from the benefits of the saving in Article 4(1) of the rights, powers, liabilities, obligations, restrictions, remedies and procedures which were available in domestic law by virtue of Section 2(1) of the ECA. According to the Explanatory Notes, this saving is not needed because the retained direct EU legislation is expressly made part of domestic law by Clause 3, but, given that these laws are moved into UK law with an undefined and unique status, what rights and obligations actually exist in relation to them in domestic law is far from clear. This is particularly so if a provision at issue has neither been amended under the Withdrawal Bill or referred to in a piece of pre-Brexit domestic legislation, so that there is no purely domestic law source from which those rights and obligations can be derived. Given that Schedule 5 (paragraph 3) provides for Ministers to make Regulations "enabling or requiring" judicial notice to be taken of (among other things) retained EU law, there may even be doubt about the status of EU law retained under Clause 3.

We suggest this is an area that requires further thought to produce the clarity and legal certainty needed for this difficult transition from European to domestic law. One possible approach would be that EU Regulations should be equated to UK-wide Acts of Parliament for all purposes and Implementing and Delegated Regulations to UK-wide Statutory Instruments and that rights etc. in relation to them should be expressly stated to be those that would be accorded if they had been passed in the UK Parliamentary process. This would, so far as EU Regulations are concerned be consistent with the limitation in paragraph 1 of Schedule 1 of the Bill on challenging the validity of a retained EU law post Brexit (a provision suited to statute level laws), but would allow challenges in relation to Implementing and Delegated Regulations on the same terms as for UK subsidiary legislation.

Publishing retained EU legislation

The Bill just states that it is intended that the retained direct EU legislation will be published by the Queen's printer as in force at exit day (Section 13 and Schedule 5, part 1), presumably (although there is no express confirmation of this) both in paper form and by including it on the website, www.legislation.gov.uk. There is, however, no obligation to keep consolidated versions as amendments occur under UK legislation.

This means that it is not clear where up to date copies of the EU law which has been transposed into domestic law will be able to be found, what the exact status of that law is and how it should be referred to. For example, will a referencing system be adopted so that it is possible to distinguish a UK incorporated version of an EU Regulation from the continuing EU version (which may well be amended after Brexit, but those amendments will not apply in the UK)? These legislative proposals on publication could lead to considerable confusion about how retained direct EU legislation is accessed and used.

EU Directives

EU Directives require national implementing legislation in order to be given effect. The House of Commons Library estimates there are just under 8000 UK statutory instruments implementing EU law. In the UK, implementation is often, but not invariably, achieved by using section 2(2) ECA which provides Ministers with powers to make secondary legislation to implement EU obligations. Clause 2 of the Withdrawal Bill preserves all of these laws, referred to as "**EU-derived domestic legislation**" to ensure that this secondary legislation does not automatically fall away at the point that the ECA is repealed.

According to the Explanatory Notes, this Clause also preserves the validity of other domestic legislation which "pre-supposes membership of or refers to the EU". The Explanatory Notes explain that the Government intend Clause 2(2) to preserve validity for the following categories of legislation:

- Primary legislation made to comply with EU law
- Secondary legislation made to comply with EU law using powers under another act, not the ECA.
- Law which has been accepted as effective to ensure compliance with EU law, even if predating the relevant EU law.

Much of this law will not actually refer to the EU or EU law at all and so its validity would not seem to be in doubt, but the provision in Clause 2 makes the point expressly clear.

However, there is no express saving for Directives in force at exit date in so far as they have direct effects at that date (eg because the UK has not fully implemented them yet) or may need to be referred to in order to resolve ambiguities in EU implementing legislation. It is possible that the general saving set out in Clause 4(1) of the Bill is intended to apply, but in relation to Directives, Clause 4(1) is limited to rights and obligations that have already been recognised specifically by the European Court or a UK court or tribunal prior to Brexit (Clause 4(2)(b)). The general provision in Clause 5(2), that maintains the principle of the supremacy of EU law regarding the interpretation, disapplication or quashing of any enactment or rule of law made before exit day, could also possibly allow a court to use a Directive for interpretation purposes and Clause 5(3) gives some discretion to the courts to apply the principle in relation to legislation which has been modified after exit day "*if the application of the principle is consistent with the intention of the modification*". Clause 6(1)(a) however, removes any obligation to follow EU judicial decisions made after exit day (see paragraph 3 below).

Again, in the same way described above in relation to EU Regulations, the definitions seem to have missed Directives made under specific provisions of EU Treaties, such as EU Commission Directives under Articles 105(3) and 106(3) of the TFEU.

Overall the approach seems unnecessarily complex and unclear. The position would be clearer if Directives, like other EU legislative acts, retained the status they had before Brexit.

EU Decisions

Decisions are EU measures taken by the Council or the Commission, and some other EU bodies, addressed to individual States or parties (e.g. State aid and competition law decisions). Some Decisions have a broader application and are similar to Regulations in effect. Where a Decision falls within the scope of Articles 288, 290 or 291 of the TFEU, it will fall within the definition in the Withdrawal Bill of tertiary EU legislation and so in those cases the same issues arise as described above in relation to Regulations.

Again, Decisions made under other specific Treaty provisions may have been missed by the Withdrawal Bill definitions: for example Commission Decisions on competition law cases under Articles 105(2) and 106(3) of the TFEU.

It seems likely that the Article 50 agreement between the UK and the EU will address transitional issues, which will be particularly important for competition law Decisions addressed to businesses under Article 105(2). It should be borne in mind that even if these Decisions became unenforceable in the UK, they will remain enforceable in the rest of the EU, so that UK businesses operating in the EU will still in practice need to comply with the obligations and pay the penalties these Decisions impose. In addition, the parties' rights to appeal Decisions of the European Commission to the European Courts in such cases arises under the law of the continuing EU and is not affected by the status of these Decisions under UK law.

Other directly effective EU rights and obligations

Directly effective rights, obligations and remedies arise under provisions forming part of EU law, including Treaties and Directives, which are sufficiently clear precise and unconditional to confer rights directly on private parties, even though, unlike Regulations, they are not expressed to be directly effective. Most of these rights are against Member States, but some may be inter-parties; eg rights to sue for damages for breach of competition law to the extent not codified in domestic legislation.

According to the Explanatory Notes, Clause 4(1) of the Withdrawal Bill is intended to ensure that directly effective rights in the EU Treaties, particularly the TFEU (eg the competition law provisions in Articles 101 and 102) are available post-Brexit. Most of these directly effective provisions seem likely to be irrelevant if the UK leaves the EU, the Single Market and the Customs Union, except in relation to historic matters, but the approach of the Bill seems to start off with the preservation of all directly effective provisions and then adjust these later by means of subsidiary legislation (as discussed in Section 5 below).

The Explanatory Notes state that "Where directly effective rights are converted under this clause, it is the right which is converted, not the text of the article itself." What Clause 4(1) actually says is *"any rights, powers, liabilities obligations, restrictions, remedies and procedures which, immediately before exit day –*

(a) are recognised and available in domestic law by virtue of Section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)."

Without the benefit of the Explanatory Notes, it is very difficult to understand the effect of Clause 4(1). As Clause 4(2) then excludes the application of this provision to the main sources of EU rights under the Treaties, that is Regulations, Directives and Decisions, Clause 4(1) could perhaps be read more easily as intended merely to preserve the remedies that are currently available, eg for non-compliance with EU law, on a historic basis rather than as intending to bring into domestic law on an on-going basis the full range of rights and obligations derived from EU law.

We consider that much greater clarity is needed to ensure the correct application by the UK courts of what is intended. We also question how a right or obligation derived from the words of an EU Treaty, can be identified and applied by a UK court if the words of the relevant Treaty are not incorporated into domestic law.

The analysis is further muddied by clause 6(3) and Schedule 1, paragraphs 2 and 3, which (as described in Section 3 below), while allowing general principles of EU law existing before exit day to be part of domestic law, abolish any right of action in domestic law on or after exit day to give effect to those principles (apparently even if relating to pre-Brexit matters). There is no definition of "general principles of EU Law" in the Withdrawal Bill (and "retained general principles of EU law" are defined by reference to this term). The term itself does not have a finite definition as a matter of EU law, but refers to a body of "gap-filling" principles needed to apply EU law in a coherent manner and consistently so far as possible with the varying principles of the domestic laws of its law Member States.

What is needed in Clause 4 is less abstracted language which spells out clearly what is really intended together with a fully consistent analysis of the inter-relation of preservation and removal provisions throughout the Withdrawal Bill and its Schedules, so as to ensure that they are not contradictory or self-defeating. The abstract nature of Clause 4(1) leaves it open to misinterpretation, while the different lists of exclusions (particularly the placing of additional exclusions in a Schedule) adds to the uncertainty.

Creating a coherent and competent system of preservation of those parts of EU law which are desired to be retained, together with the ability to enforce that law, will be vital to the proper functioning of the UK legal system post-Brexit. It is to be hoped that Parliamentary scrutiny of the Bill will focus on these issues.

Retained EU law

So it can be seen from the descriptions above that the body of EU law that is being incorporated into domestic law by the Withdrawal Bill comes from a range of difference sources. Clause 6(7) of the Bill has an overarching definition of this **"retained EU law"** for the purposes of the other provisions of the Bill and states that it comprises:

- the "EU-derived domestic legislation" preserved under Clause 2;
- the "direct EU legislation" converted into domestic law under Clause 3;
- the rights and obligations under existing EU law preserved by Clause 4; and
- the case law and general principles that are retained by Clause 6.

Non-binding elements of EU jurisprudence

There are numerous non-binding documents, such as guidance notes and explanatory notes that are published as an aid to interpretation and application of EU law. Mainly these are published by the European Commission (eg in relation to their competition law Regulations) and specialist regulators such as the European Banking Authority. Some are addressed to Member States more formally as Recommendations. They are all aids to consistent interpretation and to better understanding of the law, so that its application can be consistent.

As these documents do not create binding law, the main question that arises is the use of these documents after Brexit. They undoubtedly will continue to be used in the UK: for example to assist the correct application of the block exemption Regulations that the Commission makes under competition law. Under the Competition Act 1998 these Regulations provide "parallel" exemptions from the application of UK competition law for any transaction of a purely domestic nature to which the Regulations would apply if the transaction affected trade between EU Member States. It would be very helpful if they were officially published together with the legally enforceable retained EU

legislation and if a right to refer to this material in UK courts or before UK regulators were included in the Bill. It could be clearly stated that there is no obligation to follow guidance or interpretations in such material. This would make it easier to refer to this material in court without the need to prove it in evidence. As the courts and regulators are currently free to follow or reject guidance, there would be no change in the legal position.

3. Ending the supremacy of EU law and CJEU case law

Repealing the ECA brings to an end the supremacy of EU law save in so far as saved by the Withdrawal Bill.

Limited preservation of EU law

Clause 5(1) provides for the cessation of this supremacy as regards any post-exit day EU legislation, but Clause 5(2) preserves it as regards the interpretation, disapplication or quashing of any older enactment or rule of law existing prior to exit day. There is also a discretion under Clause 5(3) to apply this approach to UK legislation amending EU law which has been incorporated into domestic laws, so long as consistent with the purposes of the amendment.

Extent to which the UK courts must follow CJEU case law

The starting point in the Withdrawal Bill, Clause 6(3), is that UK courts and tribunals should apply retained EU case law and any retained general principles of EU law (that is EU law pre-dating exit day) to questions of the validity, meaning and effect of any retained EU law. However, Clause 6(4) then provides that the Supreme Court is not so bound, although it must apply the same test as it would in deciding to depart from its own case law. This EU case law should therefore be binding on all courts below the Supreme Court and the Supreme Court will rarely depart from those prior precedents. It would be for Parliament to amend interpretations based on such case law if it wished to do so after Brexit.

Post-Brexit EU law and case law is not the subject of these rules and UK courts are free to ignore it, though they may well look at, for example, CJEU or Member State courts interpretation of law pre-dating Brexit, just as they might look at an Australian decision on a point of contract law common to both English and Australian law, or an Irish decision on a provision of company law where the UK Companies Act has the same language as the Irish Act.

Lord Neuberger, the retiring head of the Supreme Court has suggested that the courts would welcome more precise guidance, but we think this is a lesser problem than the way that other provisions of the Withdrawal Bill contradict the apparently clear scheme laid out in Clause 6 as regards the application of retained EU law. This is discussed below.

Treatment of Directives

Directives, and their UK implementation, are not part of the definition of "retained" EU law and as a result there is doubt that regard can be had to them at all after Brexit. This could result in unnecessary deviation in interpretation of UK legislation which in origin or application implements Directives, since it would be interpreted without regard to the Directive it implements.

We consider it would be far better if Directives, in the form current on exit day, continued to have the same status as before Brexit as an aid to interpretation, as well as so far as they created any directly effective rights at exit day.

Interpretation of retained EU law

The interpretation of retained EU law is stated to be a question of law (Clause 13 and Schedule 5, paragraphs 3 and 4). According to the Explanatory Notes, this is intended to preserve the application of EU law as provided in Section 3 of the ECA. But the provision does not preserve the full effect of Section 3 of the ECA which made it clear that the law to be applied included EU law. When something is described in UK law as "a matter of law" without more, that would normally be interpreted as a reference to the law of the relevant part of the UK and this provision may therefore have the opposite effect to that intended and require the courts to apply domestic rather than EU rules of interpretation to retained EU law.

More explicit language is needed, we believe, to achieve the effect stated in the Explanatory Notes. This is particularly important as normal UK rules of interpretation would not allow the courts to rely on the Explanatory Notes as an aid to interpretation.

Schedule 5, paragraph 4, of the Withdrawal Bill would allow Ministers to legislate to enable or require judicial notice to be taken of retained EU Law, EU law or the EEA Agreement or any other relevant matter and to provide for the use in evidence of such law or EU documents more generally. This provision is intended to operate in a supplemental manner: as the present state of drafting means that this provision might be needed to remedy

confusion, we think it would be much better if the Bill itself were clarified now so as to ensure that the law used to interpret retained EU law includes EU law and CJEU decisions as in force at exit day.

As discussed below, however, the provisions on general principles of EU law contained in paragraph 3 of Schedule 1, may in any event drive a coach and horses through the intended legislative scheme.

Exclusion of the general principles of EU Law

The general principles of EU law are a series of doctrines developed by the EU courts effectively to fill in gaps in the Treaties. In order to apply retained EU law and follow decisions of the CJEU predating Brexit as envisaged, one would expect the UK courts to need to be able to interpret and apply the general principles of EU law as established at the date of Brexit. However, the Withdrawal Bill contains a series of contradictory provisions and exclusions in relation to these principles.

General principles explained: The general principles of EU law are often derived from principles common to all (or a majority) of Member States' domestic laws. They include fundamental rights, equality before the law, legal certainty, non-retrospectivity of legislation, legitimate expectations and proportionality. The categories of general principles are not closed and may extend more widely: eg to the concept of directly effective rights and obligations contained in laws not expressed to be of direct effect.

The general principles affect the way that the CJEU and EU Member States approach EU law, what rights and obligations they derive in relation to EU legislation and its application and may include the principles of interpretation of EU law, which follows the "purposive" approach taken to interpretation in most EU Member States. This includes the habit of drafting legislation with recitals explaining its purpose and intent at some length, the right of courts to refer to recitals, headings and "travaux préparatories" (working documents) in the interpretation of the law and its application. By contrast UK rules of statutory interpretation severely limit reference to anything but the words of the legislation itself, excluding even headings.

Exclusion of general principles: The Withdrawal Bill contains a number of express exclusions or qualifications as to the application of the general principles post-exit date:

- Fundamental rights are excluded by Clause 5(4), with a saving for equivalent rights arising irrespective of the EU Charter of Fundamental Rights.
- The right to challenge the validity of a retained EU law on the basis that the EU law from which it was derived was invalid immediately before Brexit is excluded by Schedule 1, paragraph 1, with a saving in respect of laws declared invalid by the European Court before exit day or where permitted by UK Regulations.
- Post-exit developments of and changes to the general principles of EU law are excluded by Schedule 1, paragraph 2.
- A claim for damages based on the application of a UK Statute passed in breach of the UK's EU Treaty obligations (the rule in *Francovich)* is excluded by Schedule 1, paragraph 4.

Withdrawal Bill provisions of contradictory effect: Clause 6(3) of Bill contains a general provision stating that the interpretation of retained EU law shall take account of general principles of EU law, which are defined to include principles in force immediately before exit day and not excluded by Clause 5 or Schedule 1. Paragraph 2 of Schedule 1 then makes it clear that this applies only to general principles recognised by the CJEU prior to exit day and not to those recognised after Brexit. However, paragraph 3 of Schedule 5 then provides for a total removal of rights of action under domestic law (which would include retained EU law incorporated into domestic law by the Withdrawal Bill) arising from failure to comply with any general principle of EU law and an express ban on any court, tribunal or public authority applying any general principle of EU law to dis-apply or quash an enactment or any rule of law, quash any conduct or decide it is unlawful.

These provisions in paragraph 3 of Schedule 5 do not have any reservation at all as regards retained general principles of EU law. There is no preservation of the application of any general principles even for decisions relating to matters occurring before exit day or any provision allowing the courts to apply a principle that exists both as a general principle of EU law and as part of UK domestic law. If the rules of interpretation of EU law are part of the general principles, then it is difficult to see how the courts can apply retained EU law in a meaningful way.

The Explanatory Notes suggest that paragraph 3 of Schedule 5 is only intended to prevent a challenge to original domestic law (ie not including EU law incorporated into domestic law by the Bill) post-Brexit on the grounds that it is incompatible with EU general principles and suggests that it does not prevent the interpretation of retained EU law in accordance with retained general principles of EU law. It is, however, open to mis-interpretation as doing precisely that, at least to the extent retained EU law is regarded as part of domestic law, as is clearly the case for UK implementing laws referred to in Clause 2, direct EU law preserved under Clause 3 and Treaty rights retained

under Clause 4 (these sections are all expressly subject to Clause 5 and Schedule 1) and is probably the position for the various other retained laws which the courts are authorised to apply by Clause 6.

Again the language of the Bill requires attention in order to ensure that the inability of the courts to give effect to general principles of EU law is not expressed so widely as to over-ride the ability of the courts to give effect to retained general principles and the EU case law that incorporates them and to follow EU case law as envisaged in Clause 6.

We consider this would be better achieved by express provisions disapplying each general principle Parliament does not wish to see used with the circumstance of the disapplication clearly stated, rather than by a blanket provision with the uncertain effects of paragraph 3 of Schedule 1. For example, the Explanatory Notes make it clear that the general principle of EU law that precludes retrospective legislation (this is not part of UK notions of legal certainty) is intended to be disapplied by paragraph 3 of Schedule 1. This could easily be done by express exclusion but is not currently dealt with in the Bill.

While we do not think the courts would be prepared to interpret paragraph 3 as removing rights of action which are based on a principle of domestic law which is to the same effect as a general principles of EU law, the blanket nature of paragraph 3 (as compared with the specific exclusion of the Charter of Fundamental Rights in Clause 5(4)) would make such an argument possible. Over the years, EU law and UK law have had substantial cross influences and some general principles of EU law, like that of proportionality (according to the Explanatory Notes, another target of this provision), have affected significantly the development of domestic law and practice. It is, in our view, inappropriate to seek to turn the clock back; the case for the continued application of the proportionality principle in public law matters is in any event very strong.

Status of the Explanatory Notes

We have already mentioned more than once how difficult some of the Withdrawal Bill is to understand without reading the relevant part of the Explanatory notes. The UK courts are very limited in what materials they can look at when interpreting UK legislation and how they can use it. In a leading decision, Lord Steyn stated that it was permissible to review Explanatory Notes: "… *Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible as aids to construction*." But later he said: "*What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.*" Thus, if the court concludes that the meaning of a law is different from that stated in the Explanatory Notes, it will not follow the Explanatory Notes (*Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956 (HL)).

Conclusion

In short, the proposed wholesale exclusion of rights based on general principles of EU law would undermine legal certainty in our domestic law, add to legal costs and lead to unnecessary divergence from EU interpretation and application by UK courts and tribunals of laws common to the UK and the EU.

We are strongly of the view that the Withdrawal Bill requires amending so that general principles of EU law retained under paragraph 2 of Schedule 1 can be applied except where there is a precise disapplication, which should be as limited and clear as possible.

4. Challenges for the transposition process

The transposition of the whole of EU law into domestic law via one short clause in the Bill is at first sight a simple and neat solution to the immediate risk of major gaps in UK law, but, in addition to the range of issues set out above about which EU laws are actually included in that transposition and how they are to be interpreted by the Courts, it has some key limitations and raises a number of challenges:

- A range of measures relate to the UK's membership of the EU and therefore cannot be transposed (for example the laws relating to European Parliament elections) - these are repealed in Schedule 9 of the Withdrawal Bill.
- Many laws make reference or assign roles to EU bodies and depend upon those bodies in order to be effective (for example the European Medicines Agency which is responsible for evaluating medicinal products). Assuming that the UK leaves the EU Single Market, the Government will need to decide how it will deal with such legislation. The approach in Clause 7 of the Withdrawal Bill is to leave those questions entirely to secondary legislation to be made within 2 years of the exit day. This seems like an opportunity lost to lessen the legislative burden by, for example, providing for the general transfer of powers and duties

currently assigned to the Commission to a Minister of the Crown, unless otherwise provided, with power to sub-delegate if it appears those powers would be better assigned to a public authority. However, it may be that politically, it is thought that such a general transfer of powers to Ministers would not be accepted.

- In the case of legislation that is cross-border or international in nature, it will not be possible for the UK unilaterally to preserve the effects of the EU legislative framework without the cooperation and consent of other Member States and the EU (for example the Treaty provisions on free movement or the rules in the Insolvency Regulation relating to cross-border insolvencies). The extent to which such frameworks will remain relevant, and the way they will operate, depends on the final deal negotiated between the UK and the EU. The Withdrawal Bill simply preserves all this legislation, with specific decisions on reform to follow. This inevitably means that a great deal of change to primary legislation to implement Brexit will need to be done by statutory instrument and, as explained below, the Bill contains sweeping powers to pass such statutory instruments. Given the volume of legislation involved, there is probably no viable alternative.

5. Delegated powers

The debate and Henry VIII Powers

The Government has recognised that substantial changes will need to be made to a significant proportion of EU-derived law (that is both current EU-derived domestic law and EU regulations that will become part of domestic law under the Withdrawal Bill) in order to make it work and to provide legal clarity and certainty in a post-Brexit environment. The Government's current estimate is that the necessary corrections to EU-derived law will require between 800 and 1,000 statutory instruments, and we think that this may be a substantial underestimate.

The Government proposes to deal with this challenge through delegated powers which will allow Ministers to make the necessary amendments by secondary legislation. Such powers are controversial, particularly as they will include so-called "Henry VIII" powers, under which Ministers are able to amend primary legislation through secondary legislation.

The White Paper recognised that, although these powers must be sufficiently wide to be workable, there will be limits as to when and how they can legitimately be used. Relevant reasons for using secondary legislation are cited in the White Paper as:

- Matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations
- Adjustments to policy that are directly consequential on our exiting the EU; and
- To provide a level of detail not thought appropriate for primary legislation.

The House of Lords Select Committee on the Constitution (which recently considered the extent of secondary legislation that may be needed under the Bill) identified the need to ensure that there are clear limitations on the use of secondary legislation in the context of Brexit. The Committee distinguished between:

- The more mechanical act of converting EU law into UK law, where secondary legislation is legitimate, and
- The discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence, which should be done through primary legislation.

The White Paper also recognised this distinction stating "Crucially, we will ensure the power will not be available when 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."

The sweeping scope of powers in the Withdrawal Bill

The Withdrawal Bill seeks to put the delegated powers principles set out in the White Paper into operation but appears to add supplemental powers which go well beyond those recognised as needed in the White Paper.

Powers to amend via secondary legislation are provided as follows:

- Clause 7 provides a time limited (2 years from exit day) power for Ministers to legislate to prevent, remedy or mitigate:
    (a) Any failure of retained EU law to operate effectively,
    (b) Any other deficiency in retained EU law.

Regulations made under the Clause may make any provision that could be made by an Act of Parliament, but are limited in scope and cannot bring in or increase taxation, create a criminal offence or amend or repeal certain key

legislation, notably the Human Rights Act 1998 or the Northern Ireland Act 1998. This legislation cannot be retrospective. The Clause gives some explanation of what a Minister may decide is a "deficiency", varying from redundancy once the UK has left the EU to containing EU references which are no longer appropriate and gives examples of likely legislation, such as transfer of functions from an EU body to an existing or new UK public body. Schedule 8, paragraph 13 allows any instrument to modify retained EU law, to make different provisions for different circumstances and to include supplementary, incidental, consequential, transitional, transitory and saving provisions, including restating retained EU law in a clearer or more accessible way.

- Clause 8 provides for amendments of similar scope, and similarly with a 2 year time-limit, to prevent or remedy any breach of the UK's ongoing international obligations (no examples are given of specific concerns).
- Clause 9 provides for powers to make amendments to law to be made before exit day to implement the withdrawal agreement with the EU. This includes a power to provide for anything that could be done by Act of Parliament, including amending the Withdrawal Bill itself, via secondary legislation (Clause 9(2)).
- Clause 10 and Schedule 2 gives equivalent powers to those in Clauses 7-9 to the devolved administrations in Scotland, Wales and Northern Ireland for matters within the scope of their devolved powers.
- Clause 12 is a financial provision allowing Ministers, devolved administrations and public bodies to incur expenditure in connection with the implementation of the Withdrawal Bill and provides for fees and charges to be levied in accordance with Schedule 4, for example where a UK body takes over a role from an EU body and exercises a function for which it would be appropriate to charge a fee. There is little limitation on what central government can do in this regard, but more controls on the actions of the devolved administrations and other public bodies.
- Clause 17, described as a consequential and transitional provision, allows for amendment of any UK Act or Regulation (including of statute law made in or before the Parliamentary Session in which the Bill becomes law) by way of a transitional, transitory or saving provision if considered "*appropriate in consequence of this Act*". The power is not time-limited.
- Paragraphs 3 and 5 of Schedule 8 provide for powers to amend by subordinate legislation any retained direct EU legislation (essentially EU Regulations, EU Decisions and EU tertiary legislation) as if it were subordinate legislation, and for new powers to this effect to be created after exit day. This will allow all EU directly applicable law that is being transposed, including that which is in the nature of primary legislation at EU level, to be amended by statutory instrument with little Parliamentary scrutiny and is not subject to the time-limits contained in Clauses 7-10.

There is no doubt that these extensive powers will be the main focus of Parliamentary debate on the Withdrawal Bill as the Bill progresses. Clause 17 and Schedule 8 appear to contain powers that could have effects that go beyond those envisaged by the White Paper.

The rest of Schedule 8 contains almost the only Brexit related amendments to existing UK laws that will be achieved by the Bill itself. The first two paragraphs deal with references in UK legislation to EU legislation and how these are to be treated after exit day: either as a reference to retained EU legislation or, if not retained, as a reference to the EU law immediately before exit day. Parts 2, 3 and 4 of the Schedule cover some specific amendments to a small number of UK Acts, and make some additional transitional provisions (eg for pending litigation).

The Statutory Instrument procedure

A number of procedures exist under which Parliament is able to play a role in the making of statutory instruments, with different levels of scrutiny according to the significance of the subject matter. Schedule 7 of the Bill explains which procedure will apply.

The negative procedure (which does not require debate) will be used to deal with the mechanistic issues of converting EU law to workable UK law whereas the affirmative procedure (which does require debate and approval by both Houses) is seen as more appropriate for the more substantive changes, such as establishing or assigning functions to a public body, imposing a fee, creating or extending the scope of a criminal offence or creating or amending a power to legislate (Schedule 7, paragraph 1). This same division applies to legislation under the powers in Clauses 8 (and also to any amendment to the Withdrawal Bill itself, which as mentioned above, is possible under the powers in Clause 9(2)).

It remains to be seen whether Parliament will support this approach. Henry VIII powers are generally subject to greater scrutiny by Parliament than is offered under the standard affirmative procedure. For example, the exercise of the amendment powers in the Legislation and Regulatory Reform Act 2006 are subject to a "super-affirmative procedure" via the Legislative Reform Order process, although this does mean that the process for approval takes

longer (albeit still more economical of Parliamentary time than the primary legislation process). This level of safeguarding may be regarded as unworkable in the context of Brexit, where Ministers will need to employ Henry VIII powers on an unprecedented scale in a limited time.

6. Interaction with the devolution settlements

As the devolution settlements for Scotland, Northern Ireland and Wales are all premised on UK membership of the EU, the devolved administrations and legislatures are currently competent to make laws implementing common frameworks of EU policy that apply to devolved matters: for example they can each apply the Common Agricultural Policy and certain environmental policies that are within their devolved competencies. It is therefore important to consider how the repatriation of powers from the EU will interact with the devolution settlements.

The White Paper briefly addressed this, outlining a process of "intensive discussions" where the Government will "work closely" with the devolved administrations to identify the areas where EU common frameworks should be retained and to "determine the level best placed to take decisions on these issues" after the UK leaves the EU. While the White Paper states that the Government's expectation is that these discussions will result in a "significant increase in the decision making power of each devolved administration" the White Paper is silent on which repatriated EU powers will be devolved and which will be reserved to Westminster (even in relation to currently devolved matters).

The Withdrawal Bill contains extensive provisions which would allow the devolved administrations to take equivalent action to central government on matters falling within their respective competencies, contained principally in Clause 11 and Schedules 2 and 3. However, it is noteworthy that the devolved administrations are not given the power to amend retained EU law, unless they would have had legislative competence before exit day or as specifically provided by Order in Council. The effect of this is to retain the powers "returned" from the EU to the UK on Brexit with the Westminster Government, unless specifically devolved. This would mean, for example that control over agricultural subsidies would remain with Westminster. The other details of the devolution provisions are outside the scope of this briefing.

7. Timing for the Withdrawal Bill

The Withdrawal Bill is the top priority for the current Parliamentary session, but is likely to be hard fought over and the Government's very slim Parliamentary majority makes this an even more fraught exercise than had been anticipated, even though the session has been extended to two years, rather than the usual one.

In the event it is passed, repeal of the ECA will only take effect on the day the UK leaves the EU, that is on the exit day, but the Government intends that the delegated powers to amend the EU-derived legislation will come into force as soon as the Bill receives royal assent, to allow for the process of correcting the relevant legislation before the UK leaves so that it can take effect from the moment of departure.

8. Rest of the Brexit legislative programme

The Withdrawal Bill does not attempt to deal with areas of the law where major reform will be needed to enable the UK to operate independently from the EU. The Government will also need to adopt a number of new bills in areas where entirely new domestic regulatory regimes will need to be created. This legislation will be adopted alongside the Withdrawal Bill but falls outside the scope of the Bill. The following Bills are listed in the Queen's Speech as being necessary for the purpose:

- **An Immigration Bill** which legislates for the end of the free movement under EU law and governs the status of EU nationals and their family members under UK law
- **A Trade Bill** which puts in place the necessary framework for an independent trade policy for the UK outside the EU
- **A Customs Bill** creating a standalone UK customs regime and also deals with necessary adjustments to VAT law
- **A Fisheries Bill** to allow the UK to take on responsibility for access to fisheries and management of its territorial waters once it is outside the EU Common Fisheries Policy
- **An Agriculture Bill** which creates a system to replace the UK's membership of the EU Common Agriculture Policy
- **An International Sanctions Bill** with the necessary powers for the UK to implement non-UN sanctions which is currently done at EU level

- **A Nuclear Safeguards Bill** with new powers for the Office for Nuclear Regulation which will be necessary as a result of the UK leaving the Euratom Treaty.

Neither the White Paper nor the Queen's speech has mentioned how the Government will tackle the important task of providing UK rights for holders of EU intellectual property rights (e.g. EU Trademark) which will cease to apply in the UK when it leaves the EU. This will require, at least, amendment to the UK's existing law in these areas. Other affected IP rights include EU design rights and EU plant variety rights. It is therefore not clear whether new primary legislation will be introduced to deal with these IP rights or whether it is intended to be dealt with via the secondary legislation powers in the Withdrawal Bill.

9. Summary

The Withdrawal Bill intends to set out a legislative scheme which extricates the UK from the EU, while providing for continuity of law and its interpretation and the tools to ensure that law is fit for application in the UK. Given the volume and complexity of the laws involved, this is a huge undertaking, made more difficult by the Government's slender Parliamentary majority.

The main challenges as we see it are:

- For the Government to hold together a majority during the passage of the Withdrawal Bill and be able to pass the legislation.
- To make the "Henry VIII" powers acceptable to Parliament, but still able to achieve the necessary changes in time for Brexit, which is expected at end March 2019.
- To clarify the provisions on application and interpretation of EU law so that the scheme is readily understandable and workable. There is a danger that the technical nature of these provisions means that they receive insufficient scrutiny and we end up with a law that promotes unnecessary divergence of EU and UK laws at considerable cost to business and the UK's competitiveness.
- To provide an accessible and rapidly updated database of legislation applicable in the UK, both primary and secondary and including all retained law. Regrettably the UK starts from a low base, in which publicly available texts of statutes are often out of date and of secondary legislation, almost invariably so.
- To complete the rest of the legislative programme required to implement Brexit.
- To reach a settlement with the devolved administrations on their competencies in relation to laws "repatriated" from the EU, such as rules on agricultural subsidies and environmental laws.

Of course, these challenges lie alongside the negotiation of the UK's Article 50 leaving agreement with the EU, of the framework for a future trade relationship and any transitional or implementing measures. All of these will need approval under the applicable EU processes, some of which may require the unanimous approval of all 27 continuing EU States. Given the volume of what is to be achieved, the extension of time through a transitional arrangement seems vital to achieving a smooth changeover.

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