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Legislating for Brexit: the Great Repeal Bill

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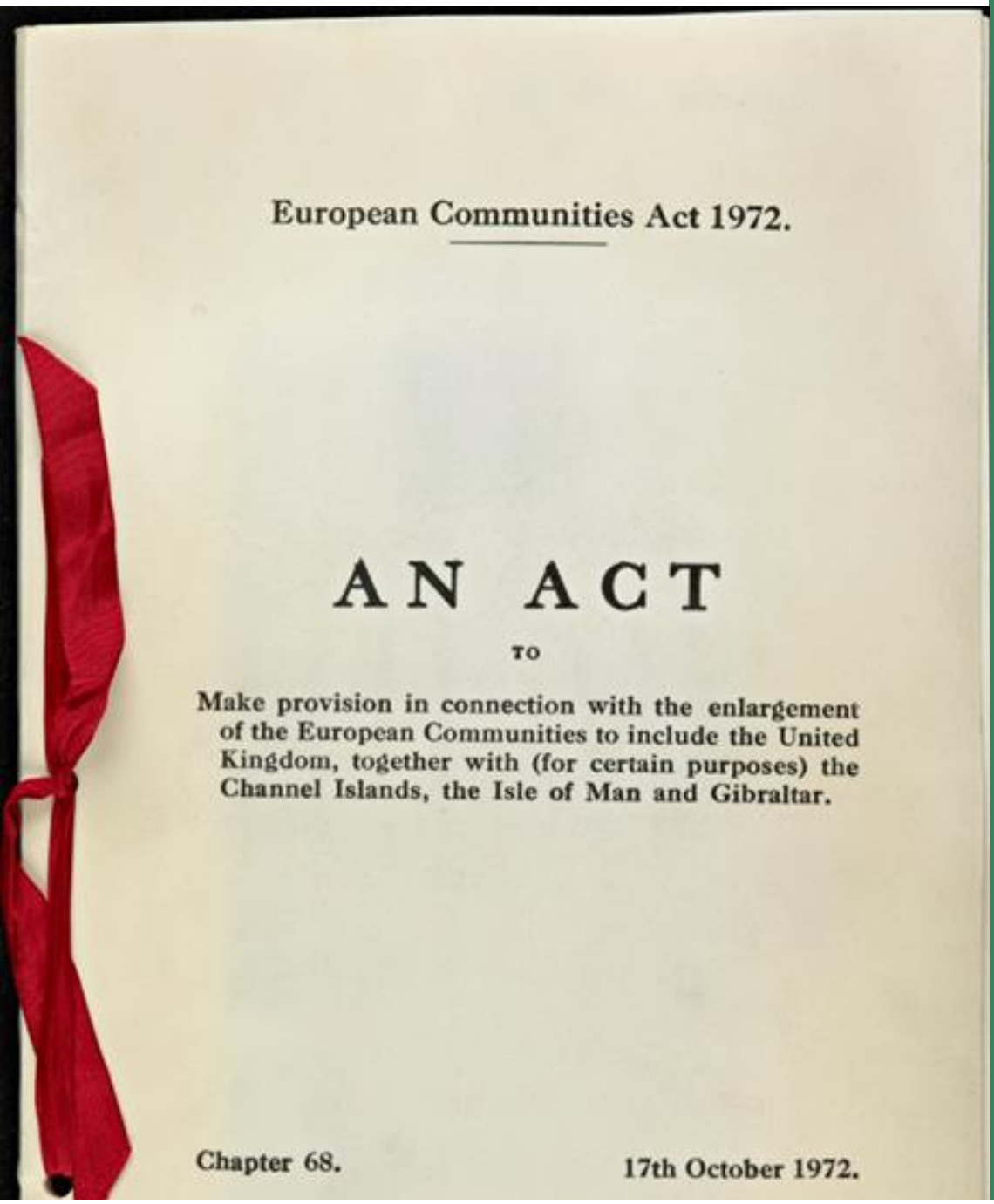
European Communities Act 1972.

AN ACT

TO

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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Contributing Authors: Paul Bowers, Devolution, Section 6

Summary

Leaving the European Union will require major changes to the statute book.

On 2 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 (transpose) European Union law into domestic law, "wherever practical".[1] The Government has indicated that these legal changes within the Bill would take effect on "Brexit Day": the day the UK officially leaves the European Union (EU).

The Great Repeal Bill has not yet been published. In January 2017, the Government announced that a White Paper on the Great Repeal Bill would be published.

This briefing considers issues likely to be raised in the Bill. It works on the basis of comments made by senior members of the Government, as well as statements and reports published by the Government.

The Government has also indicated that the Great Repeal Bill will contain delegated powers to enable the Government to ensure that any laws on the statute book that originate from the EU will "function sensibly" once the UK leaves the EU. This will require major swathes of the statute book to be assessed to determine which laws will be able to function after 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. It is not yet known when the legislative changes will be made to give effect to any withdrawal agreement made with the EU.

This briefing addresses each of these potential 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).

The Government has indicated that the Bill will be designed to re-establish 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. Once the UK has left, the next legislative stage would be for Government and Parliament to decide whether to keep any EU-derived law in UK domestic law.

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 a Henry VIII power to enable ministers to make changes to primary legislation which gives effect to EU law? (Section 5);

[1] HC Deb 10 October 2016 c40

- Will the Bill require a legislative consent motion from the devolved legislatures? (Section 6);
- Will the judgments of the Court of Justice of the European Union (CJEU) continue to be relied on in domestic courts after transposition? (Section 7)

At this stage it is difficult to know what the UK's statute book will look like in the medium term after the UK has left the European Union. This is in part because of the as yet unknown nature and content of any withdrawal agreement with the EU, which is central to the question of how much EU law is to be retained after Brexit.

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. A Government Report published prior to the referendum emphasised the need "to maintain a robust legal and regulatory framework where that had previously depended on EU laws".[2] The Government has already indicated that the intention is to retain EU related legislation in certain areas, such as employment law.[3]

Repealing the ECA

Since the enactment of the ECA, 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 Treaties and EU Regulations are incorporated into domestic law by the ECA and are therefore directly applicable, whereas EU directives are implemented by Parliament through both primary and secondary legislation.[4] This distinction between directly applicable EU law and EU law already implemented will have implications for the process of legislating for Brexit.

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 White Paper, *The United Kingdom's exit from and new partnership with the European Union*, published in January 2017, stated that the aim of the Bill is "to ensure that all EU laws which are directly applicable in the UK (such as EU regulations) and all laws which have been made in the UK, in order to implement our obligations as a member of the EU, remain part of domestic law on the day we leave the EU".[5]

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 CJEU.[6] Further, some EU law rights might not be transposed

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2 HM Government, *The process for withdrawing from the European Union*, Cm 9216, February 2016, para 4.9

3 Brexit: employment law, Commons Library Briefing Paper CBP 7732, 10 November 2016

4 Much of the secondary legislation is enacted through the power given to ministers under Section 2 (2) of the *European Communities Act 1972*, but there is also a significant amount of free-standing primary legislation which gives effect to European Union law

5 HM Government, *The United Kingdom's exit from and new partnership with the European Union,* Cm 9417, January 2017, p10

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

for political reasons. Another important question is how transposition will be done, both in terms of the form of words used and whether this will be done using statutory powers delegated to ministers or on the face of the Bill (or in multiple Bills). The Government has stated that significant policy changes will be underpinned by primary rather than secondary legislation.[7]

Other legislation that implements EU law

Repealing the ECA will not remove EU law's influence on the statute book. Since the UK became a member of the EU in 1973, Parliament has enacted a significant amount of legislation to give effect to the UK's obligations under the Treaties. Whilst the majority of this legislation will function effectively post-Brexit, some provisions may need to be amended, while others might need to be repealed altogether, such as the *European Union Act 2011*. The Great Repeal Bill might include on its face changes to such primary legislation. Equally the delegated powers included in the Bill might enable such changes to be made by Ministers pre and post Brexit.

Delegated powers

The Government has indicated that the Great Repeal Bill could contain delegated powers enabling Ministers to make changes to the statute book to give effect to the outcome of the withdrawal negotiations.[8] If such power are included, the Government may need powers to cover multiple scenarios.

The Bill could also use delegated powers to adapt legislation, enacted to give effect to the UK's EU law obligations, so that it functions effectively post Brexit. These powers could be limited so that only technical changes could be made to make EU-related law operate effectively post-Brexit.

If the Great Repeal Bill contains delegated powers that enable Ministers to make changes to primary legislation (sometimes known as Henry VIII powers), it 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. For example whether a negative, affirmative or super-affirmative procedure is used.

Devolution

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

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

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7 HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, January 2017, p10 para 1.8

8 Gov.uk, *Government announces end of European Communities Act*, 2 October 2016

However, an alternative approach would be to restrict the Bill to reserved matters and leave the devolved legislatures to create their own continuation Bills.

If any delegated powers in the Bill enabled UK ministers to legislate in regard to devolved matters there would be concerns from the devolved governments and legislatures that the Sewel process might be circumvented. The requirement for consent from the devolved legislatures applies only to primary legislation. It might be possible to offset this by creating delegated powers that involve approval from both the UK Parliament and the devolved institutions, an approach that is used in some circumstances already. Alternatively, the delegated powers might be exercised by devolved ministers.

The courts

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 primacy to EU law. The domestic courts will not be obliged to follow the judgments of the CJEU, nor will they be able to refer questions of EU law to the Luxembourg Court.

It is not yet known how the domestic courts' approach to interpreting legislation giving effect to EU law might change after Brexit. The judgments of the CJEU, and EU law itself, could remain relevant to deciding cases on domestic legislation originating from EU law. The Government's White Paper outlines that preserved EU law should "continue to be interpreted in the same way as it is at the moment".[9]

[9] HM Government, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, January 2017, p10

1. The Great Repeal Bill

The UK Government has announced that a "Great Repeal Bill" will be the means to give effect in UK legislation to the referendum vote of 23 June 2016 which was in favour of leaving the EU.

The Prime Minister, Theresa May, has said that she intends to trigger Article 50, the formal process for starting a two-year negotiation over exit from the EU, by March 2017.[10]

This route to EU exit at UK level was announced by the Prime Minister, Theresa May, at the Conservative Party Conference on 2 October 2016. She described:

> … a Great Repeal Bill, which will remove from the statute book-once and for all- the European Communities Act.[11]

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.[12]

She explained that the UK would "convert" the body of existing EU law into British law:

> 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.[13]

On 20 December, the Prime Minister confirmed, in evidence to the Liaison Committee, that the changes made by the Bill will come into force "at the point in which we leave the EU".[14] She added this would provide certainty. On 17 January 2017, in her Lancaster House speech she reaffirmed that "the same rules and laws will apply on the day after Brexit as they did the day before".[15] In the same speech she emphasised that the Government would seek a "phased process of implementation".[16]

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10 'Theresa May's Conservative conference speech on Brexit', *Politics Home*, 2 October 2016
11 Ibid
12 Ibid
13 Ibid
14 Liaison Committee, Oral evidence: the Prime Minister, HC 833, 20 December 2016.
15 Theresa May Speech, The government's negotiating objectives for exiting the EU: PM speech, Lancaster House, 17 January 2017
16 Ibid.

The Great Repeal Bill will therefore do two major things:

- Repeal the *European Communities Act 1972* (ECA)
- Transfer European Union law applicable in the United Kingdom on Brexit day into domestic law

As such, the Bill, once published, is likely to be of major constitutional significance.

1.1 Likely features of the Bill

It is not yet known whether a draft Bill will be published or subject to pre-legislative scrutiny. However, various Government statements have set out its key features and aims.

The Secretary of State for Exiting the European Union, David Davis released a statement on 2 October 2016 which provided further details about the Bill. This highlighted how the Bill

> demonstrates the Government's determination to deliver the will of the British people, expressed in the EU referendum result, to ensure that Britain makes its own decisions about how it wants the country to be run.[17]

He restated that the Government planned to repeal the ECA and that the new Bill "will convert existing law into domestic law, while allowing Parliament to amend, repeal, or improve any law after appropriate scrutiny and debate". He confirmed that the legislation would be passed in advance so that EU law ceases to apply and domestic law can take its place on the day of exit. [18]

In a statement to the Commons on 10 October, he elaborated that the Bill would convert existing European Union law into domestic law "wherever practical" and highlighted the challenge ahead:

> ...In all, there is more than 40 years of European Union law in UK law to consider, and some of it simply will not work on exit. We must act to ensure there is no black hole in our statute book. It will then be for this House—I repeat, this House—to consider changes to our domestic legislation to reflect the outcome of our negotiation and our exit, subject to international treaties and agreements with other countries and the EU on matters such as trade.[19]

He confirmed that the UK will follow the process to leave the EU which is set out in Article 50 and needed to prepare for the impact of Brexit on domestic law:

> It's very simple. At the moment we leave, Britain must be back in control. And that means EU law must cease to apply.
>
> To ensure continuity, we will take a simple approach. EU law will be transposed into domestic law, wherever practical, on exit day.
>
> It will be for elected politicians here to make the changes to reflect the outcome of our negotiation and our exit.

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17 Gov.uk, *Government announces end of European Communities Act*, 2 October 2016

18 Ibid

19 HC Deb 10 October 2016 cc40-42

> That is what people voted for: power and authority residing once again with the sovereign institutions of our own country.

He also stressed the separate nature of triggering Article 50 and the role of the Bill:

> Let me be absolutely clear: this Bill is a separate issue from when article 50 will be triggered. The great repeal Bill is not what will take us out of the EU, but what will ensure the UK statute book is fit for purpose after we have left. It will put the elected politicians in this country fully in control of determining the laws that affect its people's lives—something that does not apply today. […][20]

Mr Davis highlighted that the Bill would include delegated powers to give the Government the flexibility to take account of the negotiations with the EU as they proceed.[21] Mr Davis said that this would:

> …also ensure that the Government can establish new domestic regimes in areas where regulation and licensing is currently done at an EU level, and amendments are required to ensure the law operates effectively at a domestic level. The ECA created a power which currently exists for Ministers to make secondary legislation to give effect to EU law.[22]

In 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 primary legislation, and not through statutory instruments.[23] Mr Davis added that after the Great Repeal Bill converts the "acquis", there will need to be consequential primary legislation which will need to be enacted before "the conclusion of the negotiation".[24] He cited the examples of migration, fisheries and agriculture, where Bills might be required.

During the same evidence session Mr Davis gave some indication of where the Great Repeal Bill would fit within the Government's broader strategy in legislating for Brexit. He explained that the Bill would convert the acquis "pretty much – not quite – untouched into British law".[25] This, he implied, would mean that the enactment of the Great Repeal Bill would only be the start of the process, further primary and secondary legislation would then need to follow:

> …there will be consequential legislation. Some of that will be primary legislation and, therefore, we will need time to go through before the conclusion of the negotiation, or before the ratification of the negotiation anyway. That will take some time.
>
> 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

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20 HC Deb 10 October 2016 c41
21 Gov.uk, *Government announces end of European Communities Act*, 2 October 2016
22 Gov.uk, *Government announces end of European Communities Act*, 2 October 2016
23 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016
24 Ibid
25 Ibid

> 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.[26]

Mr Davis emphasised that the scale of the task meant that time was scarce, and he refused to commit to publishing the Bill in draft so that it could be subject to pre-legislative scrutiny.[27]

The mechanics of the Bill are likely to be a significant part of the debate on the Bill. From what has been announced, the Bill could 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;
- A parliamentary procedure to enable scrutiny of delegated legislation made by ministers under the powers in the Bill;
- A schedule which lists primary legislation to be repealed as it is no longer required, such as the *European Union Act 2011*.

26 Ibid
27 Ibid

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.

The ECA is one of the most significant Acts passed by Parliament in the 20th Century. In the High Court case of *Thoburn*,[28] 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.[29]

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 1 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.

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),

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28 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

29 Ibid 62

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.[30]

When the ECA is repealed, it is not clear how many of the rights in the Treaties, and in other directly applicable law, namely regulations, will be transposed into domestic law via the Great Repeal Bill. 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.

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.[31]

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

30 N Barber and A Young 'The Rise of Henry VIII Clauses and their Implications for Sovereignty' *Public Law*, 113, 2003, p122

31 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5

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 originatin*g 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".[32]

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.[33]

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",[34] 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.[35]

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.[36] 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".[37] The courts will not be bound to follow the interpretation of the CJEU, and therefore EU law rights transcribed could be interpreted differently than they would have been when the UK was a member of the EU. [38]

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32 Ibid para 65

33 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 94

34 Ibid para 82

35 Ibid para 84

36 Ibid para 94

37 Ibid para 80

38 Ibid para 80

(Notification of Withdrawal) Bill 2016-17

As a consequence of this ruling the Government introduced the European Union (Notification of Withdrawal) Bill 2016-17 to the Commons on 26 January 2017. The enactment of this Bill is relevant to evaluating the legal effect of the Great Repeal Bill's proposed repeal of the ECA.

The Bill has only one operative clause:

> 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 Secretary of State for Exiting the European Union has emphasised that this drafting is designed to ensure that it is "the most straightforward bill possible".[39] The Government has indicated that it intends to trigger Article 50 before the end of March 2017.

Impact on the ECA

The European Union (Notification of Withdrawal) Bill 2016-17 will not, once enacted, 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".[40]

The words in Clause 1(2) of the EU (NoW) Bill also indicate that the Bill will 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.

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

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39 HC Deb 24 January 2017

40 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5, para 36

legislation, and in the United Kingdom this is often made with the power in section 2(2) of the ECA.

Section 2(2) is a 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.[41]

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 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.[42]

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 identified through each instrument's preamble which will refer to section 2(2) as the power under which it is made.[43]

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.

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,[44] which would mean that instruments made under the

41 Para 1 of Schedule 2 of the ECA

42 HC Deb 15 February 1972 vol 831 cc264-377

43 Instruments can be made under more than one power.

44 Tindal CJ in *Kay v Goodwin* (1830) 6 Bing. 576, 582

ECA would no longer be legally valid. As a consequence, in order to 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.[45]

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.[46] 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…[47]

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 1 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.

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.

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45 *Interpretation Act 1978*, Section 16

46 *Craies on Legislation*, D Greenberg (ed) (9th edition 2008) p842

47 *European Communities Act 1972*, Section 2(4)

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, and thus it is expected that the Bill will mean that UK courts are no longer required by law to follow the CJEU's judgments when confronted with questions of EU law. This does not mean that the CJEU's judgments will no longer be legally relevant to the task of interpreting legislation that originates from EU, and this point is explored in Section 7 of this paper. At this stage it is also unclear, as legal academic Thomas Horsley points out, whether this provision will be replaced with a new interpretive instruction to the courts.[48] Such a provision could seek to determine how the courts should treat both transposed EU law and the jurisprudence of the CJEU after the UK leaves the EU.[49]

Box 1: 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,[50] 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.[51]

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

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 ***Macarthys 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

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48 See T. Horsley, 'UK Courts and the Great Repeal Bill – Awaiting Fresh Instruction', U.K. Const. L. Blog (28th Feb 2017)

49 Ibid.

50 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.

51 Court of Justice of the European Union, *Flamino Costa v E.N.E.L*, 15 July 1964

> 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.[52]

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.[53]

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.[54]

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 not 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 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.

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52 *Macarthys Ltd v Smith* [1979] 3 AER 325 at 329c-d

53 [1990] 3 CMLR 31

54 *Factortame Ltd, R (On the Application Of) v Secretary of State for Transport* [1990] UKHL 13 para 13

> (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.[55]

[55] *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, argues 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.[56]

Similarly, Kenneth Armstrong, Professor of European Law at the University of Cambridge argues 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.[57]

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 repeal that 1972 Act. What Parliament did voluntarily in 1972, we can reverse by repeal of that 1972 Act. We can and must.[58]

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56 Mark Elliott Theresa May's "Great Repeal Bill": Some preliminary thoughts, *Public Law for Everyone* (3 October 2016)

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

58 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

2.6 Previous attempts at repealing the ECA

There have been a number of attempts by Members of Parliament to repeal the ECA via Private Members' Bills.

In June 2013, Phillip Hollobone MP sponsored the *European Communities Act 1972 (Repeal) Bill 2013-14*. The Bill contained two clauses, one that repealed the ECA and saved the statutory instruments made under section 2(2) of that Act, and another that empowered ministers to repeal legislation, which gave effect to EU law, by order.

In June 2012, Douglas Carswell MP sponsored the *European Communities Act 1972 (Repeal) Bill 2012-13*, which used the same forms of the words. This Bill received a second reading, and Mr Carswell explained the purpose of the Bill:

> I am not introducing this Bill in the expectation that it will become law—yet. My aim is to ensure that we begin to give serious thought to the mechanics of withdrawal. Leaving the European Union will be simple, but it will not be easy. It will be simple because a simple Act of Parliament can get us out, but what then? What about all the acres of public policy that have been created under the auspices of the European Communities Act? How might we retain, for instance, perfectly sensible environmental protection rules, but change some of the secondary laws that need to be repealed? What process will we use to sort out the difference between public policy that we wish to retain and public policy that we need to get rid of? Do we need different mechanisms to deal with directives and to repeal regulations? How—and I say this as a staunch parliamentarian who is suspicious of all who sit on any Front Bench—do we balance the need for the legislature to oversee the process against the need for an Executive then to take action?
>
> My proposal in this Bill is just one model. I propose that all secondary measures and laws would remain in place, but that Ministers would then, subject to the approval of this House, have the power to repeal or amend. Is this idea of statutory instruments and ministerial fiat enough? Might it not also be an idea to give Select Committees specific powers to try to overturn regulations introduced under the auspices of the 1972 Act?[59]

In his response, the then Europe Minister, David Lidington stated that the Bill had "considerable technical deficiencies".[60]

Legislating for parliamentary supremacy

The debate on whether parliamentary sovereignty can be secured, or indeed abrogated by a parliamentary enactment is likely to feature in the debate on the Great Repeal Bill.

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59 HC Deb 26 Oct 2012 c1260

60 HC Deb 26 Oct 2012 c1265

There have been a number of attempts to legislate to assert Parliament's supremacy over EU law. A number of "sovereignty bills" of various forms has been considered by Parliament in recent years.

Prior to the referendum, it was reported by the BBC that then Prime Minister intended to introduce a "sovereignty bill" to clarify that Parliament retained supreme law-making powers.[61] No plans were ever officially announced.

The Coalition Agreement, published in 2010, stated that the Government would "examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament". The *European Union Bill*, introduced to the House of Commons in November 2010, included a clause that clarified that the authority of EU law was based on UK primary legislation, rather than on EU itself. The then Foreign Secretary, William Hague, outlined the thinking behind the provision:

> I announced in October that, following that examination, we had decided to include a provision in this Bill to place on a statutory footing the existing common law principle of parliamentary sovereignty. The doctrine that EU law has effect here for one reason only, namely that authority has been conferred upon it by Acts of Parliament and subsists only for as long as Parliament so decides, has been upheld consistently by the courts. However, we can see considerable merit in placing that position beyond speculation on a statutory footing. That will guard against any risk that in future, common law jurisprudence might drift towards accepting a different argument. In other words, we have included a clause that underlines the fact that what a sovereign Parliament can do, a sovereign Parliament can undo.[62]

As enacted section 18 of the *European Union Act 2011* reads:

> Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.[63]

Christopher Chope MP and Sir William Cash MP have both sponsored Private Members' Bills, for example in 2010, 2009 and 2004,[64] that have sought to reaffirm parliamentary sovereignty by statute.

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61 'David Cameron: There's 'a good case' for new UK sovereignty law', BBC News, 18 January 2016

62 HC Deb 7 Dec 2010 c204

63 *European Union Act 2011*, Section 18

64 *United Kingdom Parliamentary Sovereignty Bill* 2010-12; *United Kingdom Parliamentary Sovereignty Bill* 2009-10; *Sovereignty of Parliament (European Communities) Bill* 2003-2004

Constitutional scholars have disputed the utility of legislating to secure parliamentary sovereignty. For example, Professor Jeffrey Goldsworthy of Monash University and a leading authority on parliamentary sovereignty, submitted in evidence to the European Scrutiny Committee:

> Any attempt by Parliament to enact that it has sovereign power would be open to the objection that it is begging the question - because the validity of that enactment would presuppose that Parliament already has the sovereign authority needed to enact it.
>
> The true foundation of the doctrine of parliamentary sovereignty is general consensus among senior officials all branches of government, supported by public opinion and based on commitments to principles of political morality such as democracy. The principled commitments of Parliament itself, of the Crown, and of senior judges, are all essential parts of this consensus. For this reason, the doctrine of parliamentary sovereignty has a much broader and more democratic foundation than is entailed by the false view that it is a doctrine of judge-made common law.[65]

In 1955 Professor Sir William Wade argued that parliamentary sovereignty was "the ultimate political fact" upon which the system of legislation in the United Kingdom was based.[66] As such legislating to secure parliamentary sovereignty was based on a misconception:

> Legislation owes its authority to the rule (parliamentary sovereignty): the rule does not owe its authority to legislation. To say that Parliament can change the rule, merely because it can change any other rule, is to put the cart before the horse.[67]

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65 Jeffrey Goldsworthy, Written submission to the European Scrutiny Committee, The EU Bill and Parliamentary Sovereignty, 6 November 2010

66 HWR Wade, "The basis of legal sovereignty", *Cambridge Law Journal* (1955) p188

67 Ibid

3. Challenges for converting European Union law to domestic law

The Government has indicated that the Great Repeal Bill will seek to transpose (transfer) all of the *Acquis Communautaire,* which comprises all the EU's treaties and laws, and the case law of the CJEU, into domestic law in the first instance.

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 transposed?
- 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?

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].[68]

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 environmental law will be able to be converted with some "technical changes", but that "roughly a third won't".[69]

The Prime Minister has also indicated in her Lancaster House speech, on 17 January 2017, that the Government was committed to ensuring that "the same rules and laws will apply on the day after Brexit as they did the day before".[70] For this to happen, transposition will have to overcome some of the technical issues identified by Andrea Leadsom above.

At this stage it is not clear how many Bills will be needed to complete the transposition project. David Davis's evidence to the Exiting the EU Committee, on 14 December, indicated that the Great Repeal Bill will be

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68 Gov.uk, 'Government announces end of European Communities Act', 2 October 2016

69 Environmental Audit Committee Oral evidence: The Future of the Natural Environment after the EU Referendum, HC 599, 25 October 2016

70 Theresa May Speech, The government's negotiating objectives for exiting the EU: PM speech, Lancaster House, 17 January 2017

followed by "consequential legislation", some of which Mr Davis indicated would be primary.[71] It is not yet clear whether principal aim of such primary legislation would be transposition, or whether the fact that separate bills are needed might indicate that such bills would be concerned with material policy change.

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?

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.[72]

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 2 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 2: 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.[73] 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:

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71 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

72 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

73 Colin Reid, Brexit: challenges for environmental law (2016) *Scots Law Times* p143-144

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.[74]

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.[75] That provision ensured that all laws in force in Jamaica immediately before the appointed day continued in force on and after that day.[76] Such a simple approach would not appear to be sufficient in this case, as the Government has indicated that some of the EU will be need be amended and adapted for effective transposition.

A great deal of EU law is already transposed in UK domestic law. As outlined in section 4 of this briefing, there any 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.

3.2 Which EU law might not be transposed?

It is not yet clear whether all of directly applicable EU law which is currently in force pre-Brexit will be able to be in force on the first day after the UK leaves the EU. The Prime Minister has indicated that the process of transposition will ensure that there is no "cliff edge" on Brexit day.[77] This might mean that those laws which cannot be transposed will

74 Ibid
75 S Douglas-Scott, 'The Great Repeal Bill: Constitutional Chaos and Constitutional Theory', *UK Constitutional Law Association*, 10 October 2016
76 *The Jamaica (Constitution) Order in Council 1962*, Section 4(1)
77 Theresa May Speech, The government's negotiating objectives for exiting the EU: PM speech, Lancaster House, 17 January 2017

be replaced prior to Brexit day, which might occur through the Great Repeal Bill or through other primary legislation.

David Davis's 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".[78] This implies that the Bill may not itself identify or select particular laws to be transposed. Instead transposition in the Great Repeal Bill could be wholesale, and then will be followed by "consequential legislation", some of which Mr Davis indicated would be primary.

Further primary legislation might be used to repeal and replace those areas of EU law that could not be easily converted so as to work effectively after Brexit day. He referred to some areas of EU competence that could need their own bills as part of the transposition process, citing agriculture, fisheries and immigration as possible examples.[79] He also noted that much of the technical changes that would need to be made to the EU law to be converted, in order to ensure it operates effectively, will need to be made by secondary legislation, through powers likely to be included in this Bill.[80] All of these changes, Mr Davis explained, would need to be made before the ratification of the withdrawal agreement.[81]

Areas where simple transposition may not be possible might therefore need separate Acts of Parliament to be passed before the UK leaves the EU. This point was reinforced by David Davis's indication, during the evidence session, that any powers in the Bill would only be used to make "technical" changes rather major policy decisions.[82]

This serves to emphasise the fact that transposition will have to be carefully phased with a multi-stage process. The way in which the transition is implemented, and the nature of any "interim arrangements" is likely to depend on the outcome of the negotiations with the EU.

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 may 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.

There are also some directly applicable provisions which depend on co-operation with Members State and the EU itself. For example those

78 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016
79 Ibid
80 Ibid
81 Ibid
82 Ibid

concerning the Four Freedoms (Free Movement of Goods, People, Services and Capital). The way in which these provision operate will depend on the UK's negotiations with the EU. As Kenneth Armstong, Professor of European Law at the University of Cambridge, outlines:

> 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.[83]

According to Professor Douglas Scott, 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 under Article 50? And what happens if agreement is not reached?[84]

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".[85] 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, explains:

> …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.[86]

At this stage it is not known how any adjustments based on the negotiations will be made. Ultimately how powers in the Bill could be

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

84 S Douglas-Scott, 'The Great Repeal Bill: Constitutional Chaos and Constitutional Theory', *UK Constitutional Law Association*, 10 October 2016

85 Gov.uk, 'Government announces end of European Communities Act', 2 October 2016

86 S Laws, 'Article 50 and the political constitution', UK Constitutional Law Association, 18 July 2016

used at each of the various stages of the process will depend on they are drafted, and the nature of any limits included.

These issues will be addressed in more detail in Section 5 of this briefing.

A recent report by The UK in a Changing Europe, an independent research initiative funded by the Economic and Social Research Council, has highlighted the connection between the post-Brexit statute book and the outcome of withdrawal and the future arrangements agreement with the EU. The report, *Brexit and Beyond; How the United Kingdom might leave the European Union*, outlines four different options for the UK's legal relationship with EU law, ranging from full ongoing legal compliance to explicit non-compliance. The Great Repeal Bill is unlikely to reveal whether the UK intends to pursue hard or soft Brexit, but the ways the powers in the Bill are used could depend on the form of Brexit adopted in the agreements between the UK and the EU.

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.

An example of where transposition may give rise to difficulties is when the laws in question make reference to, and depend upon, European Union institutions or agencies. The European Medicines Agency (EMA) is responsible for evaluating medicinal products, and is directly referred to in the relevant EU regulations.[87] 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 technical, but such matters will arise with literally hundreds of EU provisions, requiring thought, time, expertise and cost before the law will be workable. [88]

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. In such scenarios, how will be legislation be made to function? Will

87 For example: Regulation (EC) No 726/2004

88 S Douglas-Scott The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?, 10 October 2016

ongoing interactions with the EU be maintained, or will the legislation be reframed so that it functions independently, or will such provisions simply not be transposed?

Another important question is when directly applicable EU law is transposed post-Brexit, will the Great Repeal Bill enable the law to be updated in line with changes made by the European Union post Brexit? Or will the law which is transposed be "Grandfathered" so that any EU law transposed will not be updated post-Brexit day? If the latter is correct, the EU and UK regulatory regimes could diverge over time.

3.4 Drafting for transposition

At this stage it is unclear to how transposition via the Great Repeal Bill will work. In particular, how will directly applicable Treaty provisions be transposed or converted into domestic law.

Certain provisions in the European Union's Treaties are couched in broad language that is not normally used by drafters of legislation in the United Kingdom. Even European Union Regulations, which are directly applicable detailed technical provisions, are drafted in order to operate in all Member States and are therefore not drafted in the same way as domestic legislation is drafted in the UK.

As such, transposing directly applicable European Union into domestic legal form could give rise to the issues which currently faces drafters when implementing European Union directives, namely whether the provisions should be copied out or replicated when enacted here, or whether they should be rendered into precise English. This is to an extent a technical question, but it will have important implications for future interpretation by UK courts, and in relation to the question of the relevance of the original European provisions and relevant materials used to determine their meaning, such as judgments of the CJEU.

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.[89] For example, the *Consumer Protection Act 1987* and the *Consumer Rights Act 2015*, both refer and give effect to EU, directives.

At this stage it is not known whether the Great Repeal Bill will provide for or enable changes to be made to this body of law. Some of this legislation could continue to function post-Brexit without amendment.

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. Most Acts of Parliament that give effect to EU obligations will, like the *Equality Act 2010*, function effectively post-Brexit without amendment.

At the same time, Brexit may give rise to changes as to how these Acts are interpreted in the courts, as the underlying EU law, including the judgments of the CJEU may no longer be relied upon in the same way as it was pre-Brexit (this is addressed in Section 7 of this briefing).

Further 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;

[89] 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)

- 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. As a consequence, the powers in the Great Repeal Bill may also enable changes to be made to secondary 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
Wildlife and Countryside Act 1981	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.
Environmental Protection Act 1990	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)
Trade Marks Act 1994	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
Competition Act 1998	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.
Pollution Prevention and Control Act 1999	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.
The Extradition Act 2003	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.
The Communications Act 2003	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, to give effect to the outcome of the negotiations with the EU "as they proceed".[90]

On the date this Bill is introduced, it is unlikely that the Government will know the outcome of the negotiations with the EU. It is also unlikely that the Government will know all of the changes that might need to be made to EU-related legislation currently on the UK statute book, as well as that to be transposed by the Great Repeal Bill itself, in time for the UK's first day outside the EU.

To account for these unknowns, the Government could include delegated powers in the Bill in order to empower Ministers to:

a. give effect to the outcome of the negotiations;

b. change EU-related legislation to match the Government's policy objectives;

c. amend EU-related legislation so that it functions effectively post Brexit.

In evidence to the Exiting the European Union Committee on 14 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 primary legislation, and not through statutory instruments.[91] He added "I don't foresee major changes by SI".[92]

How any powers in the Great Repeal Bill are drafted and used will be informed by the decision of how many separate "consequential" bills will be needed before Brexit day. The Government will have to decide on the balance between primary and secondary legislation in changing the statute book to give effect to Brexit.

Mr Davis' evidence implies that the Government will only use delegated powers to make adjustments to the transposed acquis. Even if the powers are framed so that they can only be used by Minister to make EU-related legislation operate effectively (option c above), the potential scale of technical changes needed could mean that the powers included are nonetheless relatively significant.

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90 Gov.uk, 'Government announces end of European Communities Act', 2 October 2016

91 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

92 Ibid

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 normally used to enable the Government to enact detailed statutory provisions. Secondary legislation is drafted in Government departments. Parliament's ability 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.[93]

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".[94]

Henry VIII powers are seen by their critics as transferring legislative power from Parliament to Government. This is in part because secondary legislation (also referred to as delegated legislation, subordinate legislation, or statutory instruments) generally receives less overt scrutiny in Parliament than primary legislation. As such, Henry VIII powers are often considered a means to facilitate Government to circumvent the full legislative process, which the executive would otherwise need to use in order to enact primary legislation.

In the case of law that derives from the EU, the potential introduction of UK ministerial power to vary that law causes special concern in devolved 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

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93 *R (on the application of The Public Law Project) (Appellant) v Lord Chancellor (Respondent)* [2016] UKSC 39

94 'Henry VIII clauses' get their name from the 1539 *Act of Proclamations* (31 Henry VIII, c.8). That 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 thoughe 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).

> 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?[95]

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

Once Article 50 is triggered and the countdown to the two-year deadline begins, Parliament will only have a limited time to enact any changes necessary in order to be ready for Brexit day.

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.[96] 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 made to accept concessions during the negotiations because of a need to secure more time for implementation.

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.[97]

Mr Davis' evidence appears 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, particularly that which may have been transcribed, operates effectively post-Brexit. It is not yet known whether the powers will be specifically limited to such a purpose. A potential challenge is that it might prove difficult to define what counts as a "technical" change. Further, the Government might want the powers to be able to be used for other purposes. For example, the powers in the Bill might be used by the Government to change the

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95 HC Deb 7 November 2016 c1318

96 S Laws, 'Article 50 and the political constitution', UK Constitutional Law Association, 18 July 2016

97 Exiting the European Union Oral evidence: The UK's negotiating objectives for its withdrawal from EU, HC 815, 14 December 2016

transcribed acquis so as to keep pace with any changes made by the EU, in areas where it is decided that the UK does not want to diverge from EU law immediately post-Brexit.

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 not wish to limit any delegated powers in the Bill to any one particular purpose.

As delegated powers have been central to the legislative scheme used to facilitate the UK's EU membership, namely through section 2(2) of 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. Delegated powers are therefore arguably necessary and appropriate for the purpose of legislating for Brexit.

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

It is expected that the delegated powers in the Great Repeal Bill will include broadly-framed Henry VIII powers. Stephen 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".[98]

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 set out 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 Henry VIII 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.[99]

Some constitutional scholars - for example, Nick Barber and Alison Young, both Professors of Law at Oxford University - argue that Henry

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98 S Laws, 'Article 50 and the political constitution', UK Constitutional Law Association, 18 July 2016

99 Rt Hon Lord Judge, 'Ceding power to the Executive: the Resurrection of Henry VIII', King's College London lecture, 12 April 2016

VIII powers can "have a positive role to play in the constitution".[100] They do acknowledge that there are acute concerns for parliamentary sovereignty when Parliament enacts Henry VIII powers, as they 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".[101]

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".[102]

The appropriateness 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 yet known whether the scope of any powers will to 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;
- 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.

Any delegated powers in the Bill could be used from the moment they are enacted to begin the process of adapting EU related legislation in

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100 N Barber and A Young 'The Rise of Henry VIII Clauses and their Implications for Sovereignty' *Public Law* [2003] 113

101 Ibid

102 Ibid

advance of the UK leaving the EU. The Government may wish to use the powers in the Bill to make changes that it regards as necessary and in pursuit of its policy objectives, irrespective of the content of any potential withdrawal agreement.

When and how the delegated powers can be used will ultimately depend on how the powers are defined in the Bill.

The powers could be strictly limited to ensuring that the transfer of EU law is technically effectively after Brexit. Even if the powers were so narrowly defined they could be used before and after the UK leaves the EU .

Alternatively, they could be used for a range of legislative tasks relating to Brexit.

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 could 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.

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 included broad delegated powers, debate in both Houses has often focused on whether the powers should be amended so as to limit the use of the power 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.[103]

The claim of 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.[104] 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.[105]

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*,[106] would, if applied, mean that the courts would assume that Parliament did not intend to delegated the power to the executive to infringe fundamental rights.

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*. This debate provides an example of how the scope of powers have been analysed in Parliament.

Box 3: The scope of the delegated powers in the *Legislative and Regulatory Reform Bill 2005-06*

[103] 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

[104] The Earl of Donoughmore (Chair), Report of the Committee on Ministers' Powers, Cmd 4060, April 1932

[105] *McKiernon* v *Secretary of State for Social Security*, The Times, November 1989; Court of Appeal (Civil Division) Transcript No 1017 of 1989

[106] [2000] 2 AC 115, 131 HL

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".[107]

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".[108]

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.[109]

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.

During debate on the *Legislative and Regulatory Reform Bill*, a number of safeguards were added to prevent the powers being used for certain ends. 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.

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107 House of Commons Regulatory Reform Committee, *Legislative and Regulatory Reform Bill,* 6 February 2006, HC 878 2005-06, p16

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

109 Section 1 and Section 2 of *Legislative and Regulatory Reform Act 2006*

The scope of powers in the Great Repeal Bill

As the competences of the European Union, 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, it is likely that the powers will have to be broadly framed to cover a large range of 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.[110]

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.

5.2 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. There are two main forms of procedure specified by the *Statutory Instruments Act 1946*: the negative and the affirmative resolution procedures (see box 3).

The Cabinet 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.[111]

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

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110 S Douglas-Scott, 'The Great Repeal Bill: Constitutional Chaos and Constitutional Theory', *UK Constitutional Law Association*, 10 October 2016

111 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)

one.[112] The difference between the two has been outlined by the Committee in their Report: *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers.*[113]

Box 4: Affirmative or negative procedure?

Under the **negative procedure**, a statutory instrument is laid before both Houses[114], 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[115] 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 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

[112] D Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament*, 2011, p207

[113] 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

[114] In some cases the parent Act may specify that the instrument is to be laid before the House of Commons only.

[115] In some cases the parent Act may specify that the instrument is to be approved by the House of Commons only.

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.[116] 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.[117] For example, the powers in the *Legislative and Regulatory Reform Act 2006* are subject to what is 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.

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 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.[118]

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.[119] At the same time, he notes

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116 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

117 For a full analysis of the differences see the *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* p8

118 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/

119 Greenberg, *Laying Down the Law*, p209

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.[120] 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".[121]

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.[122]

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. [123]

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120 Ibid., p209

121 Ibid., p211

122 J Blackwell, 'Will the Great Repeal Bill be another 'Abolish Parliament' bill?, Hansard Society Blog, 20 October 2016

123 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

The Government has said that legislation connected to the UK's withdrawal from the EU must work for the whole of the UK.

David Davis, Secretary of State for Exiting the European Union, has said the UK Government will work closely with, and consult, the devolved administrations to get the best possible deal for all parts of the UK. However, he has also warned that "no one part of the UK can have a veto over our exit."[124]

Two immediate questions arise in respect of devolution

- Will the Great Repeal Bill need consent from the devolved legislatures?
- Will they need similar legislation of their own?

The inclusion of extensive Henry VIII powers also has complex implications for the devolved institutions, which are discussed below.

6.1 Consent

The 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.[125]

This Convention was reflected in statute in the *Scotland Act 2016*, and is also reflected in the *Wales Bill 2016-17* currently in passage through Parliament.[126]

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:

- removes from the devolved legislatures the requirement to abide by EU law, thus changing devolved competence
- changes actual EU law going forward that is currently part of the devolved body of law

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124 HC Deb 10 October 2016, cc40-2

125 See *The "Sewel Convention"*, SN 2084, 25 November 2005, and next footnote.

126 *Scotland Act 2016*, s2, *Wales Bill 2016-17*, c2. For discussion see also *Scotland Bill 2015-16*, CBP 7205, 4 June 2015, and *Wales Bill 2016-17*, CBP 7617, 13 June 2016.

- 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

These options are discussed further immediately below.

In January 2017, the Secretary of State for Scotland, David Mundell, has 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.[127]

Changing or preserving EU law on devolved matters

If the Great Repeal Bill changes any existing EU law that relates to devolved matters, then it would be doing something that usually brings the Sewel Convention into play. However, even if it provides for the continuing effect of EU law that relates to devolved matters, then, so long as the Government chooses to abide by the Sewel Convention, consent motions will be required from the devolved legislatures. This is because the UK Parliament would still be legislating on devolved matters, even though the effect would be to preserve the status quo.

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. It is not clear if withdrawal from the EU would be considered "normal." Thus it will 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 stated in the devolution statutes.[128] If consent is sought it might be withheld or the process of securing consent might introduce a delay. Equally, not using the Sewel Convention would bring its own political issues and would raise objections in the devolved institutions.

A proportion of European Union law relates to subject matter which has been devolved in each of Scotland, Wales and Northern Ireland, for instance agriculture, fishing and the environment.[129] Professor Sionaidh Douglas-Scott drew attention to this in a paper for the Scottish Parliament's European and External Relations Committee:

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127 "Mundell: Holyrood to be consulted on Great Repeal Bill," *BBC News*, 26 January 2017

128 *Scotland Act 1998*, s28(7), *Government of Wales Act 2006*, s107(5), *Northern Ireland Act 1998*, s5(6)

129 Sionaidh Douglas-Scott The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?, 10 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. [130]

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.[131]

There is also the matter of EU law that provides a passive framework in which the exercise of devolved competence must take place. The removal of a Treaty base and the ECA might have unexpected consequences across the devolved statute books, and an argument of prudence can therefore be made in favour of legislation to maintain EU law across the board.

It appears then that there will be a need to legislate on matters which currently fall to the EU but which would otherwise be devolved. If this is done in a UK Bill, then the devolved institutions would be likely to expect consent motions to be requested by the UK Government.

This would be the case if the UK sought either to change that law with effect after withdrawal, or to claim ongoing competence over the matter. It would also be the case if the UK sought to state the continuation in force of existing EU law in devolved matters.

Changing the scope of devolved powers

There is also an issue as to whether the Sewel Convention might come into play where EU exit removes some specific responsibilities from devolved institutions.

The competences of the devolved legislatures and executives are circumscribed by EU law, and some positive responsibilities are placed

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

131 Alan Page, The implications of EU withdrawal for the devolution settlement (2016) p4

upon the executives to implement that law. This is shown in Box 4 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 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 5: 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, then those Bills would be the subject of consent. It would not be certain whether the Great Repeal Bill would still be subject to the Sewel Convention on the grounds of a change in competence. It is not, after all, the ECA that shapes devolved competence, but EU law. The Great Repeal Bill will be repealing the ECA. Withdrawal from the EU may well automatically render EU law defunct in respect of all parts of the UK, and hence will expand devolved competence, but that withdrawal will not be effected directly by means of the Great Repeal Bill.

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 repeal:

> 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.[132]

Professor 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.[133]

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 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

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132 *National Assembly for Wales Record of Proceedings*, 8 November 2016

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

> as they will be able to legislate in fields where the European Union had previously had competence.[134]

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

In December 2016, the Scottish Government published Scotland's Place in Europe.[135] 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.[136]

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.[137]

The paper outlines that "repatriated competences" from the EU will be the responsibility of the Scottish parliament.[138] It also signals that it would resist any attempt reserve "repatriated competences" such as agriculture, fisheries, education, health, justice and environmental protection.[139]

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.[140] More significantly, the paper outlined 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

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134 *EU reform and the EU referendum: implications for Scotland*, SP Paper 978, 19 March 2016, text box, p49
135 Scottish Government, Scotland's Place in Europe (December 2016)
136 Scottish Government, Scotland's Place in Europe (December 2016) para 176
137 Ibid
138 Ibid
139 Ibid
140 Welsh Government and Plaid Cymru, Securing Wales' Future (January 2017) p28

> 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.[141]

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".[142] The Committee explains that 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. The Committee point 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 that is based on EU law. The Assembly could not remove those powers without the UK Ministers' consent.[143]

Miller and the Supreme Court on Sewel

The Supreme Court held unanimously in *Miller*, in its judgment on 24 January, that the Sewel Convention, despite being recognised in statute,[144] is a political convention that does not give rise to a legal obligation that can be enforced in the courts.[145] In response, the Scottish Government's Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell MSP, stated that he was "disappointed" with the Supreme Court's position on the legal enforceability of the Sewel Convention:

> 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. The UK Government merely reinforces the old view—the supremacy of Westminster and its immunity from constraint by law or courts or respect for this Parliament. We can expect to see more of that as Brexit proceeds; we already see that attitude in proposals for UK-wide regimes, overriding existing devolved competence.[146]

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141 Ibid

142 External Affairs and Additional Legislation Committee, Implications for Wales of leaving the European Union, January 2017 para 297 ; See below

143 External Affairs and Additional Legislation Committee, Implications for Wales of leaving the European Union, January 2017 paras 300-301

144 Section 28 (8) Scotland Act 2016 and Section 107 (6) of the Government of Wales Act 2006

145 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5 paras 148-149

146 SP OR 25 January 2017 c17-18

David Davis MP, Secretary of State for Exiting the European Union, stated, in response to the judgment, that it would not diminish the 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".[147]

6.2 Henry VIII powers and devolution

If the Great Repeal Bill includes Henry VIII powers, the impact on devolution depends on what approach is chosen from a range of options.

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.[148]

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.[149]

Powers for the Secretary of State alone

The Secretary of State could acquire Order-making powers in matters that are devolved, if s/he gains powers to vary any and all EU law.

The Sewel Convention does not apply to secondary legislation, so even the convention of gaining consent would not apply in this instance. There would be no mechanism to seek, gain or respect consent unless a new Convention were adopted.

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147 HC Deb 24 January 2017 c162

148 Evidence, 27 October 2016

149 Ibid

To avoid this situation, the Order-making powers could be restricted to reserved matters or the scope of the Bill itself could be restricted in this way. This would provide a simple solution to the extent that reserved powers are identifiable in respect of given policies and can be taken in isolation.

However, devolution law, in the form of the devolution statutes and their interpretation by the courts, already contains extensive and complex provisions to manage the interaction of devolved and reserved competences. This happens, for example, in subjects that have elements of each, or where a policy that is clearly reserved/devolved has tangential effects on the other body of law. Therefore it is open to question whether the solution of a Great Repeal Bill restricted to reserved matters could be easily and reliably achieved.

Powers for UK and devolved ministers

It is possible to envisage a UK-wide Henry VIII power that would be created by the Bill, but exercisable by UK or devolved ministers in their respective areas.

This might have the benefit of certainty in that a single Act of Parliament would contain an unquestioned basis for the continuance of EU law, while the variation of that law in practice would be available to whichever ministers had responsibility for the subject matter in future.

Professor Alan Page has suggested that any Henry VIII power in the Great Repeal Bill could be exercised by both devolved (in his case, Scottish) and UK ministers:

> The question that will arise is whether it should be exercisable by UK Ministers as well, as is currently the case with the implementation of EU obligations in the devolved areas, which would then open up the possibility of relying on UK subordinate legislation in disentangling UK law from EU law and filling any resulting gaps. This raises in turn the question of Scottish parliamentary control over such legislation. 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.[150]

Powers subject to devolved consent

[150] Alan Page Brexit: the implications for the devolution settlement Centre on Constitutional Change (2016)

The Government could draft a Great Repeal Bill in such a way as to give the devolved legislatures or ministers a say over the use of Order-making powers.

There are examples of this in existing statutes.

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 —
>
> (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.[151]

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:

> (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.

6.3 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.

[151] Other examples include adding new devolved taxes (s80B)

If the UK Great Repeal Bill preserves all EU law applicable in the UK, regardless of where competence lies to change that law in the future, then the devolved legislatures might need to enact provisions stating, for instance, that references to the TEU or the ECA should be read as references to the Great Repeal Bill (by then "Act"). These sorts of issues will come down to the details, and timings, of the withdrawal agreement, the Great Repeal Bill and any Henry VIII powers created by it.

If the Great Repeal Bill does not make provision for EU law on devolved matters, then it seems inevitable that the devolved legislatures will need to pass legislation of their own to create some kind of basis for the ongoing application of EU law. This might create the potential for tension were the UK level to agree to a package of changes on the international plane which would seem to pre-empt, or force the hand of, the devolved legislatures when passing their own continuation Acts.

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"). For instance, it would be politically problematic for the devolved nations to be obligated in respect of EU Member States, or an EU quota regime, on the basis that it had been "rolled over" the point of withdrawal, if the remaining EU Member States were not obligated to reciprocate or to respect the arrangements because the UK and its constituent parts would no longer be Members themselves.

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.[152]

An interesting issue arises from the last point made in this quotation, that the Scottish Government could opt to shadow EU law if it wished,

[152] SP Paper 978, 19 March 2016, para 110, p41

for instance to support rapid re-entry in the event of independence from the UK.

Not only may some continuing provisions rely on a web of other EU law, but some may require clarification from the CJEU. The Great Repeal Bill is likely to (have to) remove the jurisdiction of the CJEU. Likewise, Article 267 TEU, which allows matters of interpretation of EU law to be referred to the CJEU, applies only to Member States. As a result, a Great Repeal enactment, like the withdrawal from the EU itself, will limit the capacity of devolved institutions to shadow EU law in a precise way.

Professor Sionaidh Douglas-Scott has addressed this point in a paper for the Scottish Parliament's European and External Relations Committee:

> A further matter concerns the role of the CJEU post Brexit. On the one hand, the 'Great Repeal Bill' will have stipulated that the UK no longer recognises its jurisdiction. That was an essential part of 'taking back control'. On the other hand, not recognising CJEU jurisprudence will render EU-derived UK law static, and of limited utility when it concerns trans-border matters (eg criminal law matters, such as EU arrest warrants, where the UK is likely to want to continue co-operation with the EU). So although CJEU decisions may be of 'persuasive' authority only post-Brexit, UK courts may find it practical to reach similar conclusions to the CJEU for a time to come.[153]

Sir David Edward, former judge at the CJEU, summarised some of the legal considerations for dealing with EU-derived law in evidence to the House of Lords European Union Committee, as mentioned in Section 7 below.[154]

The Scottish Parliament's European and External Relations Committee presented a picture of what it saw as a powerful impact on the work of the political institutions around the UK:

> For pragmatic and practical reasons, notably if the UK wished to have continued access to the single market, the UK might find that it had to retain EU law and voluntarily adopt it in the future. There could also be areas where it would be simply easier to continue with existing legislation, for example in relation to discrimination, rather than introducing a new regime. A close consideration shows that while the UK might choose to leave the

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153 *The "Great Repeal Bill" and issues of legislative consent*, Briefing Paper for Scottish Parliament's European and External Relations Committee, 9 October 2016, p4, para 6(iii)

154 *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

> EU, it is likely that the effects of EU law would continue to govern and shape our lives for many years to come. [155]

The Committee also recognised the impact that this could have on the UK and devolved legislatures and the potential for it to detract from other scrutiny and inquiry work due to the time required to deal with the repealing, amending or replacing of EU law.[156]

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":

> 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.[157]

Such devolved legislation would depend on the nature of the withdrawal agreement and might therefore require coordination of a more or less delicate nature between the executives and legislatures of the UK.

If a question arises about the need to coordinate multiple continuation Acts with the ratification of a single new treaty with the EU, presumably well-organised commencement Orders would allow both piecemeal "new reality" legislation and a single "new treaty" instrument to co-occur.

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155 SP Paper 978, 19 March 2016, text box, pp42-3

156 Ibid

157 *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.[158] 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.

Once the ECA is repealed, the courts in the United Kingdom will therefore no longer be under an obligation to give effect to EU law over and above domestic law. As such, this will mean that EU law is no longer given primacy, and any legal provision on the statute book which originated from a provision of EU law will be afforded the same status as any other provision of domestic law.

Changing the status of EU law in domestic law will not necessarily end the influence of the CJEU in domestic courts. If as predicted, after Brexit, a large amount of primary and secondary legislation that originates from EU law remains on the statute book, it is likely that the UK courts will continue to refer to judgments of the CJEU to guide the interpretation of that legislation. Further, judgments of the CJEU form part of the *Acquis Communautaire*, which the Government has indicated will be converted into domestic law.[159]

A related question concerns the approach of the UK's courts to interpreting domestic laws based on EU law after Brexit day. Currently domestic courts will often look behind a provision of domestic law to the relevant EU provision, for example a Directive, to assist their interpretation and application of the law. It is not known to what extent this will continue after Brexit. As Supreme Court noted in *Miller*, leaving the jurisdiction of the CJEU will mean that any law transcribed will not necessarily have the same effect as it would before Brexit as domestic courts will not be able refer questions of interpretation to the CJEU.[160]

The Government's 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 be interpreted as it is currently. Further the judgments of the CJEU are, as a result of over 40 years of EU membership, embedded in the judgments of domestic courts.

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158 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

159 See statement of the Minister of State for Department for Exiting the European Union, David Jones MP HC Deb 7 November 2016 c1363 – cited below

160 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5 para 70

The UK Government could legislate to give the courts a specific direction as to how to treat the judgments of the CJEU in their interpretation of statutes based on EU law post-Brexit.[161] It is not yet known whether the Government intends for such an interpretive instruction in the Great Repeal Bill.

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 law might be changed 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 countries. 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.

When it does so, the UK Government must do something to remedy the situation and comply with the judgment of the CJEU, 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.[162]

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 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

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161 For example, Professor Steve Peers, from the University of Essex, has suggested such a provision might be included in the Great Repeal Bill: "As bad as it gets: the White Paper on Brexit", EU Law Analysis 3 February 2017

162 To date the UK has not incurred such a fine for failure to implement an EU obligation

law is observed". However, the CJEU's role in the EU's institutional framework is, for some, controversial.[163]

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.[164] 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.[165]

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.[166]

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 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.

After Brexit, the UK's courts will no longer need or be able to make references to the CJEU under the Article 267.

7.2 Domestic courts and EU law

Courts in the UK will continue to interpret and apply laws that originate from the EU after the UK leaves the EU.

However, the Government has indicated that the Great Repeal Bill will change the status of EU law post Brexit, which will no longer be supreme, nor will it be directly applicable.

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163 For example – Sir Patrick Neil, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum 1995)

164 For an outline of such criticisms see Paul Craig and Gráinne de Búrca, *EU Law; Text, cases and Materials* (6th ed 2015) p63-66

165 Ibid

166 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

The change to the formal legal status of EU law within the UK will not necessarily 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.

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.[167]

As Daniel Greenberg notes, in *Craies on Legislation*, even when the relevant domestic law exists as a "self-sufficent text", it is often necessary to refer to the underpinning EU provision.[168] 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) ("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.[169]

Lord Walker added that the case law of the CJEU is also used to guide interpretation.

Domestic courts and the CJEU

As noted above, the judgments of the CJEU form part of the body of law that the Government has indicated will be converted into domestic law. During a debate in the House of Commons on Exiting the EU and

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167 *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

168 *Craies on Legislation*, D Greenberg (ed) (9th edition 2008) part 5

169 *Royal and Sun Alliance Insurance Group Plc v. Customs and Excise* [2003] UKHL 29

workers' rights David Jones MP, the Minister of State for Department for Exiting the European Union, stated:

> The right hon. Gentleman raised, as did the hon. Member for Great Grimsby (Melanie Onn), the issue of what will happen to EU case law and judgments of the European Court of Justice. I wish to make it clear that the starting position of the Government is that EU-derived law, from whatever quarter, will be transferred into United Kingdom law in full at the point of exit.[170]

It is difficult to know how the courts will treat the underlying EU law and the jurisprudence of the CEJU post Brexit. As the courts will no longer be under the obligation, as is currently set out in the ECA, to give effect to the supremacy of EU law, the courts may be free to develop their own distinctive interpretation of EU law that has been transposed. In this sense, the court may approach EU law that has been transposed differently from the way in which the courts currently approach domestic law which implements EU law obligations resulting from the UK's membership of the EU.

On the other hand, the courts may not want to or need to interpret EU law, which has been transposed, differently from the rest of the EU. Equally, even if the judgments of the CJEU are no longer binding on the UK's courts, it may be practical to continue to follow their interpretive guidance. 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.

Kenneth Armstrong, Professor of European Law at the University of Cambridge, explains this in the following terms:

> If the aim is to preserve EU law in the UK unless and until politicians decide to change UK law, to what extent should UK courts follow or at least track developments in the interpretation of EU rules by EU courts to maintain consistency? Should UK judges continue to follow changes in the interpretation of EU rules unless and until ministers decide to express a view on an interpretation they do or do not wish to see reflected in UK law?[171]

The approach of the courts will depend on how transposition is done, and the nature of the UK's withdrawal agreement, and the facts of the cases that raise these interpretive questions after Brexit day.

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170 HC Deb 7 November 2016 c1363

171 Kenneth Armstrong, 'On your marks, get set LEAVE! The technical challenge of the Great Repeal Bill' LSE Brexit Blog (October 2016)

7.3 Replacing the ECA 1972?

One of the key elements of the ECA 1972 is that it provides an instruction to domestic courts as to how they should interpret EU law and the judgments of the CJEU.[172] Section 3 of the ECA 1972 sets out that domestic courts should follow the interpretation of the CJEU on questions of EU law. Once this is repealed, as Thomas Horsley, Senior Lecturer in EU law at Liverpool Law School, outlines the Government could replace this provision with a further instruction to the courts on the status of EU and the jurisprudence of the CJEU.[173]

The majority of the Supreme Court in *Miller* pointed out that once the ECA is repealed, the judgments of the CJEU will be "of no more than persuasive authority".[174] As such if there is no specific instruction to do otherwise after the repeal of the ECA, it is likely that domestic courts would interpret transposed law in the same way as ordinary domestic legislation. They would no longer be bound as matter of law to follow the interpretative approach of the CJEU.

If the Government did include a general overarching legislative instruction on the status of transposed EU law and/or the status of case law of the CJEU, then there are a number of matters to be determined:

- Should there be a cut-off date with respect to the relevance of the judgments of the CJEU?
- What status, if any, should be accorded to the transposed EU law vis-à-vis ordinary domestic law?[175]

It may be that the Government does want the transposed EU law to be given any particular status at all. But if the Government wanted a particular area of domestic law to remain in conformity with EU law, so as to prevent divergence between the UK and EU law for a period, then it could legislate so as to provide that in the event of ambiguity, the law should be interpreted in conformity with EU law. This would not afford primacy to transposed EU law, but could create an interpretive presumption.

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172 A point made by T. Horsley, 'UK Courts and the Great Repeal Bill – Awaiting Fresh Instruction', U.K. Const. L. Blog (28th Feb 2017)

173 Ibid

174 *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, Para 80

175 T. Horsley, 'UK Courts and the Great Repeal Bill – Awaiting Fresh Instruction', U.K. Const. L. Blog (28th Feb 2017)

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