



BRIEFING PAPER

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The *European Union
(Withdrawal) Bill*.
Retained EU law

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Summary

This briefing paper has been prepared for day 2, scheduled to take place on 15 November, of the Committee Stage of the *European Union (Withdrawal) Bill* (EUW Bill) in the House of Commons.

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

- **Clause 2** provides for domestic primary and secondary legislation that give effect to EU law obligations to be retained; this body of law is to be known as 'EU-derived domestic legislation' (Section 2 of this briefing);
- **Clause 3** provides for the conversion of existing EU law that applies in the UK into domestic law; this body of law is to be known as 'direct EU legislation' (Section 3 of this briefing); and
- **Clause 4** would save rights and obligations in EU law that take effect through section 2(1) of the *European Communities Act 1972* (ECA) and that are not converted by **clause 3** (Section 4 of this briefing).

The Commons Library Briefing, [European Union \(Withdrawal\) Bill \(CBP8079\)](#), covers all of the provisions in the Bill, and was published on 1 September 2017.

The conversion of EU law and preservation of existing EU-related domestic legislation that would otherwise be lost on repeal of the ECA is intended to provide legal continuity during Brexit. Without these measures, there would be large gaps in the statute book in important areas of policy where the EU currently has competence, such as agriculture, environmental law and immigration.

Clauses 2, 3 and 4 of the EUW Bill convert and preserve a large amount of legislation. According to the EU's Eur-lex website there were (in November 2017) over 20,000 EU (consolidated) laws in force (Section 6 of this briefing).

This body of law would become part of domestic law immediately after exit day, which is when the repeal of the ECA through **clause 1** would take effect.

Clauses 2, 3 and 4 of the EUW Bill are also designed to lay the foundations for the post-Brexit statute book by creating new legal concepts. The concepts proposed by the Government in clauses 2, 3 and 4 - "retained EU law", "EU-derived domestic legislation" and "direct EU legislation" - re-imagine familiar legal terminology in order to capture a body of law which will undergo significant change and operate under a new constitutional framework. These novel concepts would have important consequences for the way in which the UK's legal systems operate.

These new concepts will also prove instrumental to the Government's strategy in legislating for Brexit. Many, if not all, of the Bills designed to prepare for Brexit are likely to contain provisions and powers that make reference to EU retained law. For example, the [Trade Bill](#), introduced to the House of Commons on 7 November 2017 contains a power to amend retained EU law by secondary legislation in order to implement international trade agreements (**clause 2(6)**).

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Clauses 2, 3 and 4 also underpin the whole scheme of this Bill. **Clauses 5 and 6** provide instructions to the courts on the status and interpretation of retained EU law. **Clause 7, 8 and 9** contain powers to change retained EU law for specific purposes. **Clause 11** provides that retained EU law will replace EU law as a limit on devolved competence after exit day.

Legal experts and parliamentary committees have raised concerns over the clarity and status of retained EU law. For example, it has been noted that it is not clear to what extent **clause 4** converts EU law that does not contain directly enforceable rights. Sir Stephen Laws QC, former First Parliamentary Counsel, has suggested that these clauses depend upon a “suppressed proposition” that these laws continue to have effect “as if the UK were still a Member State”.

In relation to the status of retained law, it is not clear whether converted direct EU legislation (**clause 3**) and saved EU law rights (**clause 4**) are primary legislation, secondary legislation or something else entirely. This could have implications for how retained EU law is amended, and how it is interpreted in the courts (Section 5 of this briefing).

Converting EU law and preserving existing EU-related domestic legislation is designed to provide legal continuity, but it would also enable Parliament to amend this body of law before exit day. The Government has stated that retained EU law will be subject to a raft of changes through secondary legislation in order to ensure that it operates effectively after exit day. For example, a significant amount of the legislation converted and preserved by the EUW Bill will contain references to European Union institutions which may need to be removed for the legislation to operate effectively in the UK after exit day.

The Brexit Bills and any legislation required to implement the withdrawal agreement could also make changes to retained EU law before exit day.

Any transitional arrangements agreed as part of the withdrawal agreement could require retained EU law to be updated in line with changes made by the EU after exit day, and could place practical limits on the extent to which changes to retained EU law could come into effect during any transition period.

1. Introduction

The *European Union (Withdrawal) Bill* (the EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the *European Communities Act 1972* and removing the competence of European Union institutions to legislate for the UK.

The Bill had its [second reading debate](#) in the House of Commons on 7 and 11 September 2017. The [Programme Motion](#) passed at the end of the second reading debate provides for eight days in Committee of the Whole House.

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

A large number of amendments have been tabled for the Committee stage. An up to date list of amendments can be found on Parliament's [bill pages](#) online.

The Commons Library produced a [briefing paper](#) to inform the Second Reading debate which sets out full details of the provisions of the Bill and extensive commentary on them. This briefing paper has been produced to inform the Committee of the Whole House debate on clauses 5 and 6, which are scheduled to take place on days one and three. Day one is scheduled to take place on 14 November. Day three has, at time of writing, not yet been announced.

The House of Lords Constitution Committee has published an [Interim Report](#) on the Bill which includes conclusions and recommendations relevant to the debate on clauses 2, 3 and 4 of the Bill.

2. Clause 2: preserving EU-derived domestic legislation

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

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

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

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

Box 1: Examples of environmental law preserved by clause 2: water management and protection

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

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

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

- [Water Environment \(Water Framework Directive \(England and Wales\) Regulations 2003](#) (as amended)¹
- [Water Environment and Water Services \(Scotland\) Act 2003](#) (as amended)
- [Water Environment \(Water Framework Directive\) Regulations \(Northern Ireland\) 2003](#) (as amended)

¹ There are also separate implementing legislation for the cross-border river basin districts: *Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003* and *Water Environment (Water Framework Directive) (Solway-Tweed River Basin District) Regulations 2004*

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

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

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

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

is designed to include legislation which was not specifically passed or made to implement our EU obligations (for example, because the EU had not legislated in that area at the time the legislation was made) but has since become part of the way in which we demonstrate compliance with EU requirements.²

As the High Court noted in *ITV Broadcasting v TV Catchup limited Ltd* section 2(2)(b) of the ECA allows for legislation to be enacted that is connected to a directive, but that is not necessary for the implementation of a directive, or which is consistent with but does not have the same purpose as a directive.³

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

The House of Lords Select Committee on the Constitution has described **clause 2** as “significantly broader than it needs to be”.⁴ The Bar Council, which represents Barristers in England and Wales, has said that clause 2 should be limited to preserving secondary legislation adopted pursuant to section 2(2) of the ECA.⁵ The Government has said that clause 2 is “deliberately drawn more widely” than domestic law

² [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN), para 74

³ [2001] EWHC 28 (Admin)

⁴ House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 25

⁵ Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 10

which implements EU obligations so to put “beyond doubt” that the provision will catch all the legislation that needs to be caught by other provisions in the Bill (for example clauses 6 and 7).⁶

What is EU-derived domestic legislation?

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

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

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

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

One reason for expressly preserving and including more enactments within the category “EU-derived domestic legislation” is that certain legal consequences will flow from their inclusion. For example, if a provision is defined as “EU-derived domestic legislation” it will be interpreted by the courts in accordance with the pre-Brexit case law of the CJEU (**clause 6(3)**). It would also serve to expand the category of laws capable of being subject to the principle of the supremacy of EU law (**clause 5(2)**).

Clause 7, as discussed in Section 6, enables changes to be made by regulations to cure “deficiencies with retained EU law”. This power can be used for two years after exit day. It can be used to amend all primary legislation, other than certain parts of the *Northern Ireland Act 1998* and the *Human Rights Act 1998*, and so is not limited to changes to retained EU law. However, the breadth of the definition of retained EU law has a

⁶ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

direct bearing on the scope of **clause 7**; increasing the number of laws that could be “deficient” increases the potential circumstances that the power could be used in line with its purpose.

Box 2: Equality Act 2010

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

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

It is difficult to overstate the significance of EU law to domestic equality law; as one text puts it, EU equality directives “changed UK law more than the Equality Act did: by comparison, the provisions of the Equality Act are matters of detail”.⁷ At present, EU discrimination law includes, among other things, Treaty obligations covering equal pay between male and female workers; a directive on equal treatment in the workplace in respect of disability, religion or belief, sexual orientation and age; a directive on race discrimination; and a directive on equal treatment between men and women in matters of employment and occupation. This body of EU law and the cases that interpret it, together with the *Equality Act 2010* insofar as it implements EU law, would form part of retained EU law, preserved by **clause 2**. In consequence, the Bill would provide for a large degree of legal continuity.

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

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

⁷ *Blackstone’s Guide to the Equality Act 2010*, 2012, p5

3. Clause 3: converting direct EU legislation

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

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

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

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

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

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

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

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

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

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

Chemicals

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

Regulation places responsibility directly on industry to manage the risks from chemicals and to provide safety information on the substances.

The House of Commons Environmental Audit Committee published a report on the [Future of Chemicals Regulation after the EU Referendum](#) which found that the chemicals regulation framework established through REACH would be difficult to transpose directly into UK law, pointing to the fact that much of it relates to "Member State co-operation and mutual obligations, oversight and controls, and freedom of movement of products". A Government Response to the report has not yet been published.

There are also specific EU laws for specific groups of chemicals, such as pesticides and pharmaceuticals, which are not set out in this paper. More information is available on the [European Commission Chemicals webpage](#).

When does EU law become operative?

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

The concept of a law being "operative" is novel. **Clause 3(3)** defines "operative" as any provision which is stated to come into force at a particular time and then apply from a later date, a decision to which the person to whom it is addressed has been notified, or any provision in force before exit day. The Bar Council has raised concerns on the basis that EU legislation is often "produced as 'packages' of laws around a particular policy area with different provisions coming into force and applying at different times".⁸ There is a risk, the Bar Council has suggested, that Clause 3 "creates a cut-off point at exit day which means that the UK will adopt some provisions in relation to a particular area of policy but not those that are part of the same package of measures which do not apply and come in to force until after exit day".⁹

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

EU regulations

EU regulations, which are addressed to all Member States, enter into force on the date specified in them, or if no date is specified, on the 20th day after their publication in the Official Journal of the EU (OJEU). But their effects, or some of them, may be operative from a later time. The Explanatory Notes to the Bill refer to this as "staggered application".¹⁰

This approach gives legal force to the agreement to bring something into force later on, leaving actual application of the regulation until

⁸ Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 23

⁹ Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 23

¹⁰ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN), para 49

later.¹¹ In the EUW Bill an EU regulation or part of one which applies after exit day will not be converted.

EU decisions

EU decisions can be addressed to one or several EU Member States, or one or several companies or individuals.¹² The party/parties concerned must be notified and the decision takes effect upon this notification. They may be published in the Official Journal of the EU, but publication does not mean formal notification is not needed. Notification is the only way to ensure the act is enforceable against the addressee (Article 297 TEU).

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

What is tertiary legislation?

Clause 3 does not use the customary EU terminology to distinguish between EU legislative and non-legislative acts. The Bill uses the term ‘tertiary legislation’ for EU implementing and delegated acts.¹³ These are usually Commission (occasionally Council) regulations, directives or decisions and they are binding (either on all Member States or those to whom they are addressed). The Explanatory Notes point out that the distinction between legislative and non-legislative acts refers to the EU procedure for the adoption of the act, and not whether the act is legally binding.

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

Examples of non-legislative acts include:

- Commission acts under Article 290(1) TFEU, e.g. Commission regulations in the field of agriculture;
- European Council and Council of the EU decisions under Article 31 TEU (CFSP decisions); and
- European Council decisions under Article 236 TFEU (Council configurations, presidency of Council configurations).¹⁴

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

¹² E.g. the Commission’s [decision](#) to impose a fine on the software giant Microsoft for abuse of its dominant market position, where the only company directly concerned was Microsoft

¹³ For detailed information on these acts, see European Parliament Research Service blog, [Delegated and Implementing Acts](#), 24 September 2012

¹⁴ From: Christa Tobler, Jacques Beglinger, *Essential EU Law in Charts*, 2010

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

The relationship between clauses 3 and 4

One of the principal criticisms made against the drafting of the provisions in the EUW Bill that convert EU law into domestic law (as opposed to preserving EU-related domestic legislation) is that the logic of the relationship between **clauses 3** and **4** is unclear. The Government has said that “when considering the meaning and effect of these provisions, it is crucial that they are considered together, and alongside the rest of the Bill as a whole, including detailed provision set out within the schedules”.¹⁵

Sir Stephen Laws QC outlined his analysis of the connection between the two provisions in the following terms:

I do not fully understand why separate provision is made by clause 3 for “direct EU legislation”. All directly applicable EU law (including all direct EU legislation) is currently given effect in the UK under section 2(1) of the ECA. Clause 4 contains provision for securing continuity for rights etc. recognised and available in law under section 2(1), but excludes rights etc. under legislation incorporated into UK law by clause 3. There is probably an explanation for the making of separate and additional provision in clause 3 that is not specifically directed either at the repeal of section 2(1) of the ECA or at UK withdrawal; but it is not clear to me what it is.¹⁶

The Bar Council also raised concerns as to why clause 3 was required to supplement clause 4:

In terms of legal certainty, Clause 3(1) introduces uncertainty as to the status of measures forming ‘part of domestic law’; and Clause 3(3) also introduces a novel and unexplained concept of ‘operative’ EU legislation. It is not clear whether these concepts are intended to differ in their scope from the wording used in section 2(1) of the 1972 Act, which is maintained under Clause 4(1).¹⁷

¹⁵ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

¹⁶ [Written evidence submitted by Sir Stephen Laws KCB, QC \(EUB0004\) to Exiting the European Union Committee](#) para 10

¹⁷ Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 15

4. Clause 4: saving EU law rights

Clause 4(1) preserves any rights, powers, liabilities, obligations and restrictions currently “recognised and available” through section 2(1) of the ECA immediately before exit day, that are not also caught by **clause 3**. By contrast with **clauses 2 and 3**, **clause 4** is cast in general terms (“any rights...”) and does not attempt to define in precise terms which provisions of EU law are to be continued after exit. The Government has described clause 4 as a “broad ‘sweeper’ provision”.¹⁸

The Explanatory Notes says that **clause 4(1)** includes “directly effective rights” in the EU Treaties.¹⁹ **Clause 4** does not convert the EU Treaties wholesale into domestic law, in the way that **clause 3** converts EU regulations. The Explanatory Notes emphasise that this provision is intended to convert rights and obligations arising from the EU Treaties; it does not convert the text of the EU Treaties themselves.²⁰ This could affect the way that these rights are amended by regulations made under **clause 7** (see Section 6).

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

Treaty provisions that do not create such rights might also be caught by **clause 4(1)**: for example Article 267 TFEU, which provides that a domestic court can refer a question on the interpretation of EU law to the CJEU (and in certain contexts *must* make a referral). **Clause 6(1)(b)** explicitly provides that a UK court cannot make such a referral. One possible reading of this exclusion is that **clause 4(1)** does convert Treaty provisions that are not recognised as having direct effect or that otherwise would be redundant once the UK is no longer a Member State. As the clause does not expressly exclude such provisions - for example Article 20 TFEU, which provides the right to vote for the European Parliament - it could be presumed that these are continued by **clause 4(1)**. Such rights can be amended by the **clause 7** power, as the Explanatory Notes points out.²¹

An alternative reading of **clause 4(1)** (“recognised and available in domestic law”) would suggest that provisions which do not have direct effect, such as those relating to the functioning of the EU’s own institutions, and those that do not give rise to an enforceable right in

¹⁸ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

¹⁹ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 97-89

²⁰ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 88

²¹ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 91

domestic law, will not be converted. This reading is supported by the exclusion in 4(2)(b), which the Explanatory Notes state excludes the *direct effect* of Directives which have not been recognised by a court before exit day.²²

Clause 4(2)(b)

Clause 4(2)(b) provides that directly effective provisions of directives that are not “of a kind” recognised by a European or domestic court prior to exit day will not be converted. Professor Paul Craig, University of Oxford, has outlined two different interpretations of this exception.²³

On one reading, it would be necessary for an individual to show that a right in a directive had been “expressly accorded direct effect in a case concerning that very provision prior to exit day” for it be relied upon after exit day.²⁴ On an alternative reading, a right in a directive could be continued and relied upon after exit day if it was “of the kind to which direct effect would attach, because it is sufficiently precise, certain and clear” to continue, *even if* no pre-exit case had specifically said so.²⁵

The latter interpretation would be preferable, according to Craig, as the “intent underlying the Withdrawal Bill is to bring the existing *acquis* into UK law”.²⁶ The absence of litigation is not evidence that a particular directive does not generate rights. Instead such an absence could be evidence that it “has been accepted that the particular provision does generate rights” on the basis that it is “closely analogous to, or indistinguishable from, another provision that has been held” by a court to have direct effect.²⁷

Which laws will be converted into domestic law by clause 4?

Beyond the example of directly enforceable rights in the Treaties given in the Explanatory Notes, and rights in directives recognised by a court before exit day (clause 4(2)(b)), it is not clear to what extent “recognised and available in domestic law” will act as a filter on what is carried over into post-exit domestic law by **clause 4(1)**. For example, could the CJEU’s interpretation of the Treaties and the rights arising from judgments be converted by **clause 4(1)**?

²² Only directly effective rights arising under an EU directive which have been recognised by a court or a tribunal will be converted into domestic law by clause 4: [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 92.

²³ Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p4-5

²⁴ Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p4-5

²⁵ Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p4-5

²⁶ Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p4-5

²⁷ Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p4-5

The way that the exceptions to **clause 4(1)** are framed in **clause 5(1)** and **Schedule 1** (which **clause 4(3)** expressly provides are the relevant exceptions) would imply that the Government envisages that this body of law could be continued by **clause 4(1)**.

Clause 5(1) provides that the principle of the supremacy of EU law does not apply to post-exit enactments. The Department for Exiting the EU's evidence to the House of Lords Select Committee on the Constitution has stated that 5(1) is necessary "in order to ensure that nothing in the Bill saves the supreme status of EU laws".²⁸ This appears to indicate that the case of *Costa*,²⁹ which established the principle of supremacy, could be continued post-exit by **clause 4(1)**.

Further, the *Francovich* principle,³⁰ which provided that the damages for a state's failure to implement EU law should be available before national courts, and that state liability on the basis of the failure to implement a directive could be established in certain circumstances, is expressly excluded under provisions in **Schedule 1**.

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

A "suppressed proposition"?

Were it not for these exceptions, it might be assumed that much of the case law and provisions relating to the functioning of EU law in a Member State could not be continued by **clause 4**, for the practical reason that they simply cannot be applied in the legal system of a non-Member State. As the House of Lords Select Committee on the Constitution notes "many of the rights derived from EU treaties to be transferred by clause 4 presuppose membership of the EU".³¹ As a consequence, the Committee questions if these rights will have "meaningful effect" after exit day.³²

Tom de la Mare QC and James Segan, from Blackstone Chambers, have argued that the Treaty provisions, identified by the Government in the explanatory notes as capable of being continued by clause 4, would have no possible application after exit day, as they are expressly addressed at Member States of the EU.³³ They highlight a number of examples, such as Article 34 of the TFEU which provides "quantitative

²⁸ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

²⁹ Court of Justice of the European Union, *Flaminio Costa v E.N.E.L*, 15 July 1964.

³⁰ [Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991](#).

³¹ House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 27

³² House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 27

³³ Thomas de la Mare and James Segan [The European Union \(Withdrawal\) Bill: constructive ambiguity or a political choice not yet made?](#) (2017)

restrictions on imports and all measures having equivalent effect shall be prohibited *between Member States*".

Sir Stephen Laws, Former First Parliamentary Counsel, in his evidence to the Exiting the EU Committee, has outlined that clauses 3 and 4 would function after exit day as a result of the "suppressed proposition" that all the converted and continued laws would have effect "as if the UK were still a Member State".³⁴ Laws outlined that this "suppressed proposition" is important to understanding how clauses 3 and 4 would operate:

Directly applicable law can have no application in relation to the UK on or after exit day except on that hypothesis.

To be clear: I do not think that the failure to make the hypothesis express in the Bill means that clauses 3 and 4 fail to produce the desired effect. They cannot be construed in any way other than as preserving continuity. That is clearly Parliament's intention. But Parliament's intention in that regard must still involve the hypothesis of UK membership, even if it is not expressed. It is perfectly legitimate as a matter of drafting, (but, in this case, it may be unhelpful) to elide a proposition if it is in practice unnecessary to spell it out.³⁵

Any practical issues arising from rights preserved by clause 4 could also be resolved through amendments. The Government has said that it will consider whether and how rights continued by clause 4, including those set out in the Treaties, "can be given effect to in the context of our exit from the EU on a case-by-case basis ahead of exit day".³⁶

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

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

³⁴ [Written evidence submitted by Sir Stephen Laws KCB, QC \(EUB0004\) to Exiting the European Union Committee](#) para 17

³⁵ [Written evidence submitted by Sir Stephen Laws KCB, QC \(EUB0004\) to Exiting the European Union Committee](#) para 17-18

³⁶ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

5. The status of retained law

It is not clear whether converted direct EU legislation (**clause 3**) and saved EU law rights (**clause 4**) are primary legislation, secondary legislation or something else entirely. In written evidence to the House of Lords Select Committee on the Constitution, the Department for Exiting the European Union said that law converted by clause 3 will form part of a “unique and new category of domestic law”.³⁷ The Department’s evidence states that it considered prescribing the status of retained direct EU legislation in the EUW Bill but decided against it:

Retained direct EU legislation will operate in a different way to both primary and secondary legislation, was not made by UK legislators, and will have a unique status within the domestic hierarchy.³⁸

The House of Lords Constitution Committee have pointed out that the direct EU legislation incorporated by clause 3 and the EU law incorporated by clause 4 have “no equivalent status in UK law and the Bill makes no provision for them”.³⁹ Professor Paul Craig, University of Oxford, argued that this is “an important ambiguity that lies at the heart of the present schema, which will render the law post Brexit difficult to understand, even for the trained lawyer”.⁴⁰

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

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

³⁷ Department for Exiting the European Union—Written evidence to the HL Constitution Committee (EUW0036)

³⁸ Department for Exiting the European Union—Written evidence to the HL Constitution Committee (EUW0036)

³⁹ House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 28.

⁴⁰ House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 29

In their written evidence to the Constitution Committee, the Department for Exiting the European Union explained that “whether converted law is to be treated as primary or secondary legislation for the purpose of other statutes will be considered on a statute-by-statute basis and set out in further legislation or in regulations made under **clause 17(1)** of the Bill as necessary”.⁴¹

The Constitution Committee argued in their report on the Bill that the status of retained EU law “should be addressed on the face of the Bill to avoid uncertainty”.⁴²

The question of the status of converted direct EU legislation and saved EU law rights, and their relationship with other legislation, is significant for understanding how both forms of law will be interpreted in the courts.

EU-derived domestic law, whether primary or secondary, which is preserved by **clause 2** and is to be classified as retained EU law, will not change its primary or secondary status by virtue of the provisions of this Bill.

Will retained EU law be subject to implied repeal?

If enacted the EUW Bill is likely to be treated as a constitutional statute by the courts, as per the High Court case of *Thoburn*.⁴³ This would mean that it would not be subject to implied repeal. Implied repeal is the rule of statutory interpretation applied by the courts which means that if Parliament has enacted two statutes which contain “irreducibly inconsistent” provisions, “the earlier statute is impliedly repealed by the later”.⁴⁴ In *Thoburn*, Lord Justice Laws established that “ordinary statutes may be impliedly repealed. Constitutional statutes may not”.⁴⁵

The extent to which this degree of constitutional protection will be afforded to retained EU law, and in particular the law converted by **clauses 3** and **4**, is uncertain. A connected question is the extent to which secondary legislation made under the powers in this Bill, particularly those giving effect to any withdrawal agreement, will be subject to implied repeal. If retained EU law or the secondary legislation made under the powers in this Bill are considered to be constitutional statutes, then this could require Parliament to outline in express terms any repeal of any rights that either protect.

Under the UK’s existing constitutional arrangements, EU law rights are afforded a degree of constitutional protection by virtue of a combination of the ECA, the Treaties, and the way both have been

⁴¹ Department for Exiting the European Union—Written evidence to the HL Constitution Committee (EUW0036)

⁴² House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2016-2017 Third Report HL Paper 19) para 29

⁴³ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin)

⁴⁴ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 37

⁴⁵ *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 63

interpreted by the courts. As such Parliament can only legislate contrary to an EU law right if it does so expressly—as it is invited to do in this Bill.

6. The scale of retained EU law

According to the EU's Eur-lex website there were (in November 2017) over **20,000 EU (consolidated) laws in force**. These are mainly directives, regulations, decisions and international agreements, but they include other instruments, such as resolutions, reports and special reports, rules of procedure, guidelines, declarations, inter-institutional and internal agreements, Memorandums of Understanding, programmes, opinions, communications, information, conclusions and statutes. Over the next two years it has been estimated that there could be 1,600 more EU measures.⁴⁶

Directives

According to the EU's Eur-lex database, there are **around 900 Directives in force**, almost all of which apply to the UK.⁴⁷ The vast majority of these are implemented in the UK by Statutory Instrument, either under the authority of the ECA or of another 'parent' act. A few EU directives are implemented in the UK by primary legislation and are therefore already enshrined in UK law.

The Commons Briefing Paper, [Legislating for Brexit: Statutory Instruments implementing EU law](#), lists around 7,900 Statutory Instruments which have implemented EU laws, a significant proportion of these will have been made under section 2(2) of the ECA 1972 and therefore will be preserved by **clause 2** of the Bill. The Commons Briefing Paper 7943, [Legislating for Brexit: EU directives](#), lists EU directives and the UK implementing measures (SIs and Acts of Parliament) as at the end of 2016.

Regulations

There were **12,484 regulations** (in early October 2017), sub-divided as follows:

- [Regulation \(8667\)](#)
- [Implementing regulation \(3374\)](#)
- [Delegated regulation \(438\)](#)
- [Financial regulation \(5\)](#)

While the EUW Bill will formally incorporate over 12,000 EU regulations (see Government's [Factsheet](#) on the Bill), the intention is the amended legislation is considered as one with the legislation amending it - so approximately **7,000 pieces of EU legislation** (comprising the body of EU regulations as amended prior to exit day – the consolidated version) will be incorporated.

⁴⁶ Jill Rutter, Institute for Government, [reply](#) to blog, 24 July 2017.

⁴⁷ Based on data accessed in April 2017.

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

EU decisions

There are **around 7,000 EU decisions** (from the EU Commission and Council). A great many of these are addressed to other EU Member States, companies or even individuals and will not be dealt with in the EUW Bill. **Clause 3** only converts those addressed to the United Kingdom.

It is not clear at the moment how many EU decisions apply to or in the UK.

Publication

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

- EU regulations
- EU decisions
- EU tertiary legislation

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

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