

HOUSE OF LORDS

Select Committee on the Constitution

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3rd Report of Session 2017–19

# **European Union (Withdrawal) Bill: interim report**

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Ordered to be printed 6 September 2017 and published 7 September 2017

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Published by the Authority of the House of Lords

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Q in footnotes refers to a question in oral evidence

## SUMMARY

The European Union (Withdrawal) Bill raises a series of profound, wide-ranging and interlocking constitutional concerns. Indeed, it is difficult to think of areas of constitutional concern that are not deeply engaged by the Bill. In this report, we draw attention to three broad constitutional themes that emerge from our analysis. Those themes respectively concern the relationship between Parliament and the executive, the rule of law and legal certainty, and the stability of the UK's territorial constitution.

The executive powers conferred by the Bill are unprecedented and extraordinary and raise fundamental constitutional questions about the separation of powers between Parliament and Government. In the broader context, it is not merely that the Bill invests the executive with deep legislative competence by authorising the making of "any provision that could be made by an Act of Parliament," it is that the Bill contains multiple such powers, which overlap to a very considerable extent, and which are not subject to an enhanced scrutiny process as we recommended in our previous report. In this way, the Bill weaves a tapestry of delegated powers that are breath-taking in terms of both their scope and potency.

The multiple uncertainties and ambiguities contained within the Bill, to which we draw attention in this interim report, raise fundamental concerns from a rule of law perspective. The capacity of the Bill to undermine legal certainty is considerable. Whenever a Bill is unclear, rule of law concerns arise. But such concerns are especially troubling in relation to a constitutional Bill such as this. The Bill is fundamental to the content and application of the legal system post-exit since it determines both the content of large parts of the law ("retained EU law") and the rules of priority and interaction as between retained EU law and other parts of domestic law. In such circumstances, legal certainty is essential, and the apparent multiple ambiguities in the Bill are deeply problematic. Individuals, organisations and the government need to know what exactly the law is, and what their rights and responsibilities are, post exit, without having to resort to litigation.

The UK's departure from the European Union will have profound consequences for the devolution settlement within the UK. The ambiguities and uncertainties in the Bill extend to issues of devolved competence and this has implications for the balance of the power within the Union and the future of the devolution settlements.

Overall, we conclude that the Bill is highly complex and convoluted in its drafting and structure. This is not to deny that it must inevitably grapple with a set of difficult legal issues. But it is a source of considerable regret that the Bill is drafted in a way that renders scrutiny very difficult, and that multiple and fundamental constitutional questions are left unanswered. We will consider all of these issues in greater detail in our forthcoming inquiry on the Bill.

# European Union (Withdrawal) Bill: interim report

## CHAPTER 1: INTRODUCTION

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### Background

1. In October 2016, the Government announced its intention to bring forward a ‘Great Repeal Bill’ to facilitate the UK’s departure from the European Union while delivering legal “certainty and stability”.<sup>1</sup> This was subsequently confirmed in a White Paper, published on 2 February 2017, which said that the Bill would “remove the European Communities Act 1972 from the statute book and convert the ‘acquis’—the body of existing EU law—into domestic law.”<sup>2</sup>
2. In March 2017, before the arrival of the Bill, we published a report, *The ‘Great Repeal Bill’ and delegated powers*, examining the constitutional issues that were likely to arise.<sup>3</sup> We noted that the Government faced “a unique challenge in converting the current body of EU law into UK law,” that was “complicated not only by the scale and complexity of the task, but also by the fact that in many areas the final shape of that law will depend on the outcome of the UK’s negotiations with the EU.”<sup>4</sup> We made recommendations about how this task should be approached, particularly in relation to the broad delegated powers the Government was likely to require and the safeguards and scrutiny processes they should be subject to.
3. In our report, we welcomed “the Government’s commitment to publishing a white paper on the ‘Great Repeal Bill.’” We said that it “should contain sufficient detail—including draft clauses—to allow for a proper debate on the Government’s approach.”<sup>5</sup> The Government published its White Paper, *Legislating for the United Kingdom’s withdrawal from the European Union*,<sup>6</sup> on 30 March 2017. While it referred to a number of our recommendations, it lacked detail in a number of important areas—such as devolution—and did not include draft clauses.

### European Union (Withdrawal) Bill

4. On 13 July 2017, the Government introduced the European Union (Withdrawal) Bill in the House of Commons. The Bill seeks to “repeal the European Communities Act 1972 (ECA) and make other provision in connection with the withdrawal of the United Kingdom from the EU.”<sup>7</sup> It is

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1 HC Deb, 10 October 2016, [col 40](#)

2 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, Cm 9417, February 2017, p 10: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf) [accessed 6 September 2017]

3 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123)

4 *Ibid.*, paras 5–6

5 *Ibid.*, para 9

6 Department for Exiting the European Union, *Legislating for the United Kingdom’s withdrawal from the European Union*, Cm 9446, March 2017: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/604516/Great\\_repeal\\_bill\\_white\\_paper\\_accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf) [accessed 27 June 2017]

7 [European Union \(Withdrawal\) Bill](#) [Bill 5 (2017–19)]

due to have its second reading debate in the House of Commons on 7 and 11 September 2017.

5. The European Union (Withdrawal) Bill has a simple and essential purpose; to provide legal certainty after the UK leaves the European Union. However, the practicalities of delivering that aim are not straightforward and the Government will need to be realistic about the complexity of the challenges involved in achieving it. The Bill is likely to be the most important legislation that this Parliament will consider. The political, legal and constitutional significance of the Bill—in particular its potential implications for the balance of power between Parliament and the executive—is unparalleled.
6. Accompanying the Bill are Explanatory Notes and a Delegated Powers Memorandum, both of which refer to our earlier report. Although it is our normal practice to report on Bills only when they are introduced in the House of Lords, we consider it appropriate to review this Bill early in light of its significant constitutional implications.
7. This follow-up report examines the European Union (Withdrawal) Bill by reference to our earlier conclusions and recommendations to establish the areas where the Government has taken our points on board and where there are still issues of concern. This report does not explore the Bill’s substance in detail or its legal and policy effect. We will shortly launch an inquiry and take evidence on the Bill with a view to publishing a further report on it later this Session, but some constitutional concerns about the Bill are so fundamental and so striking that it is important for us to identify and explain them now.
8. In Chapter 2, we consider how the Bill proposes to preserve EU law post-exit and how the principle of the supremacy of EU law will apply in relation to retained EU law. We note that the Bill raises difficult technical issues resulting from the relationship between retained EU law and domestic law. There is considerable ambiguity and uncertainty in the Bill as to how retained EU law will work in practice and how the supremacy principle will apply.
9. In Chapter 3, we explore the delegated powers in the Bill. Our earlier report concluded that, given the complexity of converting EU law into UK law in order to facilitate the UK’s exit from the European Union, and the time constraints involved, the Government would almost certainly need “relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit.”<sup>8</sup> The Government quoted this in the Explanatory Notes on the Bill. However, the Government has ignored the qualifications on this statement we set out in our report and the safeguards that we required for such powers to be acceptable.
10. The Bill fails to respect the “key distinction” to which we drew attention in our earlier report. That is the distinction between “the necessary amendments that must be made to the existing body of EU law as a consequence of the UK’s exit from the EU, and substantive, more discretionary changes that the Government may seek to make to implement new policies in areas that previously law within the EU’s competence.”<sup>9</sup> As we advised, only the former was a proper subject for delegated powers. The Bill also fails to adopt our proposal for “a sifting mechanism within Parliament that considers whether

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8 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 46

9 *Ibid.*, para 37

a particular piece of delegated legislation contains policy decisions that should trigger an enhanced form of Parliamentary scrutiny.”<sup>10</sup>

11. In Chapter 4, we look at how the Bill proposes that UK courts interpret the judgments of the Court of Justice of the European Union. We call for Parliament to give the courts greater clarity as to the status of CJEU judgments in domestic law.
12. In Chapter 5, we consider the devolution issues raised by the Bill. We conclude that the political and constitutional consequences of proceeding with the Bill without legislative consent from the devolved institutions would be significant and potentially damaging.
13. **We conclude that the Bill fails to address many of the points made in our earlier report and that it will therefore require amendment to address these fundamental issues.**
14. As part of our ongoing inquiry into the legislative process,<sup>11</sup> we held an evidence session with Professor John Bell, Professor Paul Craig and Professor Alison Young to discuss what the ‘Great Repeal Bill’ might contain and what its consequences might be.<sup>12</sup> All three subsequently made short submissions about the European Union (Withdrawal) Bill, which we draw on in this report. We are very grateful for their contributions to our work and to the assistance of our legal advisers.

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10 *Ibid.*, para 100

11 Constitution Committee, ‘Legislative Process inquiry’: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/inquiries/parliament-2017/legislative-process/>

12 Oral evidence taken on 1 February 2017 (Session 2016–17), [QQ 134–142](#) (Professor John Bell, University of Cambridge; Professor Paul Craig, University of Oxford; and Professor Alison Young, University of Oxford)

## CHAPTER 2: EUROPEAN UNION LAW AND EXIT DAY

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### Repealing the European Communities Act 1972 (ECA)

15. Clause 1 of the Bill states that “The European Communities Act 1972 is repealed on exit day.” For present purposes, the ECA serves three vital functions:
  - It provides for directly effective EU law, such as treaty provisions, regulations and decisions, to have effect in the UK without the need for further enactment. Thus, for instance, regulations adopted by the EU (to the extent that they comply with the requirements for direct effect) become effective and enforceable in the UK without the need for domestic transposition.
  - It provides for the supremacy in the UK of directly effective EU law. Among other things, this enables UK courts to “disapply” Acts of the UK Parliament and to quash other legislation to the extent of any inconsistency with relevant EU law.
  - It provides a legal basis for implementing EU law to the extent that this is necessary. For instance, most EU directives—which do not, in the same way as regulations, decisions and some treaty provisions, have direct effect—have been implemented using the delegated law-making powers conferred by the ECA.
16. It follows that repealing the ECA will have three principal effects:
  - Directly effective EU law will no longer have effect in the UK, because the ECA will no longer authorise it to do so. Although, even without repeal of the ECA, directly effective EU law would cease to have effect in the UK upon exit, because the ECA provides for the direct effect of EU law in the UK only to the extent that the UK’s treaty obligations so require; post-exit, no such obligations will persist.
  - Directly effective EU law will no longer have primacy over UK law—both because there will be no EU law capable of having primacy and because, in any event, domestic accommodation of primacy will cease upon repeal of the ECA.
  - The legal basis upon which UK secondary legislation has been made so as to implement EU directives will be swept away, rendering such secondary legislation invalid.
17. It is self-evident that if these three things were to occur immediately upon the UK’s exit from the EU, the degree of legal chaos that would result would be unmanageable. The remainder of the Bill is therefore devoted to attempting to ameliorate such consequences. It does so by preserving EU-derived domestic legislation and domesticating directly effective EU law, while assigning extremely broad executive powers for the purpose of amending such law. None of these things, however, can happen until “exit day”.
 

**“Exit day”**
18. As a consequence of clause 19, many of the Bill’s provisions will enter into force immediately upon enactment; the remainder will enter into force on a date (or dates) appointed by a Minister of the Crown. However, whether or

not they are in force, many parts of the Bill cannot be operationally effective until “exit day” arrives. For instance, the repeal of the ECA explicitly occurs “on exit day” (clause 1), while the provisions concerning the saving and domestication of EU and EU-derived law do not operate until “exit day” (clauses 2 to 4).

19. “Exit day” will not necessarily be the day on which the EU treaties cease to apply to the UK—it is due to occur by default, albeit not inevitably, on 29 March 2019 by operation of Article 50 of the Treaty on European Union. For the purpose of the Bill, “‘exit day’ means such day as a Minister of the Crown may by regulations appoint.”<sup>13</sup>
20. The Bill contains no express provisions that constrain the scope of ministerial discretion to define “exit day” or that otherwise set criteria by which “exit day” is to be determined.<sup>14</sup> Indeed, the Bill leaves open the possibility that Ministers may provide through regulations that “exit day” is to be taken to mean one thing for one purpose and something else for another purpose.<sup>15</sup> For instance, it may be possible for Ministers to provide that for the purpose of clause 1 (repeal of the ECA) “exit day” is to be taken to be 29 March 2019, but that for the purpose of the clause 7 amendment powers (which lapse, through a sunset clause, two years after “exit day”) “exit day” is to be taken to be some later date. This might be intended to facilitate a transitional period, between the formal disapplication of the EU Treaties to the UK and the establishment of a new, permanent relationship with the EU, necessitating phased domestic legal reforms over a longer period of time.
21. The Bill also does not require that regulations to define “exit day” be subject to any parliamentary scrutiny procedure. **We are concerned that the power to define “exit day”—a matter that is pivotal to the operation of the Bill—is unduly broad in its scope and flexibility, and that it is not subject to any parliamentary scrutiny procedure.**

### Preserving EU law

22. The Government set out in its White Paper, *The United Kingdom’s exit from and new partnership with the European Union*, that it would seek to “preserve EU law where it stands at the moment before we leave the EU.”<sup>16</sup> In our report, we recommended that “the Government should make clear how it intends to preserve and publish the exact text of the ‘snapshot’ of (what was) directly effective EU law if imported by means of a general provision in the ‘Great Repeal Bill’.”<sup>17</sup>
23. The European Union (Withdrawal) Bill attempts to take such a ‘snapshot’ of EU law by setting out what is termed collectively as “retained EU law.” Clause 2 seeks to preserve EU-derived domestic legislation, clause 3 covers the incorporation of direct EU legislation and clause 4 preserves rights and obligations arising under EU treaties.
24. Clauses 2 to 4 seek to provide a definition of what will count as “retained EU law” to be domesticated by the Bill. However, the Bill’s creation of

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13 [Clause 14\(1\)](#)

14 The Bill does not impose any duty on Ministers to ever prescribe “exit day”.

15 Schedule 7, [para 13](#)

16 HM Government, *The United Kingdom’s exit from and new partnership with the European Union*, p.10

17 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 62

categories of “retained EU case law” and “retained general principles of EU law” present some difficult technical issues, as a result of the complex forms of interaction provided for between retained EU law and other domestic law. For example, clause 2(1) provides that: “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.” While the purpose of the provision is to capture domestic secondary legislation made under the ECA for the purpose of implementing EU directives, the definition of “EU-derived domestic legislation” captures a much wider range of measures, including:

- Secondary legislation made under the ECA that implements EU directives or other EU obligations or that otherwise relates to the EU or the EEA
- Provisions of secondary legislation made under other primary legislation that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA
- Provisions in Acts of the UK Parliament that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA
- Provisions in primary and secondary devolved legislation that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA

25. Most of these categories of domestic legislation to which clause 2 would apply would remain in force even without clause 2. Most obviously, provisions in Acts of Parliament—such as the Equality Act 2010—that implement EU obligations would not be repealed or otherwise rendered inoperative either by withdrawal from the EU or by the repeal of the ECA pursuant to clause 1 of the Bill. **Clause 2 therefore appears significantly broader than it needs to be.**
26. This has implications when it comes to understanding how the powers to amend retained EU law in clause 7 will work—and, in particular, how far they will extend. Clause 7 creates ministerial powers to amend “retained EU law”, which includes “anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2.”<sup>18</sup> However, legislation that would have continued in force with or without clause 2 cannot continue to be or form part of domestic law “by virtue of” that provision. Thus, for instance, primary legislation such as the Equality Act 2010, parts of which implement EU obligations, does not constitute “retained EU law” under clause 6(7), even though it constitutes “EU-derived domestic legislation” under clause 2, meaning that it is therefore invulnerable to the exercise of clause 7 powers of amendment. **We recommend that the limited scope of clause 7 in this respect be stated expressly on the face of the Bill to avoid uncertainty.**
27. Additionally, many of the rights derived from EU treaties to be transferred by clause 4 presuppose membership of the EU. This is so, for instance, with rights that relate to the operation of the single market. Even if clause 4 technically makes such rights part of domestic law, it is difficult to see what meaningful effect they could have if they no longer reflected reciprocal

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18 [Clause 6\(7\)](#)

treaty commitments between the UK and the other EU Member States. Clause 4 also appears to domesticate the directly effective provisions of EU directives irrespective of whether the directive has been implemented in domestic law by means of EU-derived legislation that will (where necessary) be saved by clause 2. This gives rise to the question whether the operation of clauses 2 and 4 will result in two versions of some EU norms co-existing within the domestic legal system, i.e. the version contained in EU-derived domestic legislation and the version domesticated by clause 4. Clause 4 may be intended to operate only upon directly effective provisions in directives to the extent that such provisions have not already been domesticated through the medium of EU-derived domestic legislation, however this is not clear from clause 4 as drafted.

28. It is also unclear as to the status of retained EU law post-exit; whether it is primary legislation, secondary legislation, or some new taxonomical form. Clause 2 suggests that primary legislation that implements EU obligations will remain primary legislation, while secondary legislation that implements such obligations will remain secondary legislation. However, the direct EU legislation and directly effective EU law domesticated by clauses 3 and 4 effectively have no equivalent status in UK law and the Bill makes no provision for them. The Bill requires that retained EU law be considered primary legislation for the purposes of the Human Rights Act 1998,<sup>19</sup> but does not set out how it should be considered otherwise.
29. Professor Paul Craig concluded there was “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” not least because “the legal status of the retained law is not entirely clear.”<sup>20</sup> **We recommend that this matter should be addressed on the face of the Bill to avoid uncertainty.**
30. Schedule 5 to the Bill requires the Queen’s printer (within the National Archives) to publish the EU regulations, decisions, tertiary legislation and relevant treaties that apply before exit day. This is essential—as the body of law that applies after exit day must be clear and accessible—but it is not straightforward. The amount of retained EU law will be considerable and its contents will be changing up until exit day.
31. **It is imperative, in the interests of legal certainty, that there is maximum clarity as to what counts as retained EU law. That clarity must be available immediately upon exit, even though the body of EU law on which retained EU law will be based is subject to change until immediately before exit. We will examine the proposed transfer of EU law and of the rights derived from EU treaties, and the practicalities of publishing a copy of the retained EU law, in our forthcoming inquiry.**

### Primacy of EU law

32. We noted in our report that “following the repeal of the ECA, secondary legislation made under section 2(2) of the ECA will no longer be afforded primacy over incompatible UK law (unless the ‘Great Repeal Bill’ seeks to provide otherwise)” and that this would have “the potential to unsettle the

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<sup>19</sup> Schedule 8, [para 19](#)

<sup>20</sup> Written evidence from Professor Paul Craig ([EUW0002](#))

clarity” of areas of the law.<sup>21</sup> The European Union (Withdrawal) Bill sets out at clause 5 that the principle of the supremacy of EU law will no longer apply to any Act or rule passed on or after exit day. However, the supremacy principle will continue to apply in relation to UK legislation passed before “exit day”.

33. We will consider the drafting and implications of clause 5 in detail in our forthcoming inquiry. For the time being, we observe that it is ambiguous and risks creating considerable uncertainty. As currently drafted, clause 5 provides that “the principle of the supremacy of EU law” will continue to apply to certain UK laws post-exit. It is unclear how and in what way “the principle of the supremacy of EU law” can continue to apply in the UK at a point in time—i.e. post-exit—when “EU law” does not apply. It is true that “retained EU law”, as defined by the Bill, will continue to apply, but that category is all-embracing, and not all of those laws would, in their pre-exit incarnations, have benefitted from the supremacy principle. For instance, while, pre-exit, directly effective treaty provisions and regulations benefit from the supremacy principle, thereby enjoying priority over incompatible domestic law, the same is not true of domestic secondary legislation that gives effect in national law to directives.
34. **Our initial view is that clause 5 is insufficiently clear in setting out the aspects of retained EU law to which the supremacy principle will continue to apply and how it will continue to apply. This risks creating confusion as to the effects of the already highly complex legal regime prescribed by the Bill. We will examine the application of the supremacy principle in more detail in our forthcoming inquiry.**

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21 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 59

## CHAPTER 3: DELEGATED POWERS

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### Granting delegated powers

35. In our earlier report, we said that the ‘Great Repeal Bill’ was likely to “propose that Parliament delegate to the Government significant powers to amend and repeal (primary) and revoke (secondary) legislation to enable it to carry out the significant task of preparing the ground for the conversion of the body of EU law into UK law within the timeframe set out for the UK’s exit from the EU.”<sup>22</sup> However, we noted that providing powers to make these changes through delegated legislation would “involve a massive transfer of legislative competence from Parliament to Government” which raised “constitutional concerns of a fundamental nature” about the balance of power between the legislature and executive.<sup>23</sup>
36. We recognised that there was an important distinction between the “mechanical act of converting EU law into UK law”—for which the European Union (Withdrawal) Bill is intended—and the process of implementing new policies “to make substantive changes to certain areas currently covered by EU law” which should take place separately in primary legislation.<sup>24</sup>

### Delegated powers in the Bill

37. In our report, we were mindful of “the degree of uncertainty as to what exactly the process of converting EU law into UK law will involve” and we recognised that the process “will almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit where necessary.”<sup>25</sup> The Government quoted this conclusion in the Explanatory Notes on the Bill and said that “the approach of taking delegated powers to make the necessary changes by secondary legislation was agreed by the Government as being the only appropriate solution.”<sup>26</sup>
38. However, we did state—in a passage of our report that was not quoted by the Government, and the implications of which were ignored—that “Parliament should ensure that the delegated powers granted under the ‘Great Repeal Bill’ are as limited as possible.”<sup>27</sup> The delegated powers proposed under the European Union (Withdrawal) Bill are, as drafted, exceptionally wide. For example, clause 7(1) gives Ministers extensive powers to make such regulations they consider “appropriate” to deal with “any failure of retained EU law to operate effectively or any other deficiency in retained EU law” arising from withdrawal. This application of a subjective test to a broad term like “deficiency” makes the reach of the provision potentially open-ended. Indeed, the Explanatory Notes accompanying the Bill sets out that “the sorts of deficiencies that the power might need to deal with”<sup>28</sup> could include the rights under EU treaties that are no longer appropriate. Although clause 7(2) gives some examples of “deficiencies”, the list is not exhaustive. As a

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22 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 45

23 *Ibid.*, para 47

24 *Ibid.*, para 16

25 *Ibid.*, para 46

26 *Explanatory Notes to the European Union (Withdrawal) Bill* [Bill 5 (2017–19)-EN], para 13

27 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 46

28 *Explanatory Notes to the European Union (Withdrawal) Bill*, para 111

result, Ministers are likely to have considerable latitude when it comes to determining what counts as a “deficiency”. Although the courts, using their judicial review powers, may rule on whether a Minister has taken an overbroad view in exercising the power, their task will be made extremely difficult by the breadth with which the power is drafted and, more broadly, the overlapping nature of delegated powers throughout the Bill. Professor Alison Young concluded that these powers were “broad and vaguely worded” and that this “could give rise to potential over-breadth, in addition to potential future litigation over the specific confines of the powers granted to the executive.”<sup>29</sup>

39. In our earlier report, we said that it was important to distinguish between powers required to make the necessary amendments “to the existing body of EU law as a consequence of the UK’s exit from the EU, and substantive, more discretionary changes that the Government may seek to make to implement new policies in areas that previously lay within the EU’s competence.”<sup>30</sup> We concluded that delegated powers “granted for the purpose of converting the body of EU law into UK law” should not be used to “implement new policies.”<sup>31</sup> The Explanatory Notes state that the Bill “does not aim to make major changes to policy or establish new frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one.”<sup>32</sup> The Secretary of State for Exiting the European Union, Rt Hon David Davis MP, has said that the powers in the Bill will not make substantive changes, but rather “technical changes to make the law work.”<sup>33</sup> The Government may intend to limit their use of the powers in this way, but the Bill, as drafted, does not impose such a constraint. As Professor Paul Craig noted, “there will be many instances where a change is required in order that the measure makes sense post-exit, but where the necessary change may also entail policy choices, and not mere technical adaptation.”<sup>34</sup> As such, the powers in the Bill as drafted provide considerable scope for significant policy changes to be made. **The Bill therefore fails to respect the distinction for which we called in our earlier report between technical and policy changes. We are concerned that clauses 7 to 9, as drafted, leave open the possibility that the powers they contain could be used to make changes in significant policy areas. The Government should place on the face of the Bill restrictions on the powers to limit their use to purely technical changes; given the broad scope of the powers, ministerial assurances are not sufficient. This would also potentially assist relations with the devolved administrations, to which we turn later in this report.**

40. We proposed that “a general restriction on the use of delegated powers” could be achieved using “a general provision ... placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework; and so far as necessary to implement the result of

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29 Written evidence from Professor Alison Young (EUW0003)

30 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 37

31 *Ibid.*, para 49

32 *Explanatory Notes to the European Union (Withdrawal) Bill*, para 14

33 BBC News, *Brexit: The UK’s key repeal bill facing challenges*, 13 July 2017: <http://www.bbc.co.uk/news/uk-politics-40589510> [accessed: 8 August 2017]

34 Written evidence from Professor Paul Craig (EUW0002)

the UK’s negotiations with the EU.”<sup>35</sup> **We repeat our recommendation that the Bill should “clearly set out a list of certain actions that cannot be undertaken by the delegated powers ... as another means of mitigating concerns that may arise over this transfer of legislative competence.”**<sup>36</sup>

41. In the Delegated Powers Memorandum, the Government, referring to our initial report, said that the Committee “noted the complexities of the issues which the Government would need to address and concluded that in the circumstances it would be unrealistic to limit tightly the power needed to adapt retained EU law.”<sup>37</sup> While we said that it was “unrealistic to assume that Parliament will be able tightly to limit the delegated powers granted under the Bill—because it will not be clear what, exactly, they will be required to do,”<sup>38</sup> we also made clear that such powers should not be used to make substantive policy changes. As such, we “considered various ways in which the Government could be granted a greater degree of latitude in the delegated powers granted under the ‘Great Repeal Bill’ while simultaneously restricting their exercise to the task of converting relevant aspects of EU law into UK law.”<sup>39</sup>
42. The Bill includes some restrictions on the delegated powers, such as the stipulations in clause 7(6) that the powers cannot be used to impose or increase taxation; make retrospective provision; create certain types of criminal offence; implement the withdrawal agreement; amend, repeal or revoke the Human Rights Act 1998 or subordinate legislation made under it; or amend or repeal the Northern Ireland Act 1998. Similar restrictions exist in clause 8 which grants ministers powers to comply with international obligations and clause 9 to implement the withdrawal agreement.<sup>40</sup> However, these restrictions are limited in their effect, given that the ministerial powers allow regulations to “make any provision that could be made by an Act of Parliament.”<sup>41</sup>
43. In addition to the principal delegated powers in clauses 7 to 9, we have concerns about delegated powers elsewhere in the Bill. For instance, an extremely wide power appears to be contemplated by clause 17 which provides that a minister “may by regulations make such provision as the Minister considers appropriate in consequence of this Act.”<sup>42</sup> The Bill also stipulates that any power conferred by it to make regulations “may be exercised so as to modify retained EU law.”<sup>43</sup>
44. **We are concerned about the delegated powers the Government is seeking in the European Union (Withdrawal) Bill. The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could**

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35 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 50

36 *Ibid.*, para 51

37 *European Union (Withdrawal) Bill Delegated Powers Memorandum*, para 13

38 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 42

39 *Ibid.*, para 44

40 *Clause 9* does not include the restriction on implementing the withdrawal agreement.

41 *European Union (Withdrawal) Bill*, *clause 7(4)*

42 *Ibid.*, *clause 17*

43 *Ibid.*, schedule 7, *paragraph 13*

**draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.**

45. **In our forthcoming inquiry, we will examine these powers in greater detail. We look forward to the conclusions of the Delegated Powers and Regulatory Reform Committee on the Bill.**

*Henry VIII powers*

46. In our earlier report we explored the difference between normal delegated powers (that cannot be used to amend primary legislation) and Henry VIII powers (which can be used to amend primary legislation). We recognised that in the unprecedented situation brought about by departure from the EU, “the usual distinction between Henry VIII powers ... and other delegated powers ... is of less import.”<sup>44</sup> Our reasoning was not that Henry VIII powers were less concerning in this instance; it was that while powers to amend much retained EU law need not be Henry VIII powers (because most retained EU law will not be set out in Acts of Parliament), a good deal of retained EU law contains measures of the type that might be contained in Acts of Parliament had its legislative root been domestic rather than European. We therefore concluded:

“Parliament must not assume that, simply because a particular delegated power would only affect a piece of secondary legislation or an element of what is currently directly effective EU law, the delegation of power requires less scrutiny than a delegation of power that happens to affect an element of EU law that is currently embodied in primary legislation (and would thus have to take the form of a Henry VIII power). In short, the distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such.”<sup>45</sup>

47. The Delegated Powers Memorandum accompanying the European Union (Withdrawal) Bill, quotes the latter part of our conclusion that “the distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such” in justifying the broad powers to amend primary legislation.<sup>46</sup> However, we made no suggestion that the limited need for Henry VIII powers to amend retained EU law should be taken to signify that the constitutional concerns in play are limited in scope or seriousness. Rather, our point was that in these highly unusual circumstances, the fact that a Henry VIII power may not be needed should not be taken to signify that important constitutional concerns are necessarily absent.

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44 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 39

45 *Ibid.*, para 40

46 *European Union (Withdrawal) Bill Delegated Powers Memorandum*, para 36 quoting Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 40

48. The Memorandum states that “a large number of fairly straightforward changes will be needed to primary legislation in readiness for exit day.”<sup>47</sup> To this end the Bill contains Henry VIII clauses of a very broad nature. These are set out not only in the main clauses (7 to 9) which give regulation-making powers, but throughout the Bill, including clause 17. It is also the case that some of these powers can be exercised using only the negative, rather than affirmative procedure. **We accept that the Government will require some Henry VIII powers in order to amend primary legislation to facilitate the UK’s withdrawal from the European Union, but they should not be granted lightly, and they must come with commensurate safeguards and levels of scrutiny. We do not believe that the Government has engaged with the need for such safeguards and we will pursue this issue in our forthcoming inquiry.**

### *Sunset clauses*

49. In our earlier report, we explored the use of sunset clauses as “a viable means of controlling the powers granted to the Government.” We concluded that “if the Government seek discretion to domesticate and amend significant elements of the body of EU law by secondary legislation, then it is essential Parliament consider how that discretion might be limited over time” and as such, the extensive powers ministers have under the Bill should be subject to sunset clauses.<sup>48</sup>
50. We therefore welcome the inclusion of sunset clauses in the Bill. These set a two-year time limit after “exit day” on the powers to deal with deficiencies in retained EU law (clause 7), with any breach of international obligations (clause 8) and to implement the withdrawal agreement (clause 9). **We note that “exit day” will be defined by the Government and will not necessarily have to be 31 March 2019. In our forthcoming inquiry we will consider whether the length of the sunset clause for these powers is appropriate and explore the potential consequences of ministerial discretion in determining what counts as “exit day”. Our inquiry will also consider how the inclusion of sunset clauses could influence the work between the UK Government and devolved administrations to agree common frameworks.**

### *Scrutiny of delegated legislation*

51. In our earlier report, we noted the “significant challenge” Parliament will face scrutinising the secondary legislation that will follow this Bill, both in terms of its volume and its complexity. In order to “mitigate the constitutional risks that will arise if the Government are given relatively wide discretionary powers to convert the body of EU law into UK law”<sup>49</sup> we made a number of recommendations. These included a proposal that ministers should “sign a declaration in the Explanatory Notes to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.”<sup>50</sup> We also recommended that “the Explanatory Notes to each statutory instrument sets

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47 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 36

48 *Ibid.*, para 73

49 *Ibid.*, para 102

50 *Ibid.*, para 102(1)

out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes are necessary.”<sup>51</sup>

52. In the Delegated Powers Memorandum accompanying the Bill, the Government said that it has built “on a suggestion of the House of Lords Constitution Committee” and “decided that all explanatory memoranda accompanying statutory instruments made by Ministers of the Crown under powers in the Bill must, in addition to the usual requirements for the contents of an explanatory memorandum, also: explain what any relevant EU law did before exit day, explain what is being changed or done and why, and include a statement that the minister considers that the instrument does no more than what is appropriate.”<sup>52</sup> **We welcome the Government’s decision to act on our recommendation in part by requiring statutory instruments under these powers to be accompanied by ministerial statements explaining them; however, our recommendation was that declarations in the Explanatory Memorandum to each statutory instrument should apply a necessity test. The commitment by the Government to do “no more than what is appropriate” is weaker than our recommendation. Therefore we would like to see ministerial statements explain why the instruments are necessary.**
53. In our earlier report we discussed the possibility of strengthened scrutiny procedures. We addressed various options set out by the Delegated Powers and Regulatory Reform Committee (DPRRC) in its special report: *Strengthened Statutory Procedures for the Scrutiny of Delegated Powers*.<sup>53</sup> We concluded that the Government should “make a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo”<sup>54</sup> and that a parliamentary committee(s) should consider that recommendation and nominate a strengthened scrutiny procedure where they deemed it appropriate.<sup>55</sup> We suggested that a statutory instrument amending “EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.”<sup>56</sup>
54. We concluded that an “essential element of whatever strengthened procedure is selected is that it should provide an opportunity for a statutory instrument to be revised in the light of parliamentary debate.”<sup>57</sup> This is particularly important given that statutory instruments cannot be amended. **Given the breadth of the powers in the Bill, and the possibility that these will be used to make substantive policy changes, we are concerned that no consideration has been given to the need for enhanced parliamentary procedures.**
55. The European Union (Withdrawal) Bill and the associated Delegated Powers Memorandum set out the scrutiny procedures to which exercises of each of the delegated powers will be subject. Most instruments will be

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51 *Ibid.*, para 102(2)

52 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 49

53 Delegated Powers and Regulatory Reform Committee, *Special Report: Strengthened Statutory Procedures for the Scrutiny of Delegated Powers* (3rd Report, Session 2012–13, HL Paper 19)

54 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 102(3)

55 *Ibid.*, para 102(4)

56 *Ibid.*, para 102(3)

57 *Ibid.*, para 102(5)

subject to the negative procedure; there are only very limited circumstances where the affirmative procedure will apply, such as the establishment of a public authority, transferring functions to a public authority, and creating/widening the scope of a criminal offence. No mechanism has been proposed that would allow for instruments to have their scrutiny process strengthened or for instruments to be revised. Professor Young described this as “particularly problematic”,<sup>58</sup> while Professor John Bell said that the Bill “does not recognise the magnitude of the task and therefore the need to have differently designed procedures to ensure adequate scrutiny.”<sup>59</sup>

56. **We are concerned that, despite the broad powers contained in clauses 7 to 9 to make substantial changes to retained EU law, only a narrow range of matters require the express consent of Parliament through the affirmative procedure. This is not constitutionally acceptable for Henry VIII powers of this significance.**
57. We note that the House of Commons Procedure Committee began an inquiry in the last Parliament to examine if any changes were “desirable to Commons procedures related to the delegation of powers or secondary legislation to address the likely scale and volume of ‘Great Repeal Bill’ legislation.”<sup>60</sup> Parliament was dissolved before that inquiry could be completed, but in its legacy report at the end of the Parliament, it concluded that there was a “need to establish procedures for scrutiny of secondary legislation” under the Bill to “ensure that the time of Members is directed to the scrutiny of legislation of the greatest legal and political importance. Arguably, this balance is not achieved in respect of existing procedures for parliamentary approval of secondary legislation.”<sup>61</sup> The Bill does not propose new procedures for the scrutiny of secondary legislation.
58. The Bill would also allow the Government to bypass the standard scrutiny procedures if the minister considers it “urgent.”<sup>62</sup> The Delegated Powers Memorandum states that:
- “the made affirmative procedure will be available as a contingency should there be insufficient time for the draft affirmative procedure for certain instruments before exit day ... The Government believes that the exceptional circumstances of withdrawing from the EU **might** necessitate the use of the made affirmative procedure.”<sup>63</sup>
59. The Memorandum quotes our 2009 report, *Fast-track Legislation: Constitutional Implications and Safeguards*, where we said that “in a very limited number of circumstances there may be grounds for seeking to fast-track parliamentary procedure of draft affirmative instruments ... ” The Memorandum omits the remainder of the sentence, which continued “... we take this opportunity to remind the Government of the importance of executive self-restraint.”<sup>64</sup>

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58 Written evidence from Professor Alison Young ([EUW0003](#))

59 Written evidence from Professor John Bell ([EUW0001](#))

60 House of Commons Procedure Committee, *Matters for the Procedure committee in the 2017 Parliament* (Seventh Report, Session 2016–17, HC 1091) para 5

61 *Ibid.*, para 13

62 European Union (Withdrawal) Bill, [schedule 7 part 1\(3\)](#) and [part 2\(11\)](#)

63 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 48

64 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), para 139

60. **We acknowledge that there are likely to be significant time pressures for the Government delivering the secondary legislation required to facilitate legal continuity upon exit. We also acknowledge that regulations made by way of the ‘made affirmative’ procedure are time-limited in their effect. However, given the significance of the issues at stake, and the breadth of the powers involved, we are not convinced that urgent procedures are acceptable. We will examine this issue further in our forthcoming inquiry, but we urge the Government to consider bespoke mechanisms for ensuring some parliamentary scrutiny prior to urgent statutory instruments being made.**
61. **We are concerned that the procedures for parliamentary involvement and scrutiny of the statutory instruments that will derive from the European Union (Withdrawal) Bill will be insufficient, given their potential significance. The establishment of a public authority or the creation of a criminal offence would normally be effected by primary legislation which would be open to amendment. We await with interest the views of the Delegated Powers and Regulatory Reform Committee on this area, and will consider further whether enhanced scrutiny procedures are required for this Bill in our forthcoming inquiry.**

#### **Practicalities of delegated legislation scrutiny**

62. Our earlier report noted that the volume of secondary legislation required to convert EU law to UK law would be significant and that Parliament would need to consider how to scrutinise it effectively. We said that:

“scrutiny committees will need the capacity, expertise and legal support to cope with the increased volume and complexity of secondary legislation. We look to the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments, both of which have extensive experience in the scrutiny of secondary legislation, to advise the Liaison Committee as to what will be required to deal with the secondary legislation flowing from the ‘Great Repeal Bill’ and other Brexit-related legislation. Given that there can be a long lead-in time for recruiting and training new staff, thought will need to be given at an early stage to ensuring that these additional resources are in place and up to speed by the time the ‘Great Repeal Bill’ has completed its passage through Parliament.”<sup>65</sup>

63. We also said that the “effective use of external expertise and public consultation may well prove an essential tool for committees tasked with scrutinising secondary legislation”<sup>66</sup> laid under the Bill. **We will give further consideration to these issues in our forthcoming inquiry. In light of the breadth of the powers given by the Bill, the extent of its Henry VIII powers, the absence of any strengthened procedure for scrutinising statutory instruments, and the range of instruments that can be made by negative procedure, effective parliamentary oversight will be especially important.**

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65 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 108

66 *Ibid.*, para 105

## CHAPTER 4: THE COURT OF JUSTICE OF THE EU

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### Judgments of the Court of Justice of the EU

64. Our report considered the status of judgments of the Court of Justice of the European Union (CJEU) after Brexit. We concluded that “it would be politically unlikely that UK courts would have to continue to follow the judgments of the Court of Justice following Brexit.” We recommended that “the Government may wish to consider whether the Bill should provide that, as a general rule, UK courts ‘may have regard to’ the case law of the Court of Justice” as this would “allow UK courts to take into account the judgments of the Court of Justice, but not be bound by them.”<sup>67</sup>
65. We further recommended that “the Bill should provide clarity as to the status of the Court of Justice’s judgments, including the extent (if any) to which those judgments can or must be followed or taken account of by UK courts following Brexit.” We went on to state that “it will also be necessary to consider whether a distinction should be drawn in this regard between judgments given before and after the date on which the UK leaves the EU.”<sup>68</sup>
66. The Government has acted on these points. The European Union (Withdrawal) Bill sets out how judgments of the CJEU are to be treated by domestic courts and tribunals after exit day.<sup>69</sup> Clause 6 draws a distinction between pre-exit and post-exit CJEU case law. Domestic courts and tribunals are not bound by post-exit case law; however the Government accepted our recommendation and has permitted domestic courts and tribunals to have regard to it if the court or tribunal considers it appropriate. In contrast, pre-exit case law is binding upon most domestic courts and tribunals insofar as it is relevant to questions pertaining to retained EU law. The Supreme Court and (in some circumstances) the High Court of Justiciary are, however, not bound; they can depart from pre-exit CJEU case law by reference to the same test as applies when they decide whether to depart from their own case law.
67. The President of the Supreme Court, Lord Neuberger of Abbotsbury, has called for greater clarity about how UK law will be developed after Brexit. He said that Parliament needed to be “very clear” about how judges should approach CJEU decisions and “spell it out in a statute”. He continued “If [the government] doesn’t express clearly what the judges should do about decisions of the ECJ after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best.”<sup>70</sup> Professor Alison Young also argued that greater clarity was needed:

“The UK courts will be required to determine the meaning of retained EU law in accordance with the case law of the CJEU up to exit day and in accordance with general principles of the EU. However, this is not the case where retained EU law is modified on or after exit day, unless this is consistent with the intention of the modifications. This creates uncertainty surrounding whether the modified retained EU law should be interpreted in line with EU case law up to exit day, particularly as

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67 *Ibid.*, para 27

68 *Ibid.*, para 26

69 European Union (Withdrawal) Bill, [clause 6](#)

70 BBC News, *UK judges need clarity after Brexit: Lord Neuberger*, 8 August 2017: <http://www.bbc.co.uk/news/uk-40855526> [accessed 8 August 2017]

many of these modifications would occur through delegated legislation which may provide little information as to the intention of these modifications.”<sup>71</sup>

68. Professor John Bell raised particular concerns about the treatment by clause 6 of EU case law, arguing that:

“Clause 6 unnecessarily clutters the simplicity of what needs to be achieved by regulating “retained EU caselaw” and “retained EU general principles of law”. This seems to be modelled on the preservation of common law rules in other areas ... But this does not work in the case of EU law ... if a legislative provision is retained, the case law interpreting it is retained and clause 6(2) is sufficient. If the legislative provision lapses or is abolished, then the case law on it lapses. There is no space for special regulation of “retained EU case law”.”<sup>72</sup>

69. As it is presently drafted, clause 6 draws no distinction between the general category of judgments rendered by the CJEU post-exit day and the specific category of post-exit CJEU judgments rendered in cases that were referred to it by UK courts pre-exit. **In our inquiry, we will consider whether that specific category of cases should be treated differently from other post-exit day CJEU case law.**

70. **While the European Union (Withdrawal) Bill provides some welcome clarity regarding judgments of the Court of Justice of the European Union, it is at least arguable that the Bill should provide more guidance to the courts. We will explore in our forthcoming inquiry the status of post-exit judgments by the CJEU on any pre-exit laws that still apply in the UK. We will also consider whether, post-Brexit, UK courts are likely to take into account CJEU case law which overturns or clarifies pre-exit law.**

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71 Written evidence from Professor Alison Young ([EUW0003](#))

72 Written evidence from Professor John Bell ([EUW0001](#))

## CHAPTER 5: DEVOLUTION

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### Brexit and devolution

71. Devolution has developed in an *ad hoc* fashion, with different constitutional conversations taking place separately in different parts of the country. We noted in our previous report, *The Union and devolution*, that the asymmetric devolution settlements involve a complex set of “shared and overlapping competencies.”<sup>73</sup> The House of Lords European Union Committee concluded that:

“Against this backdrop the European Union has been, in effect, part of the glue holding the United Kingdom together since 1997. The supremacy of EU law, and the interpretation of that law by the Court of Justice of the EU, have in many areas ensured consistency of legal and regulatory standards across the UK, including in devolved policy areas, such as environment, agriculture and fisheries. In practice, the UK internal market has been upheld by the rules of the EU internal market.”<sup>74</sup>

72. The UK’s departure from the European Union will therefore have profound consequences for the devolution settlement within the UK. **In our forthcoming inquiry we will seek to further consider the constitutional implications of the Bill for the devolution settlements as a whole.**

### EU law and the devolved institutions

73. In our earlier report we recommended that the Government should make clear in the Bill whether it alone would amend the whole body of EU law in preparation for the UK’s exit from the EU, following which the devolved institutions would have responsibility for those matters within devolved competence, or whether the Bill would confer on ministers in the devolved administrations the ability to prepare amendments within their competence from the outset.<sup>75</sup>
74. The European Union (Withdrawal) Bill largely takes the former route. While clause 10 and schedule 2 confer powers on the devolved administrations to make regulations which correspond to the powers conferred by clauses 7 to 9 on UK ministers, clause 11 amends the devolution settlements to prevent the devolved institutions from modifying the body of retained EU law. The effect is that the devolved administrations will only have powers (under clauses 7 to 9) if they are subsequently granted by the UK Parliament. The Bill provides “a power to release areas from the limit on modifying retained EU law where it is agreed that a common approach established by EU law does not need to be maintained and changed.”<sup>76</sup> This is to be done by an Order in Council, approved by the UK Parliament and the relevant devolved legislature.
75. The Explanatory Notes to the Bill make clear that “the UK Government hopes to rapidly identify, working closely with devolved administrations, areas that do not need a common framework and which could therefore be

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73 Constitution Committee, *The Union and devolution* (10th Report of Session 2015–16, HL Paper 149), para 277

74 European Union Committee, *Brexit: devolution* (4th Report of Session 2017–19, HL Paper 9), para 277

75 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 121

76 *Explanatory Notes to the European Union (Withdrawal) Bill*, para 36

released from the transitional arrangement by this power.”<sup>77</sup> However, in a joint statement, First Minister of Scotland Nicola Sturgeon and First Minister of Wales Carwyn Jones concluded that the Bill “does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and National Assembly for Wales.”<sup>78</sup>

76. In our earlier report we stated that “the devolved institutions will need to be appropriately consulted on the amendments to EU law in areas that fall within their jurisdiction.”<sup>79</sup> The Government makes clear in the Explanatory Notes that it will “seek legislative consent” for certain provisions in the Bill, however the First Ministers said that “the Scottish and Welsh Governments cannot recommend that legislative consent is given to the Bill as it currently stands.”<sup>80</sup> **While the legislative consent of the devolved institutions may not be legally required, as the UK Parliament remains sovereign,<sup>81</sup> the political and constitutional consequences of proceeding with the Bill without consent would be significant and potentially damaging.<sup>82</sup> We will explore the Bill’s devolution implications further in our forthcoming inquiry.**

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77 *Ibid.*

78 Scottish Government, ‘EU (Withdrawal) Bill’, 13 July 2017: <https://news.gov.scot/news/eu-withdrawal-bill> [accessed 17 August 2017]

79 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 122

80 Scottish Government, ‘EU (Withdrawal) Bill’, 13 July 2017: <https://news.gov.scot/news/eu-withdrawal-bill> [accessed 17 August 2017]

81 *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5

82 Written evidence from Professor Paul Craig (EUW0002) and Professor Alison Young (EUW0003)