



Brexit Briefing

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Foreword



The Government's approach to Brexit is incoherent and inconsistent. It has not set out a clear and achievable negotiating position. It gives contradictory messages on the Single Market. Its proposals on the Customs Union have been met with derision. The Tory Government is more concerned with keeping together the fragile coalition within the Tory party - and its costly pact with the DUP - than achieving a Brexit deal that secures a viable future for the UK.

UK workers and trade unions are rightly worried by the Tory approach. It represents a threat to the economy and to jobs. And the Government's planned legislation offers no guarantees of rights at work or health and safety into the future. The Government has consistently opposed Labour Bills and amendments to enshrine protection for workers' rights now, and in the future.

As my colleagues explain in this briefing, the European Union (Withdrawal) Bill is a dangerous piece of proposed legislation. It gives Ministers sweeping powers to make, or amend, laws with immense scope and without adequate Parliamentary scrutiny or the power for Parliament to amend those regulations.

It means that employment rights will not keep pace with future EU developments, nor will they be interpreted in line with decisions of the European Court of Justice after exit day. And general EU law principles can no longer be used to strike down post-Brexit laws, leaving the Government free to remove or dilute discrimination laws by capping compensation or limiting back pay for equal pay.

The Prime Minister's absurd insistence that the removal of the European Court of Justice from any role on UK cases is a "red line" prevents the negotiation of a sensible exit deal. It also leads the EU (Withdrawal) Bill into legal contortions that have been criticised by the head of the Supreme Court. They make no sense and will lead to confusion and chaos.

We live in uncertain times. No-one can be sure what Brexit will mean. We certainly don't have all the answers, but I hope you find this latest Brexit briefing a helpful guide to the issues and the current state of play.

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I. INTRODUCTION



The UK is on a path currently leading to its departure from the European Union (EU) by 29 March 2019. But that simple truth conceals an increasing divergence as to the possible permutations for Brexit.

Theresa May's failure in June's General Election to secure the mandate she sought for her version of a 'hard' Brexit opened up the debate as to what shape Brexit will take, and the opportunities for intervention by Parliament and the electorate, particularly as it becomes clearer what the consequences of Brexit will be.

Negotiations are at least nominally underway with the EU. Whether progress is sufficient to give confidence that all issues can be negotiated, agreed and approved by the necessary UK and EU institutions, and appropriate measures put in place in time, is a matter for conjecture. This contributes to a growing sense that some form of transitional arrangements will be inevitable, a position now apparently adopted by the Government.

The Government has now introduced into Parliament the European Union (Withdrawal) Bill, which will be its most important legislative mechanism for the delivery of Brexit. At its simplest, the Bill will repeal the European Communities Act 1972 (the ECA), convert and preserve EU law into and as a part of UK law, and allow for 'retained EU law' to be modified so as to continue to operate effectively after Brexit, and provide for implementation of any withdrawal agreement.

The Bill was introduced just before the summer recess in Parliament. It has its second reading on 7 and 11 September 2017. It has been widely criticised, with particular attention focused so far on the exceptional powers reserved to Ministers to amend or repeal EU law converted into (and preserved in) UK law. Strong opposition has also been voiced on behalf of the devolved administrations.

In this briefing, we summarise the stage reached in the withdrawal process and the current timetable leading to Brexit, including a 'Brexit glossary' to assist readers with the terms being used in the public debate. We then set out a reminder of the EU employment and health and safety rights at stake, and how they are currently provided for in UK law. We then discuss the main provisions of the EU (Withdrawal) Bill.

2. WHERE ARE WE, AND WHAT HAPPENS NEXT?



Miller, triggering Article 50 and negotiations timetable

On 29 March 2017, Theresa May gave notice of the UK's intention to withdraw from the EU under Article 50 of the Treaty on European Union. This means that, as matters stand, the UK is scheduled to leave the EU on 29 March 2019.

Notice of withdrawal¹ followed the decision of the Supreme Court, in proceedings brought by Gina Miller, that (a) the Government had no power to initiate the formal process of withdrawal from the EU without the approval of Parliament; and (b) the consent of devolved administrations was not required for legislation authorising the start of the withdrawal process².

Negotiations between the EU and the UK began on 19 June. So far, the UK has tabled (not very well received) proposals on the rights of EU citizens living in the UK. There have been preliminary exchanges on the so-called 'divorce bill' the UK will be required to pay. At the time of writing, the Government has announced its proposals for a 'temporary customs union' and its position on Northern Ireland's border with Ireland. Brexit Minister David Davis says the negotiations are going 'incredibly well'³, which isn't a universally held view.

Any agreement will have to be approved by both Houses of Parliament, and, in the EU, by at least 20 of the remaining EU countries with 65% of the population of the EU⁴ (and then ratified by the European Parliament). The negotiations, approvals and ratification must be completed by the time the UK is currently scheduled to leave the EU (29 March 2019), unless all 27 countries agree to an extension. Otherwise, the EU Treaties will cease to apply to the UK on 29 March 2019.

¹ Given under The European Union (Notification of Withdrawal) Act 2017

² R (on the application of Miller and (another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5

³ Today programme, 15 August 2017.

⁴ So-called 'Super Qualified Majority Voting'.

The General Election and variations on Brexit

Theresa May said that she called the General Election on 8 June 2017 so as to strengthen her hand in Brexit negotiations with EU leaders. However, she failed to increase her majority in the House of Commons and ended up weakened, having to rely on the support of 10 MPs from Northern Ireland's Democratic Unionist Party (DUP).

In consequence of Mrs May having failed to achieve a mandate for a so-called 'hard' Brexit, different permutations as to what Brexit might end up meaning have gathered momentum. Focus has also intensified as to what the practical consequences will be.

Will it be 'hard' or 'soft' Brexit? Will the UK remain part of the EU's Single Market, which eliminates tariffs, quotas and taxes on trade, but requires the free movement of goods, services, capital and people? Will the UK remain part of the EU Customs Union, which applies the same tariffs to goods from outside the union (without further tariffs between EU countries)? If the UK leaves the Single Market and the Customs Union, will it be able to negotiate a free trade deal with the EU, where there are no tariffs, taxes or quotas on goods or services passing from one country to another? Could the UK join the European Free Trade Association (EFTA)?

Over the summer, the Government announced its proposals for the creation of a 'temporary customs union', which would last up to two years and so, supposedly, allow sufficient time for the UK to negotiate new trade deals. The proposal is described by Keir Starmer, Labour's Shadow Brexit Secretary, as 'incoherent and inadequate'⁵.

These questions in turn raise further issues such as what is to happen to the border between the Republic of Ireland (a continuing member of the EU) and Northern Ireland, on which the Government has published its position paper, which has unsurprisingly met with the approval of the DUP. Other questions include 'How long does it take to negotiate a free trade agreement?', 'What about the position of the devolved administrations?' The more we come to understand what leaving the EU means in practice, the more the questions arising multiply.

Whilst not debating these issues in this briefing, we thought that readers might find it helpful to have a glossary of definitions of some of the main terms used in the public and political debate. This is at Appendix I.

⁵ BBC News 15 August 2017.

Introduction of the European Union (Withdrawal) Bill

Immediate attention is focused on the EU (Withdrawal) Bill, introduced into Parliament on 13 July 2017, and accompanied by Explanatory Notes and a Delegated Powers Memorandum⁶. As envisaged by its white paper of March 2017⁷, the Government's approach is 'to convert the existing body of EU law into domestic law, after which Parliament (and, where appropriate, devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU'⁸. This will be the Government's main (but not exclusive) legislative mechanism to implement Brexit.

The rationale is that it would not be 'possible or desirable' for all the changes that will be needed to domestic law to be made before exit day. And it would not be enough simply to incorporate EU law into UK law because 'the UK's statute book would contain significant gaps once we left the EU'⁹. The Bill will also 'provide a further limited power to implement the content of any withdrawal agreement reached with the EU into our domestic law without delay'¹⁰.

It is probably the right thing to do to import existing EU law into domestic UK law (also preserving implementing legislation), and for Ministers to have powers (i) to modify that collection of imported, and preserved, laws to make them work properly after Brexit; and (ii) to implement the terms of any withdrawal agreement being negotiated in tandem with the Bill's passage through Parliament. With over 40 years' worth of EU law effective by a variety of means across so many sectors, there just wouldn't be enough time to complete the process of disentangling the UK's legal system by exit day, whilst, at the same time, negotiating the terms of withdrawal from the EU, which will themselves require legislative implementation.

But the Bill must not be used as a vehicle for the Government to rush though substantive policy changes to EU-derived law without the proper approval of Parliament. If Ministers are to be given far-reaching powers to modify imported or preserved EU law, then (i) the circumstances in which these powers can be used must be carefully circumscribed; and (ii) the exercise of the powers must be subject to appropriate supervision by both Houses of Parliament, with the elements of supervision being calibrated to the individual circumstances of each particular exercise of those powers. On any analysis, Courts and Tribunals, as well as everyone else, must also have certainty as to how the new legal system, with EU-derived law imported and preserved in it, is going to work.

⁶The EU (Withdrawal) Bill, the Explanatory Notes and the Delegated Powers Memorandum are available at <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>.

⁷ Department for Exiting the European Union: Legislating for United Kingdom's withdrawal from the European Union, March 2017

⁸ Paragraph 1.12

⁹ Paragraph 1.13

¹⁰ Paragraph 1.18

These are not new concerns. They were raised in the Government White Paper preceding the Bill and also, for example, by the House of Lords Select Committee on the Constitution. But the concerns have not been properly addressed in the Bill as introduced into Parliament. The current version of the Bill has been described by the First Ministers of Scotland and Wales as 'a naked power grab'¹¹.

The Bill in its current form is riddled with dangers, deficiencies and uncertainty. And recent experience, not least in the decision in UNISON's magnificent ET fees victory¹², tells us that the Supreme Court, which will have the ultimate task of interpreting the Bill once enacted, is fully prepared to invalidate the results of unprincipled use of Ministerial powers.

The EU (Withdrawal) Bill contains neither the protections, nor the clarity, of Melanie Onn MP's private members' Bill 'The Workers' Rights (Maintenance of EU Standards) Bill 2016'¹³. That Bill included clear and precise preservation of the requirement to interpret domestic legislation in accordance with workers' rights derived from EU law¹⁴, a prohibition on downgrading workers' rights derived from EU law except by primary legislation¹⁵ and the continuation of the procedural protections provided by EU law¹⁶.

Brexit Minister David Davis said that

*'The Great British working class voted overwhelmingly for Brexit. I am not at all attracted to the idea of rewarding them by cutting their rights'*¹⁷.

If Mr Davis meant what he said, then the Government of which he is a member should have supported Ms Onn's Bill.

The Government's desired direction of travel in relation to health and safety standards was indicated by the inclusion in the Queen's Speech of a Civil Liability Bill, supposedly to reform the handling of whiplash claims for the benefit of insured motorists. In truth, whilst we await the detail of the new Bill, this is certain to attempt to resurrect those elements of the Prisons and Courts Bill (killed off by the snap election call) which continued the insurer-led attack on the rights of all victims of injury, including those injured at work.

¹¹ Joint statement of Nicola Sturgeon and Carwyn Jones responding to the EU (Withdrawal) Bill, 13 July 2017

¹² R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51.

¹³ Which we had a hand in drafting with Michael Ford QC. See <http://services.parliament.uk/bills/2016-17/workersrightsmaintenanceofeustandards.html>

¹⁴ Modelled on section 3 of the Human Rights Act 1998.

¹⁵ Clause 5.

¹⁶ Clause 6.

¹⁷ 'Trade Deals. Tax cuts. And taking time before triggering Article 50. A Brexit economy strategy for Britain', 14 July 2016. <http://tinyurl.com/z8m58yl>.

3. EU EMPLOYMENT AND HEALTH AND SAFETY RIGHTS, AND HOW THEY TAKE EFFECT IN UK LAW



Any attempt by the Government to use the powers contained in the EU (Withdrawal) Bill to reduce employment and health and safety rights must be resisted. But before turning to how the Bill operates, we set out a reminder of the employment and health and safety rights at stake, and how they are implemented in UK law¹⁸.

Employment rights

Many of the UK's employment rights have no origin in Europe and Brexit per se will not directly affect them. These include key claims such as unfair dismissal, the national minimum wage and unlawful deductions from wages. Other claims, such as equal pay and race discrimination, had a domestic origin before being developed in EU law.

But there are many UK employment rights which do have their origins in EU law. These include protections for agency, young, fixed-term and part-time workers. They include rights in the event of business transfers and collective redundancies, or the insolvency of the employer. They also include rights in relation to working time (including holiday pay), posted workers, parental leave and European Works Councils.

The standards of EU law relating to discrimination, in particular, on the grounds of religion or belief, age or sexual orientation, and relating to equal pay have set required minimum standards in the UK which could not be undercut by governments bent on deregulation.

As we have reported previously¹⁹, during the four years 2008-2011, nearly a million people considered that their EU-derived rights had been breached and went so far as to lodge an Employment Tribunal claim. This figure does not take account of the much wider benefit of having standards in the workplace with which employers are required to comply.

It is not just individual employment rights that will be affected. Most (but not all) trade union and collective rights, including most of those provided for in the Trade Union and Labour Relations (Consolidation) Act 1992, are UK rather than EU rights. Some of these rights, such as the freedom to take industrial action and the right to recognition derive from non-EU international law such as International Labour Organisation Convention Nos.87 and 98 and Article 11 of the European Convention on Human Rights. Those rights derived from UK and non-EU international law are not directly affected by Brexit.

Until the Lisbon Treaty elevated the status of the EU Charter of Fundamental Rights to the same level as other EU Treaty provisions, the EU's competence so far as trade union freedoms are concerned was at best opaque. However, there have been a series of challenges to the Court of Justice by employers under free movement principles²⁰. They argued (successfully) that any restriction on free movement principles brought about by collective action had to be justified according to the standards of the Posted Workers Directive²¹. These EU free movement principles, here used against workers to undermine collective action, are the equivalent for companies of the free movement principles at the heart of the debate on immigration and continued membership of the Single Market. Unless agreed otherwise, those free movement principles will cease to apply once Brexit is completed.

¹⁸ For a more in depth legal analysis, see the opinion of Michael Ford QC 'Workers' Rights From Europe: The Impact of Brexit', 7 April 2016, published by the TUC at <https://www.tuc.org.uk/international-issues/europe/eu-referendum/workplace-issues/brexit-could-risk-%E2%80%9Clegal-and-commercial>

¹⁹ 'The Impact of Brexit on UK employment law rights and health and safety legislation', Thompsons Solicitors Trade Union Law Group Briefing, September 2016.

²⁰ See International Transport Workers Federation and another v Viking Line ABP [2008] IRLR 143 and Laval un Partneri v Svenska Byggnadsarbetareförbundet [2008] IRLR 160.

²¹ Council Directive 97/81/EC.

Health and safety rights

It was the European Framework Directive on Safety and Health at work, adopted under Article 118 of the Treaty on the Functioning of the European Union, that led to the UK's introduction of the '6-pack' of health and safety regulations.

These regulations have gone on to provide the foundations for work-related personal injury claims. Many of the important cases would have been lost by the workers involved had the regulations not operated to impose stricter duties on employers.

The '6-pack' regulations were introduced into UK law through the Health and Safety at Work Act 1974 ('HSWA'). As this is primary legislation, they would not be immediately affected by Brexit. However, they would no longer have the underpinning of EU law and would be vulnerable to future change by a 'de-regulating' government.

Other regulations, including The Control of Substances Hazardous to Health Regulations 2002 are made under both HSWA and ECA, and would therefore have to be re-cast on the repeal of the ECA.

How do these rights currently take effect in the UK

EU law is currently incorporated into domestic law in different ways.

Some EU laws have 'direct effect'. This means that they apply in the UK without any need for domestic legislation and can be enforced between non-State participants. There are two main categories:

- (i) EU regulations and decisions of various institutions and regulatory bodies; and
- (ii) various Articles of the Treaty on the Functioning of the European Union (TFEU); and, as against 'emanations of the State', Directives where the content of the Directive is sufficiently clear and precise, unconditional and does not give Member States substantial discretion as to implementation.

For almost everything else (e.g. Directives which are not capable of having direct effect) the EU law takes effect in the UK via domestic UK implementing legislation. This is known as 'vertical effect'. Implementation can either be by primary legislation (i.e. Acts of Parliament such as the Health and Safety at Work Act 1974), or secondary legislation (i.e. regulations such as the Transfer of Undertakings (Protection of Employment) Regulations 2006).

These distinctions are set out in the ECA. This is the key Parliamentary authority for the application of EU law in the UK, both directly and indirectly. It is described by the Supreme Court as the 'conduit pipe' through which EU law 'flows into' domestic UK law²². The domestic Regulations have their authority from this Act, (although a few are made under more than one 'parent' Act). One of the purposes of the EU (Withdrawal) Bill is to provide for the repeal of the ECA.

There is a further, developing, category of EU law that finds its way into UK law. These are 'general principles' of EU law which, though they may be recognised in the EU Treaties, do not depend for their existence on a Directive or other regulation or decision²³. Examples of 'general principles' of EU law include not only the principles of proportionality, equivalence and effectiveness, but also the principle of equal treatment without discrimination (even though the latter 'general principle' is also provided for in EU law by means of the Equal Treatment Framework Directive²⁴). Provided that the 'context' in which the general principle arises 'falls within the scope of EU law', a Court must disregard or set aside any inconsistent UK legislation²⁵.

Many of these mechanisms can be seen at work in the recent decision of the UK Supreme Court in *Walker v Innospec*²⁶. Mr Walker, who is gay, complained that his employer had refused to grant a spouse's pension to his male partner, with whom he had been in a civil partnership since January 2006, which he said should have been based on his employment service from 2 January 1980 to 31 March 2003. The Equality Act 2010²⁷ provides an exception to the general non-discrimination rule²⁸ implied into occupational pension schemes where the right to a benefit accrued before 5 December 2005.

The Supreme Court ruled that the exception to the non-discrimination rule in the Equality Act could not be interpreted compatibly with the EU Equal Treatment Framework Directive (it being understood that the Directive could not be directly effective against an employer which was not an emanation of the State). As the Employment Appeal Tribunal had found, the plain purpose of the provision in the Equality Act was to create an exception, and to nullify that exception would run directly contrary to the 'grain' of the legislation²⁹. The exception couldn't, therefore, be dis-applied using the so-called 'interpretative obligation'.

But, nonetheless, the Supreme Court dis-applied that exception because of the 'general principle' of equal treatment in EU law, even though the deadline for transposing the Equal Treatment Framework Directive into UK law had not expired until 2 December 2003. Mr Walker's partner was therefore entitled to a spouse's pension.

In fact, all of these 'conduit' mechanisms are made available in the UK legal system because of the ECA³⁰, which is a UK Act of Parliament. That point is often missed in the perception by some that Brussels encroaches unjustifiably on the UK Parliament's sovereignty.

²² See note 2.

²³ See *Kukukdeveci v Swedex GmbH and Co KG* (Case C-555/07) [2010] All ER (EC) 867.

²⁴ Council Directive 2000/78/EC.

²⁵ See *R (Chester) v Secretary of State for Justice* [2013] UKSC 63.

²⁶ [2017] UKSC 47.

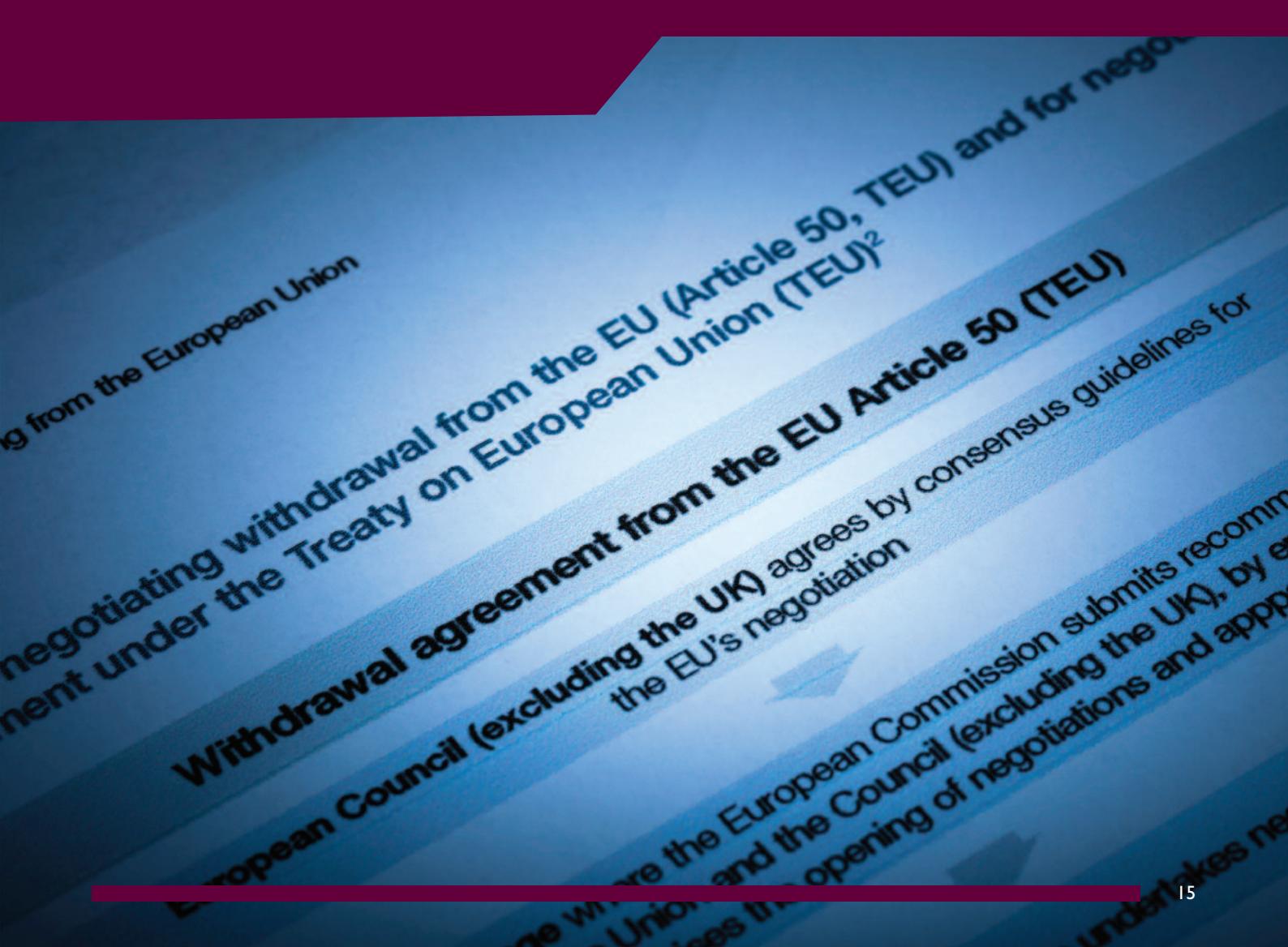
²⁷ Paragraph 18 of Schedule 9.

²⁸ Which includes discrimination on grounds of sexual orientation.

²⁹ See *Ghaidon v Godin-Mendoza* [2004] 2 AC 557.

³⁰ See *R v Secretary of State ex p. Factortame (No.2)* [1991] 1 All ER 70.

4. THE EU (WITHDRAWAL) BILL



What it will do

The EU (Withdrawal) Bill sets out to:

- repeal the ECA from the 'exit day';
- import, retain and preserve EU law (and UK domestic law implementing it); and
- permit the modification of that retained EU law for limited purposes.³¹

'Retained EU law'

The EU law to be preserved (or converted) falls into the following categories:

- 'EU-derived domestic legislation', which is the domestic legislation implementing EU law rights (employment rights examples include TUPE, the Agency Workers Regulations 2010 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000);
- 'direct EU legislation', which is EU law such as EU regulations and decisions of various regulatory bodies (there are few examples of this type of EU law relevant to employment rights, but one example is the so-called Rome I regulation on the law applicable to contractual obligations);
- other directly effective EU rights, which do not currently require domestic implementation in order to be effective (an employment rights example is Article 157 TFEU – the right to equal pay); and
- 'general principles' of EU law such as the principles of equal treatment (relevant to Mr Walker's case – see above), effectiveness and equivalence.

Currently, where domestic law is inconsistent with EU law, the domestic law must give way and this may mean that the domestic law may have to be dis-applied. However, though not expressed in the Bill, the very important obligation to interpret domestic laws compatibly with retained EU law so far as it is possible to do so (the 'interpretative obligation'³²) is also intended to be included within the concept of the supremacy of EU law³³.

The supremacy of EU law will be preserved for retained EU law over pre-exit UK legislation, but not post-exit domestic legislation. Where an inconsistency is identified between retained EU law and pre-exit domestic legislation, the retained EU law will be given supremacy. Where an inconsistency is identified between retained EU law and post-exit domestic legislation, the latter will be given supremacy.

The principle of the supremacy of EU law will not be 'prevented from applying' to post-exit day 'modifications' to retained EU law, provided that 'the application of the principle is consistent with the intention of the modification'³⁴.

³¹ For excellent, in depth, legal analysis see 'Public Law for Everyone', Professor Mark Elliott, which includes explanations and resources, at <https://publiclawforeveryone.com/2017/07/18/resources-the-eu-withdrawal-bill/>.

³² See *Marleasing v SA Comercial* [1990] 104153.

³³ See paragraph 97 of the Explanatory Notes.

³⁴ Clause 5(3).

So far as 'general principles' are concerned, the supremacy of EU law will be subject to qualifications, as described below. As we will see, these qualifications will apply to 'fundamental rights'.

This is confusing, and raises many potential areas of complexity and uncertainty. The suggestion seems to be that all retained EU law will have a uniform status, and that its supremacy ('modifications' apart) will depend on whether the domestic legislation it is being compared with was enacted before or after exit day. Such a uniform status for retained EU law does not reflect the current more structured hierarchy. Currently, directly effective EU laws have supremacy over inconsistent UK statutes, but UK secondary legislation implementing EU law do not.

It is also unclear what will amount to a 'modification' to retained EU law (as opposed to distinct post-exit legislation to which the principle of supremacy of EU law would not apply), and the circumstances in which the principle of supremacy of EU law will be applied to 'modifications' of retained EU law. It is also confusing to include the 'interpretative obligation' in a section headed 'Exceptions to savings and incorporation' instead of one headed 'Interpretation of retained EU law'.

This (unsatisfactory) treatment of the 'interpretative obligation' in the EU (Withdrawal) Bill is to be contrasted with its treatment in Melanie Onn's private members' Bill, which included a clear and concise analogue of section 3 of the Human Rights Act 1998.

EU Charter of Fundamental Rights and 'general principles' of EU law

The EU Charter of Fundamental Rights will not be part of UK domestic law after exit day³⁵. However, that will not prevent the retention in domestic law on or after exit day of 'fundamental rights or principles which exist irrespective of the Charter'³⁶.

Explanations accompanying the EU Charter provide that it was not intended to diverge from pre-existing case law of the Court of Justice, or to create new EU competencies. However, the suggestion that the UK has an opt-out in the form of Protocol 30 to the Lisbon Treaty has been laid to rest³⁷ and the Charter's importance has grown. Not only is it a living catalogue of fundamental rights recognised by EU law, it also has extended reach over, for example, economic rights not protected by the European Convention on Human Rights. Its legally binding status equivalent to other Treaty rights confirms that superior remedies are available for infringement of a right protected by it, as opposed to a Convention right. Currently, where a UK statute is incompatible with a right protected by the EU Charter, the UK statute would be dis-applied³⁸. However, if the UK statute was incompatible with a Convention right, the most a UK court could award would be a declaration of incompatibility³⁹ (in which case the offending statute would continue to apply), and the most the European Court of Human Rights could do would be to find a violation of the Convention right and award damages (in which case the offending statute would also continue to apply).

³⁵ Clause 5(4).

³⁶ Clause 5(5).

³⁷ See NS v Secretary of State for the Home Department Joined cases C-411/10 and C-493/10.

³⁸ See for example Benkharrabouche & anor v Embassy of the Republic of Sudan [2015] EWCA where the State Immunity Act 1972 operated as a barrier to Tribunal claims by two employees at the Sudanese embassy, and was set aside by operation of Article 47 of the EU Charter, but where the only remedy available under the Human Rights Act 1998 would have been a declaration of incompatibility.

³⁹ Section 4 Human Rights Act 1998

In any event, no 'general principle' of EU law will be part of domestic law after exit day 'if it was not recognised as a general principle of EU law by the European Court of Justice in a case decided by it before exit day'⁴⁰. There will be no 'right of action in domestic law' on or after exit day over a failure to comply with 'general principles'⁴¹. And no court will be able, on or after exit day, to invalidate domestic laws or conduct because they were incompatible with 'general principles'⁴².

'General principles' of EU law are not defined in the Bill. However, the explanatory notes accompanying the Bill provide that 'examples of general principles include proportionality, non-retroactivity (i.e. that the retroactive effect of EU law is in principle prohibited), fundamental rights and equivalence and effectiveness rights'^{43 44}. 'Fundamental rights' are clearly intended to be within the category of 'general principles of EU law'.

These 'general principles' will not be available as 'rights of action in domestic law' and will not be available as grounds for invalidating domestic laws or executive conduct which would otherwise be unlawful. Accordingly, the 'protection of fundamental rights or principles which exist irrespective of the Charter' seems to be empty. 'Fundamental rights' are in any event also going to be confined in scope to those recognised in pre-exit day decisions of the European Court of Justice, removing opportunities for future expansion.

As they stand, the provisions of the Bill concerning 'general principles', including 'fundamental rights' and the EU Charter of Fundamental Rights, are designed to ensure that those protections wither and fade as the UK leaves the EU. These protections have been important to the protection of employment rights in the UK (particularly in the field of discrimination), and they should be maintained post-Brexit. Consistent with its equivalent status to other EU Treaty Articles, the EU Charter of Fundamental Rights should also be incorporated into UK law.

Interpretation of retained EU case law: Judgments of the European Court of Justice

UK Courts and Tribunals will 'not be bound by any principles laid down, or any decisions made on or after exit day by the European Court'⁴⁵. They 'need not have regard to anything done on or after exit day by the European Court', but 'may do so if [they] consider it appropriate'⁴⁶. From exit day, retained EU law is to be interpreted in accordance with pre-exit day case law and 'general principles' of the European Court – but only if the retained EU law is 'unmodified'. Retained EU law which has been 'modified' on or after exit day can still be interpreted in accordance with pre-exit day case law and general principles of the European Court, if doing so is 'consistent with the intention of the modifications'.

⁴⁰ Paragraph 2 of Schedule 1.

⁴¹ Paragraph 3(1) of Schedule 1.

⁴² Paragraph 3(2) of Schedule 1.

⁴³ Explanatory notes, paragraph 50.

⁴⁴ Under the principle of equivalence, EU law claims must be treated in an equivalent way to claims based solely on domestic law. The principle of effectiveness requires that it must be neither practically impossible nor excessively difficult to enforce an EU law based claim.

⁴⁵ Clause 6(1).

⁴⁶ Clause 6(2).

The Supreme Court will not be bound by pre-exit day case law of the European Court of Justice. In deciding whether to depart from any pre-exit day case law of the European Court of Justice, the Supreme Court will have to apply the same test it applies in other situations – ‘whether it would be right to do so’.

This multiplies the complexity and uncertainty identified in relation to the categorisation of ‘retained law’ and application of the principle of ‘supremacy of EU law’. It’s immediately possible to identify some of the confusion which is inevitably going to arise – ‘In what circumstances is a Court or Tribunal entitled to decide that it is appropriate to have regard to rulings of the European Court of Justice after exit day?’, ‘How modified does retained EU law have to be before a court or Tribunal is no longer entitled to interpret it in accordance with pre-exit day case law of the European Court of Justice?’ We could go on.

So, what would have been the outcome in Mr Walker’s case if it had arisen after ‘exit day’, and after the EU (Withdrawal) Bill had been enacted and was in force?

Assuming that there had been no ‘modification’ to the relevant provisions of the Equality Act, Mr Walker would have available to him, as previously, the ‘interpretative obligation’, meaning that the exception in the Equality Act would have to be interpreted compatibly, so far as possible, with the Equal Treatment Framework Directive (assuming that the Directive would be regarded as ‘relevant’ after exit day). A Court or Tribunal could ‘have regard’ to pre-exit day decisions of the European Court. The Supreme Court would not be bound by pre-exit decisions of the European Court, and would be able to depart from them ‘if it considered it right to do so’. It is probable that a Court or Tribunal would reach the same conclusion as previously that, adopting the interpretative obligation, it was not possible to interpret the Equality Act exception compatibly with the Framework Directive, and the exception would therefore survive.

The EU ‘general principle’ of non-discrimination would then have to be considered. The conundrum of whether the ‘context fell within EU law’ would need to be overcome in some way. Mr Walker would be able to rely on the ‘general principle’ of non-discrimination because it has been recognised in decisions of the European Court before exit day. But, whereas the Supreme Court dis-applied the Equality Act exception on the basis of the application of ‘general principles’, a court hearing a claim by Mr Walker after exit day would not be permitted to use such a ‘general principle’ to dis-apply the Equality Act exception⁴⁷. Even without modification to the relevant retained EU law, Mr Walker’s claim would in all likelihood fail.

⁴⁷ See Paragraph 3(2) of Schedule 1 to the EU Withdrawal Bill.

The retiring President of the Supreme Court, Lord Neuberger, speaking after publication of the Bill, has said that the courts will need more guidance on how they should interpret retained EU law. He said:

*"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", adding "But to blame the judges for making the law when parliament has failed to do so would be unfair". He went on to say that all judges "would hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in the statute"*⁴⁸.

'Modification' of retained EU law and other delegated powers

Ministers will have exceptionally wide powers to repeal, amend or substitute retained EU law so as to 'prevent, remedy or mitigate' 'any failure of retained EU law to operate effectively, or any other deficiency arising from the withdrawal of the United Kingdom from the EU'⁴⁹.

The non-exhaustive list of 'deficiencies' provided includes where any aspect of retained EU law would have 'no practical application' after exit day or where it confers functions in relation to an EU institution which would no longer be applicable. It also includes reciprocal arrangements between the EU, Member States and institutions, and 'other arrangements which are otherwise dependent upon the United Kingdom's membership of the European Union'⁵⁰. So far as when retained EU law is to be regarded as not 'operating effectively', and 'other deficiencies' are concerned, the Explanatory Notes provide that 'a failure of retained EU law is a type of deficiency; a failure means the law doesn't operate effectively whereas deficiency covers a wider range of cases where it does not function 'appropriately' or 'sensibly'"⁵¹.

Similar modification powers will be given to devolved administrations. The powers given to Westminster and to the devolved administrations will lapse two years after exit day⁵² – a so-called 'sunset' clause.

Ministers are also to be given further powers – including to remedy breaches of the UK's international obligations arising out of Brexit⁵³ and to implement the terms of any withdrawal agreement between the EU and the UK⁵⁴.

⁴⁸ 'UK judges need clarity after Brexit – Lord Neuberger', Clive Coleman, Legal Correspondent, BBC News 8 August 2017 at <http://www.bbc.co.uk/news/uk-40855526>

⁴⁹ Clause 7(1).

⁵⁰ Clause 7(2).

⁵¹ Paragraph 110.

⁵² Clause 7(7).

⁵³ Clause 8.

⁵⁴ Clause 9.

These powers include 'Henry VIII powers', which allow Acts of Parliament to be changed by Ministerial Order, without the approval of Parliament itself. The powers to be given to Ministers, and especially those to modify retained EU law, though subject to some restriction⁵⁵, are powerful and wide-ranging. This is particularly so in light of a further provision that a 'Minister may by regulations make such provision as the Minister considers appropriate in consequence of this Act'⁵⁶. That latter provision, at face value, seems impossibly widely drawn. At the very least, its scope is unclear.

So far as the modification powers are concerned, the Government provided a less than convincing assurance that it was 'important that the purposes for which the power can be used are limited. Crucially, we will ensure that the power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law'⁵⁷. But the problem and risk was well described by the House of Lords Select Committee on the Constitution:

*'The process of converting the body of EU law, as described by the Government, will consist of two distinct phases. First the initial preservation of EU law by converting it into UK law with such amendments as are necessary to make it work sensibly in a UK context; and second, a longer term process in which Parliament and the Government determine the extent to which (what was) EU law will remain part of UK law. It is vital that a distinction be drawn between these two discrete processes: the more mechanical act of converting EU law into UK law, and the discretionary process of amending EU law to implement new policies in areas that previously lay within the EU's competence. The 'Great Repeal Bill' [the name then used] is intended to facilitate the first aspect of the process. The second should be achieved through normal parliamentary procedures'*⁵⁸.

The great concern remains that the powers, especially those to modify retained EU law, are not sufficiently circumscribed so as to prevent encroachment by Ministers into the domain of post-Brexit policy making in areas previously within EU competences. That post-Brexit policy making should be the preserve of Parliament. That concern is multiplied when considered in tandem with the inadequacy of the parliamentary supervision to be applicable to the exercise of these powers.

⁵⁵ For example, they cannot generally make retrospective provision, create criminal offences or amend the Human Rights Act 1998 – see sections 7(6), 8(3) and 9(3).
⁵⁶ Section 17.

⁵⁷ Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, March 2017, paragraph 3.17.

⁵⁸ The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-2017, House of Lords Select Committee on the Constitution, 9 March 2017

Parliamentary supervision of Ministerial powers

Supervision of the powers to deal with deficiencies in retained EU law arising from withdrawal, implementation of any withdrawal agreement and implementation of international obligations will come in two varieties. The standard procedure will be the so-called 'negative resolution procedure' – where the order will become law when 'made', but is subject to annulment by resolution of either House of Parliament⁵⁹.

But the more intrusive 'draft affirmative resolution procedure' – where the order does not become law unless a draft has been laid before, and approved by, both Houses of Parliament – will apply in certain circumstances. These include where a public authority is created, where functions are transferred from EU (or other Member State) authorities to UK authorities, where criminal offences are created or widened, or where 'powers to legislate' are created⁶⁰.

The delegated powers memorandum accompanying the Bill, but not the Bill itself, also contains the Government's assurance that all statutory instruments made by Ministers under powers in the Bill must, in addition, to the usual requirements as to content 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 the instrument does no more than what is appropriate'⁶¹.

This is an imperfect restatement of the principles suggested by the House of Lords Select Committee on the Constitution for inclusion in a declaration to be signed by the Minister. Its suggestions included that the declaration state that the order 'does no more than is necessary to ensure 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'⁶².

These supervision procedures are very seriously inadequate.

First, the House of Lords Select Committee on the Constitution recommended that the Bill should '*set out a list of certain actions that cannot be undertaken by the delegated powers contained in the Act, as another means of mitigating concerns that may arise over this transfer of legislative competence*'⁶³. This suggestion should be adopted.

Second, the circumstances in which the affirmative resolution procedure (i.e. the higher level of scrutiny) is to apply are relatively narrow.

⁵⁹ Paragraph 1(5) of Schedule 7.

⁶⁰ Paragraph 1(1) and (2) of Schedule 7.

⁶¹ European Union (Withdrawal) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, paragraph 49.

⁶² The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-2017, House of Lords Select Committee on the Constitution, 9 March 2017, paragraph 102

⁶³ The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-2017, House of Lords Select Committee on the Constitution, 9 March 2017, paragraph 51.

Third, there is no facility to make available the more enhanced scrutiny procedures to be found in other legislation such as the Legislative and Regulatory Reform Act 2006. Those enhanced scrutiny procedures include requirements to consult such organisations as appear to be affected by the proposals (and others, where considered appropriate)⁶⁴, to provide a more detailed accompanying explanatory document (giving, for example, details of consultation undertaken)⁶⁵ and, in the case of the so-called 'super-affirmative resolution procedure'⁶⁶, to have regard to representations.

Fourth, there is no opportunity for consideration by any parliamentary committees as to the appropriate form of supervision in any particular case. The House of Lords Committee Select Committee on the Constitution recommended:

"(4) That a parliamentary committee(s) consider the Government's recommendations, and decide the appropriate level of scrutiny for each statutory instrument laid under the ['Great] Repeal Bill'. If the two Houses perform this function separately, then it would seem appropriate in the House of Lords for the Secondary Legislation Scrutiny Committee to perform this function. Alternatively, a Joint Committee could be established to carry out this role on a bi-cameral basis.

(5) That where the relevant committee(s) determines that a statutory instrument laid under the ['Great] Repeal Bill amends EU law in a manner that determines matters of significant policy interest or principle, it should undergo a strengthened scrutiny procedure. We do not, in this report, attempt to define exactly how this strengthened scrutiny procedure should operate, or whether one of the existing models should be adopted. We recognise that existing models for enhanced scrutiny can prove resource intensive and time consuming – in our view, the only 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"⁶⁷.

⁶⁴ Section 13 Legislative and Regulatory Reform Act 2006.

⁶⁵ Section 14 Legislative and Regulatory Reform Act 2006.

⁶⁶ Section 18 Legislative and Regulatory Reform Act 2006.

⁶⁷ The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-2017, House of Lords Select Committee on the Constitution, 9 March 2017, paragraph 102, paragraph 102 (4) to (5)

Devolved administrations

In some areas (such as agriculture, environmental and some transport issues), the extent of devolved competence is circumscribed by EU law and the common policy frameworks it sets. When the UK leaves the EU, these powers currently exercised by the EU will revert to the UK, and without more, would return to the devolved administrations in accordance with their devolution settlements. The Government said that '*it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained*'⁶⁸. The Government therefore said that:

*"To provide the greatest level of legal and administrative certainty upon leaving the EU, and consistent with the approach adopted more generally in legislating for the point of departure, the Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel we will begin intensive discussions with the devolved administrations to identify where common frameworks need to be retained in the future, what these should be, and where common frameworks covering the UK are not necessary"*⁶⁹.

However, the EU (Withdrawal) Bill itself, under the heading 'Retaining EU restrictions in devolution settlements'⁷⁰, provides that devolved administrations are only to have powers to modify retained EU law to the extent that they had such powers before exit day. The Bill does not provide for current areas of EU competence to be re-distributed in accordance with devolution settlements.

This has led the First Ministers of Scotland and Wales to say in response to the Bill:

*"We have repeatedly tried to engage with the UK government on these matters, and have put forward constructive proposals about how we can deliver an outcome which will protect the interests of all the nations in the UK, safeguard our economies and respect devolution. Regrettably the Bill does not do this. Instead, it is a naked power grab, an attack on the founding principles of devolution and could destabilise our economies"*⁷¹.

The Government has conceded that the Sewel Convention (the need for legislative consent motions to be passed by devolved administrations) will apply, certainly to the extent that the Bill provides for 'the preservation and conversion of EU law' and 'the replication of the EU law limit on the devolved institutions and the power to vary that limit, because this will alter the competence of the devolved institutions'⁷².

⁶⁸ Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, March 2017, paragraph 4.3.

⁶⁹ Legislating for the United Kingdom's withdrawal from the European Union, Department for Exiting the European Union, March 2017, paragraph 4.4.

⁷⁰ Clause 11.

⁷¹ Joint statement of Nicola Sturgeon and Carwyn Jones responding to the EU (Withdrawal) Bill, 13 July 2017

⁷² See Explanatory Notes, paragraph 69.

Following a meeting with First Secretary of State Damian Green on 9 August 2017, Michael Russell, Scottish Minister for UK Negotiations on Scotland's Place in Europe issued this uncompromising statement:

"Today was a useful opportunity for an exchange of views between ourselves and the UK Government on Brexit and the repatriation of powers it will involve.

But following today's meeting we remain absolutely clear that, as things stand, we will not recommend to the Scottish Parliament that it gives its consent to the EU Withdrawal Bill.

The bill as currently drafted is impractical and unworkable. It is a blatant power grab which would take existing competence over a wide range of devolved areas, including aspects of things like agriculture and fishing, away from Holyrood, giving them instead to Westminster and Whitehall.

That means that unless there are serious and significant changes to the proposed legislation, the strong likelihood is that the Scottish Parliament will vote against the repeal Bill.

To be clear, that would not block Brexit and we have never claimed to have a veto over EU withdrawal.

But UK Ministers should still be in no doubt – to override a vote of the Scottish Parliament and impose the EU Withdrawal Bill on Scotland would be an extraordinary and unprecedented step to take..."⁷³.

⁷³ The statement is available at <https://news.gov.scot/news/brexit-bill-talks>.

5. CONCLUSIONS



'Hard' Brexit looks less likely than it did a year ago; some form of 'Soft' Brexit more likely. But the truth is that we don't yet know what Brexit means, and we don't know what is going to happen to EU employment and health and safety rights. The General Election has opened up new possibilities and made alternative types of Brexit viable.

We can't be confident of the Government's faltering steps in its negotiations with the EU. But what we do know is that, in the EU (Withdrawal) Bill, the Government is attempting to give itself exceptionally wide-ranging and invasive powers to amend and repeal EU law converted into (and preserved in) UK law. The danger is that this will include policy decisions which should be reserved to Parliament. This may well include policy decisions in relation to employment and health and safety rights. The EU (Withdrawal) Bill will be bitterly contested, not least by the devolved administrations. But without it, it is difficult to see how Brexit can be implemented efficiently and on time.

As the EU (Withdrawal) Bill proceeds through Parliament, it is essential that every opportunity is taken to prevent the Government using the extraordinary powers given to Ministers in the Bill to start to dismantle over 40 years' worth of EU employment and health and safety laws, and to ensure that the use of those powers is subject to proper supervision.

Trade Union Law Group
Thompsons Solicitors LLP
September 2017

Appendix I: Glossary of Brexit terms

'Competences': an allocation of power to act in a particular policy area such as agriculture, fisheries or justice. The EU has competences conferred on it by the EU Treaties. Competences not conferred by the EU Treaties remain with the Member States. In the UK, the devolution settlements in Scotland, Wales and Northern Ireland define competences of the devolved administrations vis a vis Westminster.

'Council of Europe': the Council of Europe is not an EU body. It is an organisation concerned with human rights and democracy, founded in 1949, which produced the European Convention on Human Rights and the European Court of Human Rights in Strasbourg. It has 47 Member States, including all 28 current EU Member States. Withdrawing from the EU does not automatically mean withdrawing from the Council of Europe.

'Court of Justice of the EU': the Court of Justice of the EU was established in 1952 and is located in Luxembourg. It ensures that EU law is interpreted and applied in the same way in all EU Member States. UK courts are currently able to make references to the Court of Justice of the EU for determinations of the interpretation of EU law, where that EU law is not clear.

'Customs union': an arrangement where there are no duties on trade between member states, and there is a common external tariff on imports from outside the customs union. The EU is a customs union. Turkey is in a customs union with the EU, but it is not member of the EU.

'European Commission': the executive body of the EU, managing the day to day business of the EU. The current President is Jean-Claude Juncker.

'European Communities Act 1972': the UK Act of Parliament by which the UK joined the European Economic Community ('EEC' or 'Common Market'), the European Coal and Steel Community and the European Atomic Energy Community. It also provides for the incorporation of EU law into UK law.

'European Council': comprises the Heads of State or Government of all 28 EU Member States. The current President is Donald Tusk. Not to be confused with the 'Council of Europe' – see above.

'European Economic Area' ('EEA'): the EEA is made up of all 28 EU Member States, plus Norway, Iceland and Liechtenstein. The three non-EU EEA members apply most EU internal market laws including employment laws, but not in policy areas such as the Common Agricultural and Fisheries Policy, the customs union and common trade policy.

'European Free Trade Area' ('EFTA'): EFTA comprises four States - Norway, Iceland, Liechtenstein (which are also in the EEA) and Switzerland. Switzerland has a bilateral Free Movement of Persons Agreement with the EU which means EU citizens wishing to live or work in Switzerland can do so. Switzerland's agreement provides for it to adopt legislation largely equivalent to EU law in the areas covered by the agreement, including employment legislation.

'European Parliament': the parliamentary institution of the EU, directly elected every five years. It is composed of 751 MEPs from the 28 Member States.

'EU Charter of Fundamental Rights': a set of fundamental political, social and economic rights for EU citizens and residents under the headings 'Dignity', 'Equality', 'Solidarity', 'Citizens' rights' and 'Justice'. First introduced in 2000, its provisions were given the same legally binding status as the Treaties by the Lisbon Treaty.

'Free trade agreements': a 'free trade agreement' is an agreement between countries to reduce barriers to trade between them. A 'free trade agreement' is different to a 'customs union' because it doesn't require its members to set the same tariffs on trade with countries outside the agreement.

'Freedom of movement': one of the four fundamental principles of the EU, freedom of movement is the right of citizens of the EU and their families to move and reside freely within the area of the EU.

'Hard' Brexit: a version of Brexit where the UK leaves the EU quickly, possibly with a free trade agreement with the EU, but possibly not.

'Henry VIII clause': a power, exercisable by Government Ministers, to enable primary legislation to be amended or repealed, with or without an opportunity for parliamentary intervention.

'Single Market': an economic area where barriers to trade between its members have been removed based on the 'four freedoms'- free movement of goods, services, capital and labour. As between member states, there are no tariffs or quotas on trade. 'Non-tariff barriers' such as regulations (for example on packaging or labelling) or technical specifications are reduced. Members accept the free movement of people, make a financial contribution to the EU and are required to adopt legislation on the single market.

'Soft' Brexit: a version of Brexit where the UK leaves the EU but negotiates to remain a member of the European Economic Area, essentially staying in the single market (and being subject to its rules), while giving up influence over single market rules.

'Super Qualified Majority Voting': the system of voting for approval, by members of each of the other 27 EU Member States the EU side, of any UK Brexit withdrawal agreement. The qualified majority is defined as at least 72% of the participating members of the EU Council, comprising at least 65% of the population of those Member States.

'Tariff': taxes paid on imported goods. They may be based on the value of the goods, or be of a fixed amount.

'Transition': this is the move from being an EU Member State to being outside the EU. UK businesses have called for a transition period, beyond exit day, during which access to the single market would be preserved.

'World Trade Organisation' ('WTO'): the WTO is an organisation of 164 member countries which provides the successor to the General Agreement on Tariffs and Trade ('GATT'). It provides a forum for negotiating multilateral trade deals.

Appendix 2: Key EU employment rights

The Acquired Rights Directive 2001/23/EC

Protects employees' rights in the event of a transfer of an undertaking, business or part of one. Includes the provision of information to, and consultation with, employees and their representatives. Also provides unfair dismissal protection.

Implemented in the UK by Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Employment Rights Act 1996

The Agency Workers Directive 2008/104/EC

Gives all agency workers equal treatment entitlements in relation to access to facilities and information on vacancies from day 1 and (after a 12 week qualifying period) creates rights to the same basic working and employment conditions in certain areas, including pay and annual leave, as directly recruited employees. Also gives unfair dismissal protection.

Implemented in the UK by the Agency Workers Regulations 2010 and the Employment Rights Act 1996

The Collective Redundancies Directive 98/59/EC

Guarantees a minimum standard of treatment for employees in the event of collective redundancy. In particular sets out collective consultation with representatives and the enforcement of protective awards.

Implemented in the UK by the Trade Union and Labour Relations (Consolidation) Act 1992

The Employer Insolvency Directive 2008/94/EC

Provides employees dismissed from an insolvent employer a right to State-backed compensation payments for wages and redundancy. Operated in the UK via the Redundancy Payments Office and payments from the National Insurance Fund.

Implemented in the UK by the Employment Rights Act 1996

The Employment Conditions Directive 91/533/EEC

Requires employers to provide employees with details of the key provisions which govern their employment relationship. Implemented in the UK as the requirement for Statement of Particulars of Employment.

Implemented in the UK by the Employment Rights Act 1996

The Employment Framework Directive
89/391/EEC

Provides protection from discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Also provides for paid time off for health and safety representatives.

Implemented in the UK by the Equality Act 2010 and the Health and Safety (Consultation with Employees) Regulations 1996

The Equal Treatment Directive
76/207/EC

Requires Member States to ensure equal treatment in relation to employment and vocational training. Although this measure was adopted under a single market legal base, it was subject to expansive interpretation by the European Court of Justice, resulting in its application to pregnancy and maternity and gender reassignment.

Implemented in the UK by the Equality Act 2010

The European Works Council Directive
2006/109/EC

Provides for the establishment of European Works Councils (EWCs) or for a procedure to inform and consult employees on transnational issues affecting the workplace (i.e. those which concern all the operations of the business in Europe, or which concern undertakings and establishments in at least two different EEA countries). Only larger multi-national employers fall within the scope of the EWC rules and there is no obligation to set up a EWC in the absence of a request from at least 100 employees in two or more countries.

Implemented in the UK by the Transnational Information and Consultation of Employees Regulations 1999

The Fixed-term Workers Directive
99/70/EC

Ensures that fixed-term workers may not be treated in a less favourable manner than permanent workers solely because they have a fixed-term contract, unless different treatment is justified on objective grounds. Also provides for the provision of a permanent contract after a set period of time.

Implemented in the UK by the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002

The Information and Consultation Directive
2002/14/EC

Provides employees in organisations with 50 or more employees the right to be informed and consulted on a regular basis about issues in the organisation for which they work. This includes the provision of information on the organisation's economic situation, to be informed and consulted about developments in the workplace and in particular on anticipatory measures envisaged where there is a threat to employment. Includes right to paid time off and protection from detriment and unfair dismissal.

Implemented in the UK by the Information and Consultation of Employees Regulations 2004 and the Employment Rights Act 1996

<p>The Parental Leave Directive 2010/18/EC</p>	<p>Entitles workers to at least four months parental leave on the birth or adoption of a child until a given age, suggested as being up to the age of eight. Also provides unfair dismissal and detriment protection.</p> <p>Implemented in the UK by Maternity and Parental Leave etc. Regulations 1999 and the Employment Rights Act 1996</p>
<p>The Part-time Workers Directive 97/81/EC</p>	<p>Requires that, in respect of employment conditions, part-time workers are not treated in a less favourable manner than comparable full-time workers solely because they work part-time. Also unfair dismissal protection.</p> <p>Implemented in the UK by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Employment Rights Act 1996</p>
<p>The Posted Workers Directive 96/71/EC</p>	<p>A single market measure to ensure a level playing field when businesses or agencies post workers temporarily from one Member State to provide services in another. The Directive entitles posted workers to certain core employment rights available in the country they are posted to, including minimum rates of pay, maximum work periods and equal treatment provisions.</p> <p>Implemented in the UK by the Posted Workers (Enforcement of Employment Rights) Regulations 2016 and the Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016</p>
<p>The Pregnant Workers Directive 92/85/EEC</p>	<p>Sets the minimum levels of maternity leave and pay which Member States must provide (14 weeks' maternity leave with an "adequate allowance" paid at least at the rate of statutory sick pay), alongside health and safety at work protections. Also provides for right to suitable alternative work or pay if suspended, a prohibition on detriment due to pregnancy and unfair dismissal protection.</p> <p>Implemented in the UK by the Management of Health and Safety at Work Regulations 1999, the Employment Rights Act 1996 and the Equality Act 2010</p>
<p>The Race Directive 2000/43/EC</p>	<p>Implements the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive prohibits discrimination on the grounds of race in employment, training, social protection, including social security and healthcare, education, access to and supply of goods and services which are available to the public.</p> <p>Implemented in the UK by the Equality Act 2010</p>

The Recast Gender Directive 2006/54/EC	Implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. This recast directive contains provisions to implement the principle of equal treatment in relation to employment, training, working conditions, including equal pay and occupational social security schemes.
	Implemented in the UK by the Equality Act 2010
The Working Time Directive 2003/88/EC	Contains restrictions on night work, requirements for daily rest, weekly rest, rest breaks, and four weeks paid annual leave. It also sets a 48 hour limit on the working week, which individuals can opt-out of. Also provides protection from detriment.
	Implemented in the UK by the Working Time Regulations 1998 and the Employment Rights Act 1996
The Young Workers Directive 94/33/EC	Provides various protections for employees aged under 18 in areas such as night work.
	Implemented in the UK by the Working Time Regulations 1998
Treaty on the Functioning of the European Union 2012/C 326/01	<p>Article 8 imposes an obligation to eliminate inequalities, and to promote equality, between men and women.</p> <p>Article 10 imposes an obligation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.</p> <p>Article 157 imposes an obligation on the State to ensure measures which provide for equal pay for male and female workers for equal work or work of equal value.</p> <p>Implemented in the UK by the Equality Act 2010</p>





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