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**BRIEFING PAPER**

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# The *European Union (Withdrawal) Bill*: Supremacy and the Court of Justice

By Jack Simson Caird

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# Summary

This briefing paper has been prepared for days 1 and 3 of the Committee Stage of the *European Union (Withdrawal) Bill* (EUW Bill) in the House of Commons.

It addresses **clauses 5** and **6** of the EUW Bill which together provide instructions to the courts on the status and interpretation of retained EU law (the new category of law which clauses 2, 3 and 4 of the EUW Bill would create).

In particular, the paper examines:

- **Clause 5** which would change to the role of the principle of the supremacy of EU law post-exit (the elements of clause on the Charter of Fundamental Rights are covered in a separate paper);
- **Clause 6** which would provide instructions to the courts on the relevance of judgments of the Court of Justice of the European Union (CJEU) to the task of interpreting retained EU law post-exit.

The HC Library's Briefing, European Union (Withdrawal) Bill (CBP8079), covers all of the provisions in the Bill, and was published on 1 September 2017.

A central aim of legislating for Brexit is to ensure that UK institutions have the final say over the laws that apply in the UK. The EUW Bill is designed to ensure that Parliament and domestic courts, rather than the EU's institutions, decide on the content and meaning of the law post-Brexit. During the referendum campaign in 2016, the successful Vote Leave campaign argued that the CJEU "overruled UK laws" and that the principle of the supremacy of EU law "stops the British public from being able to vote out those who make our laws".[1]

Taken together clauses 5 and 6 provide for a new relationship between domestic law and EU law. Once the UK is no longer a member of the EU, and the *European Communities Act 1972* (ECA) is repealed, EU law will no longer be supreme over new laws made by Parliament. Further, UK courts will no longer be bound to follow the judgments of the CJEU handed down after exit day.

This Bill includes measures that enable retained EU law to have priority over some domestic law in certain circumstances (**clause 5(2)**), and that CJEU judgments given before exit day will continue to be binding precedents in most domestic courts (**clause 6(3)**). **Clause 6(2)** also enables a domestic court to take account of CJEU judgments given after exit day "if it considers it appropriate to do so".

Just as the status of EU law was clarified by the courts it is likely the status of retained EU law and its relationship with other constitutional legislation will be tested and clarified in the courts.

There is some uncertainty over how the provisions in clauses 5 and 6 of this Bill would interact with the withdrawal agreement, and the domestic legislation needed to implement it.

1 http://www.voteleavetakecontrol.org/briefing_control.html

# 1. Introduction

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

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

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

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

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

The House of Lords Constitution Committee has published an Interim Report on the Bill which includes conclusions and recommendations relevant to the debate on clauses 5 and six of the Bill.

# 2. Clause 5: the supremacy of EU law

## 2.1 Introduction

This section covers **clause 5 (1)** and **clause 5 (2)** of the EUW Bill, which excludes and then re-introduces in modified form the principle of the supremacy of EU law into the post-exit constitutional framework.

**The current role of the supremacy of EU law in the UK**

The supremacy of EU law means that when there is conflict between EU law and the law of Member States, EU law prevails and the relevant national law has to be set aside.

Though not written into the EU Treaties themselves,[2] the principle of the primacy of EU law over national law was established in the early case-law of the Court of Justice of the European Union (CJEU).[3]

In the ***Factortame*** cases in 1990 and 1991 the CJEU ruled that UK law was incompatible with the EC Treaty and the Common Fisheries Policy by discriminating against non-UK EC nationals. This led to the 'disapplication' of a UK statute in accordance with the authority of the ECA. In order to comply with the Interim Order of the CJEU against the UK, the Government legislated to amend the *Merchant Shipping Act 1988*.

The effect is that EU law and the ECA enables domestic courts to disapply primary legislation enacted by the UK Parliament. No other category of law enables the courts in the UK to disapply primary legislation enacted by the UK Parliament.

## 2.2 A new legal hierarchy

**Clause 5(1)** of the EUW Bill provides that the principle of supremacy of EU law does not apply to any legislation "or rule of law" passed or made after exit day. The reference to a "rule of law" in 5(1) means that the exclusion applies to both legislation and common law rules.

Once the UK has left the EU and the ECA is repealed (**clause 1** of this Bill), the supremacy of EU law will no longer apply.

The explanatory notes state that **clause 5(1)** is an exception "to the saving and incorporation of EU law provided for under clauses 2, 3 and 4. This approach would suggest that **clause 4** could convert the principle of the supremacy of EU law.[4] This principle could operate, like many of the laws converted by **clause 4**, under the "suppressed proposition" that it would have effect "as if the UK were still a Member

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2 The primacy of EU law, in accordance with the established case law of the CJEU, was confirmed in a Declaration (No. 17) attached to the Lisbon Treaty.

3 Most notably, in ***Costa v ENEL*** in 1964. Court of Justice of the European Union, *Flamino Costa v E.N.E.L*, 15 July 1964. See Box 11 on page 53 of Commons Library Briefing Paper, *The European Union Withdrawal Bill*.

4 Explanatory Notes to the European Union (Withdrawal) Bill (Bill 5-EN) para 94.

State".[5] The Department for Exiting the EU's evidence to the House of Lords Select Committee on the Constitution states that 5(1) is necessary "in order to ensure that nothing in the Bill saves the supreme status of EU laws".[6]

Accordingly **clause 5(1)** would be needed in order to create an exception to this general rule that in the event of a conflict between a retained EU law and domestic law, the latter must give way to the former.

### A power for the courts to disapply primary legislation

**Clause 5(2)** makes provision for a new legal hierarchy to be introduced into the UK's constitutional system. The subsection ensures that the supremacy of EU law remains part of domestic law, but can only apply "so far as relevant" to enactments passed or rules of law made *before* exit day, but not over those passed or made after exit day. The provision does not define "relevance", but the Explanatory Notes suggest that the principle would not apply to legislation "which is made in preparation for the UK's exit from the EU".[7]

This would imply that the effect of **clause 5(2)** is to ensure that retained EU law has priority over all law enacted before exit, *including* that enacted between this Bill being enacted and exit day, but *excluding* that made in order to prepare for Brexit.

The courts will have to decide, on a case by case basis, whether pre-exit legislation should be subject to supremacy. Professor Alison Young, University of Oxford, points out that clause 5(2) is notable as it grants the courts a power to disapply primary legislation enacted by Parliament.[8] Up to this point, the courts have only held this power as a consequence of the UK's membership of the EU. This provision would be the first time that Parliament has granted domestic courts the power to disapply primary legislation enacted by the UK Parliament outside the context of EU Membership.

The House of Lords Select Committee on the Constitution has argued that clause 5 is "insufficiently clear" in its regulation of when supremacy will apply and how it will apply.[9]

The Bar Council, which represents Barristers in England and Wales, has said that it is neither appropriate nor desirable "to incorporate, without definition or guidance" the principle of supremacy of EU law.[10] Mikolaj Barczentewicz, Lecturer in Law at the University of Surrey, has argued that this provision "risks confusion and unintended consequences".[11]

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5 Written evidence submitted by Sir Stephen Laws KCB, QC (EUB0004) to Exiting the European Union Committee para 17
6 Department for Exiting the European Union—Written evidence (EUW0036)
7 Explanatory Notes to the European Union (Withdrawal) Bill (Bill 5-EN) para 96
8 A. Young, 'Benkharbouche and the Future of Disapplication', U.K. Const. L. Blog (24th Oct. 2017)
9 House of Lords Select Committee on the Constitution, European Union (Withdrawal) Bill: interim report (2016-2017 Third Report HL Paper 19) paras 33-34
10 Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 36
11 Mikolaj Barczentewicz, University of Surrey School of Law— Written evidence (EUW0018) to the House of Lords Select Committee on the Constitution para 3

He argues that the risks of 5(2) could outweigh its potential benefit of ensuring a degree of continuity: "disapplication of an Act of Parliament is such a radical measure that it may be seen as nearly always raising significant rule of law concerns".[12]

## If retained EU law is amended, does it remain supreme?

**Clause 5(3)** addresses the issue of the status of a post-exit EU amendment to a retained EU law. **Clause 5(3)** outlines that a post-exit modification will not prevent the retained EU law from being accorded supremacy over pre-exit legislation, as long as the application of supremacy is "consistent with the intention of the modification".

It is likely that a large number of amendments to retained EU will be made by Parliament, including through the delegated powers in clauses 7, 8 and 9 in this Bill.

Courts will have to assess whether applying the principle of supremacy to a provision of retained EU law which has been amended is consistent Parliament's intentions when it enacted the amendment. Generally speaking, assessing the "intention of a modification" may prove difficult. The former President of the Supreme Court, Lord Neuberger, said in evidence to the House of Lords Select Committee on the Constitution that this exercise "could lead to difficulties" and will lead to "arguments about what you are entitled to look at to see what the intention was".[13]

The question of whether a provision of retained EU law that has been modified by either subsequent primary or secondary legislation can continue to be supreme could have important legal consequences. As such it will be important for a court, or anyone else, to be able to assess whether amendments to a Treaty right saved by **clause 4**, for example, continue to be supreme over all pre-exit legislation, or whether the extent of its modification has rendered it subject to the ordinary rules of statutory interpretation.

The Government has committed to provide Parliament with a memorandum accompanying each instrument made under clause 7 that will identify how the retained EU law operated, why and how it is being changed, and a statement that the regulations contemplated will do no more than is necessary.[14] This memorandum could be used by the courts to assess the "intention of the modification".

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[12] Mikolaj Barczentewicz, University of Surrey School of Law— Written evidence (EUW0018) to the House of Lords Select Committee on the Constitution para 37

[13] Select Committee on the Constitution Uncorrected oral evidence: European Union (Withdrawal) Bill Wednesday 1 November 2017

[14] Department for Exiting the EU, Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee para 49.

# 3. Clause 6: the jurisprudence of the CJEU

## 3.1 Introduction

This section examines **clause 6** of the EUW Bill, which provides instructions to domestic courts on the relevance of judgments of the CJEU when interpreting retained EU law after exit day. Clause 6 expressly provides that domestic courts must refer to CJEU judgments given pre-exit, which form part of retained EU case law, and that the courts can refer to post-exit CJEU judgments when they consider it appropriate to do so.

**The current role of the CJEU in the UK**

The Court of Justice of the European Union (CJEU), based in Luxembourg, is the highest judicial authority in the EU and is responsible for producing authoritative rulings on the meaning and interpretation of EU law.

Domestic courts can make references to the CJEU on questions of EU law, under Article 267 of the Treaty for the Functioning of the European Union (TFEU), and this is one of the principal means by which the CJEU influences the decisions of domestic courts.

Under Article 258 of the Treaty for the Functioning of the European Union (TFEU), the EU Commission can bring infringement proceedings against a Member State for a failure to fulfil an obligation under the Treaties. The final stage of this procedure is for the Commission to refer proceedings to the CJEU for determination.

Under Article 260 TFEU, if the Commission refers a Member State back to the Court for failing to adapt its law or practice to a Court ruling, it can propose that the Court impose financial penalties on the Member State concerned based on the duration and severity of the infringement and the size of the Member State.

After Brexit, the UK will no longer be subject to either Article 258 or Article 260 proceedings, nor would UK courts be able to make references under Article 267.

At present, the status of the CJEU in UK law is secured by section 3(1) of the ECA, which requires UK courts to follow the CJEU interpretation of EU law.

The Government has consistently maintained that removing the influence of the Court of Justice over the UK's legal system is one of the aims of Brexit.[15] On 2 October 2016, Theresa May said that the interpretation of law would no longer be via judges in Luxembourg but instead would be "by courts in this country".[16]

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15 'Theresa May's Conservative conference speech on Brexit', *Politics Home*, 2 October 2016.

16 Ibid

The Government has also committed to limiting the impact of Brexit upon the legal systems in the UK, and as such has said that does not intend for the interpretation of retained EU law to be changed upon Brexit.[17]

## 3.2 Post-exit CJEU judgments

**Clause 6(1)(a)** provides that domestic courts are not bound to follow judgments of the CJEU handed down after exit day. It does not prevent domestic courts from treating them as persuasive authority, as they may currently treat judgments given by courts in other jurisdictions.[18]

### A statutory test of "appropriateness"

**Clause 6(2)** expressly permits a domestic court to refer to a post-exit CJEU judgment "if it considers it appropriate to do so". The Bill does not offer any guidance as to the meaning of "appropriate" in this context. As noted above, in the absence of any statutory direction, UK courts regularly engage with the judgments of foreign courts, which they treat as persuasive and not binding.

For the past 40 years UK courts have co-operated with the CJEU on questions of interpretation relating to EU law. If a provision of retained EU law is not amended, and a question arises as to its interpretation in domestic courts after exit, and the CJEU has recently given a judgment on the meaning of that provision, then there may well be a strong incentive for the courts to take account of that judgment in a similar way as they did before exit. The principal difference will be that a UK court would not be bound by law to do so, and if the circumstances meant that it was not thought to be relevant they could decide on a different interpretative approach.

Sir Stephen Laws, Former First Parliamentary Counsel, described clause 6(2) as "unhelpfully vague", as it gives no indication of what might be considered "appropriate".[19] Laws adds that "that silence would be better than the creation, as in clause 6(2), of a new, but imprecise, statutory test of appropriateness".[20]

The Bar Council has argued that 6(2) would not be effective, as it reflects neither the "UK courts approach to rulings on foreign law by courts of competent jurisdiction" nor their approach to judgments of the CJEU.[21] The Bar Council suggested that the subsection should be deleted and replaced with a provision which instructs domestic courts

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[17] HM Government, The United Kingdom's exit from and new partnership with the European Union, Cm 9417 February 2017 para 2.3; Department for Exiting the European Union, Legislating for the United Kingdom's withdrawal from the European Union (March 2017) Cm 9446 para 2.16.

[18] A study of the Supreme Court's case law 2009-2013 found that 31.3% of human rights cases in that period cited foreign jurisprudence (77 out of 246 cases): Hélène Tyrrell, The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court (2014) p143.

[19] Written evidence submitted by Sir Stephen Laws KCB, QC (EUB0004) to Exiting the European Union Committee para 30

[20] Written evidence submitted by Sir Stephen Laws KCB, QC (EUB0004) to Exiting the European Union Committee para 30

[21] Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill Para 45

"may take account of but is not bound by" the CJEU's post-exit case law.[22]

The Institute for Government (IfG) has highlighted a number of options that it argues could enhance the clarity of clauses 6(1) and 6(2), including instructing the courts to ignore post-exit CJEU judgments or that they must treat post-exit judgments as persuasive.[23] In an earlier report published before the EUW Bill was introduced the IfG argued that ambiguity on this point "would risk leaving judges stranded on the front line of a fierce political battle".[24]

Such a prospect was raised by Lord Neuberger, in evidence to the House of Lords Select Committee on the Constitution. He said that clause 6(2) could lead to the courts having to take in account "economic and quite high-level political factors" when deciding on the relevance of post-exit CJEU case law.[25] This, he implied was problematic, adding that "it would be better to give them guidance".[26]

Clauses 6(1) and 6(2) allow judges a degree of flexibility to decide how to use post-exit case law in the circumstances before them. Flexibility could be important to allow the courts to adapt to the relationship with the EU as it changes over time. It is not yet clear, for example, to what extent post-exit cases might inform the courts application of the principle of the supremacy of EU law.

In August 2017, the UK Government published a Future Partnership Position Paper on the CJEU, in which it said it aims to end the "direct" jurisdiction of the court.[27] The paper acknowledges that it is possible that "account is to be taken of CJEU decisions", "where there is a shared interest in reducing or eliminating divergence in how specific aspects of an agreement with the EU are implemented".[28]

The nature of any withdrawal and future partnership deals with the EU will be crucial in determining the courts' approach. These could determine the areas in which there is a shared interest in reducing or eliminating divergence, or in which there is a shared interest in maintaining interpretive consistency with the post-exit judgments of the CJEU. The Bar Council points out that it may be unhelpful for the UK Courts to develop their own distinctive approach to the interpretation of

22 Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill Para 50
23 Raphael Hogarth, How to answer Lord Neuberger's call for clarity on the ECJ, Institute for Government (10 August 2017).
24 Ibid.
25 Select Committee on the Constitution Uncorrected oral evidence: European Union (Withdrawal) Bill Wednesday 1 November 2017
26 Select Committee on the Constitution Uncorrected oral evidence: European Union (Withdrawal) Bill Wednesday 1 November 2017
27 Department for Exiting the EU, Enforcement and dispute resolution - a future partnership paper (2017) para 1.
28 Department for Exiting the EU, Enforcement and dispute resolution - a future partnership paper (2017) para 46-51.

a retained EU law.[29] As a consequence, they argue that if the aim is legal certainty, the Bill should be "clearer one way or another".[30]

Further, as noted below (Section 3 of this briefing), any transitional arrangements could contain measures that influence how the test of "appropriateness" is applied by the courts.

**Box 1: Section 2 of the *Human Rights Act 1998***

A relevant comparison could be made between clause 6(2) and section 2 of the *Human Rights Act 1998* which provides that the courts should "take account" of the judgments of the European Court of Human Rights. For a period the senior judiciary interpreted this provision to mean that domestic courts should not depart from the interpretive approach of the ECtHR.[31] This approach drew criticism from those responsible for designing the Act,[32] and the Supreme Court has since modified this approach. In *Manchester City Council v Pinnock* Lord Neuberger said: "This Court is not bound to follow every decision of the European Court of Human Rights. Not only would it be impractical to do so: it would sometimes be inappropriate.[33]

## 3.3 Pre-exit CJEU judgments

**Clause 6(3)** provides that CJEU judgments given before exit day will be binding on most domestic courts when interpreting retained EU law.

By contrast with **clause 6(2)** this is a relatively unambiguous direction to the courts designed to ensure that the meaning of retained EU law is not changed simply by the removal of the obligation on domestic courts to decide questions of EU law by reference to the case law of the CJEU. This is a measure designed to provide legal continuity. It is subject to some notable exceptions.

**Clause 6(3)(a)** requires that UK courts post-exit will decide questions on the meaning of retained EU law "so far as it is unmodified" and "so far as… relevant" in accordance with any retained case law (which includes pre-exit CJEU judgments). The provision also requires UK courts to decide such questions by reference to retained domestic case law that is relevant to retained EU law, and retained general principles of EU law. The fact that retained case law does not include judgments of the CJEU given after exit means that there is the possibility of divergence in interpretation between EU law and as it applies in the EU and retained EU law applicable in the UK.

**Clause 6(3)(b)** instructs the courts to have regard to the limits of EU competences when interpreting retained EU law. This provision appears to act as a reminder to the courts that after exit day retained EU law should not, once it is no longer connected to the limits of the Treaties,

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[29] Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 54.

[30] Bar Council Parliamentary Briefing for the Committee of the Whole House on the European Union (Withdrawal) Bill para 54.

[31] *Regina v. Special Adjudicator ex parte Ullah* [2004] UKHL 26 Lord Bingham

[32] Lord Irvine, the Lord Chancellor at the time the Human Rights Act was enacted criticised this approach: see [Lord Irvine: human rights law developed on false premise](), The Guardian, 14 December 2011.

[33] *Manchester City Council v Pinnock* [2010] UKSC 45.

be treated as relevant to matters outside of EU competence. To ascertain the limits of EU competence immediately before exit day, domestic courts will likely to have to examine and consult the EU treaties and relevant CJEU cases.

### What is retained EU case law?

The precise boundaries of which CJEU judgments and domestic judgments are retained is defined by **clause 6(7)**. **Clause 6(7)** provides that "retained case law" refers to the cases of domestic and European courts given before exit day and that relate to the laws converted and preserved by **clauses 2, 3 and 4** of this Bill.

Clause 6(7) also states that retained domestic and European case law would not include principles or cases on elements of retained EU law in "so far as" expressly excluded by **clauses 5** or **Schedule 1**. It is not clear to what extent this exclusion would prevent courts from referring to, for example, the CJEU cases of *Costa* and *Francovich*.[34]

As and when retained EU law is amended, repealed or replaced this will have a knock on effect on the relevance of retained EU case law. The courts will have to assess the extent to which pre-exit case law remains relevant once retained EU law is amended after exit day. Further, Parliament could enact legislation to expressly repeal retained EU case law.

Schedule 5 enables the Queen's printer to make arrangements to publish CJEU judgments that form part of retained EU case law.

### Exceptions to the duty to follow retained EU case law

**Clause 6(4)** exempts the Supreme Court, and in certain circumstances the High Court of Justiciary in Edinburgh, from this duty. Instead, **clause 6(5)** provides that these courts should treat retained EU case law in the same way as they would their own case law. The Supreme Court departs from previous decisions "where it appears right to do so".[35] This means that the Supreme Court will be able to choose to depart from pre-exit CJEU judgments.

In practical terms, the circumstances in which the UKSC would decide to depart from a CJEU judgment are impossible to predict. Whether the Supreme Court is likely to depart from retained EU case law is likely to depend on the content of any agreements with the European Union. Further, any amendments to retained EU law could also affect how the Supreme Court assesses the relevance of pre-exit CJEU case law.

### How will amendments to retained EU law affect clause 6(3)?

**Clause 6(6)** explains, in a similar formulation to **clause 5(3)**, that post-exit amendments to a provision of retained EU law do not prevent CJEU case law being relied upon for interpretation so long as doing do is "consistent with the intention of the modifications". As discussed above

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

[35] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234; *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 at paragraphs 24, 25

in relation to clause 5 (3), this will make ascertaining the intention of any amendment to retained EU law significant, and this will not always be straightforward.

## 3.4 References to the CJEU

**Clause 6(1)(b)** confirms that domestic courts cannot send a reference to the Court of Justice under Article 267 Treaty on the Functioning of the European Union. Courts in countries outside the European Union cannot make references to the CJEU.

# 4. The Withdrawal Agreement

The principle of supremacy of EU law and the role of the Court of Justice could be addressed in any withdrawal agreement with the European Union under Article 50(2) TEU.

The flexibility in clauses 5 and 6, particularly in relation to post-exit judgments of the CJEU in 6(2), could enable these provisions to be interpreted in a way that fits with what is agreed in the withdrawal agreement. Alternatively, an agreement could mean that **clause 5** and **clause 6** need to be amended, or that their implementation is delayed until the end of transition, or that they are interpreted in the light of what is agreed. These provisions could effectively be superseded by other legislation (either secondary legislation under clause 9 of this Bill, or separate primary legislation) that implements the withdrawal agreement. Such a scenario could arise if a post-exit transitional period forms part of the withdrawal agreement.

The United Kingdom Government has stated that it would like to agree transitional arrangements. The Prime Minister, on 22 September 2017, said the following on transition:

> As I said in my speech at Lancaster House a period of implementation would be in our mutual interest. That is why I am proposing that there should be such a period after the UK leaves the EU.
>
> Clearly people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU.
>
> So during the implementation period access to one another's markets should continue on current terms and Britain also should continue to take part in existing security measures. And I know businesses, in particular, would welcome the certainty this would provide.
>
> The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations.[36]

The European Council's Article 50 guidelines state:

> To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.

36 https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu

If the EU's position were accepted, EU law might need to be supreme and CJEU judgments binding for the duration of the transition period. On 9 October 2017, the Prime Minister said in the House of Commons:

> We will have to negotiate what will operate during the implementation period. Yes, that may mean that we start off with the ECJ still governing the rules we are part of for that period, but we are also clear that we can bring forward discussions and agreements on issues such as a dispute resolution mechanism. If we can bring that forward at an earlier stage, we would wish to do so.[37]

If **clauses 5 and 6** are incompatible with the withdrawal agreement, then they could be amended or their implementation could be delayed in a number of ways including:

- Amending clauses 5 and 6 using the clause 9 power to implement the withdrawal agreement;
- Amending clauses 5 and 6 through further primary legislation (which could include an Act of Parliament dedicated to implementing any withdrawal agreement, and, or other Brexit Bills);
- Delaying the implementation of clauses 5 and 6 using the power to set different exit days for different purposes (clause 14 (1)) (this could be done in combination with either 1 and/or 2);
- Delaying the implementation of clauses 5 and 6 using the clause 17 power to make transitional and/or transitory provisions.

A working paper by the Cambridge Centre for European Legal Studies and the Cambridge Centre for Public Law argues that the EUW Bill "does not appear to be designed with a transitional period specifically in mind".[38] The paper analyses a number of options for legislating for transition, including amending the EUW Bill (and rewriting clause 6) or alternatively amending the major provisions of the European Communities Act 1972 and leaving them in force during the transitional period, which could be done in combination with a delay in the implementation of the EUW Bill. The authors conclude that the most straightforward legal mechanism would be an extension of the Article 50 period and a deferral of "exit day" for the purposes of the EUW Bill. This could mean that clauses 5 and 6 of the EUW Bill would not take effect until the end of the transitional period.

[37] HC Deb 9 October 2017 c53

[38] Armstrong, Kenneth and Bell, John and Daly, Paul and Elliott, Mark, Implementing Transition: How Would it Work? (October 13, 2017)

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