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BRIEFING PAPER

Number 8140, 17 November 2017

EU (Withdrawal) Bill: the Charter, general principles of EU law, and 'Francovich' damages

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Summary

This Commons Library briefing paper has been prepared for day 3 of the Committee Stage of the European Union (Withdrawal) Bill (the EUW Bill) in the House of Commons. It addresses clause 5(4) and 5(5) of the Bill and Schedules 1 and 6, which together specify some particular exceptions to the Bill's general retention and conversion of EU law. Schedule 1 also makes provision for how retained EU law will be scrutinised in domestic courts after exit day.

Other related briefings

Clause 5(1), **5(2)** and **5(3)**, which relate to the principle of supremacy of EU law, are covered by the Commons Library briefing paper, the *European Union (Withdrawal) Bill*: Supremacy and the Court of Justice.

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

Exceptions to the retention and conversion of EU law

One of the main aims of the EUW Bill, which is currently in Committee stage in the House of Commons, is to preserve and convert EU law for the post-exit statute book (clauses 2, 3 and 4). However, as this paper explains, some elements of EU law are specifically excluded by the Bill:

- **Charter of Fundamental Rights (chapter 2 of this paper)**

Clause 5(4) exempts the EU Charter of Fundamental Rights and Freedoms from being converted into domestic law, and **clause 5(5)** explains that pre-Brexit case law on the Charter would be read as referring instead to 'corresponding retained fundamental rights and principles' (undefined).

The Government contends that no rights would be lost because the Charter did not introduce any new rights, but this is contested. And although the Charter is criticised for adding a layer of complexity, this Bill arguably adds complexity and uncertainty in the way it handles the Charter. It could also affect the negotiations relating to Ireland/Northern Ireland issues. Several amendments relating to the Charter have been tabled.

The Charter might continue to have 'residual' effects in the UK even after its removal under these provisions, for instance in relation to the withdrawal agreement, any transition arrangements, and future cooperation.

- **Challenges to the validity of retained EU law (chapter 3.1 of this paper)**

Schedule 1 para 1 provides that after exit day retained EU law cannot be challenged in domestic courts on the basis that immediately before exit day, an EU instrument was invalid. **Schedule 1 para 1(2)(b)** and **(3)** is a power to enable the Government to provide the grounds upon which the validity of a retained EU law can be challenged. As some retained law, namely 'retained direct EU legislation' converted by clause 3, is neither primary nor secondary legislation, there is some uncertainty as to how the courts will approach challenges to validity of retained EU law after exit day.

- **General principles of EU law (chapter 3.2 of this paper)**

Schedule 1 para 2 limits the 'general principles of EU law' that would be retained to those that have been recognised by the Court of Justice of the EU (CJEU) before exit day. So principles such as legal certainty and proportionality would be retained; but not all the principles of the Charter have been recognised as general principles by the CJEU.

Para 3 reduces the function even of those general principles that are retained, so that they can only be used to help interpret other retained EU law. UK courts would no longer have the power to disapply domestic legislation on the grounds that it conflicts with these general principles.

Together these provisions amplify the effects of not retaining the Charter.

- **Francovich damages (chapter 3.3 of this paper)**

Other exceptions in **Schedule 1** include the EU remedy of state liability as set out by the CJEU ('the rule in *Francovich*')[1]. In some circumstances states have to compensate individuals or businesses for damage they suffer because the state has failed to transpose a directive, or done so late or poorly.

Excluding principles like '*Francovich*' damages for state liability appears to create a presumption that all other comparable principles are preserved. For example, the principle set down in *Marleasing*,[2] which provides that courts should interpret all domestic legislation if at all possible so as to comply with EU law, is not expressly excluded.

- **Other exceptions (chapter 4 of this paper)**

Schedule 6 clarifies the **Clause 3** exemptions, which exclude some of the *acquis communautaire* (the accumulated body of EU law) from the preserving and converting provisions, where it does not apply to the UK.

This paper also explains that '**soft law**' originating from the EU, in the form of guidance and other non-legislative measures, will not be converted into domestic law by the EUW Bill.

Of course legislative measures passed after the EUW Bill receives Royal Assent could also restrict the amount of retained EU law that applies after exit day. Other Brexit bills, and secondary legislation under the EUW Bill and other Brexit bills, will change various elements of retained EU law.

Transition period

It is not clear yet whether the Charter, general principles and Francovich damages would have to be fully retained for any transition or implementation period.

The exclusion of particular aspects of the *acquis* imply that this Bill is not intended to provide for a standstill transition which preserves the existing structure of EU rules and regulations. On 13 November 2017, the Government announced that further primary legislation, the Withdrawal Agreement and Implementation Bill, would be used to implement the withdrawal agreement and any transition / implementation period.

Impact on the operation of 'retained EU law'

Clause 6(7) of the EUW Bill provides that the exceptions in **clause 5** and **Schedule 1** enable the exclusion of certain cases from the definition of 'retained case law'**. Clause 6(7)** also states that clause 5 and Schedule 1 exclude particular principles from the 'retained general principles of EU law'. **Clause 6(7)** further confirms that each of these categories can be modified by further subsequent legislation.

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1 Judgment in the Cases C-6/90 and C-9/90 Francovich and Bonifaci of 19 November 1991.
2 *Marleasing v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135.

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. It has yet to publish an ECHR memorandum as promised.

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.

The present briefing paper has been produced to inform the Committee of the Whole House debate on clause 5 and Schedule 1, which is scheduled to take place on day three (21 November 2017). The Commons Library briefing paper, the European Union (Withdrawal) Bill: Supremacy and the Court of Justice, covers clause 5(1), 5(2) and 5(3) which are also due to be debated on day three.

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 Schedule 1 of the Bill. The Commons Exiting the European Union Committee published a Report on the European Union (Withdrawal) Bill on 17 November 2017, which also contains recommendations relevant to the debate. A number of other committees in the Commons, the Lords, the Scottish Parliament and the Welsh Assembly are also conducting inquiries relevant to the Bill.

2. Clause 5(4) and 5(5): the EU Charter of Fundamental Rights

2.1 Clause 5(4): the Charter will not be retained

The Government's position

Clause 5(4) of the Bill says "The Charter of Fundamental Rights is not part of domestic law on or after exit day". This is the one of the few specified exceptions to the Bill's aim of continuity of EU law.

The Government considers that the Charter would not be "relevant" after Brexit, because it applies to the UK only when the UK is acting "within the scope" of EU law.

The Government's factsheet on the Charter[3] also argues that it cannot be right that the Charter could be used in its own right, post-exit, to bring challenges against the Government to strike down UK legislation after exit.

Moreover, the Government asserts that no substantive rights will be lost as a result of not retaining the Charter, because:

- 'The Charter did not create new rights but rather codified rights and principles which already existed in EU law' (including case law of the CJEU);
- 'by converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law'; and
- 'EU law which is converted will continue to be interpreted in the light of those underlying rights and principles'.[4]

But it has not said exactly how or where each of the rights and principles set out in the Charter would be reflected in retained EU law or other domestic law in the UK.

The Secretary of State for Exiting the European Union has made a statement under the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the European Convention on Human Rights (ECHR). But the Government has yet to publish the separate ECHR memorandum it has promised to explain its assessment of compatibility.[5]

Other views

When the Bill was published, Keir Starmer, Labour's Shadow Brexit Minister, said that incorporating the Charter was one of the six matters on which the Government would have to make significant concessions

3 The Repeal Bill, Factsheet 6: Charter of Fundamental Rights
4 EUW Bill Explanatory Notes, paras 99-100
5 EUW Bill Explanatory Notes, paras 298-99

in order for Labour to vote for it.[6] The then Liberal Democrat leader, Tim Farron, also stated his support for the Charter.[7]

Those who support retaining the Charter generally argue that:

- individual rights and remedies would be lost if it was not retained
- the Charter could continue to be relevant in relation to retained EU law
- the Government's approach in this Bill leaves it unclear exactly what rights would continue to apply.

The independent advisory Equalities and Human Rights Commission argues that the Bill as presently drafted will not achieve the Government's objective of non-regression on social justice issues, and the removing the Charter will create unnecessary uncertainty.[8]

The Public Law Project (a charity which aims to improve access to public law remedies) argues that regardless of one's opinion on the Charter, it is inappropriate to use this Bill to remove it:

> the decision to exempt fundamental rights from the Bill's "general rule" of maintaining the status quo reflects a major change to policy and a political judgment that has no place in this Bill. The future of the UK's human rights framework should not be debated in the already-complicated context of the Brexit.[9]

What is the Charter?

The EU Charter of Fundamental Rights and Freedoms is part of the EU's complex set of human rights obligations. It **overlaps** with other EU laws and separate international human rights treaties that currently apply to the UK, including the (non-EU) European Convention on Human Rights, as well as common law in the UK.

The Charter's 54 articles were intended to **consolidate** existing fundamental rights and principles relating to the EU, and largely do so. A 2014 report from the Commons European Scrutiny Committee heard a range of evidence on this point, and concluded that there was only one potential exception (Article 13, freedom of the arts and sciences).[10]

But it has also been considered **innovative** – for instance, disability, age and sexual orientation are specifically prohibited as grounds of discrimination, and it includes some modern rights such as the prohibition against reproductive human cloning and the right to be forgotten which do not exist in other human rights law applying to the UK.

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6 'Labour vows to wreck Brexit process by voting against 'Repeal Bill' unless Theresa May makes major changes', Independent, 13 July 2017

7 '"Great repeal bill" human rights clause sets up Brexit clash with Labour', Guardian, 13 July 2017.

8 Equalities and Human Rights Commission, European Union (Withdrawal) Bill, House of Commons Committee stage briefing, 14 November 2017

9 Public Law Project, Committee Stage Brief on the Rights Implications of the EU (Withdrawal) Bill, 26 October 2017

10 European Scrutiny Committee, The application of the EU Charter of Fundamental Rights in the UK: a state of confusion, HC 979 2013-14, 2 April 2014, para 150.

The Charter binds not only the EU institutions, but also the Member States (including the UK) whenever their public authorities are '**implementing Union law**'. Dr Tobias Lock of the University of Edinburgh explains what this means:

> The European Court of Justice (ECJ) has equated this with 'acting within the scope of EU law', which happens in two broad categories of cases. The first category encompasses so-called 'agency' situations, mainly where a UK public authority acts on the basis of an EU obligation (eg when distributing farming subsidies on the basis of an EU regulation). The second category covers cases where a public authority deviates from one of the EU's fundamental freedoms (eg by preventing a product from another Member State from being marketed in the UK).[11]

He adds that where the Charter applies, a public authority must comply with the rights contained in it, including its procedural requirements such as the right to a fair trial. The public authority must also exercise any discretion in a way that is compatible with the Charter.

The Charter now has the same legal force as the EU Treaties, so takes precedence over inconsistent EU regulations and directives, etc. It also has **supremacy** over inconsistent national law or decisions of public authorities.

Many of the Charter's provisions have **direct effect** in the UK, as a result of the European Communities Act 1972 and the Treaty on European Union (TEU). This means that they need to further implementing legislation to apply here.

Many of its provisions are also **directly applicable**, allowing individuals to rely on them in domestic courts against public bodies. But as Article 52(5) explains, the Charter contains both rights and principles, and the latter are only interpretative. It is not always clear from the wording which provisions are rights and which are principles.

The Charter is also built into the UK's **devolution** settlements. The devolved executives may not act contrary to the Charter,[12] and devolved legislation is not law if it contravenes the Charter.[13]

Although the Charter incorporates or reflects the provisions of the Council of Europe's European Convention on Human Rights (ECHR), it is entirely **separate from the ECHR**. The Charter contains more substantive rights than the ECHR does, but it applies in fewer circumstances, and it is enforced in a completely different way.

How and why is the Charter used in the UK courts?

It is important to restate that not all Charter provisions have 'direct effect', and that the Charter applies to the UK only when it is 'acting within the scope of EU law'.

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11 Tobias Lock, 'What Future for the Charter of Fundamental Rights in the UK?', European Futures, 6 October 2017

12 Scotland Act 1998 s57(2); Government of Wales Act 2006 s80; Northern Ireland Act 1998 s24(1)(b)

13 Scotland Act 1998 s29(2)(d); Government of Wales Act 2006 s94(6)(c) and 108(6)(c); Northern Ireland Act 1998 s6(2)(d)

But individuals and businesses can bring cases in UK courts to uphold their rights under the Charter, and have been doing so increasingly. There are several reasons for this, including:

- Where the Charter applies, it provides **more rights** than ECHR claims under the Human Rights Act 1998; for example:
  - a right to dignity (Article 1)
  - an express right to protection of personal data (Article 8)
  - rights of the child (Article 24)
  - a broader right to a fair trial (Article 47)
- A **wider class of applicants** can use it. Anyone with 'sufficient interest' can apply for judicial review based on the Charter, and it can also be relied on in other types of case (for example employment tribunal claims) that are 'within the scope of EU law'. Claims under the Human Rights Act can only be made when an individual is a 'victim' of a rights violation.
- **Stronger remedies** are available. If any national court finds that any national law is incompatible with a directly effective provision of the Charter, it must disapply contravening primary legislation or quash secondary legislation. 'It neither matters what type of national law it is (it can be an Act of Parliament), nor does it matter which court hears the case (it could be a tribunal or a magistrates' court).'[14]

Examples

A recent example is the case of Benkharbouche and Janah.[15] The applicants were employed by foreign embassies in the UK, and when trying to enforce their employment rights were prevented by provisions of the UK's State Immunity Act 1978. The Supreme Court agreed with the Court of Appeal that this breached their right to a fair hearing under Article 47 of the Charter. The Court therefore ruled that those provisions of the 1978 Act will not apply to the claims derived from EU law for discrimination, harassment and breach of the Working Time Regulations. The claims were returned to the employment tribunal to consider the merits. Parts of the claim were also based on English law rather than EU law – for these, the court could only make a declaration of incompatibility under the Human Rights Act 1998.

When David Davis thought the provisions of the Data Retention and Investigatory Powers Act 2014 violated privacy, he turned to the Charter, and the High Court in the Davis case noted that Article 8 of the Charter "clearly goes further, is more specific, and has no counterpart" in other privacy laws.[16]

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14 Tobias Lock, 'What Future for the Charter of Fundamental Rights in the UK?', European Futures, 6 October 2017

15 [2017] UKSC 62; on appeal from [2015] EWCA Civ 33

16 Davis v. Secretary of State for the Home Department). Case No: CO/3665/2014, CO/3667/2014, CO/3794/2014, 17 July 2015.

Role of the CJEU

Currently, UK courts may – and sometimes must – make referrals to the CJEU to interpret the Charter (Article 267 TFEU)[17]. The CJEU could also be involved if the Commission took enforcement action against the UK in relation to the Charter.

Given that the Charter has only been in force since December 2009, the CJEU has yet to interpret many Charter provisions. But it appears to be relying on the Charter increasingly. For example, in a recent opinion on an EU-Canada agreement on transferring personal data outside the EU,[18] the Grand Chamber of the Court of Justice said that it would refer only to Charter Article 8 (protection of personal data) instead of other EU data protection law, because that provision lays down the conditions for data processing in a more specific manner than Article 16 TFEU.[19] In the earlier Google Spain[20] case the CJEU extended Articles 7 (privacy) and 8 of the Charter to include a 'right to be forgotten'.[21]

CJEU judgments also referred to Charter rights before it was given legal force in the Lisbon Treaty. For example, in Spain v UK in September 2006[22] the CJEU referenced Article 39 (right to vote and stand as a candidate at elections to the European Parliament).

The EU Agency for Fundamental Rights (FRA) database provides a compilation of CJEU and European Court of Human Rights (ECtHR) case law with direct references (in decisions, judgments and opinions) to the Charter and a selection of national case law with direct references to the Charter from EU Member States. According to the database, the CJEU has referred to the Charter in 312 decisions and 132 opinions. Seven of these involved the UK. It also lists nine cases in which UK courts referenced Charter rights.

Dr Charlotte O'Brien of York Law School suggested an even bigger case law on the Charter in her evidence to the Commons Exiting the EU Committee:

> I did an approximate count and found that there were 248 cases in the courts of England and Wales that cited the charter, 17 in Northern Ireland, 14 in Scotland, 98 in the European Court of Human Rights and 832 EU judgments, 515 of which are the Court of Justice.[23]

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17 Treaty on the Functioning of the EU

18 Opinion 1/15 on the transfer of Passenger Name Record data from the European Union to Canada, 26 July 2017 (Grand Chamber).

19 See Lorna Woods (Professor of Internet Law, University of Essex), 'Transferring personal data outside the EU: Clarification from the ECJ?', EU Law Analysis blog, 4 August 2017.

20 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12, 13 May 2014

21 This was subsequently incorporated in the General Data Protection Regulation (GDPR).

22 Case C-145/04. Spain maintained that by enacting the European Parliament (Representation) Act 2003 conferring the right to vote on qualifying Commonwealth citizen who are not Community nationals, the UK was in breach of its obligations under the EC Treaty, in particular relating to the right to vote in EP elections in Gibraltar.

23 Select Committee on Exiting the European Union, Oral evidence: The European Union (Withdrawal) Bill, HC 373, 11 October 2017, Q19

Dr Tobias Lock of the University of Edinburgh argues that 'the main loss for the UK legal order might be found in the Charter's yet unfulfilled potential.[24]

Objections to the Charter

Objections to the Charter have largely been based on concerns that it is overly complex, that it could extend enforceable EU rights and obligations, and/or that the CJEU would take an expansionist approach to interpreting it.[25]

It was in response to such concerns that the UK and Poland succeeded in obtaining a Protocol on the Charter (Protocol 30 to the EU Treaties) which emphasises that the Charter is not to be interpreted as imposing new obligations on the UK. But Protocol 30 cannot be used to prevent the CJEU from defining the extent of EU rights contained in the Charter;[26] and it does not amount to an opt-out, as has sometimes incorrectly been thought.[27]

Richard Ekins of the University of Cambridge has described the Charter as a "package of vague, open-ended standards – 'standards' in many ways looser and vaguer than those of the Human Rights Act and the underlying ECHR". He considers that not removing it "would undermine the rule of law and wrongly elevate judicial policy views over those of elected political authorities."[28]

2.2 Clause 5(5): other 'fundamental rights or principles' as a substitute

Clause 5(5) states that even though the Charter will not be retained, this 'does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter'.

What this means in practice, and why it was considered necessary to include this provision, are not entirely clear.

Clause 5(5) goes on to state that 'references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles'.

How case-law on the Charter fits into the definition of 'retained case law' in **clause 6(7)** is unclear. **Clause 6(7)** of the EUW Bill provides that

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24 Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017] Public Law Brexit Special Issue 2017 117 at 126

25 See Joint Committee on Human Rights, The human rights implications of Brexit, 19 December 2016, paras 61-65. For academic analysis of accusations of CJEU 'activism' and 'competence creep' generally, see European University Institute, AEL 2013/9, Academy of European Law Distinguished Lectures of the Academy To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice, Koen Lenaerts and José A. Gutiérrez-Fons.

26 *R v David Davis MP et a*/[2015] EWHC 2092 (Admin), para 10.

27 See Angela Patrick, Mapping the Great Repeal: European Union Law and the Protection of Human Rights, October 2016, para 53.

28 Richard Ekins, 'The Charter of Fundamental Rights gives judges too much power, and is bad for accountable government', Conservative Home, 14 July 2017

the exceptions in **clause 5** and **Schedule 1** enable the exclusion of certain cases from the definition of 'retained case law'**. Clause 6(7)** also states that clause 5 and Schedule 1 exclude particular principles from the 'retained general principles of EU law'. Clause 6(7) further confirms that each of these categories can be modified by further subsequent legislation. This suggests that retained case law does not include matters excluded by clause 5 and Schedule 1 (so no Francovich damages) – but Supremacy and Charter case law are exceptions to the exception because clause 5(2) and 5(5) respectively re-retain the relevant case law albeit with certain specific restrictions.

It is also unclear how this unusual provision would work in practice when trying to determine what pre-Brexit case law referring to the Charter means after Brexit. For example:

- Professor Steve Peers has suggested it would be "like trying to remove an egg from an omelette, because the judicial reasoning on the Charter and the EU legislation is intertwined".[29]
- Where there are multiple underlying or corresponding rights and principles, it will be challenging for the courts to identify which one is in play in any particular case.
- If the Charter goes beyond the corresponding fundamental right, should that fundamental right be interpreted as though it were as wide as the Charter right?[30]

What are these 'corresponding retained fundamental rights or principles'?

The Bill does not define 'fundamental rights or principles'. It could potentially include some or all of any of the following:

- rights and principles set out in retained EU law
- 'retained general principles of EU law' as defined in **clause 6(7)** – see below
- rights and principles set out in the European Convention on Human Rights (ECHR)
- rights and principles set out in other in international human rights treaties that apply to the UK
- rights and principles in common law or statute law in the UK outside the scope of retained EU law

It seems likely that the range of substitute reference points for case-law on the Charter after exit day will need to be wider than fundamental rights or principles retained 'in accordance with this Act'.

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29 Professor Steve Peers, 'The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers', EU Law analysis blog, 31 March 2017.

30 See Kelyn Bacon QC and Emma Mockford, Brick Court Chambers, 'Questions left unanswered by the Great Repeal Bill', ALBA summer conference 2017, para 53

2.3 What is the overall result?

Lack of clarity

It is not clear from the Bill which Charter rights and principles would be retained in other sources and which lost. How easy will it be for the courts to identify the scope, substance, status and operation of the fundamental rights and principles existing 'irrespective' of the Charter and 'underlying' it?

Some Charter Articles would not make sense if retained after Brexit: for example, the right to vote in and stand for election in the European Parliament (Article 39).

Many Charter rights would be kept as retained EU law or 'general principles' through other provisions of the Bill, or would continue to exist by virtue of other UK or international law. These other sources overlap but also leave gaps: the content of those rights is not always identical with the Charter, even in combination, and their justiciability varies.

Moreover, it is not clear whether the fundamental rights and principles that constitute part of retained EU law would retain their supreme status in relation to pre-exit day law (**clause 5(1)**)[31] or whether they would be relegated to the status of non-justiciable 'general principles'.

And even though Charter rights currently apply only where the UK is acting 'within the scope' of EU law, it will not always be easy to identify what diminution there might be in the substance and scope of human rights protections.

Chris Leslie and others have tabled an amendment to the Bill requiring Ministers to produce a report reviewing the implications of removing the Charter from UK law (**New Clause 16**).

The Commons Exiting the EU Committee said it would be "helpful if the Government published its memorandum on rights set out in the Charter, as referred to by the Minister, before Clause 5 is considered during the Committee Stage of the Bill".[32] The Joint Committee on Human Rights has also written to David Davis requesting that he expedite the publication of the ECHR memorandum and clarify various issues regarding clauses 5(4) and 5(5). The deadline for response is 20 November 2017.

Below is an analysis of how the Charter relates to various different sources of corresponding rights.

Retained EU law

Many Charter rights correspond to rights in the EU Treaties or EU secondary law such as regulations and directives. Under **clauses 2, 3**

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31 The supremacy of EU law continues to apply to any enactment or rule of law passed or made before exit day – see 'The European Union (Withdrawal) Bill: Supremacy and the Court of Justice', Commons Library Briefing Paper 8133, 8 November 2017

32 Exiting the European Union Committee European Union (Withdrawal) Bill First Report of Session 2017–19, 17 November 2017, para. 33.

and 4 of the Bill these rights would be converted into or retained in UK domestic law, and could continue to be relied on in UK courts.

For example, Charter Article 23 on equality between men and women is underpinned by Article 3 TEU and Articles 8 and 157 TFEU, as well as several directives.

However, it is not clear exactly which EU Treaty rights are directly effective, and so would fall within the scope of clause 4.

And in some cases the Charter goes further than its corresponding EU law rights. For example, the Charter is now central to EU data protection law, with a number of cases relying on Charter Article 8 in preference to other EU data protection provisions. Although Article 8 is based partly on the predecessor to Article 16 TFEU (right to data protection)[33] and the 1995 Data Protection Directive,[34] it appears to go further than other EU legislation. It also goes further than the equivalent provision of the European Convention on Human Rights.[35]

Also much EU legislation now refers directly to the Charter. For example:

- The Recitals of the General Data Protection Regulation ('GDPR')[36] refer to Article 8 of the Charter, and the substantive provisions refer to the Article 47 right to an effective remedy.
- Regulation 2201/2003 on the jurisdiction of matrimonial matters and parental responsibility makes specific reference to the Charter in recital 33.[37]

How would these references be dealt with by UK courts?

Importantly, rights in retained EU law could be amended or repealed by regulations under **clauses 7, 8 and 9** of the Bill, as these clauses currently have only limited human rights safeguards.

Other Brexit Bills, and secondary legislation made under them, could potentially have similar effects. For example, the Trade Bill currently before the House of Commons contains delegated powers to amend retained EU law, with no specified human rights safeguards at all (clause 2(6)).

The Joint Committee on Human Rights has consistently expressed concern about the excessive use of delegated powers to legislate in a way that interferes with individual rights. In its December 2016 report on the human rights implications of Brexit, it called for Parliament to be able to amend and vote on any such changes:

> …the Government must resist the temptation to allow laws relating to fundamental rights to be repealed by secondary

33 Article 286 of the EC Treaty
34 Directive 95/46/EC
35 ECHR Article 8. See David Davis and others v Secretary of State for the Home Department [2015] EWHC 2092 (Admin) para 80: "Article 8 of the Charter clearly goes further, is more specific, and has no counterpart in the ECHR".
36 Regulation 2016/679 EU – see Brexit and data protection, Commons Library briefing paper CBP7838, 10 October 2017
37 Dr Charlotte O'Brien, Select Committee on Exiting the European Union, Oral evidence: The European Union (Withdrawal) Bill, HC 373, 11 October 2017, Q21

> legislation for reasons of expediency. If rights are to be changed there should be an opportunity for both Houses to seek both to amend and to vote on such changes.[38]

The JCHR added that the Government should also avoid using secondary legislation to interfere with fundamental rights because (unlike primary legislation) 'secondary legislation can be quashed or disapplied by the courts on a number of grounds including *vires* [going beyond statutory powers] and compatibility with the ECHR'.[39]

General principles of EU law

There is considerable overlap between the Charter and the 'general principles of EU law'. But exactly what those general principles are is not always clear.

Some general principles will be retained by the Bill, but their effect will be reduced, and they will be subject to amendment (see section 3.2 of this paper below).

Under **Schedule 1 para 2** of the Bill, only those general principles recognised as such by the CJEU before exit day would be retained. Many Charter rights have not yet been dealt with in the CJEU's case law,[40] so would not be considered 'retained general principles of EU law' under the Bill.

And even retained general principles would have reduced effect under the Bill. Instead of being used to challenge and disapply UK laws that are 'within the scope' of EU law, as at present, they could be used only for interpreting retained EU law (**clause 6(7)** and **Schedule 1 paras 2 and 3**).

Retained general principles of EU law would also be subject to amendment or repeal in the same way as other retained EU law.

ECHR rights

ECHR rights corresponding to Charter rights would still be available and enforceable in the UK under the Human Rights Act 1998 (HRA). The Government has stated that it has no plans to withdraw from the ECHR (at least for the remainder of this Parliament).[41]

Although there is a large overlap between the Charter and the ECHR, there are both substantive and procedural differences.

The substantive provisions vary from matching exactly to having no equivalence:

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38 Joint Committee on Human Rights, 'The human rights implications of Brexit', HL 88 / HC 695 2016-17, 19 December 2016, para 92

39 Joint Committee on Human Rights, 'The human rights implications of Brexit', HL 88 / HC 695 2016-17, 19 December 2016, para 82

40 Tobias Lock, 'What Future for the Charter of Fundamental Rights in the UK?', European Futures, 6 October 2017

41 Department for Exiting the EU, The Repeal Bill Factsheet 6: Charter of Fundamental Rights, July 2017.

- Some Charter provisions correspond exactly to equivalent provisions of the ECHR.[42] For these, individuals will still be able to uphold their rights under the Human Rights Act 1998, though in different circumstances and with different remedies.
- However, even where the wording is exactly the same, the CJEU has sometimes interpreted those rights more widely. It would continue to develop its interpretation in future cases that would not apply directly to the UK.
- Other Charter provisions based on the ECHR go further than their ECHR equivalents. For example, the right to education (Charter Article 14) is based partly on Article 2 of Protocol 1 to the ECHR but 'it was considered useful' to extend it to cover vocational and continuing training.[43] This 'new' wording might no longer apply in the UK.
- Many Charter provisions have no equivalent in the ECHR, such as the right to human dignity and an express right to conscientious objection, or the guarantees on bioethics in Article 3.

For example, in the ZZ case the CJEU held that the Charter right to a fair trial (Article 47) applied to immigration cases, unlike the corresponding ECHR right (Article 6) which only applies to the determination of civil rights and obligations or criminal charges.[44]

Further, as set out above, the HRA does not have the same remedies as using the Charter. The Supreme Court highlighted this in the recent case of Benkharbouche and Janah,[45] noting that 'a conflict between EU law and English domestic law must be resolved in favour of the former, and the latter must be disapplied; whereas the remedy in the case of inconsistency with article 6 of the Human Rights Convention is a declaration of incompatibility'.[46]

Also, after exit day, ECHR rights could not be used to disapply certain retained EU law. This is because **Schedule 8 para 19** of the Bill states that any 'retained direct EU legislation' would be treated as primary legislation under the Human Rights Act 1998. Therefore if it was found to be in breach of ECHR rights, the courts would be limited to issuing a declaration of incompatibility.

Other international human rights treaties

Charter rights that correspond only to rights under other international human rights treaties would become unenforceable where either:

- the UK has not ratified the corresponding human rights treaty provision – for example ECHR Protocol 12 which provides a free-standing right to equal treatment similar to that in the Charter

42 Six whole Charter Articles and parts of six others have the same meaning and scope as Articles of the ECHR: Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, 14 December 2007

43 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), 14 December 2007

44 Case C-300/11, 4 June 2013 (Grand Chamber)

45 [2017] UKSC 62; on appeal from [2015] EWCA Civ 33

46 Para 78

and much broader than the limited anti-discrimination clause in Article 14 ECHR; or

- the UK has ratified the corresponding human rights treaty provision but has not made it enforceable under domestic law – for example, Charter Article 24 (the rights of the child) is based on the 1989 UN Convention on the Rights of the Child, which is only partially reflected in UK law.

Common Law

It is important to remember that the UK courts protect fundamental rights under the common law (which includes customary international law). For instance, in the recent UNISON case on employment tribunal fees,[47] the UK Supreme Court stated that any attempt by the Government to hinder or impede the right of access to a court requires clear authorisation by Parliament.

Any regulations made under the EUW Bill would be subject to review by the courts (unlike primary legislation), which could provide some human rights protection. For example, the principle of legality, as articulated by Lord Hoffman in the Simms case,[48] would (if applied) mean that the court would assume that Parliament did not intend to delegate the power to the executive to infringe fundamental rights.

Implications for Ireland/Northern Ireland

If removing the Charter does result in a loss of rights, would this risk breaching the Good Friday Agreement – which is in part an international agreement?

And would the EU accept this in the negotiations on the withdrawal agreement? The EU-27's Guiding Principles for the dialogue on Ireland/Northern Ireland, published on 7 September 2017, state that the UK "should ensure that no diminution of rights [in Northern Ireland] is caused by the United Kingdom's departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law".[49]

A paper by Professor Chris McCrudden for the Royal Irish Academy and the British Academy explores these issues.[50] They are also the subject of a recent letter to the Irish Times from Michael Farrell, Dr Colin Harvey of Queen's University Belfast and Liam Herrick of the Irish Council for Civil Liberties.[51]

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47 R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51
48 *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 HL
49 Para 4
50 Professor Chris McCrudden, 'The Good Friday Agreement, Brexit and Rights',
51 'Brexit and human rights', Irish Times, 16 November 2017

2.4 What are the alternatives?

Retaining the Charter

If clause 5(4) and (5) were omitted, the Charter would presumably be 'saved' as retained EU law under clause 4, and subject to amendment by regulation in the same way as the rest of retained EU law.

But it is not clear how a post-Brexit role for the Charter might be crafted that adapts the concept of being "within the scope" of EU law, does not over-complicate the human rights landscape, and also respects UK parliamentary sovereignty. For example:

- The Charter could be retained to apply to retained EU law and any future modifications to it. But this would mean some parts of UK law continuing to be subject to a different human rights regime from the rest. And would it also cover any legislation required to implement the withdrawal agreement?
- The Charter could even be retained and extended, to apply to all UK law and institutions. But then its relationship with the Human Rights Act 1998 would be even more complicated.
- The Human Rights Act 1998 could be amended to add the additional rights currently protected by the Charter.[52]

Standstill clauses etc

Alternatively, various human rights 'standstill clauses' could be envisaged, for instance:

- A new provision specifying that nothing in the Bill may infringe existing fundamental rights.[53]
- A new provision specifying that amendments or modifications to retained EU law must be compatible with fundamental rights as set out in the Charter.
- The Human Rights Act model could be followed, to provide that amendments to retained EU law must be "read and given effect in a way which is compatible with the rights set out in the EU Charter". Where this is not possible, a court could have the power to disapply the law or issue a declaration of incompatibility.[54]

Amendments to the Bill

Amendments of both types have been tabled. For instance, Dominic Grieve's **Amendment 8** – which had attracted cross-party support from 51 Members by 16 November 2017 – would simply leave out clause 5(4) and (5). His explanatory statement says this is "to allow the Charter of Fundamental rights to continue to apply domestically in the interpretation and application of retained EU law".

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52 Professor Merris Amos, 'Red Herrings and Reductions: Human rights and the EU (Withdrawal) Bill', UK Constitutional Law blog, 4 October 2017

53 See for example Repeal Bill: Liberty and Amnesty International UK's joint response, 13 July 2017.

54 Professor Merris Amos, 'Red Herrings and Reductions: Human rights and the EU (Withdrawal) Bill', UK Constitutional Law blog, 4 October 2017

His **amendments 9 and 10** would also retain the general principles of EU and their existing effects.

Tom Brake's **New Clause 78** aims to ensure that EU equality rights are enshrined in free-standing domestic law after the UK leaves the EU.

Amendment 48, from the chairs of six Commons Select Committees including Hilary Benn, seeks to prevent Ministers from exercising their powers under clause 7 unless they are satisfied that doing so would not "remove any necessary protection" or continue to exercise rights or freedoms. This wording comes from s3 of the Legislative and Regulatory Reform Act 2006, and also features in other amendments for instance on clause 9.

Labour's **New Clause 2** would have prevented delegated powers from other Acts being used to alter "fundamental rights as defined in the EU Charter of Fundamental Rights" as well as workplace protections, equality provisions, and health and safety regulations. But this was withdrawn after debate on day two of the Commons committee stage.

There are also amendments seeking to retain specific Charter rights, for example on data protection (**amendment 151**) and the rights of the child (**amendment 148**).

Compatibility with the Equality Act 2010

On day 1 of the Committee stage debate on the EUW Bill, the Justice Minister Dominic Raab announced that the Government is planning to table an amendment to require a statement of compatibility with the Equality Act 2010 for all Brexit-related legislation:

> we have commissioned work to be done on an amendment that the Government will table before Report. It will require Ministers to make a statement before the House in the presentation of any Brexit-related primary or secondary legislation on whether and how it is consistent with the Equality Act 2010.[55]

This follows a recommendation from the Commons Women and Equalities Committee's February 2017 report:

> The Government should give strong consideration to bringing forward an amendment to the Equality Act 2010 to mirror provisions in the Human Rights Act 1998. The purpose of that amendment would be to set out that public authorities must not act in a way that contravenes the Equality Act unless required to do so by another Act of Parliament; that ministers, when presenting any Bill, must make a declaration of compatibility with the Act; that interpretation of legislation by the courts must take account of the Act and be read as far as possible to comply with its provisions; and that, if any legislation is incompatible with the Act, a declaration of incompatibility should be made by the court.[56]

The Government had previously committed to continue to protect and enhance the rights people have at work, and that all the protections covered in the Equality Acts of 2006 and 2010 would continue to apply

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55 HC Deb 14 November 2017 c278

56 Women and Equalities Committee, *Ensuring strong equalities legislation after the EU exit*, HC 799 2016-17, 28 February 2017, para 43

once the UK has left the EU.[57] Its September 2017 response to the Women and Equalities Committee implied that nothing further was proposed:

> We have considered the Committee's recommendations carefully. It is however important to recognise that the Equality Act 2010 and the Human Rights Act 1998 differ in significant ways:
>
> The Human Rights Act incorporates Convention rights. This means that it brings into UK law rights which are set out in a European Convention which itself cannot be amended by Parliament. The Equality Act, by contrast, is a piece of domestic legislation that can be amended by Parliament.
>
> Under the Human Rights Act, the Minister declares whether legislation is compatible with Convention rights. There is no comparable set of rights within the Equality Act.
>
> It is already the case that public authorities must not breach the Equality Act unless required to do so by another Act. Furthermore, Ministers are already, and will continue to be, subject to the public sector equality duty in the Equality Act when formulating the policies which underpin legislation, whether on EU exit or other matters.[58]

The Equality Act 2010 is law in England and Wales. Most of it is also law in Scotland. Only a few of its provisions are law in Northern Ireland.[59]

Future devolved legislation?

It is possible that the devolved legislatures might seek to incorporate Charter provisions into their law in future. For instance, the Scottish Parliament could pass a Scottish Bill of Rights as long as it did not modify the Human Rights Act itself[60] or retained EU law.[61]

The passage of a Bill of Rights for Northern Ireland is foreseen in the Good Friday Agreement but has not yet been achieved.

But any devolved Bill of Rights would be restricted to acts of the devolved executives and (possibly) parliament/assemblies and could not be invoked against UK legislation or executive action.[62]

2.5 Residual effects of the Charter

The Charter might continue to have 'residual' effects in the UK even after its removal under these provisions, for instance in relation to the withdrawal agreement, any transition arrangements, and future cooperation.

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57 Legislating for the United Kingdom's withdrawal from the European Union, March 2017, para 2.17

58 Women and Equalities Committee, 1st Special Report - Ensuring strong equalities legislation after the EU exit: Government Response to the Committee's Seventh Report of Session 2016–17, HC 385 2017-19, 11 October 2017

59 Section 217. Northern Ireland has its own equalities legislation.

60 Scotland Act 1998 Sch 4

61 EUW Bill clause 11

62 See Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017] Public Law Brexit Special Issue 2017 117 at 134

Withdrawal negotiations and agreement

The UK must continue to comply with the Charter throughout the Brexit negotiations and when enacting any implementing legislation, wherever this is considered to be 'within the scope' of EU law.

The European Parliament stated in an April 2017 resolution that it will consent to a withdrawal agreement only if the agreement complies with the Charter.[63] It is possible that the EU institutions or a Member State could request a CJEU opinion on whether a withdrawal agreement is compatible with the Charter.[64]

And the EU institutions will also have to ensure that in negotiating, signing and concluding any future relations agreements with the UK they are acting in a manner compatible with the Charter.

Transition / implementation period

The role of the Charter in any transition or implementation period is not clear. The exclusion of particular aspects of the *acquis communautaire* imply that this Bill is not intended to provide for a standstill transition which preserves the existing structure of EU rules and regulations.

Labour's **amendment 286** aims to retain the Charter until the end of any transitional period agreed under Article 50.

In recent evidence to the Exiting the European Union Committee, Steve Baker, Parliamentary Under Secretary of State at the Department for Exiting the European Union, confirmed that any implementation period would be provided in separate legislation. On 13 November 2017, the Government announced that further primary legislation, the Withdrawal Agreement and Implementation Bill, would be used to implement the withdrawal agreement and any transitional arrangements.

Future cooperation

Moreover, it is likely to be the case that in areas where the UK as a 'third country' wants to continue close cooperation with the EU, such as data retention and exchange,[65] compliance with EU legislation and the Charter will be required in practice to ensure regulatory equivalence.[66]

After leaving the EU, the UK courts would no longer be able to request a preliminary ruling from the CJEU on compatibility of UK or EU legislation with the Charter. However, CJEU judgments on the Charter are likely to have an indirect impact on the UK in areas such as data retention where the Charter has an extraterritorial reach, or where the

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63 European Parliament resolution of 5 April 2017 on negotiations with the United Kingdom following its notification that it intends to withdraw from the European Union (2017/2593(RSP)).

64 Under Article 218(11) TFEU

65 See Department for Exiting the EU, The exchange and protection of personal data - a future partnership paper, 24 August 2017.

66 *Schrems* [2016] QB 527 at [73] – a third country musts in practice comply with Charter standards in order to quality as a location for the storage of data collected in the EU. See Elif Mendos Kuşkonmaz, 'Brexit and Data Protection: The Tale of the Data Protection Bill and UK-EU Data Transfers', EU Law Analysis blog, 26 September 2017; Tech UK 'European Union (Withdrawal) Bill Second Reading Briefing', September 2017; Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017] Public Law Brexit Special Issue 2017 117 at 131-3

European Court of Human Rights refers to those judgments when interpreting equivalent provisions of the ECHR.[67]

[67] Tobias Lock, 'Human Rights Law in the UK after Brexit' [2017], *Public Law* Brexit Special Issue 2017 117 at 131-3

3. Schedule 1: validity challenges, general principles of EU law, and '*Francovich*' damages

Schedule 1 supplements clause 5 and sets out further exceptions to the preservation and conversion of EU law provided for in clauses 2, 3 and 4.

3.1 How will the validity of EU law be challenged? (para 1)

The EU Treaties allow challenges to the validity of EU legislation to be brought in the CJEU.[68] Schedule 1 paragraph 1 seeks to prevent challenges to retained EU law being brought in domestic law after Brexit, but provides some circumstances where a challenge may be possible:

- if the CJEU has decided before exit day that the instrument in question is invalid, or
- if the challenge is of a kind described, or provided for, in regulations made by a Minister of the Crown.

Such ministerial regulations may allow challenges which before Brexit could have been made against an EU institution to be made against a public authority in the UK after Brexit. David Davis said in a letter to Dominic Grieve (see below):

> Existing sources of rights and domestic rights of action will continue to operate in UK law undisturbed by this Bill. This includes rights such as the right to equal treatment and non-discrimination. Likewise, notwithstanding our exit from the EU, individuals will continue to be able to challenge secondary legislation and administrative action under our domestic law by way of well-established grounds of judicial review.

Ministers might need to create new UK public authorities to do things that the EU institutions had previously done.

The Government justifies paragraph 1(1) of Schedule 1 on the basis that at present domestic courts are not able to declare EU legislation invalid.

After exit day, any converted or preserved retained EU law that has the status of secondary legislation in domestic law would be able to be challenged and held to be invalid by the domestic courts. Under the existing constitutional framework, secondary legislation can be reviewed by courts using all the grounds of judicial review.[69] For example, secondary legislation made under section 2(2) of the ECA 1972, and

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[68] See, for example, the Court's rejection in May 2016 of challenges to the Tobacco Products Directive (Directive 2014/40/EU).

[69] *R v (on the application of Javed) v Secretary of State for the Home Department* [2001} EWCH Civ 789

which is preserved by 2(2)(a) of the EUW Bill, is subject to judicial review.[70]

The EU law converted by clause 3 of the EUW Bill will be known as 'retained direct EU legislation', which the Government intends to be a new form of domestic legislation that is neither primary nor secondary legislation. The Government has said that paragraph 1(1) of Schedule 1 will not affect the ability to challenge "existing domestic secondary legislation on grounds other than the validity of the relevant EU instruments".[71] It is unclear whether retained EU law, which is neither primary or secondary legislation, will be subject to judicial review on administrative law grounds.

The Government's evidence to the Lords Constitution Committee points out that regulations made under powers in the EUW Bill that modify retained EU law will be amenable to judicial review.[72] Clause 6(7) of the EUW Bill confirms that retained EU law can be added to after exit day.

The issue is that in domestic law, secondary legislation can be tested against the parent statute, to which the former owes its legal authority. In relation to retained EU law, the EUW Bill does not, as Professor Paul Craig points out, "provides the formal legal imprimatur for the introduction of such norms into the UK legal order".[73] As such, the courts will not have "any substantive foundation against which to test such norms" of retained EU law.[74]

The Government intends that the grounds for challenging retained EU law will be provided for by the Government through paragraph 1(2)(b) of Schedule 1, which "provides a power to make regulations which could be exercised to enable certain kinds of challenge to be brought after exit".[75] These regulations could enable a challenge which would have been able to be made against an EU institution to be made against a UK public authority.[76]

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70 It is worth noting that *ITV Broadcasting v TV Catchup limited Ltd* [2001] EWHC 28 (Admin) the High Court noted that secondary legislation made under is treated differently in the sense that section 2(2) is not interpreted as restrictively as other Henry VIII powers, as it is a unique power for the purpose of implementing treaty obligations. It is unclear how the courts will approach challenges to this law once it owes it continued validity to this Bill rather than the ECA.

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

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

73 Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p3

74 Professor Paul Craig, University of Oxford—Written evidence to the HL Constitution Committee (EUW0002) p3

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

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

3.2 General principles of EU law would have reduced effect (paras 2 and 3)

What are the 'general principles'?

General principles of EU law are largely legal principles that have been recognised by the CJEU on a case-by-case basis as being particularly important in the EU legal order. They include:

- principles such as legal certainty, legitimate expectation, proportionality, effectiveness and non-retroactivity.
- certain fundamental rights recognised by the CJEU as general principles
- principles that are specific to the EU, such as solidarity between Member States, institutional balance and Community preference.

Additionally, Article 6(3) TEU now enshrines fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles.

General principles are applied by the CJEU and by national courts when determining the lawfulness of legislative and administrative measures within the scope of EU law. They are also used as an aid to interpretation of EU law. In the EU legal order they assume the same status as the Treaties.

At present UK laws that are within the scope of EU law, and EU legislation (such as regulations and directives) that do not comply with the general principles, can be challenged and disapplied. Administrative actions taken under EU law must also comply with the general principles.

Only some general principles retained

Under clauses 5(5) and 6(7), many general principles of EU law would form part of retained EU law.

But **Schedule 1 para 2** restricts this to only those that have been recognised as general principles of EU law by the CJEU in a case decided before exit day. This category will be known as 'retained general principles of EU law'.

As mentioned above, not all the Charter provisions have yet been considered by the CJEU. Those that have not would not form part of the retained general principles of EU law.

Retained general principles would be interpretative only

Further, under **Schedule 1 para 3**, UK courts will no longer have the power to disapply domestic legislation on the grounds that it conflicts with these general principles. Nor could they form the basis of a judicial review of executive action or other legal challenge. They could only be used, like the pre-exit case law of the CJEU, to inform the interpretation by UK courts of retained EU law (clause 6). This provision is linked to the ending of the supremacy of EU law and rules established *inter alia* in *Francovich* and *Factortame*.

In written evidence to the Select Committee on Exiting the EU in October 2017, Professor Phil Syrpis thought "applying EU general principles while excluding the Charter would represent a new, unnecessarily complex, challenge, for the UK courts (further complicated by the more general need to distinguish between the pre- and post-Brexit case law of the CJEU)". He continued:

> Similar issues exist in relation to the limitation in the permitted use of general principles of law in the Schedule; the explanatory notes suggest that while retained EU law is to be interpreted in accordance with retained general principles, courts will not be able to disapply domestic laws on the basis that they are incompatible with EU general principles. These distinctions will be difficult to draw, and are likely to lead to divergences between the approaches of the UK courts and the CJEU.

But Professor Richard Ekins said in written evidence to the Committee that the general principles of EU law "are notoriously uncertain and imprecise", and therefore it was "quite right for Parliament to choose to advance the rule of law by providing that after exit day one cannot rely on general principles to unsettle other rules of law or to ground legal liability". He welcomed the change, which would "remove a source of legal uncertainty and needless litigation".

The Law Society of Scotland wanted the general principles of EU law to be identified. It told the Committee it would be helpful if the Government "could identify what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of "retained general principles of EU law" in clause 6(7)". It called for the "fundamental rights and principles which exist 'irrespective of the Charter'" to be set out in the bill.

Example

The recent case of *Walker v Innospec Ltd*[77] illustrates the significance of losing 'general principles' as a source of supreme EU law.

In this case, Mr Walker was refused entitlement to his spousal survivor's pension on the basis of his same-sex relationship. The UK's Equality Act 2010 provides for an exception to the rule against non-discrimination in respect of rights that accrued before 5 December 2005, which applied to Mr. Walker. The Supreme Court held that this exception within the Equality Act 2010 was incompatible with the prohibition of non-discrimination which is a general principle of EU law contained within the Framework Directive on equal treatment in the workplace. The Court was therefore able to disapply the Equality Act 2010 and provide an effective remedy for the claimant.

Debate on the Bill

On day 1 of the Second Reading debate on the EUW Bill on 7 September 2017, Dominic Grieve said paragraph 3(1) of Schedule 1 ("There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law")

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77 *Walker v Innospec Ltd* [2017] UKSC 47

would mean "a marked diminution in the rights of the individual and of corporate entities". David Davis promised to deposit a letter on the issues, which he did on 11 September.

In the letter Mr Davis set out the Bill's approach to general principles of EU law. He insisted the Bill would not change the UK's "longstanding tradition of ensuring our rights and liberties and of fulfilling our international human rights obligations". But Brexit would 'inevitably' mean the loss of some "cross-cutting elements of the EU's legal framework", which would include the Charter of Rights and claims concerning general principles of EU law. Retaining in UK domestic law after exit day rights of action based on the general principles would, David Davis writes, "risk creating a considerable uncertainty for businesses and individuals about their rights and obligations if it resulted in pre-exit primary legislation being struck down". He concludes:

> The ability for our courts and tribunals to disapply primary legislation is – except in the context of EU law – alien to our legal system. Removing the ability of courts and tribunals to disapply primary legislation on the grounds of incompatibility with the general principles is therefore consistent with the way in which domestic law operates and an appropriate step in disentangling UK law from EU law and restoring sovereignty and control to Parliament.

On day two of the Second Reading debate on the Bill on 11 September, Dominic Grieve asked the Justice Secretary David Lidington for clarification of his assertion that "under the Bill, the general principles of European law, as recognised by the Court of Justice before exit day, or as embodied in extant European legislation, will be retained in United Kingdom law for the purposes of interpreting retained EU law". Mr Lidington replied (c585) that "For the most part, those rights are used when they are given effect through specific items of European Union legislation, rather than in the abstract", so would be preserved by the Bill. For example, Article 8 of the Charter was based on former Article 286 of the Treaty establishing the European Community (TEC, now TFEU) and on the Data Retention Directive, among other sources.

In the Committee stage debate on 14 November, Oliver Letwin was concerned about the provision in clause 6(3)(a) that a question of validity, meaning or effect of retained EU law on or after exit day would be decided "in accordance with any retained case law and any retained general principles of EU law". He asked whether the UK Supreme Court, which will not be bound by retained EU case law, should be making judgements in which it will "nevertheless apply the general principles, and try to use the same purpose and teleological reasoning that the ECJ uses". This, he thought, would create great legal uncertainty.

Cheryl Gillan raised a point (c 273) about the principle of legitimate expectation. Paragraph 27(3) of schedule 8 of the Bill provides that legal actions begun before Brexit can continue and can rely on EU legal principles. But the Bill does not allow anyone who has commenced an action before exit day a right of reference to the CJEU, "which they could have reasonably expected when lodging their claim in the court

prior to Brexit". Dominic Grieve agreed, citing the example of references to the Privy Council: when a country has terminated its references, the references continue after the date of termination until all the cases going through the system are completed. "It must follow that references to the … CJEU … must be able to continue after the date of exit".

Iain Duncan Smith was concerned (c 300) about the cut-off point for courts taking account of EU general principles, which will be modified by the CJEU going forward: "at what point will UK courts consider those principles to be no longer relevant to their judgments as they refer to them?".

3.3 No more '*Francovich*' damages (para 4)

Schedule 1 paragraph 4 states that there is "no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*". This concerns damages from a state for its failure to implement a directive.

Box 1: What is the *Francovich* rule?

In the *Francovich* case in 1991[78] the CJEU (then the ECJ) held that in some circumstances states have to compensate individuals or businesses for damage they suffer because the state has failed to transpose a directive, or done so late or poorly.

The Court in that case held that the Italian Government had breached its EU obligations by not implementing the Insolvency Directive on time, and was liable to compensate the workers' loss resulting from the breach. The Court further held that the damages for such breaches should be available before national courts, and that to establish state liability on the basis of the **failure to implement a directive**, claimants had to prove that:

- the law infringed was intended to confer rights on individuals;
- the breach was "sufficiently serious", i.e. the Member State had manifestly and gravely disregarded the limits of its discretion;
- there was a direct causal link between State's failure to implement the directive and the loss suffered.[79]

The principle of State liability for damage caused to individuals by breaches of EC law was clarified five years later in the judgments in *Brasserie du Pêcheur* and in *Factortame* (1996), when Francovich was extended beyond a failure to implement a Directive to any State action incompatible with Treaty provisions or other EU laws which grant rights to individuals.

Paragraph 5 clarifies that references to the *Francovich* rule refer to those references as they stand on Brexit day, "not as they will operate in the future".[80]

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

79 Factortame III, Joined Cases C-46/93 and C-48/93: Brasserie du Pêcheur SA v Federal Republic of Germany; and The Queen v Secretary of State for Transport, ex parte Factortame Ltd and Others" 5 Mar 1996.

80 Explanatory Notes to the European Union (Withdrawal) Bill (Bill 5-EN) para. 157. This also applies to references to the principle of the supremacy of EU law, the Charter of Fundamental Rights, and general principles of EU law.

Schedule 1 paragraph 4 has been seen by some as an attempt by the Government to water down rights to redress against the state,[81] although the Explanatory Notes add: "This provision does not affect any specific statutory rights to claim damages in respect of breaches of retained EU law (for example, under the Public Contracts Regulations 2015) or the case law which applies to the interpretation of any such provisions".

Is the right in certain circumstances to sue the state in *Francovich* linked in principle as well as practice only to EU membership? This is the Government's view: "The right to Francovich damages is linked to EU membership" and "will no longer be relevant after we leave"; but also that "After exit, under UK law it will still be possible for individuals to receive damages or compensation for any losses caused by breach of the law".[82]

David Hart QC has pointed out that "In many areas of litigation, a claim relying on a provision of EU law may have more teeth than the equivalent domestic cause of action".[83] He thinks that the "no *Francovich* damages" clause "seems to be a blatant way of Government seeking to avoid responsibilities for past breaches which is nothing to do with the underlying purpose of the Bill", and:

> The only tempering of this is for actions begun but not finally decided by a court before exit day: even further tucked away in Schedule 8, para.27.
>
> Note that this scheme ignores when the breach of EU law might have occurred, and hence has obvious retrospective effect. Let us assume that government has been egregiously in breach of a Directive for some years, both before and after exit day. Government escapes any liability under the Francovich principle for past and future breaches, unless the litigant has issued his claim before exit day. Cue flood of protective proceedings issued as exit day looms. [84]

But Hugh Bennett, deputy editor at BrexitCentral, thought disapplying *Francovich* was simply a "procedural step in leaving the EU", and:

> Clearly it would be absurd if the UK could be sued for failing to implement future EU directives passed after it has already left. However, it will not affect people's rights to sue the government for breaking existing EU laws – the UK has the centuries-old practice of judicial review, which serves the same purpose in domestic law, with Gina Miller's Article 50 case a recent high-profile example. And as the Withdrawal Bill incorporates all existing EU law into UK law, this just means that UK citizens will now be able to sue the government for breaking any EU laws directly through the UK legal system.[85]

James Segan of Blackstone Chambers thinks section 16 of the *Interpretation Act 1978* would save a Francovich claim, even if

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81 See, for example, The Times, 11 August 2017, Brexit bill will remove right to sue government.
82 Politics Home, 11 August 2017
83 UK Human Rights blog, On first looking into the Brexit Bill, 15 July 2017.
84 UK Human Rights blog, On first looking into the Brexit Bill, 15 July 2017.
85 DEBATE: Is it justified that citizens will lose the ability to sue government over failure to implement EU law? Hugh Bennett and Gina Miller, CITYA.M.,14 August 2017.

unquantified, accrued before Brexit day, unless "the contrary intention appears" from the EUW Bill.

The 1978 Act provides that:

> …where an Act repeals an enactment, the repeal does not, unless the contrary intention appears,— […]
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment; […]
>
> (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;
>
> and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.

Mr Segan does not think that intention appears in the main provisions of the EUW Bill, but points to Part 4 of Schedule 8, paragraph 27(1), which would be given effect by clause 17(6) EUW Bill, which provides that the exclusion of Francovich damages in Schedule 1 para. 4 will, subject to certain exceptions, "…apply in relation to anything occurring before exit day (as well as anything occurring on or after exit day)". He thinks the wording appears "to manifest a clear intention to extinguish even Francovich claims which had accrued before exit day. So the "contrary intention", for the purpose of section 16(1) IA 1978, does indeed appear".[86]

Professor Phil Syrpis, in written evidence to the Exiting the EU Committee, thought the express exclusions would be difficult for UK courts.

> They need to make distinctions not only between the pre- and post-Brexit case law of the CJEU, but also between parts of the EU law *acquis*, some of which is converted, some of which is not. The choices they make are, to put it mildly, likely to be politically salient, and there is little in the Bill to guide them.

Amendments to the EUW Bill

Amendment 62 proposed by Chris Leslie seeks to remove paragraph 4 from Schedule 1 in order to remove the proposal to end rights to damages under the Francovich rule after Brexit.

Amendment 139 proposed by Mary Creagh would insert at the end of paragraph 4 "except in relation to anything occurring before that day". This amendment, together with amendments 140 and 141, would restore the right to obtain damages after exit day in respect of governmental failures before exit day to comply with EU obligations.

Cheryl Gillan's **amendment 302** adds that "Anything occurring before that day" would mean "any action commenced before or after exit day in relation to any act before exit day". This would allow actions to be brought under the Francovich rule either before or after exit day if they related to an act before exit day.

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86 Blackstone Chambers, The Great Repeal Bill: What will happen to accrued rights to claim Francovich damages? James Segan, 3 October 2017.

Jeremy Corbyn's **amendment 335** adds further exceptions to 'no damages' regarding cases where the breach of EU law "took place on or before exit day", adding that for this paragraph, "the exit day appointed must not be before the end of any transitional period" agreed under Article 50 TEU.[87] The aim of this addition would be to ensure a right to obtain damages if the Government failed to uphold its obligations under a transition period in which existing EU structure of rules and regulation applied.

Dominic Grieve's **amendment 127** would remove the whole of Schedule 1 in order to allow challenges to be brought to retained EU law for alleged breach of general principles of EU law and to allow damages to be awarded for a proven breach of such principles in accordance with Francovich.

Box 2: Enforcement of environmental law outside the EU

Particular concerns have been raised with regard to environmental law[88] and workers' rights[89] after Brexit.

Claims relating to EU law

The Bill removes the right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*; and removes rights of action based on a failure to comply with any of the general principles of EU law (*Schedule 1, paras 4 and 3(1)*). Referring to these provisions of the Bill, David Hart QC "hoped that a fairer balance between past and future grounds for complaint emerges during the legislative process".[90]

Press reports have focused on environmental examples, such as air pollution, as an area in which claims relating to past breaches of EU law would not be possible after exit day.

Complaints to the European Commission

In addition to domestic rights of action for citizens to enforce their rights, the European Commission has a standard complaints form which any EU citizen can use free of charge (either online or by post) to submit a complaint against a breach of EU law by a Member State. The Commission assesses all complaints and, where appropriate, transfers them to a suitable problem-solving mechanism. This often involves discussion and negotiation rather than a formal infringement procedure.

This option is available for all EU law, but the majority of infringement proceedings have been brought in the environmental field. This is explained by the UK Environmental Law Association (UKELA) as being due to the often "unowned" and "diffusively spread" nature of the environment and environmental harms compared to other areas of EU law (such as employment rights) where specific individuals or bodies have clear interests to protect.[91]

When asked what will be in place after exit day, the Government has referred to existing provisions for regulators to enforce environmental laws; and specifically identified the judicial review process as a way that interested parties may bring legal action against the Government.[92] However, UKELA has argued that judicial review alone is "ill-suited" to replacing the supervisory role of the Commission, pointing to the costs involved as well as the loss of the less formal mechanisms such as discussion and negotiation.[93]

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87 The amendment actually states "Article 50 of the Treaty on the Functioning of the European Union", but this is an error.

88 See Blackstone Chambers, Environmental law after Brexit: Breaching the Dam? Part 4: Public law causes of action and remedies, Isabel Buchanan,1 Nov 2016.

89 See Independent, 11 August 2017.

90 Environmental Law Foundation, *Blog by David Hart QC* on first looking into the Brexit Bill [accessed 14 August 2017].

91 UKELA, Brexit and Environmental Law, Enforcement and political accountability issues July 2017 [accessed 14 August 2017].

92 For example, see: PQ HL6613 [on Environment Protection] 20 April 2017.

93 UKELA, Brexit and Environmental Law, Enforcement and political accountability issues July 2017 [accessed 14 August 2017].

4. Schedule 6

Clause 3 excludes some of the EU acquis from the preserving and converting provisions, where it does not apply to the UK. **Schedule 6** clarifies the exemptions.

4.1 UK opt-ins and opt-outs

The UK has a number of opt-in and opt-out arrangements with regard to EU law. **Schedule 6 paragraph 4** lists the EU Treaty protocols under which the UK is exempt from aspects of EU law and policy. The Bill will therefore not convert EU laws where, under the provisions of these Protocols, they do not apply to the UK.

The UK has an opt-out from Economic and Monetary Union (Protocol 15 to the TEU and TFEU) and a general opt-out from Schengen, but participates in some parts of the Schengen *acquis* (Protocol 19 to the TEU and TFEU and an earlier Protocol to the EC Treaty and TEU integrating the Schengen *acquis* into the framework of the EU).

The UK has opted out of various EU police and criminal justice measures which were adopted before the Lisbon Treaty came into force (Article 10 of Title VII, Protocol 36 to the TEU and TFEU).

Under the Lisbon Treaty the UK has a general opt-out from EU justice and home affairs measures based on Title V of Part Three of the TFEU but is entitled to opt into individual measures on a case-by-case basis (Protocol 21 to the TEU and TFEU).

A similar arrangement under an earlier Protocol to the Amsterdam Treaty applied to EU measures on visas, asylum, immigration and related policies (former Title IV Protocol to the EC Treaty and TEU).

4.2 Common Foreign and Security Policy

Title V and former Title V TEU deal with the EU's Common Foreign and Security Policy (CFSP). CFSP decisions are adopted by unanimity by Member States in the Council of the EU. They cover matters such as restrictive measures against third states or individuals (e.g. travel bans and asset freezes). The CFSP provides the broad scope of sanctions measures to be applied, and implementation may be both for the EU in matters falling within its competence (such as asset freezes), and for the Member States in other matters (such as visa bans).[94] Many CFSP instruments also reflect UK obligations under United Nations resolutions.

UK governments have consistently taken the view that the inter-governmental aspects of EU policy- and decision-making (CFSP and the former third pillar, Justice and Home Affairs - JHA) do not need to be incorporated into UK law under the ECA or amendments to it. For example, in the Bill linked to ratification of the Treaty of Nice,

[94] UK Government's Review of the Balance of Competences, Foreign Policy report, July 2013.

amendments in the second and third intergovernmental pillars of the TEU (CFSP and JHA), were outside the remit of the Bill, and, like other international treaties, were regarded as binding externally on the UK, but not enforced internally by UK courts.

Similarly, in the current Bill, CFSP decisions under former and current Title V TEU are "exempt" EU instruments. Box 2 looks at the example of international sanctions and counter-terrorism measures.

Box 3: international sanctions and anti-money laundering/counter-terrorism measures

Sanctions against third states, businesses or individuals are implemented by a two-stage EU procedure. First, a CFSP decision under Article 29 TEU is adopted; then a regulation under Article 215 TFEU (restrictive measures). So EU sanctions are imposed by two distinct EU acts – one CFSP and one non-CFSP – which are linked. What is not clear under Schedule 6(1)(2) is whether, for example, the non-CFSP EU regulation imposing sanctions will be converted into UK law and retained, while the initial CFSP decision is not. The Government's April 2017 White Paper said "It is not possible to achieve this [impose and implement sanctions in order to comply with our obligations under the United Nations (UN) Charter and to support our wider foreign policy and national security goals] through the Great Repeal Bill, as preserving or freezing sanctions would not provide the powers necessary to update, amend or lift sanctions in response to fast moving events".[95]

To address this, the Government announced in the Queen's Speech that it would publish an International Sanctions Bill containing "new legal powers that are compliant with our domestic legal system. These will enable us to preserve and update UN sanctions, and to impose autonomous UK sanctions in coordination with our allies and partners". The Sanctions and Anti-Money Laundering Bill was introduced in the House of Lords on 19 October and received a Second Reading on 1 November 2017. The Explanatory Notes to the Bill clarify that the EUW Bill will freeze current sanctions and anti-money laundering/counter-terrorism regimes in effect on Brexit day, but the UK will not be able to rely on these provisions in the long term; the UK will not be able to update provisions and regimes to keep up with emerging risks or updated international standards, or respond to "foreign policy or national security imperatives".

Temporary powers in the sanctions Bill that apply for a two-year period after the UK has left the EU are intended to be used "alongside the power in the EU (Withdrawal) Bill to make retained EU law operable after the UK leaves the EU".

4.3 EU 'soft law' measures

The Bill will not convert or retain EU measures that are often referred to as 'soft law', such as communications, declarations, recommendations, resolutions, statements, guidelines and special reports of the EU institutions. These are not legally binding and are often taken forward informally through dialogue and negotiation among the Member States or between the EU institutions and Member States. But declarations can have interpretative effect.

Soft law includes measures agreed using the Open Method of Coordination (OMC), a form of intergovernmental policy-making that does not result in binding EU legislation and does not require Member States to introduce or amend their laws. These measures are difficult to quantify as they often take the form of objectives and common targets,

95 Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions, Cm 9408, April 2017; see also Government response, August 2017.

standard setting or self-regulatory measures, but they play a significant part in the 'Europeanisation' of national policy- and law making.

In the Second Reading debate on the EUW Bill on 11 September (c 577), Lloyd Russell-Moyle (Labour/Co-operative) pointed to the Bill's silence on EU 'soft law':

> The Bill also fails completely to mention or touch on how some of the soft-law mechanisms will be brought into the UK framework, such as the open method of co-ordination. It does not even mention that area of EU co-ordination. We will clearly want to adopt significant parts of it, but the Bill is completely quiet about it.

Kelyn Bacon QC and Emma Mockford of Brick Court Chambers think EU soft law could continue in place after Brexit on the same basis that the UK courts, under clause 6(2) EUW Bill, need not, but may, have regard to anything done by the EU or CJEU on or after Brexit day if they consider it "appropriate to do so":

> … one can well imagine that […] EU soft-law, such as Commission decisions, guidelines or notices, will continue to be relied upon in domestic courts as a tool for the interpretation of retained EU law, even where that […] soft law post-dates Brexit. This would potentially be permissible under usual principles of construction or, where there is ambiguity, under the Pepper v Hart rule.[96]

Box 4: Financial services and soft law

In certain areas of economic activity, a large part of the 'law' is not composed of Acts or secondary legislation, but is instead Rules made by statutory bodies. Financial Services is a good example of this. Part X of the Financial Services and Markets Act 2000 gives the Authority (the Regulator which for conduct is the Financial Conduct Authority and for supervision the Prudential Regulation Authority) general rule making powers. The legislation sets out what and who the rules apply to and the manner in which they must be arrived at – after consultation – and their publication.

Looking simply at the FCA, the Rules collectively form the Handbook which contains the complete record of FCA Legal Instruments and presents changes made in a single, consolidated view. If printed out the Handbook would stand metres tall. All regulated firms must comply with the rules set out in the Handbook. Dual-regulated firms will need to consider both FCA and PRA rules.

In the financial services sector, the FCA is at the end of a long chain of authority or law making process. Above them is the UK government, the EU and global bodies such as the Financial Stability Board and the Financial Action Task Force and ultimately decisions taken at G20 meetings by Heads of State.

EU Directives and Regulations passed to the UK to implement have been effected by a combination of secondary legislation and FCA rules. However, the FCA, in its own right is not a passive agent in the totality of law and rule making at the European level. The FCA engage proactively with both counterparts in the EU and with EU institutions and in the work of the European Supervisory Authorities (ESAs). It is the UK representative at the European Securities and Markets Authority and it participates actively in a wide range of groups developing policy and regulatory rules. It contributes to the work of the European Banking Authority and the European Insurance and Occupational Pensions Authority on issues within its competency. It contributes also to the consumer protection and financial innovation groups of all three ESAs.

[96] Alba Summer Conference 2017. Questions left unanswered by the Great Repeal Bill, Kelyn Bacon QC and Emma Mockford, Brick Court Chambers.

BRIEFING PAPER
Number 8140
17 November 2017

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