PREPARING FOR BREXIT:
THE LEGISLATIVE OPTIONS

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Introduction

This paper examines the necessary steps for achieving the government's objective of preserving EU law after Brexit after the government has notified the European Union of its intention to cease to be a Member State.[1] The enormity of the task, even from a purely legal perspective, is unquestionable, and some of the most substantial obstacles that are likely to be encountered are described in this paper.[2]

Part 1 of the paper assesses the government's main vehicle for achieving its goal of 'freeze-framing' and preserving EU law on Brexit day: the Great Repeal Bill. It sets out the challenges that the drafters of the Bill will need to consider as well as the profound constitutional issues that are raised. It also introduces the two primary obstacles to preserving all of EU law by means of a Great Repeal Bill: the engagement of EU institutions and reciprocity.

Part 2 then considers three other models for preserving EU law, which may permit these obstacles to be overcome, namely (i) sector-specific legislation; (ii) the 'exit agreement' between the UK and EU and accompanying implementing legislation; and (iii) specific regimes that preserve the EU legal order, including the jurisdiction of the CJEU, in its entirety (in fields such as intellectual property). The remainder of Part 2 considers the legal conundrums that these other models are likely to raise, including the way in which they would interact with a Great Repeal Bill. Finally, the paper considers the important question of the impact of devolution on legislating for Brexit, including whether the devolved assemblies will be entitled to vote on the arrangements proposed by the UK government.

1 The European Union (Notification of Withdrawal) Act 2017 has now been enacted.

2 For a recent graphic depiction of the obstacles likely to face the civil service, see 'Legislating Brexit: the Great Repeal Bill and the wider legislative challenge' published by the Institute for Government (March 2017). The Government's White Paper on the Great Repeal Bill is due to be published on 30th March 2017.

Executive Summary

Part 1 examines the government's stated intention to enact a Great Repeal Bill to preserve EU law so far as practicably possible. Five key features of the Bill are identified and analysed in further detail. The first key feature examined is the temporal scope of the Bill. This raises important questions about whether the Bill will affect vested EU law rights and obligations, as well as the status of references which are pending before the CJEU on Brexit day, which the draftsman of the Bill will need to consider.

Secondly, the practical limits of preserving EU law are considered, with particular focus on the two main obstacles to replicating EU law in its entirety: the engagement of EU institutions (such as the European Medicines Agency) and reciprocity between Member States. This presents challenges for the architecture of the Great Repeal Bill, which will need to contain a general exclusion of EU law that cannot practicably be preserved.

Thirdly, the status of preserved EU law is discussed. This raises complex issues, which Parliament may wish to address in the Great Repeal Bill, about the way in which courts will interpret preserved EU law, the continuing effect (if any) of EU law 'general principles' and the status of CJEU judgments that are handed down before and after Brexit day.

The fourth key feature of the Bill is the possible inclusion of broad Henry VIII powers to make future amendments to primary legislation after Brexit. This section explains why such powers are potentially objectionable (in contrast to Ministers' existing Henry VIII powers to implement EU law under sections 2(2) and 2(4) of the 1972 Act), and what might be done to limit their scope under the Bill.

Finally, the relationship between the Great Repeal Bill and the UK's exit negotiations is discussed. For the reasons explained below, the Bill will need to cater for the possibility that negotiations may result in an exit agreement (or an interim agreement) between the EU and the UK both before and after Brexit day.

Part 2 then addresses three other models for preserving EU law. The first is the enactment of a raft of sector-specific legislation which is drafted by the relevant government departments with input from other stakeholders. This would allow bespoke solutions to be reached to some of the practical limits on preserving EU law (especially the engagement of EU institutions), but would be a highly resource-intensive exercise.

The second tool for preserving EU law is the exit agreement between the UK and the EU, and the legislation implementing it in the UK. As set out below, this will be the main opportunity to address the problem that reciprocity presents for the preservation of EU law.

The final tool for preserving EU law is the implementation of sector-specific regimes, such as in the field of intellectual property law, which reproduce the EU legal order in its entirety, and provide businesses with a "one-stop shop" for resolving their legal disputes. The UK's decision to ratify the Unitary Patent Court Agreement is discussed as a recent example of this.

The paper concludes by considering the relationship between these three models for preserving EU law and the Great Repeal Bill, as well as assessing the implications of devolution for preserving EU law.

Part 1: The Great Repeal Bill

Intended scope of a Great Repeal Bill

A legislative framework for what happens to former EU law on, and after, Brexit day will, inevitably, be needed. That framework must include repeal of relevant provisions of the European Communities Act 1972 ('ECA') but a more comprehensive framework will also be required. The need for such a framework arises for three connected reasons.

First, the primary statutory authority for giving effect to EU law in the UK is the ECA. The ECA has authorised into UK law 'without further enactment' provisions of EU law that are directly applicable or that have direct effect (see section 2(1)). Section 2(2) ECA has authorised the making of secondary legislation to transpose those provisions of EU law that required to be transposed into domestic law and that are not transposed through primary legislation. The ECA makes further provision (see sections. 2(4) and 3(1)) for the supremacy of EU law as interpreted by the Court of Justice of the European Union ('CJEU') over domestic law and, where EU law is in doubt, requires UK courts to refer the question to the CJEU.

Brexit is, thus, analytically inconsistent with the continuation in force of the ECA which will, in material part, need to be repealed and replaced by a legislative scheme for implementing any remaining EU law as domestic law. Repeal of the ECA gives statutory recognition to the fact that, following Brexit, the EU Treaties will cease to apply and with it the statutorily recognised supremacy of EU law and overriding jurisdiction of the CJEU.[3]

Secondly, though, repeal of the ECA is, of itself, insufficient to address the impact of Brexit. The consequence of ceasing to be a member of the European Union is expressly provided for in Article 50 TEU. It is (see Article 50.3) that the Treaties cease to apply once the specified time period in Article 50.3 has expired. That period is: (i) the date of entry into force of the withdrawal agreement, or (ii) (failing that) 2 years after Article 50 has been triggered or (iii) such later period as the European Council in agreement with the UK has unanimously decided upon. Any anticipatory legislative model must therefore be predicated on the prospect of Brexit day occurring before there has been any concluded withdrawal agreement or – even if there has been such withdrawal agreement – before negotiations on trade and other significant matters have concluded. If there were no further framework legislation in place beyond repeal of the ECA, any EU law not already incorporated into domestic law on or before Brexit day would no longer apply. This would encompass not merely directly applicable and directly effective legislation but also secondary legislation brought in under the authority of ECA section. 2(2).

Thirdly, although in abstract theory it would be possible simply to repeal the ECA and, with it, to remove all former EU law other than EU law that has already been separately statutorily incorporated, this would leave most (if not all) areas of existing domestic law incomplete lacking, as they would, significant links with EU regulation that has developed over the UK's period of EU membership. Thus, retention of many EU laws that have been incorporated directly via section 2(1) of the ECA and much of the secondary legislation introduced under ECA section 2(2) is likely to be thought desirable following Brexit.

3 It was initially argued by some academics that repeal of the ECA was unnecessary because post Brexit day there would be no obligations under the Treaties and, accordingly, no EU law to repeal. However, since the decision of the Supreme Court in *R (Miller and Another) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 (*'Miller'*) this position would seem no longer to be tenable. The majority in *Miller* held that under the ECA Parliament had created a new source of law in domestic law and that only Parliament could remove that source of law (see judgment at [62]).

These factors are recognised in the notion of a Great Repeal Bill ('GRB'). The Government's intention to enact such a Bill so as to give preliminary effect to the vote for Brexit in the referendum was foreshadowed by the Prime Minister in a television interview on October 2 2016. Its aims and general design were fleshed out by the Secretary of State for Exiting the European Union in a statement to Parliament on October 10.

Materially, David Davis said this:[4]

> *'We will start by bringing forward a great repeal Bill that will mean the European Communities Act ceases to apply on the day we leave the EU…*
>
> *The great repeal Act will convert existing European Union law into domestic law, wherever practical. That will provide for a calm and*
>
> *orderly exit, and give as much certainty as possible to employers, investors, consumers and workers…*
>
> *In all, there is more than 40 years of European Union law in UK law to consider, and some of it simply will not work on exit. We must act to ensure that there is no black hole in our statute book. It will then be for this House – I repeat this House – to consider changes to our domestic legislation to reflect the outcome of our negotiation and our exit, subject to international treaties and agreements with other countries and the EU on matters such as trade.*
>
> *The European Communities Act means that if there is a clash between an Act of the UK Parliament and EU law, European Union law prevails. As a result, we have had to abide by judgments delivered by the European Court of Justice in its interpretation of European Union law. The great repeal Bill will change that with effect from the day we leave the European Union.'*

From this brief position statement, five key intended features of the GRB are apparent:

i. The GRB (though likely to be passed midway through 2017) will not take effect before Brexit-day. However, it will then take immediate effect. The ECA will be repealed ('Key feature 1: temporal effect of the GRB')

ii. Existing EU law will, on that date, as far as practicable and to the extent not already having been incorporated,[5] be incorporated into domestic law. Any former EU law not incorporated by the GRB or otherwise will fall away ('Key feature 2: preserving EU law as far as practicable').

iii. Therefore, on the GRB taking effect there will be no separate or distinct EU law in the UK ('Key feature 3: absence of separate EU law following Brexit').

iv. As soon as the GRB takes effect the former EU law that has been incorporated into domestic law will be adjudicated on by UK courts and no longer by the CJEU. Moreover, the doctrine of the supremacy of EU law over domestic law will, at least as far as Acts of Parliament are concerned, no longer apply ('Key feature 4: constitutional issues arising from the domestication of EU law in the GRB').

v. The outcome of the negotiations that have taken place under Article 50 of the Treaty on the European Union ('TEU') will not themselves be reflected in the GRB but will be a matter *for Parliament* to be reflected in subsequent legislation to change relevant existing domestic law (formerly EU law as incorporated into domestic law on Brexit day) ('Key feature 5: negotiations and the GRB').

Each of these features will be examined separately. In each case there are drafting choices to be made. In some cases the drafting choices that are made may have wider constitutional effects. In

4 House of Commons Hansard, 10 October 2016 Volume 615 column 40.

5 Much EU law has already been incorporated outside the scope of the ECA by means of primary legislation transposing EU Directives.

all cases there are potential dangers in treating the GRB in isolation. As explained in Part 2, there will, deriving from the framework created by the GRB itself, inevitably be a need for supplemental legislation. It will be important to ensure that the framework created by the GRB is sufficiently robust to enable subsequent Brexit-focused legislation to build on that framework and be consistent with it.[6]

Key feature 1: temporal effect of the GRB

As outlined earlier, the GRB is, on Brexit-day, intended both to have immediate effect and to repeal the ECA. These objectives do not immediately determine the question of whether, and if so how, the imposition of a new domestic 'EU law' regime to be implemented after Brexit- day might make provision for resolving legal issues of and/or obligations or rights under EU law that have arisen before Brexit day.

There are a number of associated timing issues to be considered following repeal of the ECA. They include:

i. The continued entitlement to rights or requirement to fulfil obligations or discharge penalties incurred under EU law (and hence domestic law) prior to Brexit.[7]

ii. The legal effect (if any) to be accorded to judgments of the CJEU in respect of references made to that Court prior to Brexit but not determined by Brexit day.[8]

iii. The relationship, in temporal terms, between negotiations undertaken under Article 50 (whether or not concluded by Brexit day) and the temporal application of the GRB.

Although it would be possible in terms of domestic law for the GRB to legislate to remove the continuation of rights after Brexit or refuse to recognise judgments of the CJEU after Brexit day, there are several potential issues as far as drafting is concerned.

As far as vested 'rights' or accrued obligations are concerned, section 16 of the Interpretation Act 1978 provides that, in the absence of contrary statutory intent, a repealing statute does not affect the previous operation of the repealed enactment. This has the effect that as a matter of domestic law unless express drafting were to be employed, the GRB would not operate to remove the continued legal effect of acquired rights or accrued obligations or penalties deriving from EU law that had been incorporated through the ECA prior to Brexit day.

In any case, the common law principle of legality would compel the use of express language in the ECA to remove rights that had vested as a result of EU law. That principle mandates the use of express language[9] by Parliament in circumstances where Parliament intends to alter fundamental or other constitutional rights (see, for example, *R v. Secretary of State for the Home Department, ex p. Simms* [2003] UKHL 36).

There is an additional difficulty as far as the purported removal of continued EU rights that overlap with rights granted under the Human Rights Act 1998 ('HRA') is concerned. The European

6 In its recently published Report 'The Great Repeal Bill and Delegated Powers' 9th Report of Session 2016-17 (HL Paper 123) ('the HL Report') the House of Lords Select Committee on the Constitution recommends at [9] that the Government's promised White Paper on the 'Great Repeal Bill' should contain sufficient detail for a proper debate on the Government's intended approach. Importantly, as the HL Report explains at [16] there is a difference between the processes of freeze-framing and amending EU law; the two processes are, and should be kept, separate.

7 The term 'rights' is used in what follows as shorthand for rights, obligations, and penalties derived from the EU law incorporated into domestic law prior to Brexit day.

8 See the HL Report at [26].

9 Strictly, Parliament may legislate without express words but by necessary implication. However, the test for 'necessary implication' is only that permitted by logical inference from the language used.

Convention on Human Rights ('ECHR') is incorporated into domestic law through the HRA and it is also woven into the Charter of Fundamental Rights of the European Union ('CFREU') Article 52.3 of which provides that:

> *'In so far as this Charter contains rights which correspond to rights granted by the Convention for the Protection of Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.'*

So, even express statutory provision in an enacted GRB preventing the continuation of vested rights derived from former EU law would not necessarily operate to remove rights granted under the HRA unless the HRA were itself to be expressly dis-applied in the context of former EU rights. Given that (applying the principles outlined in *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)) the HRA is likely to be regarded as a 'constitutional' statute the doctrine of implied repeal would not apply to remove rights conferred through the HRA unless the HRA was expressly repealed in material part.[10]

Further drafting issues may arise after Brexit day as far as the application of EU law is concerned both in the context of rights and otherwise. For example, the time at which a right became vested or an obligation was accrued might, as a matter of EU law, be dependent on, for example, a judgment of the CJEU that had not been delivered before Brexit day but had been raised as a legal issue in a reference made to the CJEU prior to the GRB taking effect. It is, to say the least, doubtful that the CJEU would decide that it lacked jurisdiction to determine questions of EU law arising during the period of its membership merely because the UK had since ceased to be a Member State. If the CJEU continued to assume jurisdiction then for the UK to legislate so as to deprive the CJEU judgment of its intended effect in EU law could amount to a Treaty violation on the level of public international law. A Treaty violation would not, of itself, have legal effect as a matter of domestic law but it is not understood to be the Government's intention to breach its obligations under the EU Treaties. Any post Brexit consequences of EU law arising from CJEU judgments dealing with matters arising through the UK's membership of the EU should, therefore, be addressed in the GRB.

It is possible that some, if not all, of these issues will be covered in the negotiations, when concluded, under Article 50. But matters such as these may well not have been resolved by the time that Royal Assent is given to the GRB. Provision will, therefore, need to be made in the GRB itself that allows for the outcome of negotiations on temporal issues to be reflected in the general framework established in the GRB.[11] This is part of a more general question, considered below, of how best to 'fit' the general GRB framework with legislative steps to be taken subsequently reflecting the outcome of negotiations.

Key feature 2: preserving EU law as far as practicable

As explained later, the preservation of EU law existing on Brexit day is something of a misnomer. The proposed statutory design in a GRB is for 'freeze-framing' the entire content of EU law existing at the date that the UK ceases to be a member state of the EU. This will have to form part of the statutory design for the perhaps obvious reason that EU law does not remain static. This raises

10 Prior to Miller, there was perhaps a degree of uncertainty as to whether the Thoburn line of reasoning would be adopted by courts in the future. Was the notion of a 'constitutional' statute not one for Parliament when designating statutes of first class constitutional importance in its internal proceedings? However, the Supreme Court in Miller has developed the notion of a constitutional statute still further and it is material to the reasoning of the majority that the ECA is to be so regarded: see judgment at [66]-[68].

11 One possibility is a simple exemption of such matters from the general GRB regime (see the HL Report at [19]).

important issues of legislative drafting. However, it appears to be an inevitable part of the GRB's design that EU law is to a large, if not complete, extent freeze-framed at the date of Brexit since, otherwise, there would be no relevant conversion of EU law to domestic law.

There are three broad (sometimes overlapping) classes of 'EU law' that will need to be considered in terms of the drafting of a GRB so as to preserve that which can be preserved for at least an initial period.[12] First, there are those areas of EU law that are directly applicable and directly effective and that have been introduced into domestic law without the need for further enactment under ECA section 2(1). Secondly, there are those areas of EU law that have been separately incorporated either through the ECA section 2(2) (secondary legislation) or through discrete statutory authorisation by means of primary legislation. Thirdly, there are those areas of EU law (however incorporated into domestic law) that are incapable of being preserved unless provision is made for engagement on the part of EU institutions and/or other member states. On repeal of the ECA (and without more) all former EU legislation brought in under the ECA would lapse as lacking statutory authority for its continuation.

As to the first class, it would be a difficult (though not impossible) exercise to identify all the directly applicable and directly effective EU law existing on Brexit day comprising as it does, amongst other things, CJEU judgments clarifying provisions of EU law that are directly effective, and a myriad of directly applicable EU Regulations and unimplemented Directives. However, it would not seem to be a productive exercise to seek to list each and every item in this class (and it is, indeed, inconsistent with the logic of a general preservation provision) both because of the danger of inadvertent omission and also because, as explained below, there are a great many directly applicable and directly effective provisions of EU law that cannot simply be preserved as a matter of domestic law without the involvement of EU institutions and/or reciprocity as between member states. Given that important fact, the requisite drafting will need to be in the most general terms as to: (i) what is preserved (ii) what is not intended to be preserved (because it is incapable of being preserved) and (iii) what is intended to be preserved at a future date.

As to the second class, as far as secondary legislation is concerned general wording might, for similar reasons, be preferable to listing all existing secondary legislation sought to be preserved. There are a great many provisions of secondary legislation that have been introduced via ECA section 2(2) and some of it will, in any case, be inappropriate for preserving because it refers to engagement of EU institutions or member states which cannot be achieved under the framework proposed to be created by the GRB. A suitably worded general provision could be deployed to ensure the saving of all secondary legislation in existence on Brexit-day introduced under ECA section 2(2) subject to clearly expressed general classes of exception,

Primary legislation implementing EU law is different being, by definition, not introduced through the ECA and so repeal of the ECA will not necessitate any immediate alteration to such legislation so as to preserve law which would otherwise lapse on Brexit-day.

Having said that, it is clear that some primary legislation – even if it were to remain on the statute book – will become inoperative upon Brexit. An obvious instance of this is the European Union Act 2011. Other primary (and indeed secondary) legislation might be required to be amended. This could be achieved by the GRB by means of a schedule or (subject to more general constitutional concerns about such provisions: for which see below) a Henry VIII clause in the GRB whereby amendments to primary legislation could be made by ministers.

12 These classes do not encompass every type of EU law as is made clear below. For drafting purposes the GRB will need to include every possible category of EU law insofar as it is sought to establish a general framework for more considered subsequent legislation.

It is the third class that raises particular drafting concerns and that affects the way in which the GRB can, sensibly, be framed because it contains elements that are outside the control of Parliament and that cannot, therefore, be legislated for by a general preservation clause even were it considered desirable to preserve it. For example, much EU law is dependent on the creation and involvement of external institutions such as (taking the pharmaceuticals field as but one instance) the European Medicines Agency ('EMA'). It seems unlikely that a UK version of the EMA will have been established by the time that the GRB is enacted (or, even if it were, there would be no statutory recognition of such a body without amending the existing legislation which contains references to the ECA). Moreover, any UK institution designed to be a substitute for an existing external body would, doubtless, require agreed procedures for inter-acting with that external body such as mutual recognition.

The challenge for the GRB is to include a design for a general framework that allows for a general preservation of existing EU law as well as for a general exclusion of EU law that cannot be preserved and that it is, accordingly, not intended to preserve. There may, additionally, have to be provision for substituting a UK institutional framework (which would, for example, cater for the domestic successor to the EMA) at a future date if not already in place on Brexit-day.[13]

A framework of this kind would avoid the need to review each and every directly applicable and directly effective provision at the date of Brexit as well as each and every piece of secondary legislation so as to ensure that by repealing the ECA our domestic law contains all EU law that can be converted into domestic law but does not purport to preserve those parts of EU law that cannot be accommodated in domestic law.[14]

The creation of such a framework is necessary but not sufficient to avoid the dangers of an incomplete Brexit leading to what the Minister referred to in the above-mentioned Parliamentary statement as a 'black hole in our statute book' or the equal danger of our domestic courts having to grapple with questions about the status of EU law following Brexit. Each of these dangers needs to be avoided. Some may need to be addressed by alternative or additional legislative models, as outlined in Part 2 of this Paper; others are the subject of the remainder of Part 1.

Key feature 3: absence of separate or distinct EU law following Brexit

In an important sense, the intended design of the GRB (to convert all existing EU law into domestic law on Brexit day) contains its own vulnerability. As a matter of definition, 'EU law' that is domestic in all but name provides no sensible touchstone for how it is to be applied post Brexit.

Questions will inevitably arise as to the legal status of former EU law following the GRB and it may not be an altogether easy task in advance of subsequent legislative changes to prescribe in advance in the GRB for the status to be accorded to former EU law in all its forms and in all its different contexts.[15]

In this respect, the Parliamentary draftsman would appear to have three broad options:

13 See, further, the HL Report at [28]-[37].

14 For consideration of alternative techniques for preserving EU law, including such a legislative 'trawl', see Part 2 below.

15 This is why the idea of a 'continuance clause' as floated by Professor Sionaidh Douglas-Scott (see S. Douglas-Scott *'The Great Repeal Bill: Constitutional Chaos and Constitutional Theory'* UK Constitutional Law Association 10 October 2016) is problematic. A continuance clause such as that contained in section 4(1) of the Jamaican (Constitution) Order in Council 1962 preserves all colonial laws existing (in Jamaica) immediately in force prior to the appointed day and then continues the same laws in force. Elementarily, however, EU law is not being preserved in any juristic sense once it has been converted to domestic law. Its preservation could only be ensured if the UK were to accept all the doctrine that comes with EU law. But it has expressly disavowed that intention.

First, beyond repeal of the ECA (with the inevitable conversion of EU law into domestic law in the UK after Brexit day) it would be possible simply to ignore the detail of continuing legal status of former EU law and leave its precise status to be determined either by the courts or by later legislation (whether primary or secondary). Secondly, there could be express legislative provision for the status of all former EU law following Brexit day. Thirdly, legislation could approach the question sector-by-sector so that provision could, for example, be made for former EU law to have a particular legal status in the courts in discrete areas but not in others.

There is an obvious potential overlap between the first and the third options. Given that the GRB is intended merely to lay down a general framework for the retention of EU law prior to its progressive alteration it would be possible to create a legislative scheme whereby the legal status of law identified as former EU law is expressly left to subsequent legislation. Such a course has the advantage that it would, at least in part, avoid leaving difficult questions for the domestic courts to resolve after Brexit-day whilst leaving sufficient flexibility for later legislation to adopt a sector-by-sector approach.

However, the problem with that approach is that it leaves wholly unresolved the legal status of retained 'EU law' in the period between Brexit day and the coming into force of discrete legislation in different sectors. Moreover, it results in the domestic courts having to determine the legal status of former EU law as a whole and in whatever context might surface in a specific dispute before the courts. Some of the difficulties of the first option are set out below. They suggest that either the second or third options may be considered preferable to doing nothing.

There are many aspects of EU law - even as preserved by a GRB - that may prove unpalatable if the underlying aim of the GRB is to convert former EU law into purely domestic law. The most obvious example is the doctrine of the supremacy of EU law over domestic law. The constitutional aspects of this for a GRB insofar as the doctrine affects primary legislation are discussed under Key Feature 4 below but for present purposes the hierarchic primacy of EU law is, in many respects, a necessary identifying feature of EU law. Without it, other parts of the domestic legal system may be difficult if not impossible to separate out from EU law and may have no sensible application without primacy being accorded to former EU law now preserved as part of domestic law (whether in the GRB or in other legislation).

An example is afforded by section 60 of the Competition Act 1998 which has as its purpose (see s. 60(1)) *'to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in EU law in relation to competition within the European Union.'*

If it is to be supposed that section 60 will, in the absence of repeal, have (at least for some time) application after Brexit day it is not easy, with no provision having been made in a pre-existing GRB framework, to see how it can, sensibly, be applied. There will be no existing *'EU law'* in its real sense for the section to be given proper legal effect.

Without a relevant comparator to domestic law (here *'EU law'*) there is nothing on which s. 60 can bite. This has one of three consequences as far as courts are concerned in competition cases. The courts might: (i) simply ignore section 60, (ii) accord to the expression *'EU law'* some form of persuasive effect or (iii) continue to apply EU law in its entirety

None of these 'solutions' work well in logical terms and may, therefore, be thought to be less than satisfactory in terms of legal analysis. Ignoring the content of section 60 pre-Brexit is to introduce judicial legislation and in effect to imply that section 60 of the Competition Act has been impliedly repealed. But that would appear to be the opposite of that which is currently envisaged in a GRB.

Nor, for similar reasons, is it an obviously legitimate exercise for a court to distort the meaning of *'EU law'* so as to convert that which was formerly legally binding and applied according to principles that were uniform throughout the EU in any different way. In any case, without statutory prescription in a GRB framework as to how these principles should be applied the matter would be left to a court's discretion. This raises the prospect of courts using different and inconsistent interpretative techniques that are unanchored to any clear legislative intent.

For example, under the so-called *Marleasing* principle (see Case C-106/89 *Marleasing SA v. La Comercial Internacional De Alimentacion* SA [1990] ECR 4135) national courts have an obligation to interpret insofar as possible provisions of national law so as to give effect to the terms of EU law. This means stretching the language of the provision in question if necessary so as to implement EU law. There is a direct parallel in the interpretative duty to read statutes as far as is possible compatibly with fundamental rights under section 3 of the Human Rights Act 1998 ('HRA'). But EU law in the Marleasing sense means EU law as reflecting the acquis communautaire (i.e. the accumulated body of EU law from 1958 to the present day including CJEU rulings). That concept becomes obsolete after Brexit because EU law in its true sense has ceased to apply and cannot be revived by the singular act of a national Parliament.

The difficulty with seeking to use Marleasing is that there is no true EU law to 'fit' the EU principle. A court determining an issue where the focus was on a domestic 'EU' provision would, if it were to complete the circuit and marry true EU law to its domestic shadow, have to resurrect doctrines of EU law supremacy and discrete general principles of EU law which the very notion of Parliamentary sovereignty had, at least in theory, repudiated.

As to the third possibility (applying EU law in its entirety) unless Parliament were to prescribe for a doctrine of direct effect/applicability in relation to the 'EU law' that it preserved after Brexit a court would, in order to give full effect to 'true' EU law, have to imply such a doctrine into its canons of interpretation alongside all the other general principles of EU law that render it distinct from domestic law. An example of a discrete EU law general principle is the principle of equality which goes far beyond anything in the HRA and Article 1 Protocol 1 of the European Convention on Fundamental Rights. It is possible, though by no means foreseeable in the absence of a relevant statutory principle of interpretation in the GRB that a court would decide to apply true EU law, insofar as it considered it possible to do so, when interpreting the corpus of EU law which is preserved after Brexit. Yet it is doubtful in the event of conflict that UK courts would find it possible to do so. The status of CJEU rulings in a particular area might be persuasive and in the short term likely to be followed but where a CJEU ruling came up against a contrary statutory provision or other competing provision of domestic law the courts would have no principle of interpretation such as currently exists to enable, still less require, a contrary CJEU ruling to be followed.

The only way in which true EU law might be given effect to by the courts despite an absence of relevant statutory provision is if future domestic rulings were to hold that the common law itself had developed since our accession to the EU. But this is a somewhat exiguous basis on which to apply desirable or necessary principles and not one that the legislature may wish to encourage.

It may be suggested that section 60 is an unusual statutory provision. However, other existing primary legislation or directly applicable provisions of EU law will raise other drafting difficulties for creating a satisfactory GRB framework for applying former EU law after Brexit day. EU institutions such as, for example, the EMA (referred to above) or the EU Commission (notification of State Aid) will need to be replaced in the GRB (perhaps by means of a schedule) or a drafting formula will have to be introduced to ensure that a viable domestic legal regime exists in the GRB so as to enable former EU obligations to be maintained prior to subsequent legislation.

Moreover, following Brexit day, the legal status of many international agreements to which the EU is a party will have to be considered. The legal status of international agreements is currently regulated by a mixture of EU law and public international law and differs according to whether the agreement is one signed by the EU alone as a reflection of its exclusive competence or whether it is a so-called 'mixed agreement' where Member States may also be parties by virtue of their separate competence to enter into the agreement.

An EU-alone international agreement is one that, as a matter of EU law, will not bind the UK after Brexit day. This is because by virtue of TFEU Article 216.2 international agreements entered into by the EU alone are expressed to bind 'the institutions of the Union and its Member States.' The position may, as a matter of public international law, be different in respect of mixed agreements or at least some international agreements and it is, to say the least, unclear whether the UK would wish to and/or be able to remain a party to a mixed agreement or whether, conversely, the UK might be under continuing obligations in relation to such agreements. On any view, however, these are not subjects that the GRB's general framework could accommodate because they raise questions on the international as opposed to the domestic plane.

Nonetheless, in terms of retaining former EU law after Brexit day it would appear that - short of a general provision that indicates how the various types of 'EU law' are to be addressed before subsequent, more specific, legislation provides for them - very careful general drafting will be needed to ensure: (i) the creation of a general framework that permits former EU law to be continued if the context permits and (ii) the itemisation of all former EU bodies that are under the GFB are replaced by domestic bodies and the identification of such domestic bodies.

It seems more probable that option 3 (the attribution of EU law status in domestic law by reference to different sectors) is a rather more arduous task for future legislation following a GRB. There may, though, be limited scope for identifying specific sector exceptions in the GRB as exceptions to the general framework.

Key feature 4: constitutional issues arising from the domestication of EU law in the GRB

The constitutional implications of Brexit are, potentially, profound and will affect the way in which subsequent legislation is given effect after the GRB has come into effect.[16] Although (assuming the Government's intention as reflected in Mr. Davis' above-mentioned statement is followed) such legislation will only be put into effect after Brexit day, there are two major constitutional issues that flow from the enactment of the GRB in foreshadowing the 'shape' of that subsequent legislation. These are quite separate from the legal status in domestic law that may be accorded to former EU law considered in the previous section.

They are:

i. The general method by which such legislation is put into effect.

ii. The way in which the GRB addresses the devolved legislatures.

The emphasis on *Parliamentary* consideration of relevant future domestic legislation in the Government's initial statement about the GRB (cited above) could suggest that subsequent changes to preserved EU law will only be made by statute. However, this is unlikely to be the case given the sheer size of the EU law that will require to be reshaped after Brexit day (although it has been suggested in evidence given to the House of Lord Constitution Committee that there could be one

16 These issues are considered in great detail in the HL Report: see especially at [38]-[108]. Although they raise some drafting issues in terms of the need for appropriate mechanisms to safeguard against undue use of Henry VIII clauses, the constitutional implications are beyond the scope of this Paper.

or more parliamentary 'filtering committees' to determine which parts of EU law should be kept or replaced).[17] It is overwhelmingly likely that some form of Henry VIII clause will be introduced into a GRB to make changes.[18] Of itself, this would not necessarily be constitutionally objectionable in view of the emergency situation that would have been created.

However, an important drafting question for Parliament when enacting the GRB will be whether to use a general form of Henry VIII clause (as in the ECA 1972) or whether to restrict the use of such clauses to particular types of legislation or provide other statutory guarantees in the Bill so as to provide safeguards against abuse.[19]

The use of Henry VIII clauses to make major changes is potentially open to criticism following the underlying tenor of the majority judgments in *Miller*. The Supreme Court endorsed the notion of the ECA as a constitutional statute and of EU law as a new and independent source of law in the UK. Wholesale changes to what was in substance a new form of constitutional settlement legislated for by Parliament should, arguably, only be made by Parliament.

It is certainly the case that Parliament used a Henry VIII clause in section 2(2) of the ECA, read with section 2(4). These provisions apply to measures of EU law that are neither directly applicable nor have direct effect and so have to be expressly incorporated into domestic law. Section 2(2) makes it possible to give legal effect to such EU law in domestic law by secondary or delegated legislation. Secondary legislation can amend an Act of Parliament since the delegated legislative power is, by section 2(4), expressed to include the power to make such provision as might be made by Act of Parliament.

However, on a constitutional level ECA section 2(2), read with section2(4), is perhaps unsurprising since Parliament had assented to the wholesale incorporation of a supranational legal regime into domestic law at the time of accession to the European Community. The difference between deploying a Henry VIII clause on accession to the EU and the situation after Brexit day is that judgments as to which part of EU law to retain and which to remove would not in substance be scrutinised by Parliament. The evaluation of which parts of EU law to retain is not qualitatively the same as assenting to the whole body of EU law coming into domestic law at accession and thereafter.

As far as the devolved legislatures are concerned, the constitutional implications of deploying Henry VIII clauses in the GRB to remove the constitutional constraints that EU law currently imposes on their respective legislative competences are, arguably, even more profound.

As implicitly envisaged by the Secretary of State, the design of the GRB is currently premised on a single act of Parliamentary sovereignty; that is the conversion of <u>all</u> former EU law into domestic law on Brexit day. The constitutional challenge that this presents in relation to each of the devolution legislatures is that a large part of the EU law in Scotland, Northern Ireland and Wales is devolved to these legislatures as opposed to consisting of reserved matters[20] where legislative authority resides uniquely at Westminster. The very notion of devolved powers is qualitatively different from the powers exercised by a public body even though they are exercised under statutory constraints; it connotes (within its sphere of influence) a degree of autonomy even if that cannot be classed as the exercise of sovereignty.

Implicitly recognising this, a convention (the Sewel Convention) has developed by which be-

17 Oral evidence given to HL Constitution Committee on 1 February 2017, Q134. See: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/legislative-process/oral/46640.html

18 A Henry VIII clause is a statutory provision that relies on secondary legislation to appeal or amend primary legislation.

19 For a recent articulation of the constitutional risks posed by Henry VIII clauses (with awareness of the then impending Brexit referendum) see: *'Ceding power to the Executive: the Resurrection of Henry VIII'* Lecture 12th April 2016 at King's College London given by the Rt. Hon. Lord Judge (former Lord Chief Justice).

20 In Northern Ireland slightly different terminology is used but the same distinction applies.

fore legislating with respect to devolved matters the UK Government ordinarily seeks the consent of the devolved legislatures. The Convention is described in more detail in Part 2 below.

It seems clear, following *Miller*, that the scope and extent of the Sewel Convention (itself not free from doubt) is not justiciable in the courts. Nonetheless, whatever the exact legal status of the Sewel Convention, it amounts to a potential safeguard enabling the devolved legislatures, at the very least, to complain on a political level at primary legislation affecting the scope of their devolved powers.[21] However, the Sewel Convention does not extend to UK subordinate legislation. This raises the possibility of a raft of subordinate legislation being passed under a general Henry VIII clause in a GRB without reference to the devolved legislatures. The potential political implications of such legislation is a further reason why a general Henry VIII clause might be thought to be less than satisfactory.[22]

Overall, it may be thought to be desirable (i) to include only a limited form of Henry VIII clause in a GRB allowing for secondary legislation to amend primary legislation in certain identified circumstances and not in respect of any of the devolved legislatures and/or at the very least (ii) to include some form of constitutional safeguarding provision such as, for example, an enabling provision permitting the House of Commons and/or Lords to debate and veto all or at least some subordinate legislation made under the power.[23]

Key feature 5: negotiations and the GRB

There are potentially challenging drafting issues arising from the fact that the GRB is proposed to be given effect on Brexit day. The GRB must be drafted sufficiently widely to ensure that the outcome of negotiations that postdate its being passed are able to be accommodated within the general framework that it lays down.

In this respect, there would seem to be four possible temporal scenarios:

i. Negotiations *in certain areas* may result in agreement before the GRA is passed.

ii. Negotiations may result in partial or complete agreement after the GRA is passed but before Brexit day.

iii. Negotiations may only result in complete agreement after Brexit day.

iv. Negotiations may not result in the UK reaching agreement or the other Member States being in a position to agree as a matter of EU law.[24]

Ostensibly, there is no provision for interim agreements in Article 50. However, this does not necessarily mean that one might not be able to be reached under the authority of Article 50 as part of a staged agreement prior to Brexit day but to be included in the final agreement.[25]

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21 In *Miller* at [151] the Supreme Court observed that *'[t]he Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures.'*

22 See, further, the HL Report at [115]-[122].

23 Detailed consideration of the advantages of particular forms of constitutional safeguarding procedures are beyond the scope of this Paper. The key point is that such safeguarding should be one of the matters to be addressed in the GRB.

24 According to a very recent report of the House of Commons Foreign Affairs Committee this is a real possibility for which there is, currently, insufficient planning: see '*Article 50 negotiations: implications of "no deal*"' HC 1077 published on 12 March 2017.

25 The legality of an interim agreement is, however, not unproblematic in terms of EU law given that the expiry of the 2 year period under Article 50 does not absolve the other Member States from their obligations thereunder to reach a concluded agreement after Brexit-day. It is, at least in theory, arguable that a so-called staged interim agreement without any final agreement would not be binding on the Member States as being compliant with Article 50. However, negotiating and concluding a detailed trade deal and other important areas is not part of the Article 50 obligations. What has to be reached under Article 50(2) is a negotiated and concluded agreement *'setting out the arrangements for … withdrawal, taking account of the framework for [the UK's] future relationship with the Union.'*

Nonetheless (and assuming its legality)[26] the difficulty with a staged agreement (even one reached prior to the passing of the GRA) is that its terms might be very different from that anticipated in early statements of what was proposed to be included in the GRB. For example, complex issues might arise over the continuing jurisdiction of the CJEU after Brexit day as part of a proposed transition arrangement.[27]

Nonetheless, scenario (i) poses the simplest scenario. The terms of the interim agreement could simply be recorded as a schedule to the GRB and as reflecting an exception to the terms of the new Act.

Scenarios (ii)-(iv) share the common feature that they involve legislating for the unknown. This means that a statutory mechanism must be devised in the GRB itself enabling the results of negotiations (whether resulting in a concluded agreement or not) to be passed into law even where they cut across the more general statutory regime that is envisaged.

There are, broadly, three ways in which this might be sought to be achieved.

First, the GRB might contain a single Henry VIII clause allowing the Act itself to be amended by means of secondary legislation so as to encompass the results of concluded negotiations (or the lack of such concluded negotiations) at different stages.

Secondly, the GRB might contain different Henry VIII clauses enabling different classes of negotiated agreement to be the subject of amendment to the GRB by means of secondary legislation leaving further legislative changes to be implemented by primary legislation.

Thirdly, the GRB might contain express provision for the results of concluded negotiations at different stages to be recorded in a schedule to the GRB and/or (as the case may be and if so desired) the prescribed consequences of no agreement being reached at different points in time.

Neither the first nor third of these legislative options addresses the delicate relationship, both political and (as *Miller* exposed) legal, between Parliament and the executive. A Henry VIII clause that gave to ministers the power to legislate for that which had been negotiated under prerogative power would in substance remove the possibility of Parliament scrutinising the results of the negotiating process so as to determine the legislative changes that were needed. As cited earlier, the Secretary of State has stressed the fact that it will be for Parliament to consider what legislative changes are needed to reflect the outcome of negotiations. A Henry VIII clause or statutory schedule reflecting legislative changes would seem to be incompatible with proper Parliamentary scrutiny (although, as set out in Part 2 below, Parliament is likely to have a role in scrutinising the exit agreement pursuant to the procedure for ratifying treaties under the Constitutional Reform and Governance Act 2010).

A potential resolution may lie in the GRB carefully limiting those classes of negotiated agreement that may be legislated for under a Henry VIII clause. That would have the effect of leaving major legislative change to be given effect to by Parliament but allowing day to day and administrative or policy aspects of agreement to be secured by secondary legislation as they arise during the course of negotiations.

26 Problems could arise if the legality of a staged agreement were questioned at some stage. Although agreement could be reached with the UK as a non -member under the TEU the process would be different to that prevailing under Article 50; the negotiators would also be different as would the approval requirements.

27 See *'Brexit deal will lock UK into European Court of Justice'* (the Guardian 11 February 2017).

Part 2: Other Models for Preserving EU Law

This Part addresses a number of complementary or alternative models to a Great Repeal Bill for preserving EU law. Three possibilities are discussed: (i) sector-specific legislation which reproduces, so far as possible, EU law in each sector; (ii) domestic legislation which implements any exit agreement entered into between the UK, the EU and the Member States under Article 50.2 TEU; and (iii) specialist regimes which reproduce the entire EU legal order (including the jurisdiction of the CJEU) within specific fields, such as intellectual property law.

The second half of this Part identifies the challenges that are likely to be encountered under each model, including tensions between the GRB and the other models, the difficulties which may be encountered in implementing any exit agreement, and potential obstacles to legislating for the devolved territories.

Sector-specific legislation

On a practical level, sector-specific legislation lies at the opposite end of the spectrum to a GRB. Whereas a GRB is a general tool which seeks to preserve EU rules by means of a single statute, sector-specific legislation involves a government department (potentially alongside other stakeholders) examining each piece of EU legislation in detail and stripping out those provisions which cannot be preserved in domestic law. For example, under this model DEFRA would carry out a full review of EU legislation governing fisheries and agriculture, whilst the Department of Health would review legislation relating to medicinal products, in order to preserve EU law in both of those fields to the greatest extent possible.

The benefit of sector-specific legislation is that it provides the sponsor department with a chance to address one of the two major obstacles to preserving EU law by means of a GRB: the engagement of EU institutions. However, it is also a more resource intensive exercise and does not address the problem that many EU laws rely upon reciprocity between Member States, which cannot be reproduced unilaterally by domestic legislation.

At the outset, it is necessary to distinguish between two types of sector-specific legislation. First, there is existing domestic legislation which already incorporates EU laws. Second, there is new legislation which would implement EU laws which are not currently contained in domestic law.

i. EU laws for which there is existing implementing legislation

It will be more straightforward to preserve EU laws which are already contained in domestic legislation than to enact new sector-specific legislation. Examples of such existing legislation (of which there are many) include the Competition Act 1998 and the Enterprise Act 2002, the Consumer Protection Act 1987 and the Equality Act 2010. There are also certain regulatory codes, such as OFCOM's General Conditions for telecommunications providers, which incorporate EU rules, as well as guidance issued by public bodies such as the Competition and Markets Authority ("CMA").[28]

Even where existing legislation is in place, it may need to be amended to take account of the effects of Brexit. One example of a provision which may need to be amended has already been discussed in section 1, namely section 60 of the Competition Act 1998, which requires the courts to ensure consistency, so far as possible, between EU law and the Act. Similarly, section 25(11) of the 1998 Act, which prevents the CMA from opening an investigation into a suspected anticompetitive agreement where the agreement has been exempted by an applicable regulation of the EU

28 See, for example, OFT402 *Abuse of a dominant position*, which contains numerous references to case-law of the CJEU.

Commission, will need to be amended to take account of the fact that EU Commission regulations will no longer apply in the UK. Further, consideration will need to be given to whether the definition of an "infringement decision" under section 47A(6) of the Act, which enables follow-on damages claims to be brought on the basis of a regulator's decision that there has been a breach of competition law, should be amended to exclude decisions of the EU Commission. Of course, the latter is a political question rather than a legal one, since it would be perfectly intelligible, from a legal perspective, for domestic courts to continue to hear follow-on damages claims based on decisions made by the EU commission.

Much of the existing legislation incorporating EU rules has been enacted under section 2(2) of the 1972 Act, which provides that:

'(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU and to any such obligation or rights as aforesaid.

In this subsection "designated Minister or department" means such Minister of the Crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject to such restrictions or conditions (if any) as may be specified by the Order in Council.'

As noted above in Part 1, when the 1972 Act is repealed, the legal basis for provisions made under section 2(2) will fall away. If these are to be preserved, it will be necessary to enact primary legislation (either in the GRB or in a separate statute) which ensures their continuing effect.

ii. EU laws for which there is no existing domestic legislation

The most significant category of EU laws which would require consideration under a sector-specific model are those for which there is no existing implementing legislation. The clearest examples of these are EU Regulations which, until the UK leaves the EU, are directly effective and therefore have no counterpart in domestic law. There may also be EU Directives which have not been implemented, or fully implemented, into domestic law, but which the government nonetheless wishes to preserve.

Under the sector-specific model, the sponsor department would draft legislation reproducing EU laws within its field insofar as it is possible to do so. Three specific examples are set out below (although it is possible to think of many more).

First, legislation preserving existing EU laws on agriculture and fisheries would be drafted by DEFRA. For example, the UK's obligation to submit up-to-date information about its fishing fleet to the Commission under Article 24(1) of Regulation 1380/2013 would need to be removed from the new legal framework. Of course, many elements of fisheries legislation depend upon reciprocity between Member States (such as the Member States' obligations to allow vessels to access their

waters). These elements of the EU scheme will need to be addressed separately in an agreement between the UK and the Member States and would therefore have to be removed from the scope of any sector-specific legislation.

Secondly, legislation preserving the existing framework for product safety would be drafted by the Department for Business, Energy and Industrial Strategy ("DBIS"). This would involve removing elements of the EU legislation which cannot be reproduced domestically. For example, Article 5 of Regulation 1907/2006 ("the REACH Regulation") contains a wide-ranging obligation on all companies manufacturing or importing chemical substances into the EU to register those substances with the European Chemicals Agency. Any replacement legislation would need to either remove this requirement or identify an alternative body in the UK to which the information must be submitted. Similar considerations would apply, for example, to the obligation of cosmetics manufacturers to provide information about their products to the Commission under Article 13 of Regulation 1223/2009. The UK's obligation to notify all draft technical regulations to the Commission under Articles 4 and 5 of Directive 2015/1535 would also need to be removed from any sector-specific legislation.

Thirdly, legislation concerning the approvals process for medicinal products would be drafted by the Department of Health. Article 3(1) of Regulation 726/2004 currently provides that certain types of medicines may not be placed on the market unless marketing authorisation has been granted by the Community. Article 4(1) provides that applications for marketing authorisation shall be made to the European Medicines Agency. However, the European Medicines Agency, which is currently based in London, is an EU institution. In the absence of an agreement between the UK and the EU, it will not have power to decide applications for marketing authorisation in respect of the UK after Brexit. Any replacement legislation will thus need to identify a replacement body to make decisions about the approval of new medicines.

The benefit of sector-specific legislation, such as the examples set out above, is that it can be tailored to address the fact that many EU laws provide for the involvement of EU institutions. This reduces legal uncertainty and ensures that the rules in each field operate as a coherent framework. However, the downside of the model is that it is highly resource-intensive because it requires a wholesale review of every piece of EU legislation. The sector-specific model also cannot overcome the problem of reciprocity, which can only be addressed by an agreement, or series of agreements, between the UK, the EU and/or the Member States.

The exit agreement

A further tool for replicating EU law in domestic law will be the 'exit agreement' between the UK and the EU. Article 50.2 provides that, upon notification by a Member State of a decision to withdraw from the EU, the Union shall negotiate an agreement with that State setting out the arrangements for its withdrawal and taking account of the framework for its future relationship with the Union. It then provides that the agreement shall take the form of an international agreement between the Union and a third state.[29]

i. Preserving EU laws in the exit agreement

The exit agreement will be the UK's main opportunity to overcome the second major obstacle to reproducing EU law by means of a GRB: reciprocity. There are many examples of EU laws which may be preserved in this way. Three of these are set out below.

First, the recognition and enforcement of foreign judgments clearly depends on reciprocity. These

29 Article 50.2 refers to Article 218.3 TFEU, which sets out the procedure for the Union negotiating international treaties with third states.

matters are currently covered by the Recast Brussels Regulation.[30] Thus Article 36(1) of the Regulation provides that "[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required." Similarly, Article 39 provides that "[a] judgment given in a Member State shall be enforceable in any other Member States without any declaration of enforceability being required."

In practice, it would not be possible to preserve these types of provisions by domestic legislation because they rely upon the mutual obligation of all Member States to recognise and enforce each other's judgments. They are therefore potential candidates for inclusion in the exit agreement.[31]

Secondly, the exit agreement may make provision for preserving existing EU rules on arrest warrants. These are currently regulated by a Framework Decision of the Council of the EU.[32] Article 1(2) of the Decision requires Member States to execute arrest warrants issued by the judicial authorities of other Member States. The UK clearly cannot reproduce such an obligation in domestic legislation because it cannot compel other Member States to execute arrest warrants issued by judges in the UK (although, conversely, there is no reason in principle why it could not commit itself to executing incoming warrants issued by the remaining Member States).

Thirdly, the exit agreement may cover the UK's fisheries arrangements with the EU. Insofar as these are governed by provisions of EU law which depend upon reciprocity (such as the annual allocation of quota between Member States) they cannot be preserved by domestic legislation alone. However, there are likely to be political questions about what, if any, such arrangements the UK and the EU are willing to enter into. This may therefore be one area of law where, contrary to the government's stated intention, there is no political desire to preserve the existing EU rules in their entirety.

There are of course many other areas of EU law which depend on reciprocity, such as free movement of persons and "passporting" arrangements in the financial sector, and these will all be candidates for inclusion in the exit agreement.

ii. Implementing the exit agreement

It is a basic principle of English and Welsh law that international treaties are not directly effective in domestic law.[33] It follows that any exit agreement entered into between the UK and the Union will need to be implemented by means of legislation before it can take effect on the domestic plane.

The exit agreement may also need to be placed before Parliament, even before such implementing legislation is passed. Section 20 of the Constitutional Reform and Governance Act 2010 provides that a treaty is not to be ratified unless it is passed by Parliament under the negative resolution procedure. Parliament therefore has the power to block any exit agreement. If it were to do so, the agreement could not be ratified and therefore would bind neither the UK nor the Union. This would potentially leave a vacuum of 'reciprocal' EU laws which cannot be reproduced in domestic law.

However, Parliament's right to vote on any exit agreement is subject to a number of limitations under the 2010 Act. First, the Minister may ratify the treaty if only the House of Lords (but not the House of Commons) resolves that it should not be ratified (section 20(8)). Second, the requirement does not bite if the treaty does not require ratification at all in order to come into force (section 25(3)). Third, the requirement does not apply in 'exceptional cases' (section 22(1)). The govern-

30 Regulation 1215/2012.

31 An alternative option would be for the UK to sign up to the Lugano Convention, which is an international treaty between the EU and the EFTA states reproducing most (but not all) of the rules contained in the Brussels Regulation.

32 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

33 See e.g. JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 476-477 per Lord Templeman.

ment therefore has potential routes for avoiding a parliamentary vote on the exit agreement if it so wishes, although it has publicly 'conceded' that Parliament will be given a say.

Legislating for the implementation of the exit agreement will raise a number of legal issues which require close consideration.

First, how will the agreement be transposed? Will it be enacted by a simple provision which incorporates the entire text of the treaty in a schedule to the statute (in the same way as section 1(3) of the Human Rights Act 1998) or will it set out provisions of the agreement individually, either in a single statute or across multiple statutes? This may depend on the wording of the agreement itself. For example, any provisions of the agreement which provide the UK with a margin of discretion as to how they should be implemented will require individual thought to be given to how they should be drafted in the implementing Act, and will therefore need to be covered by individual provisions: a schedule simply reproducing the wording of the exit agreement would not be enough.

Secondly, what level of supervision will the CJEU have over the exit agreement? Article 218(11) allows any Member State, the European Parliament, the Council or the Commission to obtain the Court's opinion on the legality under EU law of any international agreement under the EU Treaties. The CJEU could therefore present a serious obstacle to reaching an exit agreement within the two-year period envisaged by Article 50.2.

Thirdly, what will be the consequences if the United Kingdom fails to properly implement the exit agreement? As a matter of international law, any breach of the exit agreement would permit the Union to bring a complaint before the International Court of Justice ("ICJ"). However, the CJEU may also have jurisdiction to take enforcement action against the EU Council if a failure by the UK to implement the exit agreement properly places the Council, or any Member State, in breach of EU law.

It follows that, whilst the exit agreement will be an important tool for replicating EU law, especially in respect of provisions which depend on reciprocity between Member States, there are a number of potentially serious legal obstacles to reaching and implementing the agreement.

Specialist regimes replicating the structure of EU law

A further tool which could be used to reproduce EU laws is a series of self-contained regimes which replicate the entire structure of EU law, including the jurisdiction of the CJEU, within specialist fields such as intellectual property law or trade law.

Such a model is potentially well-suited to areas of law in which there is a demand on the part of businesses for a "one-stop shop" to litigate their disputes across the entirety of the EU and the UK. For example, intellectual property owners may wish to hold patents and trademarks which cover the whole of both territories. This would only be possible if a centralised dispute resolution system were set up, to avoid the risk of the patent or trademark being fragmented by conflicting court decisions in different jurisdictions. However, both patent and trademark law are partially governed by EU law and it would therefore be unlawful for Member States to surrender the jurisdiction of their national courts to a centralised tribunal without putting in place sufficient safeguards to protect the supremacy and uniform application of EU law, including in the UK.[34]

It follows that, in order to bring such a unitary system into force, the UK would need to give appropriate guarantees that certain fundamental aspects of EU law will be complied with, including respect for the supremacy of EU law and the possibility of making preliminary references to the CJEU.

34 See the CJEU's Opinion 1/09 (8 March 2011) at [80], concerning the legality of a previous draft of an international agreement to establish a Unified Patent Court.

A potential example of such a regime is the Unified Patent Court ("UPC"), which is the subject of an international agreement between a number of EU Member States. The UPC complements the new system for unitary patents, which will take effect in the territory of all participating EU Member States.[35] Since the referendum result, a number of stakeholders have expressed interest in the UK continuing to be a member of the UPC after Brexit. However, it is clear from the CJEU's case law that the remaining Member States would not be permitted to surrender the jurisdiction of their national courts to a tribunal such as the UPC unless all of the participants, including the UK, sign up to sufficient safeguards to protect the constitutional principles of EU law.[36] This would require the UK to accept the supremacy of EU law in all matters within the UPC's jurisdiction, as well as state liability for any breaches of EU law by the tribunal, and mandatory references to the CJEU on questions of EU law which arise and are not act clair.[37]

There appears to be some appetite for replicating EU law in this way, since the UK government announced on 28 November 2016 that it intended to ratify the Unified Patent Court Agreement, which will require UK divisions of the Court to submit to the jurisdiction of the CJEU.[38] This model may well provide a blueprint for other areas of law where there are commercial benefits to providing a "one-stop shop" tribunal which has jurisdiction to decide disputes over a combination of Member and non-Member States.

Tensions between the Great Repeal Bill and other models

There are potential tensions between the government's proposed GRB and each of the three models set out above.

Most importantly, there is a potential for overlap, and therefore legal uncertainty, if any or all of the other models are deployed alongside a GRB. For example, it would be problematic if

the GRB includes a provision for the preservation of all EU law, whilst parallel sector-specific legislation has been passed which contained amendments to the underlying EU legislation. Similarly, as discussed in Part 1, if the exit agreement (or an interim exit agreement) contains bespoke provisions, for example on the recognition and enforcement of judgments, it would not make sense for the GRB to preserve the existing framework (in this case, under the Recast Brussels Regulation).

The drafters of the GRB will need to be astute to this potential overlap. It will be necessary to carve out from the scope of the Bill all of those provisions of EU law which are addressed in sector-specific legislation or the implementing legislation for any exit agreement. This carving-out process may need to be an ongoing one if no exit agreement is reached by the date on which the Treaties cease to apply, or if certain sector-specific legislation is passed after the date on which the GRB comes into force. As explained in Part 1, for reasons of practicality this may require a Henry VIII clause which allows the relevant Minister to remove certain provisions of EU law from the scope of the GRB as and when they are replaced by more specific provisions of domestic law.

There may also be inconsistencies between the ways in which legislation passed under the various models is interpreted. The interpretation of EU laws preserved under a GRB has already been addressed in Part 1. However, the interpretation of sector-specific legislation, or legislation implementing any exit agreement, raises separate considerations. First, if sector-specific legislation is enacted which modifies the EU law upon which it is based, should that legislation be interpreted as though it is European legislation (e.g. teleologically, and in accordance with EU fundamental prin-

35 See Regulation 1257/2012

36 CJEU's Opinion 1/09.

37 For a detailed analysis of the legal obstacles to the UK remaining a member of the Unified Patent Court Agreement after Brexit, see Richard Gordon QC and Tom Pascoe, Opinion on the Unitary Patent Regulation and the Unified Patent Court Agreement, available here: http://www.brickcourt.co.uk/news-attachments/UPCA_Advice.pdf

38 See https://www.gov.uk/government/news/uk-signals-green-light-to-unified-patent-court-agreement

ciples), or should its European provenance be ignored such that it is interpreted as any other piece of domestic legislation? Secondly, should the implementing legislation for any exit agreement be interpreted in accordance with international, European or domestic interpretive principles? Whilst domestic courts have permitted themselves to have regard to international law when interpreting statutory provisions which implement international law and are ambiguous,[39] it remains to be seen whether this approach can be stretched to having regard to EU law (whether created before or after Brexit), including the judgments of the CJEU, when interpreting implementing legislation for the exit agreement. In order to ensure legal certainty, the drafters of any such legislation may wish to deal with this question expressly in the statute (by either requiring, permitting or prohibiting courts from having regard to CJEU case-law when interpreting the implementing statute).

Preserving EU law and devolution

Devolution raises further issues for the preservation of EU law, whether by means of a GRB or any of the other techniques described above. The subject matter of many EU laws fall within the competences of the devolved assemblies, which are set out in the devolution statutes.[40] For example, all of the devolved assemblies have competences in the fields of agriculture, environmental protection, food safety and transport. These areas are all touched upon by EU law to greater or lesser extents, and any changes to the underlying EU legislation will therefore change the law within the devolved competences.[41]

It follows that any domestic legislation will engage the Sewel Convention, which regulates the relationship between the Westminster Parliament and the devolved legislatures. The source of the Convention is the Joint Memorandum of Understanding between the UK government and the devolved governments, where it is described in the following terms:

'14. The United Kingdom Parliament retains authority to legislate on *any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.'*

The Convention thus requires the Westminster Parliament not normally to legislate "with regard to devolved matters" without the agreement of the devolved legislatures. This was recently put on a statutory footing by section 2 of the Scotland Act 2016, which adds the following provision to the Scotland Act 1998:

'…. it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.'

Section 2 of the Wales Act 2017 adds an equivalent provision to the Government of Wales Act 2006

The practical effect of the Sewel Convention is that, whenever a bill is introduced to the Westminster Parliament which falls within one or more devolved matters, the devolved government must lay a "legislative consent motion" before its legislature. A vote is then held and the result is communicated to the Westminster Parliament.[42]

39 JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418, 500 per Lord Oliver.

40 See section 29 of the Scotland Act 1998, section 6 of the Northern Ireland Act 1998 and Schedule 7 to the Government of Wales Act 2006.

41 The HL Report draws attention to the need for managing 'new interfaces – and potentially overlapping responsibilities – between reserved competences and devolved competence in areas where the writ of EU law no longer runs' (see [114]).

42 See Chapter 9B of the Standing Orders of the Scottish Parliament, paragraph 42A of the Standing Orders of the Northern Ireland Assembly and Standing Order 29 of the Welsh Assembly.

The Sewel Convention is likely to be engaged by the GRB, which will be wide in scope and is therefore almost certain to cover devolved matters. There may be a question as to whether the Bill is "with regard to devolved matters" in circumstances where it simply replicates existing EU rules, and therefore does not bring about any substantive changes to the law. However, as described below, the government's official position appears to be that the Sewel Convention procedure will be followed for the GRB.

As regards the other techniques for implementing EU law described above, it is likely that any legislation implementing the exit agreement will touch on devolved matters, and will therefore engage the Convention. Similarly, any sector-specific legislation which falls within the devolved competences will also be subject to the requirement to obtain consent from the devolved legislatures.

As described in Part I above, in Miller the majority held that the Sewel Convention will not be enforced by the courts, despite its recent statutory codification.[43] There will therefore not be any legal consequences if the Westminster Parliament ignores the will of the devolved legislatures when replicating EU laws by any of the techniques outlined in this paper, and it cannot be said that those legislatures have a legal 'veto'. However, the Westminster Parliament cannot prevent the devolved governments from initiating a vote on any Brexit-related legislation (indeed the devolved governments are required to do so under their respective Standing Orders). The UK government will therefore have to face the political consequences of any vote(s) withholding consent. In any event, the UK government has given an indication in its Brexit White Paper that the Convention will be respected, at least in relation to the GRB.[44]

Finally, there is a raft of regulations which have been made by the devolved governments pursuant to their powers to implement EU law under the devolution legislation.[45] In the same way that it will be necessary to make specific provision for preserving secondary legislation enacted under section 2(2) of the 1972 Act (as explained in Part 1 above), it will also be necessary to make similar arrangements for secondary legislation passed by the devolved governments.

43 *Miller* at [146]-[151]. Lord Reid, dissenting on different grounds, agreed at [242].

44 HM Government White Paper, The United Kingdom's exit from and new partnership with the European Union (Cm 9417, February 2017), p.10, which states "the Bill will preserve EU law where it stands at the moment before we leave the EU. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal once we have left the EU."

45 The Scottish Ministers have a statutory power to adopt measures implementing EU law under section 53 of the Scotland Act 1998, whilst the Northern Irish executive has this power under section 23 of the Northern Ireland Act 1998. The Welsh Ministers have been provided with the power to implement EU law pursuant to section 59 of the Government of Wales Act 2006.