BAR COUNCIL PARLIAMENTARY BRIEFING

EU (WITHDRAWAL) BILL – FOR THE COMMITTEE OF THE WHOLE HOUSE

1. This briefing paper from the General Council of the Bar of England and Wales (the Bar Council) is an updated version of that provided to the Committee of the Whole House in October 2017, which in turn supplemented the earlier briefings outlining the profession's preliminary concerns over the European Union (Withdrawal) Bill. As before, it comments on the specific provisions of the Bill in some detail and suggests a number of possible drafting amendments to reflect those comments. We note that many of these suggestions, though previously put forward, have yet to be reflected in the Bill and urge the House of Lords to remedy that.

2. By way of initial comment and explanation, this paper is not intended as an exhaustive analysis of all the complex provisions of the Bill, but is intended to identify key elements of the Bill that are of concern to the profession and, where possible, to suggest ways to address those concerns.

3. We note that the Bill is only one element of a range of legal issues to which UK withdrawal will give rise, including:

   - The loss of enforceable EU law rights in the other 27 Member States as well as in the UK itself
   - The measures needed to give effect to whatever is ultimately agreed, whether on a transitional or a permanent basis, about the ongoing relationship between the UK and the EU
   - The way in which such measures will be adopted under UK law and the role of Parliament in approving such measures
   - The design of any ongoing enforcement and dispute resolution mechanism that may be agreed and the implementation of such a mechanism as a matter of UK or international law, and
   - The way in which changes will be made to retained EU law that do not fall within the scope of Clauses 7 to 9 of the Bill.

4. We also note that the Government aims to ensure "that there is a common understanding" of the meaning of EU derived law, which is to remain on the UK statute books once the UK has withdrawn and that this is "essential" [see March 2017 White Paper "Legislating for the United Kingdom's withdrawal from the European Union (Cm 9446)" ('WP2') ref [2.14]. The Government's view is that "this is best achieved by providing for continuity in

how that law is interpreted before and after exit day"[idem]. The most substantial difficulties that we identify are as follows:

- The extent of the legislative powers conferred on Ministers by Clauses 2-4 and 7-9 of the Bill in combination
- The loss of statutory rights currently protected by EU law and the European Communities Act 1972 (the 1972 Act), resulting in particular from Clauses 4(2)(b), 5-6 and Schedule 1 of the Bill (and the absence of any power to give effect to such rights on an ongoing basis by analogy to section 2(2) of the 1972 Act), and
- The lack of legal certainty arising from a number of features of the Bill, particularly:
    - The breadth of the measures falling within the scope of Clause 2
    - The adoption of Clause 3 in addition to Clause 4, departing from the approach that was used in the 1972 Act
    - The relationship between Clauses 3 and 4 and the uncertainty to which that could potentially give rise
    - The uncertainty in regard to precisely which EU legal provisions will be converted into domestic law under Clauses 3 and 4
    - The lack of statutory definition of 'the principle of the supremacy of EU law' in Clause 5
    - The potential loss of accrued rights under Schedule 1, including the lack of definition of the 'rule in *Francovich*'
    - The uncertain status of judgments of the CJEU and other decisions of EU bodies after UK withdrawal provided for in Clause 6, and
    - The undefined and open-ended power permitting Ministers to make regulations to address 'deficiencies' in Clause 7, including a power to make 'any provision that could be made by Act of Parliament'.

5. We further note that, in the time since the Bar provided the earlier version of this paper, more is known about the possible terms of the likely transitional arrangements, albeit they remain subject to negotiation and agreement. The EU is asserting that the EU acquis will apply in full throughout the transition period, which is likely, but not certain to last until the end of 2020. This would include all institutional aspects, save that the UK would no longer have a seat at the table in any of the EU insitutions. If the Withdrawal Agreement includes a transitional agreement on these terms, references to Exit Day as being the date when the EU acquis ceases to apply to the UK, will need to be interpreted and amended accordingly. Consideration would then also need to be given to whether EU legislation enacted between Exit Day and the end of the transition period; thus without the UK's formal participation in its adoption; would be imported into UK law and if so, whether a separate mechanism would then be needed. It also seems inevitable that the approach of the Bill to the amendment of 'retained EU law', and the timetable for the expiry of such amending powers, would need to be reconsidered to reflect the terms of any transitional regime.

6. In Part A of this paper, we have made specific comments on Clauses 1-9, the general provisions of the Bill (and related Schedules), and we have suggested possible drafting amendments to address some of the difficulties that we identify in Clauses 5 and 6 and in

Schedule 1. We have also sought to give some specific and concrete examples to illustrate our concerns.

7. In Part B, we have made comments in relation to issues arising under the devolution legislation. Although these issues are in principle common to Wales, Scotland and Northern Ireland, we have limited our specific comments to Wales, reflecting the scope of responsibility of the Bar Council in England and Wales.

A. COMMENTS ON CLAUSES 1-9

Clause 1

8. Consistently with the limited scope of this paper, we do not consider alternative statutory mechanisms that might have been adopted (such as whether it would have been possible to amend rather than to repeal the 1972 Act or, for example, whether it would be appropriate to make repeal of the 1972 Act conditional on the outcome of the Article 50 process having been approved by Parliament).

Clause 2

9. Clauses 2-5 address the same subject matter as section 2 of the 1972 Act but in reverse order. The broad approach reflected in section 2(1) of the 1972 Act is retained in modified form by Clauses 4 and 5. Clause 3 makes specific provision for the ongoing legal effect of a sub-class of rights and obligations currently given effect in UK law by the general provisions of section 2(1), directly applicable from EU secondary legislation. Clause 2 addresses the ongoing legal status of UK domestic legislation that was originally enacted to give effect to EU law, primarily by reference to section 2(2) of the 1972 Act.

10. We agree that it is desirable to ensure legal continuity for secondary legislation adopted under section 2(2) of the 1972 Act but question whether it is necessary for Clause 2 to refer to other measures, notably Acts of Parliament, whose status under UK domestic law is not cast in doubt by UK withdrawal. The purpose of this approach appears to be to bring such measures within the scope of the amending provisions of Clauses 7-9, allowing Ministers a very wide discretion to amend legislation that would otherwise remain valid provisions of UK domestic law, including Acts of Parliament itself. We doubt that this is necessary or desirable, and the scope of the very wide provisions of Clause 2(2)(c) and (d) does not appear to us to be legally certain.

11. We think that Clause 2 should be limited in its scope and effect to preserving the status of secondary legislation adopted pursuant to section 2(2) of the 1972 Act.

12. This concern is reinforced by the wide and non-exhaustive scope of the amending powers listed in Clause 7, as to which see below.

Clause 3

13. We think that this Clause is problematic – it is not obvious why it is necessary and it appears to introduce unnecessary complexity and uncertainty in a crucial area, neither of which is desirable.

Legal uncertainty and the relationship to Clause 4

14. As we understand it, given Clause 4, there would be no legal 'gap' if Clause 3 did not exist – it does not correspond to anything in the 1972 Act. Section 2(1) of that Act is very broadly drafted and gives legal effect within the United Kingdom to all rights and obligations (etc.) arising 'by ***or under***' the Treaties. We are not aware that the wide scope of this provision has given rise to difficulties or that it has ever been questioned that EU regulations etc take effect within the UK pursuant to this provision.

15. Clause 4(1) maintains that legal position by incorporating the continuing general applicability of EU law guaranteed by section 2(1) of the 1972 Act as at the exit day. The effect of Clause 4(2)(a) appears to be to make any limitations on the scope of Clause 3 redundant, in that any rights or obligations arising under EU law on exit day, that would be otherwise be excluded by Clause 3, will be incorporated in any event by Clause 4(1). If Clause 3 did not exist, that would be the general position.

16. In terms of legal certainty, Clause 3(1) introduces uncertainty as to the status of measures forming 'part of domestic law'; and also introduces a novel and unexplained concept of 'operative' EU legislation. It is not clear whether these concepts are intended to differ in their scope from the wording used in section 2(1) of the 1972 Act, which is maintained under Clause 4(1).

17. If the intention of introducing these new concepts were to ***narrow*** the legal protections currently afforded by section 2(1) in respect of secondary EU legislation in force on exit day, then it would be ineffective (and undesirable in any event): the effect of Clause 4(1) would be to override any such limitations (see Clause 4(2)(a)). But if the intention is to ***broaden*** or to ***replicate*** the approach under section 2(1) of the 1972 Act, then it introduces undesirable uncertainty into a well-understood legal regime that has been in place for 45 years. This latter possible intention does not appear likely given the deliberate and well understood breadth of section 2(1) of the 1972 Act and the terms of Clause 4(1) maintaining that breadth by reference.

18. If Clause 3 is to be retained, we would suggest that its drafting should be aligned to that of Clause 4 and section 2(1) of the 1972, to avoid undesirable legal uncertainty as to whether there is some subtle difference of scope or meaning between the two provisions.

Practical difficulties

19. We would also note an important practical difficulty arising out of the current approach under Clause 3 and Schedule 5, namely the sheer scale and complexity involved in identifying and publishing as UK domestic law, the full set of EU Regulations that happen

to be in force on exit day. Many such Regulations will be insignificant administrative legislation in the form of 'implementing' or 'delegated' regulations, including many correcting or amending earlier regulations for minor errors, or transient provisions giving effect to EU policies such as the customs union or the common fisheries policy.

20. It is not clear to us that it would be a good use of scarce resources to replicate ephemeral administrative legislation into published UK texts, given that this material is already publicly available in an easily searchable format and that much of it is likely to be changed or redundant within a relatively short period of time.

    To give some idea of what would be involved, a quick search of the Eur-lex website[1] indicates that, in August 2017 alone, 98 Regulations were published in the Official Journal, of which 6 were delegated, 31 were corrigenda, 38 were regulations that were neither implementing nor delegated regulations, and 54 were implementing regulations. To give a snapshot of the type of measure, on 1 August 2017, the following regulations were adopted:

    - *Commission Regulation (EU) 2017/1407 of 1 August 2017 correcting the Bulgarian, Finnish, German, Portuguese and Spanish language versions of Regulation (EU) No 432/2012 establishing a list of permitted health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health (Text with EEA relevance)*

    - *Commission Implementing Regulation (EU) 2017/1408 of 1 August 2017 withdrawing the acceptance of the undertaking for two exporting producers under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures, and*

    - *Commission Implementing Regulation (EU) 2017/1409 of 1 August 2017 amending Implementing Regulation (EU) No 75/2013 and Regulation (EC) No 951/2006 as regards the additional import duties in the sugar sector and the calculation of the sucrose content of isoglucose and certain syrups[2].*

21. Given these serious practical difficulties (of which these examples are only a minute illustration), we would respectfully question whether there is any need to embark on this

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[1] See http://eur-lex.europa.eu/search.html?qid=1506004392436&DB_TYPE_OF_ACT=allRegulation&DTS_DOM=EU_LAW&typeOfActStatus=ALL_REGULATION&type=advanced&lang=en&SUBDOM_INIT=LEGISLATION&date0=DD:01082017%7C31082017&DTS_SUBDOM=LEGISLATION

[2] To give another example, on 11 May 2017, the Commission adopted three implementing Regulations, (EU) 2017/908-910, 'approving non-minor amendments to the specification for a name entered in the register of protected designations of origin and protected geographical indications', namely Picodon (PDO), (Huile d'olive de Corse/Huile d'olive de Corse — Oliu di Corsica (PDO)) (Cornish Sardines (PGI)). There are of course numerous instances of such administrative measures.

extremely complex and bureaucratic exercise. Provisions of this kind have never proved necessary during the 45 years of UK membership of the European Union, they complicate the interpretation of Clause 4 in a way that appears unnecessary, they will give rise to complexities and administrative costs that are not considered necessary in respect of other directly applicable measures retained in UK domestic law by Clause 4, it is inevitable that much of the legislation caught by the current terms of Clause 3, and Schedule 5, Part 1, will be redundant within a short period of time, either because the relevant rules will expire or be amended or repealed by the EU institutions or because Ministers will decide to amend or revoke the legislation insofar as it bears on the UK pursuant to the wide powers conferred by Clauses 7-9 (including to take account of redundancy or amendment by the EU institutions).

22. We would therefore suggest that, if Clause 3 is to be retained at all, careful consideration is given to whether it is really necessary or desirable to publish all these administrative regulations as UK instruments, given their ready availability, and their trivial and ephemeral character. It also seems to us inevitable that these difficulties will be compounded to the extent that it is agreed that any transitional arrangements extend the legally binding force of some or all of EU law for a period after exit day.

The legislative cut-off date and packages of EU legislation

23. We also question the approach taken by Clause 3 in identifying which EU law provisions will be converted into domestic law. We fear that the current approach would give rise to further and considerable uncertainty and will create an arbitrary split between provisions within EU legislative packages and even within a single EU legal instrument which will then render the retained law incomplete and potentially incoherent.

24. Clause 3(3) will convert EU law into domestic law only insofar as a relevant instrument has entered into force and applied before exit day. EU legislation is, however, often produced as 'packages' of laws around a particular policy area with different provisions coming into force and applying at different times[3]. Transitional provisions are used frequently and often apply only to discrete aspects of a legal instrument, meaning that some provisions within a legal instrument may enter into force and apply years later than the main provisions. Clause 3 thus creates a cut-off point at exit day, which means that the UK will adopt some provisions in relation to a particular area of policy but not those that are part of the same package of measures, which do not apply and come in to force until after exit day.

25. Given that the great majority of these measures will have been specifically approved by the United Kingdom prior to exit day, and all will have been approved in accordance with the relevant provisions of the EU Treaties to which the UK will remain party until exit

[3] By way of example, the EU Data Protection Package includes the General Data Protection Regulation 2016/679, which entered into force on 24 May 2016, and applies from 25 May 2018 and the directive on protecting personal data processed for the purpose of criminal law enforcement (2016/680), in force since 5 May 2016, and to be implemented by 6 May 2018. Brexit day falling in that 18 day gap would undermine the legislative coherence of the whole.

day, it does not appear to us to be desirable as a matter of policy that the relevant provisions should be broken up in this way. Again, this issue appears likely to become even more complex in the context of any transitional regime.

26. In addition, it will be difficult for HM Government and those affected by the law to establish which provisions of a legal package or a legal instrument will become retained law under Clause 3(3). It is also unclear what approach will be taken to those provisions that do not become retained law under Clause 3(3) but which are an integral part of the package that is converted into domestic law. The Bill does not appear to confer any power on Ministers to adopt domestic measures to reflect EU legislative measures that have not entered into force before exit day (whether or not approved by the United Kingdom), in contrast to the wide powers conferred on Ministers to ***change*** such laws without either EU or Parliamentary approval. This does not appear to us to be desirable.

    For example, it is not unusual for delegated and implementing acts (a form of tertiary legislation, also known as level 2 of the Lamfalussy process for making EU financial services legislation) to enter into force and apply from significantly later dates than the secondary legislation (level 1 of the Lamfalussy process) which they supplement or implement. In the absence of the tertiary legislation, it is frequently impossible to understand how to comply with the secondary legislation, so a failure to convert delegated and implementing acts into domestic law because they fall on the wrong side of the cut-off date would result in an incomplete package of legislation being converted into domestic law. This example is an obvious one: more difficult examples can be found when the provisions of a single legal instrument enter into force and apply from different dates.

    To give a simple example, the benchmark regulation (Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016):

    a. *Entered into force on 30 June 2016, the day following its publication in the Official Journal, and applies from 1 January 2018*
    b. *Contains transitional provisions in Article 51 which mean that some requirements do not apply until 1 January 2020 (and potentially later depending on future delegated acts), and*
    c. *Contains various enabling provisions for the adoption of delegated acts at some, as yet unidentified, point in the future.*

    There is a far greater range of relevant dates in a larger legislative package such as MiFID II and MiFIR (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 and Regulation (EU) 600/2014 of the European Parliament and of the Council of 15 May 2014) which consists of approximately 41 legal instruments. It is not clear to us how such important measures are to be incorporated into UK law under the provisions of the Bill, even if Ministers desire to do so.

27. Paragraph 1(1) of Part 1 to Schedule 5 appears to require the publication of legal instruments that have been "published" before exit day. Paragraph 2 permits exceptions from the duty to publish if the instrument will not become retained direct EU legislation. It is unclear why the duty to publish is not limited to the law that will be converted under Clause 3(3). As explained above, the publication date is a different date from the date

when an instrument enters into force and the date from which an instrument applies. Linking the duty to publish to the law retained under Clause 3(3) would render paragraph 2 unnecessary and would clarify which provisions of an EU legal instrument or legal package have been converted into domestic legislation. The wider obligation under Schedule 5 risks causing confusion as to exactly what is retained EU legislation.

28. The Bar Council suggests some flexibility is incorporated into the Bill to allow whole packages of legislation to be adopted into UK law where it will allow the adoption of measures which are both coherent and in line with Government policy. We appreciate that careful thought will need to be given to this suggestion as HM Government may wish to retain a discretion ***not*** to adopt or to modify the implementation of legislation to which it was opposed during the EU legislative process, but we think that it should be at least possible for EU legal provisions and legal instruments to be given statutory effect, in particular where the UK has given political agreement to such measures but they happen to fall on the wrong side of the cut-off date. As already noted, there will in any event need to be a legal mechanism of some kind to enable the UK to meet its obligations under any transitional arrangements to allow measures to be adopted to give effect to what is agreed.

Clause 4

29. As already noted, Clause 4 adopts by reference the broad statutory wording of Clause 2(1), which is the key provision giving effect to EU law in the United Kingdom (including both the Treaty rights themselves and rights imposed pursuant to those Treaties, notably by EU Regulations), as confirmed by the Supreme Court in the *Miller* litigation: [2017] UKSC 5, e.g. at § 63.

30. However, the apparent statutory approach of treating Clause 4 as a residual category of rights again gives rise to further possible concerns over legal certainty, particularly in relation to provisions of the EU Treaties and general principles of law applicable within the United Kingdom.

31. These concerns have two main sources:

    a. In contrast to Clause 3, where specific secondary legislation is to be incorporated as domestic law (and seemingly printed and published as such – see paragraph 27 above), there is to be no specific list of the sources of EU law preserved by this provision or how such sources are to be identified.

    b. This appears to give rise both to uncertainty as to which EU laws will or will not be preserved and to the possibility that rights and obligations arising out of fundamental provisions of the EU Treaties, such as the four freedoms and the EU rules on competition, will be incorporated into UK domestic law in an unspecified form (presumably based not only on the Treaty provisions themselves but also on existing case law relating to those provisions as it stands on exit day) and will be subject to radical amendment by Ministers pursuant to Clauses 7-9 of the Bill.

32. To take a concrete example (and a Treaty provision which HM Government indicates in the Explanatory Notes to the Bill would be converted into domestic law as a result of this clause):

> *Article 102 TFEU prohibits the abuse of a dominant position within the EU where it affects trade between the Member States. The rights and obligations of undertakings under that provision (as developed in the case law of the CJEU since 1957 and of the UK Courts since 1973 as it stands on exit day) will presumably be carried over into UK domestic law by Clause 4(1) but not as a specified provision and with obvious difficulties of interpretation and enforcement in the United Kingdom – it is not clear whether the legislative intention is that such a provision should be modified by secondary UK legislation to enable it to have a continuing legal effect within the UK (for example, by modifying its geographical scope, or the concept of inter-State trade to include the UK, or by introducing a provision to the effect that the UK is to be deemed to remain a Member State for the purposes of this provision). It seems to us undesirable to have core provisions of the EU Treaties introduced into UK domestic law on exit day without being specifically identified and without any clear guidance as to how they are to operate.*

33. From the perspective of legal certainty, we think that it would be preferable for Clause 4 (i) to identify those provisions of the Treaties that will remain applicable under UK domestic law and (ii) to address the most likely sources of uncertainty – as the above example illustrates, the most obvious difficulty, likely to be common to many of the Treaty provisions, is that they are premised on their application being limited to the territories of the Member States (and to EU citizens and businesses). Such generic difficulties for the operation of Clause 4 could be addressed by a general deeming provision to the effect that the provisions of the Treaties are to be interpreted on the basis of the legal situation prevailing immediately before exit day, subject of course to contrary provision of UK law adopted thereafter.

34. We also think that it is unacceptable and likely to give rise to further uncertainty for Ministers to have a general and open-ended power to amend principles laid down in the EU Treaties themselves without the approval of Parliament: see further our comments on Clause 7.

Loss of vertical direct effect and repeal of section 2(2) of the 1972 Act

35. We have already noted our concerns over the relationship between Clause 3 and Clause 4(2)(a). A further difficulty appears to us to arise from Clause 4(2)(b) of the Bill, which excludes the provisions of unimplemented directives from the rights and obligations preserved by Clause 4(1), i.e. the EU doctrine of the vertical direct effect of directives. While we can understand that HM Government may wish to emphasise that the UK is no longer bound by any EU obligation to implement EU directives after exit day, it remains the case that the great majority of such directives will have been approved by the United Kingdom before exit day (and all will have been adopted in accordance with the EU Treaties to which the UK remains party until that day). There will therefore be a significant loss of individual rights if such provisions cease to be of any legal effect on exit day.

36. We further note that the Bill does not appear to confer any ministerial power equivalent to section 2(2) of the 1972 Act, in contrast to the very wide powers conferred by Clauses 7-9. We think that Ministers should at least be ***able*** to adopt measures to give effect to directives that have not been implemented into UK domestic law by exit day, even if it is considered undesirable for them to have any ongoing statutory obligations to do so. Again, this issue will have to be addressed in any event in respect of any transitional agreement pursuant to which EU law will remain directly applicable after exit day.

Clause 5

37. We do not consider that it is appropriate or desirable for UK legislation to incorporate, without definition or guidance, the 'principle of the supremacy of EU law' even in the qualified form set out in Clause 5(1)-(3). We think that this is legally uncertain and that it will give rise to unnecessary and complex litigation in which the parties will be forced to re-argue fundamental questions of EU law in a UK domestic context to obtain the guidance of the Courts as to the meaning of these provisions.

38. We note that this is an example of a departure from the approach in the 1972 Act, section 2(4) which set out a specific statutory rule whereby the provisions of the 1972 Act, including the EU law rights incorporated by or pursuant to those provisions, took priority over inconsistent subsequent legislation. It appears to us that an equivalent statutory principle, possibly expanded to take account of subsequent case law, would be a preferable statutory approach.

39. One possibility would be to replace Clauses 5(1) and (2) with the following (adopting the definitions set out in Clause 6(7)):

> *Unless otherwise provided in this Act, and subject to measures adopted pursuant to sections 7-9 below, retained EU law continues to apply on or after exit day notwithstanding any contrary enactment or rule of domestic law passed or made before exit day.*

Schedule 1

40. Paragraph 1 of Schedule 1 has the effect that individuals and businesses will be unable to challenge EU retained law on the basis that its original legal basis in EU law was invalid. As we noted in our earlier briefing paper, we think that this is an undesirable limitation on the rights of businesses and individuals. We recognise that this interacts with issues arising under Clause 6 but our view is that such challenges should be permitted, in particular where the CJEU has found that the relevant EU measure on which EU retained law is based was invalid.[4] We also think that challenges should be permitted on the basis that the relevant EU law instrument failed properly to implement the superior norm of EU law or was otherwise contrary to general principles of EU law.

[4] For example if a case arose such as Joined Cases C-293/12 and 594/12 Digital Rights Ireland by which the CJEU annulled Directive 2006/24/EC on the Retention of Data.

41. We note that sub-paragraphs 1(2)(b) and (3) permit challenges prescribed in regulations, and that such regulations may provide for challenges that would otherwise have been brought against an EU institution, to be brought against a UK public authority. We would suggest that this principle be set out in the Bill itself and not require subsequent regulations to give it effect.

    a. One possibility would be to add a paragraph 1(2)(c) as follows:

        the challenge is one which could otherwise have been brought against an EU institution and is brought against a public authority in the United Kingdom EITHER [under the same conditions as would have applied to the challenge had it been brought against an EU institution] OR [in accordance with principles of liability recognised by UK domestic law independently of EU law].

    b. Paragraph 1(3) could also be amended to provide:

        Regulations under sub-paragraph (2)(b) may (among other things) set out the public authorities against which challenges provided for in sub-paragraph (2)(c) should be brought.

42. Paragraph 3 of Schedule 1 excludes challenges to decisions based on failure to comply with general principles of EU law. In addition to the suggested amendments to paragraph 1, we think that this provision is unclear and potentially restrictive of rights that should be preserved. It is not clear whether this provision excludes positive actions, for example for a declaration of rights, based on general principles of EU law. We are also unclear whether it is intended to preclude, for example, a challenge based on a right retained as a matter of UK domestic law by Clauses 2-4 that includes a ground of challenge based on one of the general principles of EU law, for instance, that a restriction on the free movement of goods or services is contrary to the principle of proportionality, equal treatment or the protection of legitimate expectations. We think that it should be made clear that such a challenge remains valid, otherwise this would constitute a major reduction in the rights of individuals and businesses to assert rights specifically preserved by Clauses 2-4.

43. Paragraph 4 of Schedule 1 excludes claims based on 'the rule in *Francovich*' – we have three concerns about this provision. Firstly, we do not think that the wording is clear as to whether pre-existing claims, i.e. claims for damages based on breaches of EU law arising before exit day, are excluded. Secondly, we do not think that it is desirable to define the scope of this exception by reference to a specific judgment of the CJEU: the *Francovich* case concerned the failure to implement a directive, but we think that the statutory intention is wider, to cover all breaches of EU law by the UK, as clarified by later cases such as *Factortame* and *Brasserie du Pecheur*. Thirdly, if, as we think is the likely intention, this provision is intended to preclude actions for damages even in respect of breaches arising prior to exit day, we think that is a clear deprivation of accrued rights that is likely to give rise to challenge.

44. We would suggest that the following statutory wording would be preferable:

> *Breaches of retained EU law by a public authority arising after exit day will give rise to a cause of action in damages in accordance with principles of liability recognised by UK domestic law independently of EU law but not otherwise.*
>
> Or alternatively:
>
> *Principles of EU law giving rise to a cause of action for damages for breach of EU law do not form part of retained EU law.*

45. Paragraph 5 of Schedule 1 sets out two provisions in respect of interpretation: in relation to paragraph 5(1), we refer to the earlier comments on 'the principle of the supremacy of EU law' and 'the rule in *Francovich*'; in relation to paragraph 5(2), we further note that the parenthesised wording ('(among other things)') introduces a further layer of undesirable legal uncertainty. We suggest that this wording is inappropriate in a statutory interpretation provision and should be deleted. We also question whether paragraph 5(2) is needed if the wording of Clause 5 is clarified as suggested above.

Clause 6 and Schedule 5, Part 2

46. While we understand the political imperative to make it clear that rulings of the CJEU on EU law are no longer binding on the UK Courts after exit day, we consider that this is made sufficiently clear by Clause 6(1). Clause 6(2) goes well beyond what is needed and would not operate effectively. In particular, Clause 6(2) does not reflect the approach of the UK Courts to rulings on foreign law by courts of competent jurisdiction or to international law rulings by such courts; nor as a matter of substance does it reflect the approach of the UK Courts to rulings by the CJEU on points of EU law.

47. On the first point, we refer to the judgment of Lord Bingham in *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, § 20:

> *'… the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law'.*[5]

48. On the second point, we refer to his earlier judgment in *Customs and Excise v ApS Samex* [1983] 1 All ER 1042, 1055, summarising the disadvantageous position of any national judge seeking to interpret EU law:

[5] We recognize that this principle has been diluted to a limited degree by subsequent rulings of the Supreme Court, for example in the judgement of Lord Mance in *Pham* [2015] UKSC 19 at §§ 76-80. However, we consider that the Supreme Court makes it clear that it continues to be highly unusual for the UK Courts to interpret EU law in a different way from the CJEU. It certainly gives no support to the apparent suggestion in Clause 6(2) that there might be circumstances where it would be appropriate for a judgment of the CJEU on a point of EU law to be ignored or treated as irrelevant.

"[The ECJ] has a panoramic view of the Community and its institutions, a detailed knowledge of the treaties and of much subordinate legislation made under them, and an intimate familiarity with the functioning of the Community market which no national judge denied the collective experience of the Court of Justice could hope to achieve. Where questions of administrative intention and practice arise the Court of Justice can receive submissions from the Community institutions, as also where relations between the Community and non-member states are in issue. Where the interests of member states are affected they can intervene to make their views known. That is a material consideration in this case since there is some slight evidence that the practice of different member states is divergent. Where comparison falls to be made between Community texts in different languages, all texts being equally authentic, the multinational Court of Justice is equipped to carry out the task in a way which no national judge, whatever his linguistic skills, could rival. The interpretation of Community instruments involves very often not the process familiar to common lawyers of the laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires. These are matters which the Court of Justice is very much better placed to assess and determine than a national court."

49. We think that these statements of principle remain applicable to a court in the position of the CJEU in respect of EU law, notwithstanding UK withdrawal from the EU. The CJEU will remain the supreme court of the EU with a specific jurisdiction to uphold the rule of law within the EU and to give authoritative rulings on the validity and interpretation of EU law. The advantages of the CJEU over a national court described by Bingham J (as he then was) remain valid after UK withdrawal.

50. We note the following points: (i) rulings of the CJEU are and have always been limited to issues of EU law, not domestic UK law, including rights and obligations imposed by section 2(1) of the 1972 Act – the same will be true *a fortiori* of retained EU law adopted pursuant to Clauses 2-4 and amended pursuant to Clauses 7-9, given that these will be UK domestic law provisions that have no basis in the EU Treaties themselves after exit day; (ii) its rulings on issues of EU law will not be ***binding*** on the UK Courts either as a matter of EU law or UK domestic law after exit day (unless Parliament rules to the contrary); and (iii) Parliament or Ministers will in any event be free to amend EU retained law after exit day to diverge from EU law (including EU law as interpreted by the CJEU). Clause 6(1) makes these points clear, as well as the fact that UK Courts will no longer be able to make references for preliminary rulings from the CJEU on difficult points of EU law, but we do not think it is necessary or desirable to go further than that.

51. In the October version of this briefing, the Bar Council expressed concern that Subsections (1)(a) and (2) of Clause 6 as drafted could lead to unacceptable uncertainty. We recommended that the House in Committee should remove Clause 6(2) and amend Clause 6(1)(a). Since then many commentators – including members of the senior judiciary – have added their voices to those troubled by these provisions in their present form. In the light of comments made since our original briefing, the Bar Council and Law Society have

produced a joint document that now recommends a slightly different amendment to Clause 6(1)(a).

52. Along with the removal of Clause 6(2), the proposed amendment is designed to address the following issues:

- At present, the reader has to get to the end of Clause 6(2), after a series of negatively-worded provisions, to learn that a court or tribunal may take post-exit decisions etc. into account. To avoid confusion, that statement should appear at the beginning of this set of provisions.

- There is a potential clash with Clause 6(3)(a). That provision requires a UK court or tribunal, after exit day, to apply (not just "take into account") "retained general principles of EU law" when determining the "validity, meaning and effect" of any unmodified retained EU law. A post-exit European Court decision may well explain or interpret "general principles of EU law" as they stood on exit day. So Clause 6(1) should operate without prejudice to Clause 6(3)(a) (and to paragraph 2 of Schedule 1, which will require a court to distinguish between new general principles laid down after exit day and a decision elucidating pre-existing general principles).

Proposed amendments to Clause 6

53. To address these concerns, the joint recommendation is that the terms of Clause 6 should be subject to the following amendments:

a. Amend Clause 6(1)(a) to read as follows (added text shown in *italics*):

> "(a) ***without prejudice to subsection (3) and paragraph 2 of Schedule 1 may take into account, but*** is not bound by, any principles laid down, or any decisions made, on or after exit day ***in respect of EU law*** by the European Court ***or another EU entity***, and"

b. Delete Clause 6(2).

54. The effect of the amendments is to resolve the above points. The amended paragraph (1)(a) emphasises that a court or tribunal ***may*** take into account post-exit decisions or principles, but is not bound by them; and that this is without prejudice to subsection (3) and paragraph 2 of Schedule 1, which may ***require*** a court or tribunal to apply a post-exit decision of the Court in certain circumstances.

55. The phrase "another EU entity" is incorporated into paragraph (a) from subsection (2). This would cover, for example, decisions applicable to individual undertakings that are binding as a matter of EU law or interpretative communications by the Commission that cast light on the meaning of a pre-exit item of EU legislation. We do not consider it necessary to replicate the words "or the EU" from subsection (2) because that adds nothing

to the concept of an "EU entity": anything said or done on behalf of the EU always emanates from the relevant entity of the EU.

56. The added words "in respect of EU law" make clear that this provision is concerned with the ***law*** applied in courts and tribunals, not other matters. Questions of fact in courts and tribunals will continue to be governed by the ordinary rules about admissibility and relevance of evidence, which these provisions do not affect.

Other issues relating to Clause 6

57. Two other issues were canvassed by the earlier Law Society and Bar Council papers:

- Whether Courts should be ***required rather than permitted*** to take account of rulings of the European Court on issues of EU law, consistently with the approach taken to rulings of the Court of Human Rights under the Human Rights Act 1998.
- Whether rulings of the European Court on issues of EU law should be treated as ***issues of fact rather than law*** after UK withdrawal, given that EU law would become 'foreign law' after the UK ceases to be a Member State, and the preliminary ruling procedure will no longer be available in UK court proceedings.

58. These are important issues but they have not been included as positive proposals in the joint recommendation of the Bar Council and Law Society for two essential reasons:

    a. The first issue appears to us to be an essentially political rather than legal issue.
    b. On the second issue, the earlier version of this paper questioned the approach adopted by Schedule 5, Part 2, paragraph 3, in which issues of EU law arising in the context of interpreting retained EU law are to be treated as questions of law rather than, as is normally the case in respect of rulings of foreign courts on foreign law, as issues of fact to be proved by evidence. However, given the extent of effective incorporation that is provided for in Clauses 2-4 of the Bill, we can see that there could be practical difficulties in treating rulings of the European Court on points of EU law in the same way as rulings of other foreign courts relevant to UK proceedings.

59. The issue that remains is the potential for unhelpful 'gaps' or divergences to arise if the UK Courts do develop a distinctive EU law jurisprudence to any material degree. For example if a pre-exit directive which has been incorporated into UK legislation by regulations is given a wider or different interpretation post-exit by the CJEU in a case brought before it by another Member State (e.g. the Waste Directive and definition of 'waste' or if the Air Quality Directive were to be interpreted as imposing wider obligations on Member States than hitherto understood), the decision appears only to be relevant to the UK regulation as a matter of discretion whereas pre-exit the regulation would have to be read as being consistent with the directive. If the aim is certainty then the Bill needs to

be clearer one way or the other.[6] This will be another important issue to clarify in respect of any transitional arrangements (and in the light of any binding commitments entered into for a longer period in respect of the Withdrawal Agreement).

Clauses 7-9 and Schedule 7 – the 'Henry VIII' power to modify legislation to address 'deficiencies'

60. Clause 7 empowers Ministers to make regulations to "*prevent, remedy or mitigate*" any "*failure of retained EU law to operate effectively*" or "*any other deficiency in retained EU law*". Clause 7(5) includes an open-ended power to make "*any provision that could be made by Act of Parliament*". There are comparable Henry VIII powers in Clauses 8(2) (in respect of regulations to "*prevent or remedy*" any breach, arising from Brexit, of the UK's international obligations) and 9(2) (in respect of regulations implementing the withdrawal agreement).

61. We consider that these provisions (and in particular Clause 7) continue to raise serious concerns both from the perspective of the rule of law and the sovereignty of Parliament and in respect of legal certainty. We comment separately on the relationship with the devolution legislation in Part B of this paper.

62. As noted above, these concerns are compounded by the very wide scope of Clauses 2-5, which appear to give Ministers a general power to modify both Acts of Parliament and long-established principles of EU law, including EU Treaty provisions as interpreted by the CJEU since 1957, that are specifically retained in EU law by Clause 4(1). Indeed, we note with concern that these powers have been further extended at Report stage by the addition of new Clause 7(3). This appears to us to be inconsistent with ministerial accountability, the rule of law and to raise serious issues as to legal certainty.

63. Whilst section 2(2) of the ECA 1972 itself contains a wide power to adopt secondary legislation to give effect to EU law, that is in the context of implementation of EU legislation that has been subject to a process of enactment involving the directly elected European Parliament and national Parliaments in accordance with the detailed legislative procedures to which the UK is party under the EU Treaties and incorporated into UK law by section 2(1) of the 1972 Act. That background lends legitimacy and transparency to what would otherwise be an objectionably broad Henry VIII provision, including prescribed procedures reflecting agreed elements of democratic accountability both to national Parliaments and to the European Parliament.

64. We noted in our original paper that Clause 7(2) provided a non-exhaustive list of possible deficiencies and subsection (5) provided a non-exhaustive list of the purposes for which the power can be used. Given the scope of these powers, including the power to modify Acts of Parliament, we expressed the view that it was unsatisfactory for an inclusive approach to definition to be used. We remain of the view that these powers should be specifically enumerated and that any expansion of those powers that may prove necessary

[6] This is a general problem. Another example would be the definition of 'medicinal product' for the purposes of defining the scope of the EU regulation of pharmaceutical products – the UK has followed the EU model of pharmaceutical regulation since before accession in 1972.

should require specific endorsement by Parliament itself in a further Act of Parliament. We note that Clause 9 confers additional powers reflecting the terms of the withdrawal agreement.

65. Whilst we recognised that, by the most recent amendments to the Bill, the list of "deficiencies arising from withdrawal" set out in clause 7(2) has been made exhaustive rather than illustrative, nevertheless, by the addition of a new clause 7(3), a "sweeper provision" was added to encompass "where the Minister considers that there is anything in retained EU law which is of a similar kind to any deficiency which falls within subsection(2)" [clause 7(3)(a)] and a "reserve sweeper provision" was added to comprise "where the Minister considers that there is a deficiency in retained EU law of a kind described or provided for in regulations made by a Minister of the Crown" [clause 7(3)(b)]. This appears to us to be a classic case of giving with one hand while taking with the other, and does not address our concerns in a satisfactory way, in that it introduces yet further uncertainty and a still undefined discretion vested in Ministers rather than Parliament. This has relevance not only for Parliament in Westminster, but is also of fundamental significance to the devolved administrations because of the references to clause 7(2) & (3) in Schedule 2: see Part B below.

66. The House of Lords Select Committee on the Constitution recognised the concern in its 9th report of 2016-17 on *The Great Repeal Bill and delegated powers* in recommending that any new law-making powers given to Ministers to alter the 'repatriated' EU acquis should be carefully defined and subject to 'enhanced scrutiny arrangements'. In our view, the scrutiny provisions set out in Part 1 of Schedule 7 fail to address the Select Committee's well-founded concerns.

67. While we recognise that the Henry VIII power in all three clauses (7-9) is subject to sunset provisions, we do not think that this is sufficient to address the above concerns. As noted in the introduction to this paper, the operation of the amending powers and sunset clauses will need to be carefully reconsidered in the light of whatever is ultimately agreed for any transitional period or under the Withdrawal Agreement.

68. The Bar Council therefore continues to urge Peers carefully to examine the ill-defined scope of Ministers' regulation-making power under Clauses 7-9 (read together with Clauses 2-4) and the limited procedural safeguards for its exercise.

69. In addition, we consider that careful consideration should be given by Parliament to adding to Clauses 7(6), 8(3) and 9(3), which currently contain a limited list of purposes for which the Henry VIII powers ***cannot*** be used:

    a. Our strong preference would be that Clauses 2 and 7-9 should be amended to make it clear that Ministers do ***not*** have a power to amend Acts of Parliament (see our comments on Clause 2 above).
    b. In addition, we think that provision should be made to ensure that any proposed legislation which contains significant policy decisions is subject to full Parliamentary scrutiny, preferably by Act of Parliament. As the House of Lords Select Committee pointed out, it is vital to distinguish between the mechanical act

of converting EU law into domestic law and amending EU law to implement new policies. The Bar Council is of the view that it needs to be clear on the face of the Bill that the latter must be subject to a fully transparent process and the highest levels of Parliamentary scrutiny.

70. We think that the most appropriate way to address the second concern would be for Parliament to specify a number of issues that would fall outside the scope of the Clause 7-9 powers, and suggest that the following should be considered:

    a. Modifications to Acts of Parliament or measures adopted pursuant to section 2(2) of the 1972 Act implementing core policies of the EU, including (as a non-exhaustive list):

        i. Environmental policy
        ii. Competition policy
        iii. Agricultural and fisheries policy
        iv. International trade policy
        v. Regulation of financial services and insurance
        vi. Regulation of telecommunications services
        vii. Regulation of transport policy
        viii. Regulation of energy policy, and
        ix. Regulation of medicinal products and appliances.

    b. Regarding measures that require the creation of new institutions or agencies to perform tasks currently performed by EU institutions or agencies (including bodies such as the EU Commission and the European Medicines Agency), while we consider that it may be appropriate for Ministers to exercise delegated powers to extend or modify the roles of existing UK institutions or agencies to avoid gaps in the administration of EU retained law, we do not consider that it is appropriate for entirely new agencies to be created by Ministerial decree and without the approval of an Act of Parliament.

71. An alternative, or additional, possibility for constraining the otherwise excessively broad amending powers conferred on Ministers would be to revise the trigger in subsection (1) of Clauses 7, 8 and 9 so that Ministers would have power to make ***proportionate*** changes such as they consider ***necessary*** rather than merely appropriate. One potential criterion for considering it necessary to proceed by subordinate legislation would be that it would be impracticable to proceed by primary legislation, for example, because the change needs to be effected in short order, and it is not possible for primary legislation to be enacted in time. The Bar Council again urges Peers to consider carefully the correct balance between efficiency, legal certainty and accountability under these provisions.

B. THE PROVISIONS IN RESPECT OF DEVOLUTION IN SO FAR AS THEY AFFECT WALES

72. As noted above in respect of Clause 2, the Bar Council recognises the need for the Bill to provide a legal safety net when the United Kingdom leaves the European Union. However, the Bill has been described in some quarters as a roll-back of the devolution process. We are aware that the First Minister of the Welsh Government, together with the First Minister of the Scottish Government, has written to the Prime Minister setting out the objections to the legislation in its current form and tabling a number of amendments which would make the legislation acceptable to the two devolved administrations.

73. We are concerned that, in its current form, the Bill fails to respect the power granted to the elected government in Wales and the democratic legislature in Cardiff Bay. The same is also true, to differing degrees, in Scotland and Northern Ireland, but given the scope of responsibility of the Bar Council in England and Wales, we will confine our comments to Wales.

74. In summary, the objections (and amendments proposed by the First Ministers) deal with four principal areas: the UK Government's fixing of powers by the amendment of the Government of Wales Act 2006; the requirement of consent of the Welsh Ministers if making a provision is within devolved competence; the removal of the "Retained EU law" restriction for legislative and executive competence in respect of UK frameworks; and the removal of restrictions and requirement for consent on the powers of the Welsh Ministers to deal with deficiencies in Retained EU law.

Clauses 7-9: the possibility of modification of the Government of Wales Act 2006 by UK Ministers

75. The established methods for modifying the Government of Wales Act 2006 which provide for the devolution settlements for Wales are by new Parliamentary legislation, for which the consent of the National Assembly for Wales is required in accordance with the Sewel Convention, or by orders under those Acts, which again require the consent of the relevant legislature. However, as currently drafted, UK Ministers' powers to make statutory instruments in Clauses 7 to 9 of the Bill could be used to make amendments to the statutes containing the principles of the devolution settlement for Wales, without any requirement for consent from the National Assembly for Wales or from Welsh Ministers.

76. Two amendments have therefore been proposed by the First Ministers which would prevent the power to correct deficiencies in retained EU law and the power to ensure compliance with international obligations being used to amend the Government of Wales Act 2006. Were amendments to that Act to become necessary (perhaps as a matter of urgency) in order to implement international obligations entered into under the withdrawal agreement, a third proposed amendment would continue to allow such amendments to the 2006 Acts to be made pursuant to Clause 9, but with consent from the National Assembly for Wales.

77. In addition, as currently drafted, UK Ministers' powers to make statutory instruments under Clauses 7-9 of the Bill could be used to make provision in policy areas which are the responsibility of the Welsh Ministers. The Welsh Government acknowledges that there may be circumstances justifying amendments to laws in devolved areas being made on a UK-wide basis, but they consider that this should only be possible with the consent of the devolved administrations.

78. Two further proposed amendments have therefore been put forward which would mean that UK Ministers would be required to secure the consent of the Welsh Ministers, before making provision which would be within those Ministers' devolved competence. Devolved Ministers would then be accountable to their legislatures for any decision to consent to the UK Ministers legislating on such a basis.

Clause 10 – Schedule 2 Part 1 (dealing with deficiencies arising from withdrawal)

79. These powers correspond to the powers to be vested in UK Ministers by virtue of Clauses 7, 8 and 9 of the Bill. However, they are significantly more constrained.

80. Paragraph 1(1) provides that "*a devolved authority may by regulations make such provision as [it] considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law arising from the withdrawal of the United Kingdom from the EU*".

81. However, under paragraphs 2–8, the bill also proposes that these so-called Henry VIII powers to be vested in Welsh Ministers should – unlike those to be exercised by UK Ministers – be limited and constrained in an extremely restrictive manner.

82. Thus, there is: (i) no power to make provision outside devolved competence (paragraph 2); (ii) no power to modify retained direct EU legislation (rights etc. under section 2(1) ECA 1972) (paragraph 3); (iii) no power to confer certain functions relating to EU tertiary legislation (provisions made under EU Regulations, Decisions or Directives etc.) (paragraph 4); (iv) a requirement for consent of a Minister of the Crown in certain circumstances (regulations coming into force before exit day or removing reciprocal arrangements under clause 7(2)(c) or (e) (paragraph 5); (v) a requirement for consent where it would otherwise be required (paragraph 6(2)); (vi) a requirement for joint exercise where it would otherwise be required (paragraph 7(2)); (vii) a requirement for consultation where it would otherwise be required (paragraph 8(1); and (viii) very detailed provisions setting out meaning of "devolved competence" for Wales in paragraph 10(1)(2)(a)-(e) for the purposes of paragraph 2.

83. Similarly Schedule 2 Part 2 (complying with international obligations) provides for the power to comply with international obligations (paragraph 13) constrained by paragraphs 13(4) and 14-17 and Schedule 2 Part 3 (implementing the withdrawal agreement) provides for a power to implement withdrawal agreement (paragraph 21) constrained by paragraphs 21(4) and 22-26.

84. The general power to amend directly applicable EU law – regulations and directives etc. which account for most of the EU legislative framework for agriculture, for example – would therefore be retained solely by the UK Government pursuant to Clauses 7-9 of the Bill.

85. Since UK Ministers would retain their own powers – in parallel with those of Welsh Ministers – to amend any legislation, including legislation falling within devolved competence, it appears that UK Ministers would be able to amend legislation within the competence of the National Assembly without being answerable to the Assembly to explain what they are doing and why, or to require a legislative consent motion to be passed by the National Assembly in accordance with the Sewel Convention.

86. This issue is addressed in the Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, at §§ 11 and 68 (in relation to the powers under clause 11/Schedule 3 Part 1 of the Bill to make exceptions to the limit on devolved competence to modify retained EU law):

> "*The devolved authorities will only be able to make corrections within their areas of devolved competence. Devolved competence is defined in paragraphs 9 to 12 of Schedule 2 to the Bill. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved authority*" (emphasis added), and
>
> "*The Bill will replicate the common UK frameworks created by EU law in UK law, and maintain the scope of devolved decision making powers immediately after exit. This will be a transitional arrangement to provide certainty after exit and allow intense discussion and consultation with devolved authorities on where lasting common frameworks are needed*".

87. The Bar Council considers that Parliament should consider carefully whether this guidance is sufficient or whether binding statutory requirements should be included to ensure that the devolved assemblies and administrations are consulted and that consent is required for measures that fall within the scope of the devolved legislation.

Removal of restrictions on and requirement for consent for powers of Welsh Ministers

88. As currently drafted, there are a number of restrictions placed on devolved Ministers' use of the powers in the Bill which are not placed on UK Ministers. There are already significant concerns in Parliament about the very broad scope of the Henry VIII powers proposed for UK Ministers in the Bill, and amendments have already been sought to define these more narrowly.

89. However, the Bar Council considers that Parliament should also consider carefully the extent to which, as a matter of principle, devolved Ministers should have the same powers in respect of matters falling within devolved competence as UK Ministers are being given (subject of course to any further substantive or procedural restrictions that are imposed on UK Ministers):

a. Three proposed amendments have been proposed by the First Ministers, to remove the specific restrictions preventing the powers being used to confer a power to legislate, bringing the powers into line with those being given to UK Ministers.
b. A further five amendments have been proposed to remove the restrictions placed on the Welsh Ministers' ability to amend directly applicable EU law incorporated into UK law, again bringing the powers into line with those being given to UK Ministers.
c. A final three proposed amendments replace requirements imposed on Welsh Ministers to seek UK Ministers' consent in certain circumstances with a requirement to consult UK Ministers before making certain types of provision.

90. Finally, as noted at § 65 above, the new "sweeper" provisions introduced by the amendments to Clause 7 of the Bill raise concerns in respect of the devolved administrations as well as for the Westminster Parliament.

Clause 11 – Retaining EU restrictions in devolution legislation

91. Under Clause 11(2), amendments are incorporated into section 108A Government of Wales Act 2006 in relation to the legislative competence of the National Assembly for Wales. A new section 108A(8) GWA 2006 (legislative competence of the National Assembly for Wales) introduces a prohibition on modifying, or conferring power by subordinate legislation to modify "*retained EU law*". There is then an exception to this in section 108A(9) "*so far as modification would, immediately before exit day, have been within the legislative competence of the Assembly*"; and a further exception in section 108A(10) "*so far as Her Majesty may by Order in Council provide*". A restriction in section 108A(11) is placed on the making of an Order in Council under subsection (10) "*unless a draft is laid before and approved by resolution of each House of Parliament and Assembly*".

92. Clause 11 would thus amend the devolution legislation so as to put in place new constraints on the National Assembly for Wales' ability to legislate effectively on matters where it currently operates within legislative frameworks developed by the EU, even after the UK leaves the EU. Existing EU law would be frozen, and only the UK Parliament (or possibly Ministers acting under Clauses 7-9 of the Bill) would then have the power to unfreeze or modify it.

93. Likewise, Schedule 3, which is enacted under clause 11(4)(5) contains a paragraph 2 which amends section 80 of the Government of Wales Act 2006 adding a new section 80(8) providing that "*the Welsh Ministers have no power to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law*".

94. In practice, concern has been expressed that this would confer a power on the UK government to impose new UK-wide frameworks for UK-wide policies fields such as the environment, agriculture, fisheries, and regional policy, and other general areas of law, including state aid and competition law. This is seen in some quarters as an attempt by the UK central administration to 'take back control' over devolved policies such as the environment, agriculture and fisheries not just from the European Commission in Brussels, but also from the devolved institutions in Cardiff, Edinburgh and Belfast.

95. The Welsh Government considers that these provisions fundamentally cut across the principles of the devolution settlements, and it is strongly opposed to them. Two further proposed amendments are therefore put forward which would remove these new restrictions in clause 11 and Schedule 3.

96. The Bar Council considers that there is force in the concerns expressed by the First Ministers and that Parliament should consider carefully whether an appropriate balance is struck by the current proposals or whether it would not be more appropriate, and more consistent with the devolved legislation, to accept the proposed amendments.

The Bar Council Brexit Working Group
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