

The EU (Withdrawal) Bill and the Rule of Law Expert Working Group

Briefing for Members of Parliament for Report
Stage (Tuesday 16th and Wednesday 17th
January)

What this Briefing is for:

A group of experts, convened by the Bingham Centre for the Rule of Law and the Constitution Unit, and chaired by The Rt Hon Dominic Grieve QC MP, met regularly from October to December 2017 to consider how the EU (Withdrawal) Bill can be improved to make it more compatible with the UK's constitutional commitment to the Rule of Law (for full list of members see back page). **This briefing for parliamentarians seeks to** inform Members of Parliament about the most significant outstanding Rule of Law issues in the Bill that should be raised during Report Stage. These issues have been considered in more detail previously in a number of briefings for Members of Parliament and Discussion Papers, which are accessible on the Bingham Centre's website at: <https://www.biicl.org/euwithdrawalgroupmeetings>.

The issues covered in this Briefing are:

- Legal uncertainty in relation to:
 - Non-retention of the EU Charter of Fundamental Rights
 - Non-retention of general principles of EU law
 - The status of retained EU law
- Access to justice and legal challenges post-exit concerning:
 - General principles of EU law
 - Damages based on the EU Court of Justice (CJEU) decision in *Francovich*
- Delegated powers and scrutiny:
 - Limits on delegated powers in the Bill
 - Parliamentary oversight of regulations, and the role of the House of Lords

Report stage not only offers an important opportunity to discuss and agree further amendments to the Bill, but to seek further ministerial assurances and put on the record members' concerns about these matters before the bill arrives in the Lords.

1. Legal Uncertainty

Legal certainty is a fundamental component of the rule of law, and crucially important in relation to Brexit. As we have explained [elsewhere](#) in more detail, the Bill lacks certainty in a number of areas. For example, the principles in the Charter are fundamental to the interpretation of EU law, and would be a valuable tool in the interpretation of retained EU law by the courts after withdrawal. However, because Clause 5(4) does not retain the Charter, it cannot play this role. In addition, the Bill retains some, but not all, general principles of EU law. This partial retention, combined with the fact that some of the general principles that are retained overlap in substance with the Charter, which is not retained, presents a very unclear picture of the future of the legal landscape post-Brexit.

a. Non-retention of the EU Charter of Fundamental Rights and certain General Principles of EU Law

The problematic nature of the Bill's non-retention of the Charter in **Clause 5(4)** was raised during debate on the Bill on committee day 3. A number of Members of Parliament recognised that, while the general spirit of the Bill is to ensure continuity, the Charter has been singled out for different treatment. Though the general principles of EU law include 'fundamental rights', the EU Court of Justice has not yet considered each right in the Charter individually. Therefore, because **Schedule 1, paragraph 2** only retains general principles that have been explicitly given that status by the EU Court of Justice in a case before exit day, not all EU fundamental rights will be covered. There is likely to be a gap in fundamental rights protection post-exit.¹ In any case, it has been pointed out that fundamental rights which have been assigned the status of general principles are unlikely to provide the same protection as the Charter "because they are vague and likely to cover only the most fundamental rights".²

It is the Government's position that "the Charter does not add anything substantive" to UK law, and that domestic law remedies will address any fundamental rights violations which may occur post-exit.³ There has been much criticism of the notion that domestic law will fill the gaps left by the Charter, and the **House of Lords Select Committee on the Constitution** has expressed a concern that "the removal of the charter will result in the relevant rights being scattered across the domestic legislative landscape" and that "scattering equals diminution".⁴

An amendment at Committee Stage,⁵ which sought to retain the Charter by leaving out subsections (4) and (5) from Clause 5, was debated on day 3 but was not put to a vote. Another amendment,⁶ which was tabled by the Opposition Front Bench also would have retained the Charter, but was defeated on a division. Other amendments sought to 'ring-fence' selected rights, such as workers' rights, in the context of retention in Clauses 2-4.⁷ **Two similar amendments** (4 (Corbyn) and 7 (Cherry)) have been tabled for consideration at the Bill's Report Stage, as well as a number of others concerning general and specific rights protections.⁸

Specifically with regard to equality rights, the Government has agreed to an amendment (which is now reflected in the Bill in **Schedule 7, paragraph 21(3)**) requiring Ministers to make a statement regarding the impact of regulations made under Clauses 7, 8 or 9 on equalities legislation. In addition, the Government published on 5 December a ['Right by Right Analysis' of the Charter](#) aimed at demonstrating the impact of the Bill on fundamental rights in the UK. Though the analysis is welcome, the Government continues to be criticised for leaving significant gap in the legal framework for the protection of fundamental rights in the UK as a result of the exclusion of the Charter from retained EU law.⁹

Concerns to raise at Report Stage

- We remain concerned about the singling out of the Charter of Fundamental Rights for non-retention in view of its value in the interpretation of retained EU law and case law.
- Does ring-fencing certain rights, e.g., environmental principles or employment rights, make up for non-retention of the Charter?

b. The legal status of retained EU law

The legal status of retained EU law is important because it will dictate Parliament's control over amendments to retained EU law in the longer term; it will determine how susceptible that law is to legal challenges (thus impacting access to justice); and it will resolve any conflicts between legislation. The **House of Lords Select Committee on the Constitution** has flagged this as an area of concern on two separate occasions.¹⁰

The Bill does not assign a default legal status to retained EU law, though it does deal with legal status in relation to challenges under the Human Rights Act (**Schedule 8, para 19**) and amendment powers (**Schedule 8, paras 3 and 5**). Apart from these two instances, Clause 3(2) treats all retained EU law as if it has the same legal status, despite the fact that at present different legal status is assigned depending on what type of legislation it is within the EU legislative framework (e.g. primary or secondary).

The position of the Government (set out by Solicitor General for England and Wales, Robert Buckland QC MP on day 2 of committee) is that legal status would be determined on a case-by-case basis.¹¹ However, Dominic Grieve identified a relationship between the legal status of retained EU law, how Parliament conducts scrutiny, and the modification of EU law by primary or secondary legislation – and he encouraged the Government to address each of those elements in new amendments.¹² Robert Buckland agreed.¹³ However, the Solicitor General later told the House of Lords Select Committee on the Constitution that “it would not be right to give a single status to all the legislation” and referred again to the case-by-case approach.¹⁴ He has also stated that Clause 17 of the Bill can be relied upon if it is necessary to bring forth regulations “to clarify our approach with regard to the status of retained direct EU legislation.”¹⁵ Such would occur using the negative procedure. Making determinations on a case-by-case causes a great deal of legal uncertainty, particularly if there are no clear binding standards regarding how to make such a determination. There is also a concern, as **Lord Pannick** has pointed out, about a Minister having such a “fundamental” power.¹⁶

A new clause (NC13, Grieve) has been tabled for consideration of the Bill at Report Stage seeking to enhance legal certainty by assigning a default legal status to retained EU law that could be changed upon resolution by both Houses of Parliament.

Concerns to raise at Report Stage

- The failure of the Bill to assign a legal status to retained EU law beyond the two circumstances addressed in Schedule 8 gives rise to serious problem of legal uncertainty. For example, this absence means it may not be possible to determine which of two conflicting laws should prevail.
- The Bill could, for example, set out either the process by which to determine legal status or legal status itself.

2. Access to justice and legal challenges post-Brexit

Access to justice is a central and necessary part of the rule of law. It gives people the opportunity to exercise their legal rights and make their concerns heard. In particular, the ability to challenge the actions of the state before a court of law is a fundamental component

of the rule of law because it emphasises the notion that everyone, including the government, is subject to the law and it promotes accountability of the state. The Bill has implications for access to justice in a number of ways. First, **Schedule 1, paragraph 1(1)** removes the right to challenge, by reference to EU law, the validity of retained EU law on or after exit day. Second, **Schedule 1, paragraphs 2 and 3** exclude general principles of EU law that have not been recognised as such by the CJEU in a case prior to exit day, as well as legal actions post-exit based on an alleged failure to comply with any general principles of EU law. Finally, **Schedule 1, paragraph 4** eliminates the possibility for individuals to obtain damages against the state for failure to implement EU directives (i.e. *Francovich* damages).¹⁷

The Minister, Dominic Raab, offered assurances during Committee that “individuals will not lose their ability to vindicate their rights in court after exit”.¹⁸ However, a number of concerns were raised during debate on day 1, particularly in relation to these provisions and their impact on the principle of legitimate expectations.¹⁹ Amendments laid by Mary Creagh MP aimed at permitting post-exit *Francovich* claims concerning pre-exit events were defeated, but the Solicitor General acknowledged the importance of legitimate expectations and agreed to consider whether these concerns might be addressed at least on a transitional basis by regulations, but not in the Bill.²⁰

An amendment tabled by Dominic Grieve, would have left out paragraphs 1 to 3 of Schedule 1 so that challenges to retained EU law on the basis of a breach of general principles of EU law could be brought. Robert Buckland undertook to bring forward amendments which would clarify paragraph 3 and avoided a division on amendment 10.²¹

The Bill also presents a problem for judicial interpretation that is likely to give rise to legal uncertainty and could be an obstacle to effective access to justice. During debate on day 1, Sir Oliver Letwin MP noted the conflict between **Clauses 5(2) and 6(3)**.²² Clause 5(2) retains the supremacy of EU law with respect to retained EU law and pre-exit UK law, so that in the event of a conflict between the two, retained EU law should prevail. Clause 6(3) asks the courts to interpret retained EU law in accordance with retained case law, retained general principles and with regard to the limits of EU competence, but **Clause 6(4)(a)** specifically provides that the Supreme Court is not bound by retained EU case law. Letwin posed a scenario where a lower court has a case where the principles of Clause 6(3) apply and interprets the relevant retained EU law accordingly. Then the case goes to the Supreme Court, which has no guidance other than that it is not bound by EU law. Imagining that the Supreme Court reverses the lower court, if another similar case comes to the lower court, it is not clear whether the lower court must again follow Clause 6(3) and apply CJEU case law despite a contrary Supreme Court decision, or whether it is bound to apply the Supreme Court decision and no longer have regard to Clause 6(3).

An amendment was tabled by Chris Leslie MP in Committee which sought to ensure that Ministers would explain how Clause 6 was to operate during transition pending the full implementation of a withdrawal agreement, but it was defeated on division.²³ In addition, Robert Buckland has indicated that “there is continuing engagement with the senior judiciary on this issue” and that he is open to different formulations.²⁴

Since Commons Committee, the Secretary of State for Exiting the European Union, David Davis, has tabled two relevant amendments. Amendment 37 amends Schedule 8 to permit post-exit legal challenges based on general principles of EU law relating to events arising before exit day, as long as the challenge is filed within three months of exit day and on the

condition that they do not relate to the “disapplication or quashing of an Act of Parliament or the common law or anything related to them” (accompanying explanatory note). Amendment 38 amends Schedule 8 as a result of amendment 37.

Concerns to raise at Report Stage

- The Bill’s failure to retain the ability of individuals to access justice for breaches of EU law arising pre-exit presents an unfair obstacle to access to justice which ignores the principle of legitimate expectations.
- The interpretive principles of Clause 6 must be clarified, especially so that courts and tribunals have clear guidance regarding the treatment of retained EU case law by the Supreme Court and the High Court of Justiciary to enhance legal certainty and individuals’ access to justice.

3. Delegated Legislation and Scrutiny Mechanisms

A key concern throughout the Bill’s passage has been the extent of powers that it delegates to ministers. The most central are powers to amend retained EU law, which include (‘Henry VIII’) powers to amend primary legislation. There are two principal concerns: the scope of powers delegated by the Bill, and lack of parliamentary oversight of resulting regulations.

The House of Lords Delegated Powers and Regulatory Reform Committee (HLDPRRC) published an initial report on the Bill in September, commenting that it contains ‘wider Henry VIII powers than we have ever seen’.²⁵ The committee expressed significant concerns about the Bill and is expected to report again before the Bill’s Second Reading in the Lords.

On the **scope of powers delegated**, a number of amendments have been proposed for Report stage, including Government amendments. On day 6 of committee ministers agreed to work with Dominic Grieve on further possible limits to the powers of ministers to deal with ‘deficiencies’ in retained EU law in clause 7 by regulation. Government amendment 14 explicitly limits this power to the list set out in section 7(2), hence appearing to make it an exhaustive rather than illustrative list. However, government amendment 15 allows ministers to extend this list of deficiencies by regulation.

A particular concern, emphasised by the HLDPRRC, is that in several places the bill enables ministers to make changes by regulation where they consider this ‘appropriate’ rather than requiring such changes to be ‘necessary’. This is addressed by a series of Report stage amendments from Joanna Cherry (SNP), applying to clauses 7, 8, 9 and 17.

On **parliamentary oversight of resulting regulations**, amendments from Chair of the Procedure Committee Charles Walker were agreed on day 7 of committee, with Government support. The central amendment agreed to establishment of a ‘sifting committee’ which could recommend that, when the Government uses powers in the bill to lay regulations under the negative procedure, the affirmative procedure should instead apply. This is a welcome change, but some key concerns remain:

- First, the powers of the sifting committee fall well short of those proposed in expert briefing by the Hansard Society, as reflected in Dominic Grieve’s committee stage

Amendment 3.²⁶ Notably the **power to recommend is relatively weak**, as there is no requirement on the government to accept this recommendation.

- Second, as presently drafted this scrutiny mechanism applies only to the House of Commons, rather than to Parliament as a whole, yet **it is the House of Lords where the closest scrutiny of delegated powers currently takes place**. In evidence to the House of Lords Constitution Committee, ministers offered assurances that ‘Certainly we want to ensure that both Houses have an equal scrutiny role’ and ‘we want to make sure that the Lords has a comparable role in relation to SIs under this Bill’.²⁷ It is important that ministers are held to these assurances.

A number of additional concerns with the proposed scrutiny procedure, such as its constraints on the urgency power and a conditional amendment power have been addressed by the Hansard Society in a new expert briefing, which is available [here](#).

Concerns to raise on the floor at Report Stage

- Under what circumstances do ministers envisage using the powers to set out new ‘deficiencies’ as provided in Amendment 15? Does this not undermine the restrictions in Amendment 14?
- Will ministers consider placing further restrictions on the extent of delegation in the Bill (for example substituting ‘appropriate’ with ‘necessary’ in key places), particularly if this is recommended by the HLDPRRC?
- If the new sifting committee recommends that a regulation under the bill be upgraded from negative to affirmative, will the government undertake to accept such recommendations?
- Given that the House of Lords currently does such an important job in scrutinising Statutory Instruments, can ministers assure members that the Lords will play a full role in sifting, as promised by the Leader of the House of Lords to the Constitution Committee on 13 December, and that this will be written into the Bill?

This Briefing Note was prepared by Justine Stefanelli, Maurice Wohl, Senior Research Fellow in European Law and Murray Hunt, Director, Bingham Centre, and Professor Meg Russell, Director, UCL Constitution Unit. Many thanks to Isabella Buono (Bingham Centre) for her assistance in producing this Briefing.

Expert Working Group on the EU (Withdrawal) Bill and the Rule of Law

The Expert Working Group exists to identify the most pressing rule of law problems with the Bill and inform debate on the Bill from that perspective. The Group is coordinated by the [Bingham Centre for the Rule of Law](#), with additional support from the [UCL Constitution Unit](#).

Chair: The Rt Hon Dominic Grieve QC MP (former Conservative Attorney General)

Members:

- [David Anderson QC](#) (Visiting Professor in EU Law at King's College, London; former Independent Reviewer of Terrorism Legislation)
- [Professor Catherine Barnard](#) (Professor of EU Law, University of Cambridge)
- Joel Blackwell ([Hansard Society](#))
- [Andrea Coomber](#) (Director of [JUSTICE](#))
- [Professor Paul Craig](#) (Professor in English Law, University of Oxford)
- [Professor Sionaidh Douglas-Scott](#) (Co-Director, Centre for Law and Society in a Global Context, Queen Mary University of London)
- Ruth Fox (Director, [Hansard Society](#))
- [Professor Graham Gee](#) (Professor of Public Law, Sheffield University)
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- [Swee Leng Harris](#) (Co-ordinator, [APPG on the Rule of Law](#))
- Jo Hickman (Director, [Public Law Project](#))
- [Murray Hunt](#) (Director, [Bingham Centre for the Rule of Law](#); former Legal Adviser to the Joint Committee on Human Rights)
- [Sir Paul Jenkins KCB QC \(Hon\)](#) (former Head of the Government Legal Service)
- [The Rt Hon Lord Judge](#) (former Lord Chief Justice)
- [Sir Stephen Laws KCB QC](#) (former First Parliamentary Counsel)
- [Lord Lisvane KCB DL](#) (former Clerk of the House of Commons)
- [Amy Mount](#) (Head of [Greener UK Unit at Green Alliance](#))
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- [Sir Paul Silk KCB](#) (Former Clerk to the National Assembly for Wales)
- [Corey Stoughton](#) (Advocacy Director, [Liberty](#))
- [Hannah White](#) ([Institute for Government](#))

¹ See, e.g., Merris Amos, 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill', UK Constitutional Law Association (4 October 2017), available at: <https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>; Mark Elliott, 'The EU (Withdrawal) Bill: Initial Thoughts', Public Law for Everyone (14 July 2017), available at: <https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>.

² Katja S. Ziegler and Cristina Saenz Perez, 'EU Bill: 'supermaxing' EU Law and reducing fundamental rights protection', The UK in a Changing Europe (10 October 2017), available at: <http://ukandeu.ac.uk/eu-bill-supermaxing-eu-law-and-reducing-fundamental-rights-protections/>.

³ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Solicitor General Robert Buckland QC MP, Q51.

⁴ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Baroness Drake, Q51.

⁵ Amendment 8, as recorded in the Committee of the whole House amendments, 21 November 2017.

⁶ Amendment 46, as recorded in the Committee of the whole House amendments, 21 November 2017.

⁷ For example, NC58, NC67, as recorded in the Committee of the whole House amendments, 21 November 2017.

⁸ See also, e.g., NC10 (Davies), on substantive rights generally, NC12 (Creagh), NC18 (Lucas) and NC21 (McCarthy), each on environmental principles, NC15 & NC16 (Charalambous) on equality.

⁹ See, e.g., the Equalities and Human Rights Commission, 'EU Withdrawal Bill will not protect UK rights: open letter' (14/01/2018), available at:

<https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter>; open letter by Amnesty International, Liberty et al in The Observer on 14/01/2018, which is covered online by The Guardian (13/01/2018), at:

<https://www.theguardian.com/law/2018/jan/13/brexit-eu-human-rights-act-european-charter>. In addition, the Equalities and Human Rights Commission have published a briefing for Report Stage on related issues, which is available at:

<https://www.equalityhumanrights.com/sites/default/files/briefing-eu-withdrawal-bill-commons-report-stage-16-january-2018.pdf>.

¹⁰ 'European Union (Withdrawal) Bill: interim report', 3rd Report of Session 2017-19, HL Paper 19, para 29, available at:

<https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/19.pdf> and ¹⁰ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Lord Pannick, Q47.

¹¹ European Union (Withdrawal) Bill, Hansard, Vol 631, 15 November 2017, column 416.

¹² European Union (Withdrawal) Bill, Hansard, Vol 631, 15 November 2017, column 419.

¹³ European Union (Withdrawal) Bill, Hansard, Vol 631, 15 November 2017, column 419.

¹⁴ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Solicitor General Robert Buckland QC MP, Q47.

¹⁵ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Solicitor General Robert Buckland QC MP, Q47.

¹⁶ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Lord Pannick, Q47.

¹⁷ Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357, judgment of 19 November 1991.

¹⁸ European Union (Withdrawal) Bill, Hansard, Vol 631, 14 November 2017, cols 289-90.

¹⁹ European Union (Withdrawal) Bill, Hansard, Vol 631, 14 November 2017, cols 272-74 (Gillan MP); 298 (Cherry MP).

²⁰ European Union (Withdrawal) Bill, Hansard, Vol 631, 21 November 2017, col 979 (amendments 139-141).

²¹ European Union (Withdrawal) Bill, Hansard, Vol 631, 21 November 2017, col 972 (amendment 10).

²² European Union (Withdrawal) Bill, Hansard Vol. 631, 14 November 2017, cols 311-314.

²³ House of Commons Library Briefing, 'The European Union (Withdrawal) Bill 2017-19: Summary of Commons Committee Stage', No. 08192 (09/01/2018), p. 8 (NC14).

²⁴ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Solicitor General Robert Buckland QC MP, Q5

²⁵ 'European Union (Withdrawal) Bill', 3rd Report of Session 2017-19, HL Paper 22, para 9, available at: <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/22/22.pdf>

²⁶ 'European Union (Withdrawal) Bill: Briefing for Days 6 and 7', Hansard Society, available at:

https://assets.contentful.com/xkbase0jm9pp/3LeMZztWXuKuglAcAkESWG/343a1b1e0376ca6420b9384cf8faf722/EU_W_B_Briefing_FINAL.pdf

²⁷ House of Lords Select Committee on the Constitution, uncorrected oral evidence: European Union (Withdrawal) Bill (13/12/2017), Leader of the House of Lords Baroness Evans of Bowes Park, Q54.