

Brexit Committee

Thursday, 12th September, 2019

MEETING OF BREXIT COMMITTEE

Members present: Councillor de Faoite (Chairperson);
Alderman Rodgers; and
Councillors D. Baker, Brooks, Canavan,
Flynn, Hanvey, Hutchinson, Long, Magennis,
McAteer, McLaughlin, McKeown and Walsh.

In attendance: Mr. J. Walsh, City Solicitor;
Mr. N. Grimshaw, Strategic Director of City and
Neighbourhood Services;
Ms. K. Walsh, Business, Research and Development
Manager; and
Ms. E. McGoldrick, Democratic Services Officer.

Apologies

Apologies were reported on behalf of Councillors Michael Collins, Graham, McAllister and Newton.

Minutes

The minutes of the meeting of 22nd August were taken as read and signed as correct. It was reported that those minutes had been adopted by the Council at its meeting on 2nd September.

Declarations of Interest

No declarations of interest were reported.

Schedule of Meetings 2019 - Update

The Committee approved the amended schedule of meetings for the remainder of 2019:

- Thursday, 3rd October at 12.00 – 14:00 (Resilience Template Workshop);
- Monday, 14th October at 17.15 (originally Thursday, 10th October - Change due to Brussels visit on 7-10th October);
- Thursday, 24th October at 17.15 (additional);
- Thursday, 7th November at 17.15 (additional);
- Thursday, 21st November at 17.15;
- Thursday, 5th December at 17.15; and
- Tuesday, 17th December at 17.15 (additional).

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The Committee also agreed that the following be invited to attend a future meeting in order to outline their views on the impact of Brexit:

- Victoria Hewson, Head of Regulatory Affairs and Research Associate, Institute of Economic Affairs;
- Dr. Graham Gudgin, Chief Economic Adviser, Policy Exchange, Westminster;
- Representative from Alternative Arrangements/Prosperity UK; and
- Secretary General, Niall Burgess, Department of Foreign Affairs and Trade, Dublin.

Presentations

Department for the Economy - Northern Ireland Trade and Investment Data Under 'No Deal' Paper

The Chairperson welcomed to the meeting Mr. S. Murphy, Head of Analytical Services, and Ms. W. Lecky, Economist, representing the Department for the Economy.

Mr. Murphy presented an overview of the Northern Ireland Trade and Investment Data Under 'No Deal' Paper (copy available [here](#)) which had been published on 10th July, 2019. He reminded the Committee that the paper did not represent the NICS's view on matters of policy around EU Exit, it simply set out the evidence for stakeholders to use.

He advised that Northern Ireland (NI) faced a broad range of direct and indirect impacts in the event of a 'no deal' exit. He advised that the impacts were interconnected, for example, businesses and jobs depended on the totality of NI's internal and external trade. He pointed out that it was difficult to set a limit to the impact of Brexit on Northern Ireland and suggested that, due to the wide range of interconnections, the NICS's assessment remained that a 'no deal' would have a profound and long-lasting impact on NI's economy and society.

He reported that the Department had published various reports on Brexit analysis and highlighted that, following the publication of the aforementioned 'No Deal' paper, it had compiled a range of relevant economic related statistics and had published a summary of the available economic information throughout the 11 council areas (available [here](#)).

He outlined the risks and impacts of a 'no deal' Brexit, which included:

- An increase in unemployment;
- Consequences for both NI's competitiveness in the all-island economy and NI's place in the UK internal market;
- The impact of EU tariffs and non-tariff barriers potential impact might result in many businesses no longer being able to export to the Irish market, leading to a major reduction in NI's exports to Ireland; and
- Analysis of import volumes and commodity prices showed that NI businesses would have increased vulnerability to low cost non-EU

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imports in the GB or NI market, in particular, for the agri-food sector.

He stated that 'no deal' therefore placed pressures on NI's access to the EU and UK markets, leaving businesses with very limited options and the NI economy would face an absolute reduction in exports and external sales, with tradable services being similarly exposed.

He highlighted that pressure on businesses to change behaviour to remain viable or the exploitation of differentials by organised crime groups could also see an increase in smuggling and had the potential to change behaviours and attitudes in communities, which, over time, would significantly impact on the culture of lawfulness in NI.

He advised that there would also be an impact on households, such as risk of food price rises, job losses and a risk of downward pressure on wages and investment. He stated that NI's Foreign Direct Investment (FDI) attractiveness would be negatively impacted and pointed out that, across all of these risks, it was clear that the majority of businesses did not consider themselves to have a mitigation plans in place, and the NI economy had already showed worrying signs which meant it would be poorly positioned to absorb any shocks from a 'no deal' Brexit.

He emphasised that the Department had been engaging with Businesses in relation to Brexit Readiness but they had found it increasingly difficult to get feedback for its Policy research, therefore, it would appreciate if the Committee could endorse engagement between local businesses and the Department for the Economy.

During discussion, Members raised concerns in relation to job losses and wages, the reliability of the data in the report, the effect of tariffs on SMEs, currency exchange rates, food availability and affordability, the agri-food sector, financial and cyber services, FDI, banking, data access, the potential of a recession, illegal exporting and importing of goods, business preparedness and tourism.

During further discussion, the representatives answered a number of questions from the Members in relation to the economic impact and mitigation measures of a 'no deal' Brexit, the consequences of negotiation strategies, hard border exports, baseline growth and research into economic modelling for NI and south unification.

Mr. Murphy explained further the impacts of tariffs on the economy and the effect on businesses and the long term economic modelling scenarios (e.g trade frictions at different cost to the economy). He highlighted that the Civil Service had set up a group in relation to mitigation measures and its findings would be published. He stated that it was difficult to put a timescale on the long term effects of a 'no deal' Brexit across all of the aforementioned impacts. He advised that data access was a concern and his colleagues were researching this.

He expanded on the issues in relation to job growth, and confirmed that InterTradeIreland was due to publish its research on the potential impact of illegal importing and exporting.

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He highlighted that there were schemes available to help businesses prepare for Brexit and InterTradeIreland funding Vouchers were available to help prepare for Brexit and suggested that Members should encourage local business to avail of these.

Ms. Lecky advised that the Executive Office had set up a multi-agency group to deal with vulnerable groups and the Council had a representative on this.

The Chairperson thanked the representatives for attending and they retired from the meeting.

The Committee noted the information which had been provided and agreed that representatives from the Department for the Economy be invited to attend a future meeting to discuss the impact of Brexit on the transfer of data, financial data access, and cyber services.

Queen's University and Committee on the Administration of Justice – Human Rights

The Committee was reminded that, at its meeting on 22nd August, it had agreed to invite representatives from the Committee on the Administration of Justice (CAJ) and Queens' University to discuss the impact of Brexit on Human Rights. It was reported that Prof. C. Harvey, representing Queen's University Belfast, and Mr. D. Holder, representing the CAJ, were in attendance and they were admitted to the meeting and welcomed by the Chairperson.

Mr. Holder provided a presentation on the Rights by citizenship status in the post-Brexit context. He suggested that Irish citizens in Northern Ireland would retain some core EU citizens' rights automatically, most notably rights to basic freedom of movement in the EU, in the same way any EU citizen in an existing third country (i.e. non-EU country) did. However, many subsidiary EU rights, opportunities and benefits would not be automatically retained after Brexit and would require a specific arrangements, such as the European Health Insurance Card and student fees.

He summarised the impact of Brexit on the Good Friday Agreement and highlighted the illustrative table which showed the current two categories of citizenship status in NI, which would become more complex after Brexit.

He stated that the EU Settlement Scheme depended on which deal was agreed upon and explained further the legalities and contradicting elements of the situation of Irish Citizens and the impact of the Settlement Scheme.

He outlined the effect of the EU-UK Joint Report (Phase 1 Agreement) published in December 2017 in relation to the human rights of NI-born Irish citizens and suggested that the Phase II negotiations, that were to examine the 'arrangements required' to ensure that Irish citizens residing in NI were able to continue to be able to 'exercise' and have 'access to' their EU rights, opportunities and benefits, had not been taken forward.

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He summarised the impending changes to the Associated Reciprocal “Rights” of the Common Travel Area and highlighted the implications of current and future border checks that had the potential to discriminate against citizens.

He concluded with an illustration of a table which showed 13 categories of citizenship status’ in NI, post Brexit, and outlined the impact on access to work, public services, benefits, freedom of movement in the EU and EU rights.

Prof. Harvey advised that Brexit Law NI was a collaborative Economic and Social Research Council funded research project between the Law Schools of Queen’s University Belfast and the Ulster University and the Committee on the Administration of Justice to examine the constitutional, conflict transformation, human rights and equality consequences of Brexit. He stated that further information on the research could be found at www.brexitlawni.org. He suggested that the Council could endorse the annual Human Rights Day which was taking place on 10th December.

He advised that, in relation to a ‘no deal’ Brexit, the evidence suggested that changes to Human Rights Law, post Brexit, would have serious consequences for everyone. He suggested that there were a number of international, regional and domestic human rights standards which were not going to disappear, post Brexit, however there were concerns with the incorporation of those standards in to domestic law. He explained his concerns in relation to the Governments agenda for Human Rights and the intention to replace the Human Rights Act with a British Bill of Rights.

He advised that EU law was fundamentally important to the protection of human rights standards in relation to the following issues:

- Non-discrimination;
- Workers’ rights;
- Environmental protection;
- Free movement rights;
- Socio-economic rights
- Rights of children;
- Data protection;
- Gender identity;
- Gender equal;
- Sexual orientation;
- Disability rights
- Victims’ rights; and
- Consumer protection

He stated that the EU Law also had more robust mechanisms in place for enforcing rights in these areas.

He suggested that, if Brexit must proceed, it would be more advantageous to leave the EU with a deal and a protocol to assist with the implementation and protection of the human rights issues identified.

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During questions from Members, the representatives expanded on the ramifications of the EU settlement scheme, freedom of movement, the implementation of the Bill of Rights, legal complications of a 'no deal' Brexit, discrimination, and the potential for the dissemination of human rights.

The Chairperson thanked the representatives for attending and they retired from the meeting and the Committee noted the information which had been provided.

Irish Congress of Trade Unions - Workers' Rights

The Chairperson welcomed to the meeting Mr. O. Reidy, Assistant General Secretary, representing the Irish Congress of Trade Unions (ICTU).

Mr Reidy advised that, in relation to Workers' Rights, the last offer between the UK Government and the EU had been the best of the unsatisfactory options for Brexit. He suggested that a UK wide backstop would be the preferable option for the workers across the island of Ireland. He stated that he did not believe the last deal, which had been discussed by the UK Government, would have created a border in the Irish Sea.

He advised that he was a member of the Alternative Arrangements Advisory Committee, set up by Department for Exiting the European Union, and he was concerned that the Backstop was unavoidable and a 'no deal' Brexit would exacerbate the problem.

He tabled a paper on 'Preparing for a 'No Deal' Brexit' which detailed ICTU's proposals to support jobs and workers in Northern Ireland. It included a forecast of the impact of Brexit on Northern Ireland in relation to jobs, customs and exports, Foreign Direct Investment, Gross Value Added and inflation.

He reported that ICTU believed that the UK governments' preparations for Northern Ireland in the event of a 'no-deal' had been inadequate. The proposals regarding checks on the border with the Republic of Ireland contained some of the most troubling aspects and ICTU's main concerns were the deregulation effect on NI and the legal obligation of customs checks. He suggested that to reduce the number of job losses, short term work schemes needed to be agreed by government, such as temporary reduction in hours.

He explained the requirement for a Brexit adjustment fund for businesses, post Brexit, together with the necessity for redundancy grants, so that workers could retrain. He suggested there also needed to be a forum for Social Dialogue for Trade Unions, employers, agricultural sector, community and voluntary sector and other social partners to debate and discuss key social and economic issues that would affect the society and such a Forum should continue, post Brexit.

During discussion, Mr Reidy explained further the collective bargaining power of Trade Unions in relation to Brexit, and ICTU's proposals for border controls.

The Chairperson thanked Mr. Reidy for attending and he retired from the meeting and the Committee noted the information which had been provided.

Update on Day 1 Preparedness (Verbal Update)

The Strategic Director of City and Neighbourhood Services provided an update on the Civil Contingency Arrangements which included the following:

- The Council would continue to participate in Regional training/exercises;
- The Department for Communities (DfC) funding had been confirmed for Brexit Out of Hours reporting/co-ordination;
- National/NI co-ordination would commence on 14th October;
- The Council's internal business continuity monitoring/reporting would mirror this;
- Confirmation of funding for any Brexit/concurrent civil contingencies emergencies was still to be confirmed; and
- Multi-agency plans were in place to co-ordinate the response to any local impacts.

He highlighted that work was ongoing to scope potential city impacts and identify any further mitigation possible (especially businesses and vulnerable people) and invitations to deputations were being pursued. He advised that an internal list of voluntary/community groups supported by DfC grants was also being compiled.

He reminded the Committee that an EU Settlement scheme information day would also take place in October.

In relation to the Council's Critical Services, the Director reported that an internal officer workshop would take place on the 16th September to identify the business resilience impacts and mitigation and an update would be provided at the next meeting.

He advised that the Food Standards Agency (FSA) had made a successful bid to the Department of Finance for £1M to be allocated through FSA to the 11 district councils and up to £145,538.73 had been allocated to the Council for food safety delivery functions, to cover costs in 2019/20.

The Committee noted the update on Brexit Day 1 preparedness.

Update on Visit to Brussels (Verbal Update)

The Business, Research and Development Manager provided an update on the visit to Brussels from 7th - 10th October, and advised that a delegation from NILGA would also be attending the European Week of Regions and Cities.

Noted.

Shared Prosperity Fund

The Committee considered the following report:

“1.0 Purpose of Report or Summary of main Issues

- 1.1 At its meeting on the 22nd August, the Committee asked that an update on the Shared Prosperity Fund be brought to its**

next meeting. This paper provides an overview of the Fund and its current status.

2.0 **Recommendations**

2.1 The Committee is asked to note the report.

3.0 **Main report**

Key issues

3.1 The 2017 Conservative Manifesto promised a ‘Shared Prosperity Fund’ to replace EU funds after Brexit. The European Structural Investment funds (ERDF, ESF, EMFF, EAFRD and Interreg Va & Peace IV) allocate about £3.5B (£890M for non-agriculture) across NI (2014-20) but this will end with Brexit. In July 2018, the Treasury made [assurances](#) that any funding that organisations secure through EU programmes, from then until the end of 2020, will be guaranteed by the UK Government even in a no deal scenario.

Links to the Treasury statement:

<https://www.gov.uk/government/news/funding-from-eu-programmes-guaranteed-until-the-end-of-2020>

3.2 Current EU funding supports a range of areas including research and innovation, digital technologies, the low-carbon economy, sustainable management of natural resources, and small businesses. The replacement Shared Prosperity Fund will aim to reduce inequalities between communities through sustainable, inclusive growth based on the UK Industrial Strategy. A UK Government [statement](#) on the fund says it will:

- Tackle inequalities between communities by raising productivity, especially in those parts of our country whose economies are furthest behind.
- Use a simplified process so that investments are targeted based on strong evidence about what works at the local level.
- Engage the devolved administrations to ensure the fund works for places across the UK.

3.3 To deliver on the UK Industrial Strategy, local areas in England are developing Local Industrial Strategies that will be agreed in 2020. These are described as prioritising long-term opportunities and challenges to increase productivity and will help local areas to maximise the impact of their bids to the Shared Prosperity Fund.

Links to the statement:

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-07-24/HCWS927>

3.4 The latest position

There have been no major updates on the final approach to the Shared Prosperity Fund. A consultation had been proposed for late 2018 but this has not yet happened. However, comments and suggestions about the funds have been sent to the Treasury (see section 3.5) and the fund has been raised during Westminster debates. For example,

- In [June](#) there were questions asked about any discussions the Cabinet had on the Fund. The reply stated that there had been ‘meetings between officials and over 500 stakeholders at 25 official events across the country.’
- (<https://hansard.parliament.uk/Commons/2019-06-11/debates/445E3EA7-A557-4CE4-AE55-FF893EF489E2/SharedProsperityFund>)
- In [July](#), the Chancellor responded to further questions about the progress of the Fund, stating that more details would be announced during the spending review (recent announcements suggest the spending review will happen in early September). (<https://hansard.parliament.uk/commons/2019-07-02/debates/BCCA28BF-7188-4323-8980-AF973BDFAE64/SharedProsperityFund>)
- From an initial review of the recent Spending Round 2019 (3rd September) it would appear that no further information has been released in relation to this fund. Officers will continue to monitor developments and will update Members as required.

3.5 Feedback to date

Although there has not yet been any formal consultation, a [report](#) released in May 2019 outlined some of the comments already received. Key messages include:

- The general agreement that the fund should be of a similar size to existing EU funding, it should largely be allocated based on need and administered locally.
- That the EU method of calculating need (GDP per worker divided by residents) may not suit the UK (with high numbers of commuters). The EU approach makes London 9 times more productive than the UK’s worst

region; other proposed methods to calculate need close this gap, from 9 times to only 2 times.

- The use of the Barnett formula is discussed. For 2014, the EU had recommended removing Barnett from the calculation of how EU funding was allocated across the UK. It was estimated that this would have resulted in a 20-40% drop in EU funds for the devolved regions and a 9% increase for England. Westminster opposed the change and defeated a legal challenge from some English councils.

(Report available at

<https://researchbriefings.files.parliament.uk/documents/CBP-8527/CBP-8527.pdf>)

3.6 Joseph Rowntree Foundation (JRF)

At the previous Committee meeting, Members referred to the [report](https://www.jrf.org.uk/report/designing-shared-prosperity-fund) on the Shared Prosperity Fund produced by JRF (<https://www.jrf.org.uk/report/designing-shared-prosperity-fund>). This report was released in October 2018 and JRF have recommended that:

- Funding should be based on need, (estimated using employment rate and earnings) to drive up pay and employment in less prosperous areas. This is considered a more effective means of overcoming poverty, compared to the UK Government's focus on productivity.
- The new fund should be outside of the Barnett formula.
- The fund should be a 'single pot', mixing capital and revenue streams - investment in physical and economic developments can be complemented by programmes to provide people with skills and employment support.
- The devolved governments and English regions should be able to control their own schemes.

3.7 The report states that using the Barnett formula would significantly disadvantage Wales and Northern Ireland as it is primarily based on population, and not on an assessment of economic need. However, it should be noted that, under the Barnett formula, NI receives approximately 24% more per head on public spending than England. In terms of need, JRF ranks Belfast in the bottom 40 local authorities across the UK; Belfast is mid-table in this group and rated by JRF as requiring less support than cities such as Birmingham, Liverpool, Manchester, Leicester, Nottingham, Wolverhampton, Middlesbrough, Dundee and others. The UK Government may

determine the measurement of need differently to JRF and include factors such as the cost of living or the level of qualifications (for reference, Belfast is not in the top twenty local authorities for concentration of people with no qualifications or level 1 as their highest qualification, see page 13 of the JRF report). The factors that are included in the measurement of need will have an influence on Belfast's position in any rankings relative to other cities.

3.8 Currently the JRF report does not provide the level of information that would be needed to fully estimate the implications on funding for Belfast if JRF's recommendations are adopted. However, the earlier EU suggestion to remove Barnett from the calculation of EU funding in 2014 (see 3.5) was estimated to potentially cost NI between 20-40%.

3.9 Beyond the recommendations previously listed, the report refers to some broad policy interventions such as: business support, start-up support, improving basic skill levels, connectivity of infrastructure, etc. and many of these are already in place in Belfast.

3.10 **Financial & Resource Implications**

There are no financial or resource implications directly relating to this report. However, the previous Council has noted that the scale of EU funding in Belfast is significant. More detail on the Shared Prosperity fund is needed in order to consider the implications for Belfast.

3.11 **Equality or Good Relations Implications/Rural Needs Assessment**

More detail is required on the Shared Prosperity Fund in order to consider if there are any equality, good relations or rural needs implications."

The Committee noted the information which had been provided and agreed that a report be submitted to a future meeting on the potential for a Local Industrial Strategy and to explore the relevance of the Joseph Rowntree Foundation recommendations in designing a Shared Prosperity Fund.

The Committee also noted that issues relating to the Shared Prosperity Fund could be raised with representatives of the Executive Office at a future meeting.

Status of Retained EU law

The City Solicitor provided a summary of the following report in relation to the House of Commons Library briefing on the Status of “retained EU law” (copy available [here](#)) which had been updated and republished on 30th July, 2019:

“1.0 Purpose of Report or Summary of main Issues

The purpose of this report is to provide Members with a summary of the House of Commons Library briefing on the Status of ‘retained EU law’ which was updated and republished on 30 July 2019.

2.0 Recommendations

That Members note the attached summary and appended briefing paper prepared by Graeme Cowie for the House of Commons Library and published on 30 July 2019.

The briefing is relatively complex and it is recommended that any specific queries in relation to individual EU law might be best raised at Committee and followed up by officers accordingly.

3.0 Main report

3.1 Key Issues

Repeal of the European Communities Act

The *European Union (Withdrawal) Act 2018 (EUWA)* repeals the *European Communities Act 1972 (ECA)* effective on ‘exit day’ (originally 29 March 2019, now 31 October 2019). In so doing, it removes the domestic constitutional basis for EU law having effect in the United Kingdom.

The basis in international law for EU law having effect on the UK will simultaneously have been extinguished by the operation of Article 50 of the *Treaty on European Union*.

In the event of a Withdrawal Agreement being agreed to by the House of Commons, the EU (Withdrawal Agreement) Bill may postpone this effect until the end of the transition period (see section on Transition below).

3.2 Retention of some EU law

However, this does not mean that EU law is of no consequence to the UK after that point. The *EUWA* also provides for the retention of most of that law, as it stands on exit day, by ‘converting’ or ‘transposing’ it into a freestanding body of domestic law.

The main objective of retaining EU law is to ensure that the UK statute book operates as closely as possible immediately following exit day as it did before then. Although domestic law cannot replicate identically the effect of EU law when the UK is no longer a Member State, this legislative scheme seeks to minimise those initial differences and, in doing so, to provide legal certainty.

3.3 How is EU law retained?

This new body of law is called ‘retained EU law’ and will replicate several different sources of EU law as domestic equivalents. It retains this law under three distinct provisions:

- Section 2 preserves EU-derived domestic legislation.

This (typically) concerns the regulations made (usually but not always under s2(2) *ECA*) or any primary legislation passed in order to implement one or more EU directives (though sometimes other sources of EU law)).

- Section 3 preserves direct EU legislation.

This is defined as all EU regulations, decisions or tertiary legislation and certain parts of the EEA agreement.

- Section 4 preserves any directly effective residual rights, powers, liabilities, obligations, restrictions, remedies and procedures in EU law, subject to several specified exceptions.

The key issue going forward will be less what EU law is retained, but how it can subsequently be modified. The fundamental difference between EU law and retained EU law is that the latter will, in its entirety, be modifiable or revocable by Parliament. In many cases, the UK Government (and in other cases, devolved authorities) will also be able to change retained EU law through secondary legislation.

3.4 What EU law is retained?

In practice, this means (broadly) that the UK is retaining:

- EU regulations, decisions and tertiary legislation and elements of the EEA agreement (as they existed on exit day);
- domestic legislation passed to implement EU directives (and other EU law);
- most general principles of EU law (as they existed on exit day);
- most rights and obligations that currently exist in domestic law because of s.2(1) of the *ECA* (as they existed on exit day); and
- relevant case law of the *CJEU* issued before exit day (though the UK Supreme Court and High Court of Justiciary need no longer follow it).

But the UK is specifically not retaining:

- the Charter of Fundamental Rights of the European Union;
- the legislative instruments known as EU directives themselves (as opposed to the legislation implementing them or rights and obligations under them, which will be retained);
- the principle of supremacy of EU law (for prospective legislation); and
- the Francovich principle of state liability (in relation to post exit facts).

(Francovich v Italy (1991) C-6/90 was a decision of the European Court of Justice which established that European Union member states could be liable to pay compensation to individuals who suffered a loss by reason of the member state's failure to transpose an EU directive into national law.)

3.5 Status of retained EU law

EU derived domestic legislation

EUWA also provides a scheme that determines the constitutional status of these elements of EU law. Whereas previously the principle of supremacy of EU law would have given all EU law priority over any domestic law or legislation, this is not the status afforded to retained EU law.

EU law retained under Section 2 of *EUWA* already has a domestic status, as it is either secondary legislation (mainly but not exclusively made under s. 2(2) *ECA*) or in some cases Acts of Parliament.

By way of example, EU-derived domestic legislation will include, among other instruments:

- Acts of Parliament like the Equality Act 2010 or Data Protection Act 2018;
- delegated legislation made by UK ministers under s. 2(2) of the European Communities Act like the Public Contract Regulations 2015 or Working Time Regulations 1998;
- delegated legislation made under Acts that implement EU law, including regulations made by UK ministers under the Value Added Tax Act 1994 or Competition Act 1998;
- both primary and secondary legislation made by devolved institutions, including the Procurement Reform (Scotland) Act 2014 or the Public Contracts (Scotland) Regulations 2012.

As retained EU law is a domestically transposed 'equivalent', rather than EU law itself, Parliament will assume the ultimate constitutional control over its content and its status in relation to domestic law more generally.

Retained direct EU legislation

EU law retained under Sections 3 and 4 of *EUWA*, however, is neither primary nor secondary legislation. It is instead a unique, new category of domestic law with new bespoke rules determining how it may be modified. The *EUWA* sets out these rules in Section 7 and Schedule 8.

The status of retained EU law not falling into existing domestic categories is defined under section 7 of *EUWA*. It subdivides retained direct EU legislation into two categories:

- retained direct 'principal' EU legislation; and
- retained direct 'minor' EU legislation.

These two categories do not directly correspond to 'primary' and 'secondary' legislation, which are the normal distinctions drawn in domestic law. Instead, the *EUWA* sets out the rules that govern how those two categories of law can be modified or repealed and by what type of conventional domestic legal instrument.

Although the principle of supremacy applies to interpretation of retained direct EU legislation in relation to domestic legislation passed before exit day, the real challenge concerns interpretation of legislation passed after exit day, which may modify or repeal it (whether expressly or impliedly).

The key difference between ‘minor’ and ‘principal’ retained direct EU legislation is that, whereas the former can be modified routinely by secondary legislation, the latter must be modified by primary legislation unless and to the extent that the provisions under which secondary legislation is made provides otherwise.

The Act also treats retained direct ‘principal’ EU legislation as though it were ‘primary’ legislation for the purposes of the *Human Rights Act 1998*. This immunises it against being declared invalid for incompatibility with the European Convention on Human Rights.

Direct EU legislation will include (for instance):

- EU regulations in respect of which no or incomplete EU-derived domestic legislation has been passed, like the recent Regulation 2018/644/EU on cross border parcel delivery services;
- EU decisions directed at the UK or Member States generally, such as Commission Decision 2011/753/EU (establishing the rules and methods for calculating targets for re-use and recycling set out in the Waste Framework Directive); and

EU tertiary legislation that augments rules set out in regulations, decisions and directives, such as that made under Article 4 of Regulation 1143/2014/EU on the prevention and management of the introduction and spread of invasive alien species (which updates a list of plant species designated as invasive).

3.6 What this briefing paper does not cover

Statutory instruments already making changes to retained EU law

The *European Union (Withdrawal) Act 2018* includes several time limited delegated powers specifically concerned with making changes to retained EU law in anticipation of exit day.

More than 550 statutory instruments have been laid in connection with EU withdrawal (mostly under section 8 of *EUWA*, the so-called ‘correcting power’). These statutory instruments deal with a broad range of issues and hundreds of instruments of retained EU law. Some make relatively minor drafting changes, such as clarifying the meaning of references to ‘Member States’. However, these instruments are also responsible for more significant changes, such as the transfer of functions previously exercised by EU institutions to domestic bodies, or even the repeal or revocation of certain parts of retained EU law before it ever comes into force.

Primary legislation directly connected to Brexit

The Government has also sought to pass several Brexit-related Acts of Parliament. Those already on the statute book include:

- The Taxation (Cross-border) Trade Act 2018
- The Nuclear Safeguards Act 2018
- The Sanctions and Anti-money Laundering Act 2018
- The Haulage Permits and Trailer Registration Act 2018
- Healthcare (European Economic Area and Switzerland Arrangements) Act 2019

There are also several Bills which have yet to complete their passage through Parliament:

- The Trade Bill
- The Agriculture Bill
- The Fisheries Bill
- The Immigration and Social Security Co-ordination (EU Withdrawal) Bill
- The Financial Service (Implementation of Legislation) Bill

All of these statutes either modify retained EU law, confer delegated powers to do so, or do both. These allow for explicit policy divergence in these areas, which are currently impacted to a significant degree by EU competencies and EU legislation.

3.7 Transition period

If there is to be a ratified Withdrawal Agreement, it is highly likely that it will be based upon the negotiated treaty text the most recent version of which was published on 11 March 2019. Part IV of that treaty text includes provisions on a ‘transition’ or ‘implementation’ period.

The effect of this transition period would be that, although the UK would leave the EU on the coming into force of the Withdrawal Agreement, it would continue to abide by EU law (including any changes that may happen during the transition period) in almost all respects until 31 December 2020.

The *EUWA* could not, in and of itself, give effect to such a transition period in domestic law. Its provisions, for instance, are manifestly inconsistent with allowing continued references to the CJEU during that transition period. The *European Union (Withdrawal Agreement) Bill*, therefore, will need to provide, among other things, a legislative mechanism to recreate most of the effects of the *European Communities Act* for that period.

What if there is 'No deal'?

The transition period is an integral part of, and completely depends upon, the existence of a ratified withdrawal agreement. In the event of 'no deal' there will be no withdrawal agreement and therefore no agreed transition period.

In such a scenario, it would be expected that the *European Union (Withdrawal) Act* would operate as enacted: i.e. that the 'domestication' of EU law would take place on the expiry of Article 50 (currently expected on 31 October 2019).

3.8 Financial & Resource Implications

Not applicable.”

That Committee noted the information which had been provided.

Chairperson