# European Scrutiny Committee

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From: Sir William Cash MP

19 December 2017

The Rt Hon Theresa May MP
Prime Minister
10 Downing Street
London SW1A 2AA

Dear Prime Minister,

**European Union (Withdrawal) Bill: Disapplication of Primary Legislation**

The European Scrutiny Committee have asked me to write to you concerning the provisions of this Bill giving the UK courts a power to disapply pre-exit UK primary legislation. This ability of the courts to do this is currently only found as a consequence of our membership of the European Union and therefore needs careful consideration in the context of the UK's departure from the EU. A contrast can be made between the approach of this Bill and that of the Human Rights Act 1998 which has given greater recognition to Parliamentary sovereignty.

The power to disapply primary legislation is not strictly circumscribed in the Bill. As currently drafted there are significant areas of uncertainty, and significant discretion is given to the courts, without providing them with further guidance. Fears have already been expressed that the courts will be dragged into the political arena by the Bill.

The power to disapply pre-exit primary legislation derives from clause 5 which, at paragraph (2), expressly provides that the principle of supremacy of EU law continues to apply "so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day." The following considerations illustrate the breadth and uncertainty of this provision:

- "The principle of supremacy of EU law" is not defined in the Bill and its extent is sufficiently uncertain to have given rise to significant jurisprudence in other Member States. The UK Supreme Court itself has in recent years been considering this issue in cases such as *HS2* and *Pham* although it has not delivered a binding judgment on the subject.

- The power to disapply primary legislation only applies to any pre-exit enactment, not just to retained EU law. The recent *Benkharbouche* case is a reminder of the reach of the principle of supremacy of EU law; in this case the UK disapplied a

statute which was on its face far removed from EU law, namely the State Immunity Act 1978.

- Nevertheless the breadth of retained EU law introduces further uncertainty because (as explained in the Government's Factsheet on Converting and Preserving Law) where there is conflict between pre-exit domestic law and retained EU law the principle of supremacy will give precedence to the latter. EU retained law is defined very broadly[1] and includes subordinate legislation, and there will be no catalogue of it.

- This power to disapply primary legislation applies "so far as relevant", thus introducing a broad discretion. To illustrate; paragraph 96 of the Government's Explanatory Notes to the Bill suggest that these words may be used by the courts to disregard the principle of supremacy in relation to legislation made in preparation for the UK's exit from the EU, although there is nothing in the Bill itself making this explicit.

The position is exacerbated by clause 6 of the Bill. Notably, paragraph (2) gives the courts a discretion (without further guidance) to take into account post-exit judgments of the Court of Justice. This provision has been criticised on broader grounds but, in this particular context, could lead to the courts following a post-exit CJEU judgment with the consequence that primary legislation is disapplied when this would not otherwise have happened.

We appreciate that in accordance with the Bill it would be possible for Parliament, after exit, to pass primary legislation overturning any decision of a domestic court to disapply pre-exit primary legislation. However this would appear to be a burdensome fall-back position, going further than the Human Rights Act, particularly if the Bill indeed creates unnecessary uncertainty, including by the discretion it leaves to the courts.

My Committee therefore requests that you to clarify the Government's position on the matters raised in this letter and set out what the Government intends to do to address them. We should be grateful to receive your response by Monday 8 January 2018 in order that we might consider it before the report stage of the Bill."

I am copying this letter to David Davis, Secretary of State for Exiting the European Union; Jeremy White, Attorney General; Lord Boswell, Chair of the European Union Committee in the House of Lords; and Hillary Benn, Chair of the Exiting the European Union Committee.

Yours ever,

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**CHAIRMAN**

[1] Clause 2 defines EU-derived domestic legislation as, ultimately, UK legislation relating to the EU or the EEA; clause 4 is, by nature, a sweeping up provision.

10 DOWNING STREET
LONDON SW1A 2AA

THE PRIME MINISTER

9 January 2018

Dear Bill

**EU (WITHDRAWAL) BILL: DISAPPLICATION OF PRIMARY LEGISLATION**

Thank you for your letter of 19 December. I hope that my response provides further clarity on the issues you have raised and the Government's position.

The Government's first priority is to deliver an orderly exit from the EU, and the EU (Withdrawal) Bill is a key element of that. As we have repeatedly made clear, it is in no one's interests for there to be a cliff edge and so the laws and rules that we have now will, so far as possible, continue to apply. This gives the maximum possible certainty to individuals and businesses about their legal rights and obligations as we leave the EU.

For as long as we are a Member State of the EU, the principle of supremacy of EU law plays a significant role in the interpretation of our laws and in determining the relationship between EU laws and domestic laws. The principle, which is currently given effect domestically via the European Communities Act 1972 (ECA), means that domestic law must give way if it is inconsistent with EU law. The House of Lords held in *Factortame (No.2)*[1] that Parliament had intended in the ECA to give effect in domestic law to directly enforceable EU rights. The Divisional Court further explained in *Thoburn*[2] that the ECA was a 'constitutional statute' which cannot be impliedly repealed. Through the ECA, the supremacy of EU law has been given effect in a way that maintained the supremacy of the UK Parliament, and UK law has developed on that basis.

[1] [1991] 1 AC 603
[2] Thoburn v Sunderland City Council [2002] EWHC 195 (Admin)

It would clearly make no sense – and would not be in keeping with the outcome of the referendum – to retain this principle unchanged in our law after we leave the EU. However, simply removing it from our law at that point would have significant and unintended consequences, and would be likely to result in a confused and incoherent statute book and create uncertainty as to the law's meaning and effect.

This is why the Government set out clearly in our March 2017 White Paper (*Legislating for the United Kingdom's withdrawal from the European Union*) that the Bill would end the general supremacy of EU law by providing that new domestic legislation would take precedence over retained EU law. Where a conflict arises between two pre-exit laws, one of which is retained EU law and the other not, and if the retained EU law could have taken precedence over the other before exit, then it will continue to do so. This approach ensures continuity and certainty as to the meaning of existing law.

It is necessary to preserve the principle of supremacy for the limited purposes set out in clause 5 in this way. Remaining silent within the Bill – or taking a different approach – would risk changing the law and creating uncertainty as to its meaning and effect. For example, an alternative approach of seeking to replicate the position set out within the Human Rights Act 1998, which provides for a remedy of a declaration of incompatibility in respect of primary legislation, would be to retrospectively change the way in which the principle of supremacy exists in UK law at the moment.

Clause 5 of the Bill accordingly legislates for the position set out in the White Paper. The reference in clause 5 to the principle of the supremacy of EU law is a reference to the principle in its well-understood constitutional context, as explained by the Courts. Clause 5 deliberately does not try to define the term, or to alter the way it has been interpreted.

Where a conflict arises between pre-exit domestic legislation and retained EU law, clause 5(2) provides that the principle of supremacy of EU law will, where relevant, continue to apply. This does not introduce a new broad discretion for the courts as the concept does not apply more widely after exit day than it did before. The Bill does, however, draw a very clear line between pre-exit enactments and those which are passed after we leave. As explained in paragraph 96 of the explanatory notes to the Bill, the principle of supremacy would not be relevant to provisions made by or under this Bill or to other legislation which is made in preparation for the UK's exit from the EU.

In short, I am confident our approach strikes the right and sensible balance between ending the supremacy of EU law whilst maintaining coherence and continuity in the way the law functions. As set out above, our intention to achieve this outcome has been clear since the publication of the White Paper and is the basis on which individuals and businesses have been preparing for exit. I am pleased that this position was clearly endorsed by the House of Commons during detailed line-by-line scrutiny of the Bill at Committee stage.

Turning to the other specific points raised in your letter, the Bill is clear in terms of how the principle will operate after exit. Clause 5(2) provides that the principle of supremacy "...continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day" (emphasis added). The intention is that the courts apply the principle as they would have done prior to exit. Furthermore, Schedule 1 paragraph 5(1) provides that "References in section 5 and this Schedule to the principle of the supremacy of EU law …are to be read as references to that principle …so far as it would otherwise continue to be, or form a part of, domestic law on or after exit day in accordance with this Act."

I should also clarify that in *Benkharbouche*, a provision of the State Immunity Act 1978 was disapplied because the provisions in that Act were incompatible with EU law, and it was only the offending provisions and not the Act as a whole that was disapplied.

Your letter raises the broad definition of "retained EU law" under the Bill and suggests that this could expand the scope for disapplication. Clause 2 of the Bill provides that existing domestic legislation which implements EU law obligations, or otherwise relates to the EU or the EEA, is preserved. The clause is deliberately widely-drawn in this way. First, it is crucial that, to the extent any deficiencies might arise in existing domestic legislation as a result of our withdrawal from the EU, these can be corrected under powers available elsewhere in the Bill. Second, the inclusion of this broad category of domestic legislation within the scope of retained EU law ensures that it will be interpreted in line with any retained Court of Justice of the European Union (CJEU), case-law and general principles of EU law, so far as relevant. This prevents legal uncertainty about how this legislation should be interpreted. While clause 2 is widely drawn, it does not widen the scope of the supremacy principle. Clause 5 makes clear that the principle continues after exit day only so far as it was relevant before.

Under clause 5(3), there may be some cases where the courts need to decide whether the principle continues to apply to retained EU law that has been modified. This is a necessary consequence of the need to ensure that the statute book remains coherent after exit day. The Bill does not seek to – and could not – set a blanket rule as to when a modification would displace the principle. It will depend on the individual facts of the case.

Finally, your letter raises concerns about the interaction between clauses 5 and 6 of the Bill. Clause 6 provides that a court or tribunal is not bound by post-exit decisions of the CJEU, another EU entity, or the EU itself, but may have regard to them if it considers it appropriate. This clause is intended to provide a clear position for how UK courts should approach post-exit case-law of the CJEU. Again, this is fully in line with the position set out in the March 2017 White Paper. It will be entirely for our domestic courts to decide how much weight, if any, to place upon post-exit CJEU case-law when considering whether pre-exit legislation should be disapplied under clause 5(2). After exit, our domestic courts will therefore have the last say on the law of the land.

I hope this letter reassures you that there will be no uncertainty as to how the principle of supremacy as retained under the Bill will apply.

I am copying this letter to David Davis, Secretary of State for Exiting the European Union; Jeremy Wright, Attorney General; Lord Boswell, Chair of the European Union Committee in the House of Lords; and Hillary Benn, Chair of the Exiting the European Union Committee.

Yours sincerely

Sir William Cash MP