Baroness Taylor of Bolton  
Chairman of the Constitution Committee  
House of Lords  
London  
SW1A 0PW

28 February 2019

Dear Baroness Taylor,

VALIDITY CHALLENGES DISCUSSION PAPER RESPONSE

I would like to thank you for writing on behalf of the Constitution Committee in response to the Department for Exiting the European Union’s discussion paper on validity challenges in November 2018.

Since then, officials and legal experts in the Department have taken time to carefully consider all the points you raised in your letter and I would like to turn first to the very important and critical point raised in your letter regarding the constitutional impact that the use of these powers could have. In particular, I would like to highlight that the risk of any functional strike-down of matters that would usually be dealt with at the primary legislation level is low.

In drawing up these proposals the department has had to carefully balance the interests of litigants, particularly with regard to the remedies available to them in such cases, and the constitutional concerns of creating a new, limited jurisdiction for judges to be able to strike down legislation if they find it to be invalid. Having reflected, we continue to consider that our proposals (with some small amendments) strike the right balance and ensure the continued effective delivery of justice in the UK after leaving the European Union.

The first point to note with regard to our assessment that there is a low risk, is that validity challenges are not commonplace; since 2015, judges from domestic courts have only referred 12 validity cases to the CJEU. Although technically, any domestic court is able to refer such questions, in practice, these cases are not heard by the more junior courts. Importantly, our proposals do not affect the passage of such cases in domestic courts; these cases will continue their usual passage and will, therefore, only be heard only by the courts who normally consider such cases.
This is of key importance as domestic judges do already, to some extent, consider questions of validity. Indeed, for a question of validity to be referred by a UK court to the CJEU in the first instance, the UK court must determine whether it is a claim with no reasonable prospect of success. Our proposal will enable these referring courts to decide the matter for themselves rather than make a referral to the CJEU.

Further to this, we would like to clarify how the EU Withdrawal Act 2018 (EUWA) generates retained EU law and prevents future CJEU validity rulings from affecting the validity of retained EU law as this underpins all of the remainder of the questions you raise in your letter.

Firstly, let me set out again the effect of the EUWA on validity challenges. Paragraph 1 of Schedule 1 of EUWA provides that, after the UK’s departure from the EU, there will be no right in domestic law to challenge retained EU law on the basis that, immediately before exit day, an EU instrument was invalid. As set out in paragraph 1(2)(a) of Schedule 1, any decisions of the CJEU which pre-date exit day about the validity of the instrument will not be affected. In tandem, the EUWA makes clear that the jurisdiction of the Court of Justice of the European Union (CJEU) in the United Kingdom will end on exit day.

As such, the following assertion made in your letter is correct:

‘it appears to be envisaged that declaring a provision of EU law to have been invalid immediately prior to exit will render corresponding provisions of retained EU law invalid on the basis that the EUWA generates retained EU law only in respect of valid underlying provisions of EU law’.

However, this must be understood with one further and crucial clarification; that the EUWA generates retained EU law in respect of underlying valid provisions of EU law on exit day itself. Consequently, if, after exit, the CJEU declares an EU law invalid and disappplies it across the EU27, any retained domestic version of that EU law would remain on the UK statute book. However, this is not simply as a result of the decision being made after the EUWA took the snapshot of EU law for the purpose of generating retained EU law at the domestic level, but because the EUWA states at section 6(3):

Any question as to the validity, meaning or effect of any retained EU law is to be decided, so far as that law is unmodified on or after exit day and so far as they are relevant to it—
(a) in accordance with any retained case law and any retained general principles of EU law, and
(b) having regard (among other things) to the limits, immediately before exit day, of EU competences.

We believe this section of the EUWA means quite clearly that any post-exit CJEU ruling on the validity of EU law cannot have any effect on the validity of retained EU law, given the very clear limit of EU competence after exit day. This provision, as well as section 6(1),
insulates against the effects of post-exit CJEU declarations of invalidity.

We do not consider this effect of the EUWA to be problematic - it is consistent with the overall approach of the EUWA, namely to take a snapshot of EU law as it stands on exit day. Afterwards, the Government has always considered that it should be for Parliament to decide whether and how to diverge.

We can also confirm that it is the Government’s view that, if the underlying EU law is found to be invalid by a domestic court after exit, then no valid retained EU law ever existed, such that there was nothing that could be validly amended. This means any legislation which purports to amend this invalid law will have no legal effect.

Since the circulation of our initial discussion paper on this topic, we have made a few minor modifications to the proposals. The first is that a Minister of the Crown or Ministers in the Devolved Administrations must be notified by a court if a court has an intention to make a declaration of invalidity and that Ministers of the Crown or Ministers from the Devolved Administrations should have the right to become a party to any case relating to validity should they wish.

Kind regards,

LORD CALLANAN
MINISTER OF STATE FOR EXITING THE EUROPEAN UNION