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20 November 2017

Dear Harriet,

European Union (Withdrawal) Bill

Thank you for your letter of 2 November. I would first like to extend my congratulations on your recent re-election as Chair of the Joint Committee on Human Rights and I welcome the constructive input from your Committee on the European Union (Withdrawal) Bill. I am pleased to enclose with this letter our memorandum detailing the Bill's compatibility with the European Convention on Human Rights, which I have attached at Annex A.

Shortly after your Committee was appointed, you wrote to me raising a number of questions on the Bill on which the Committee was seeking further clarification. I hope this letter responds to the principal concerns you raise and explains the UK Government's position. To support your continuing inquiry into the Bill you may also wish to note that we will also shortly be publishing an analysis undertaken by my department on the Charter of Fundamental Rights.

The Government has also taken note of the Committee's report '*The Human Rights Implications of Brexit*'. This letter and the accompanying document deal with issues raised by the Committee and therefore constitute the Government's response to that report.

Defining “fundamental rights and principles”

Q1: What is the definition of “fundamental rights and principles” in clause 5(5) of the Bill? In particular:

- a. Does this term encompass all the provisions of the Charter?**
- b. If not, can you please specify which provisions of the Charter are to be retained within domestic law and which are not?**
- c. Which Charter provisions do you consider to be “rights” and which do you consider to be “principles”? What is the legal effect of this difference?**

Clause 5(5) of the Bill is not the mechanism by which rights and principles codified in the Charter are retained by the Bill. Clause 5(5) provides that “*Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter...*”. The term ‘fundamental rights and principles’ within this subsection therefore refers to the rights and principles which underlie the Charter and which are to be found elsewhere in EU law. This subsection reflects the fact that as set out in the Charter protocol, the Charter reaffirmed rights and principles which were already recognised in EU law, but did not create any new ones.

Consequently, the rights and principles set out in the Charter form part of the EU acquis *irrespective* of the Charter. For example, some provisions of the Charter replicate directly effective provisions in the Treaties, some replicate provisions in Directives that require implementation in domestic law, some are principles which are given effect when read in conjunction with direct EU legislation or domestic legislation and some reflect general principles of EU law as recognised in CJEU case law. Clause 2 of the Bill preserves all domestic legislation which implements EU law, clause 3 of the Bill converts direct EU legislation into domestic law, clause 4 of the Bill saves other directly effective rights etc (for example, those contained in the Treaties) and clause 6 of the Bill provides that retained EU law shall be interpreted in accordance with the general principles of EU law.

Some provisions of the Charter are however not rights but “principles”. Principles are not absolute entitlements for individuals: they only have effect in the context of legislative and executive acts taken by EU institutions and when member states are implementing EU law, and are designed to guide the EU institutions and public authorities when carrying out their responsibilities. They are not capable of having the same effect as rights and – as Article 52(5) of the Charter confirms – their inclusion in the Charter does not give them that effect.

Typically, a principle will be identified as such in the explanations relating to the Charter, or it will start with words such as “the Union shall respect...”. They are no different from, and in some cases replicate, many long-standing provisions in the Treaties that similarly do not grant individual rights. The explanations do not give an exhaustive list of the provisions of the Charter which are principles rather than rights but cite Articles 25 (right of the elderly), 26 (integration of persons with disabilities) and 37 (environmental protection) as examples of principles. They also explain that in some cases an Article of the Charter may contain both elements of a right and of a principle, giving Articles 23 (equality between men and women), 33 (family and professional life) and 34 (social security and social assistance) as examples.

In some cases, even where a Charter article appears to set out a right rather than a principle, that right may not be directly enforceable. For example, it has been held that Article 27 of the Charter (workers' right to information and consultation with an undertaking) does not, on its own, confer enforceable rights on individuals. In *Association de médiation sociale v Union locale des syndicats CGT* (2014) C-176/12, the CJEU said:

“44. It must also be observed that Article 27 of the Charter, entitled ‘Workers’ right to information and consultation within the undertaking’, provides that workers must, at various levels, be guaranteed information and consultation in the cases and under the conditions provided for by European Union law and national laws and practices.

45. It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.

...

48. Accordingly, Article 27 of the Charter cannot, as such, be invoked in a dispute, such as that in the main proceedings, in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.”

Principles codified in the Charter which have not been given more specific expression in direct EU legislation or in domestic legislation but which are found in directives or in the Treaties may nonetheless be relevant for interpretative purposes. Clause 6(3) of the Bill provides that any question as to the meaning of retained EU law will be determined in UK courts in accordance with relevant pre-exit CJEU case law and general principles of EU law.

CJEU case law requires that national laws must be interpreted, so far as possible, in light of relevant directives. As such, principles set out in the Charter which are based on principles in directives will continue to be relevant to the interpretation of retained EU law. Furthermore, the CJEU in its case law has set out the requirement to take a purposive approach to interpretation where the meaning of a measure is unclear - i.e. considering the purpose of the law from looking at other relevant documents such as the treaty legal base and applying the interpretation that renders the provision of EU law compatible with the treaties and general principles of EU law.

In many cases principles which are set out in the Charter replicate or are based on principles set out in the Treaties and so those principles (as set out in the Treaties) will continue to be relevant to the interpretation of retained EU law which relates to the relevant Treaty provision. For example, the principles set out in Article 37 of the Charter (environmental protection) are based on principles set out in Articles 11 and 191 TFEU. These principles will continue to be relevant to the interpretation of retained EU law in the field of environmental protection after exit.

Status

Q2: What will be the status of “fundamental rights and principles” in domestic law?

For example:

- a. Are they part of “retained EU law”? If so, do they retain the status of supremacy by virtue of clause 5(2)? Can they be used to disapply primary and quash secondary legislation made before exit day? OR**
- b. Are they merely retained by virtue of their original source? Or**
- c. Are they *sui generis* - if so, how are they to be interpreted and applied?**

As Article 1(1) of the Charter protocol which applies to the UK made clear, the Charter did not change the effect that the rights and principles which it codified had in UK law. It said:

“The Charter does not extend the ability of the Court of Justice, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.”

The fundamental rights and principles underlying the Charter which are retained in UK law by the Bill will retain the status that they have now, i.e. the status of the source law, for the purposes of clause 5(2) (supremacy). So, where a fundamental right or principle is incorporated into UK law by virtue of clause 3 or clause 4 of the Bill (for example a directly effective Treaty right) it will continue to take precedence over pre-exit domestic law in accordance with the principle of supremacy (see clause 5(1) and (2)). The general principles of EU law are not, however, being incorporated into UK law with entirely the same effect as they have now - see further the answer to Q4 below and the Memorandum.

Justiciability

Q3: Which “fundamental rights and principles” will be justiciable in domestic law post exit, by what means, and what remedies will be available?

The effect of the Bill is that where the right concerned reflects a directly enforceable right in the EU Treaties, or in direct EU legislation, or in domestic legislation which implements EU obligations, it will be possible to rely on that right as it is now; and where a domestic court is currently able to disapply legislation because of incompatibility with that right, it will continue to be able to do so where that legislation was passed or made before exit day.

Where a right is largely or wholly drawn from a general principle of EU law, as set out in CJEU case law, the right will be converted into UK law in the form of the interpretative obligation described in the Memorandum, but the way in which someone may rely on that right will be different. It will not be possible for someone to bring a challenge after exit day on the grounds of a failure to comply with that right, or for a court to disapply legislation which is incompatible with that right.

However, this does not mean that it will not be possible to challenge retained EU law or action taken by public bodies under retained EU law on rights grounds in those circumstances. There are many domestic routes of challenge which may be available depending on the precise circumstances. These include for example a claim for judicial review; a claim under the Human Rights Act 1998; or a claim under the common law. Nor does it mean that there will be no remedy if a right has been breached. For example, executive action and secondary legislation can be struck down by the court as a result of a successful judicial review or under the Human Rights Act 1998; and courts may make a declaration of incompatibility under the Human Rights Act in relation to primary legislation which is found to breach the rights in that Act (as happened in *Benkharbouche v Secretary of State for FCO* [2017] UKSC 62).

The UK has a long tradition of commitment to human rights which will not change after withdrawal from the European Union. The Charter of Fundamental Rights reflects and reaffirms a range of rights and principles which originate and find protection through a range of other sources. The intention of the EU Withdrawal Bill is that those rights will continue to be protected.

Further detail about each of the rights and principles codified in the Charter will be set out in the analysis which my Department will be publishing shortly.

Q4: What is the relationship between “fundamental rights and principles” in clause 5(5) and the non-justiciable “general principles” in Schedule 1 paragraph 3?

Some of the rights codified in the Charter reflect general principles of EU law. For example, in part, Article 23 of the Charter reflects the general principle of equal treatment between men and women. As explained in the Memorandum, the effect of the Bill is that after exit our courts will, where the general principles are applicable, be required to interpret retained EU law in accordance with those principles, so far as it is possible to do so. It will not be possible, however, to challenge legislation or administrative action on the grounds that it is incompatible with the general principles of EU law or for a court to disapply legislation or quash administrative action on that basis.

Q5: Please list the instruments which underpin the provisions of the Charter but which have not been incorporated into domestic law. Further:

- a. Does the Government intend to legislate to give effect to those instruments?**
- b. If so, which instruments and on what timescale?**
- c. What safeguards will be introduced to protect these rights from amendment, revocation or repeal under the Bill?**

We are not entirely clear which instruments are being referred to in this question but have taken it as referring to the international instruments mentioned in the explanations to the Charter which have influenced the development and interpretation of EU fundamental rights and principles by the CJEU. Whilst the international instruments referred to may have served as the inspiration and guidance for the CJEU in developing EU fundamental rights, those instruments are not what gives those rights and principles legal force in EU law - it is EU law which does that. The Bill sets out how the EU law version of those rights and principles will have effect in UK law after exit. The Bill will not affect any obligations which the UK has signed up to under any of the international instruments mentioned in the explanations - for example the European Convention on Human Rights.

The powers in the Bill have been constructed as a temporary solution to an exceptional practical challenge to deliver a functioning statute book in time for the UK's withdrawal from the European Union. The power in clause 7 in particular is intrinsically limited. To be exercised there must be a deficiency in retained EU law and this deficiency must be caused by withdrawal. There are a number of things which might be done as an appropriate correction to resolve any given deficiency but this remains a fundamental limit on the use of the power and ensures that the Government may only use it for the purpose envisaged by Parliament. This restriction ensures that it will be for Parliament, and where appropriate the devolved legislatures, to legislate for policy changes after the UK's withdrawal from the EU in the normal process.

To give an example in the equalities sphere, there are provisions in the Equality Act 2010 which will no longer work or which will be redundant once we have left the EU, for example references to the European Parliament. The power in clause 7 will be able to address these by way of technical amendments, ensuring the robust protections provided by the Equality Act continue to apply.

Courts

Q6: If the UK courts are instructed to “take into account” judgments of the European Court of Human Rights (Section 2 Human Rights Act 1998) and may “have regard” to the CJEU case law pre-exit day (clause 6), how are they to proceed when there are diverging interpretations to the same right?

It is already the case that different obligations on domestic courts exist in relation to CJEU case law and Strasbourg case law.

The effect of clause 6(3) of the Bill is that our courts and tribunals **must** follow any relevant pre-exit judgments of the CJEU when considering the meaning etc. of unmodified retained EU law. The Supreme Court and the High Court of Justiciary alone are not bound by retained EU case law (see clause 6(4)). As such, if after exit a divergence arose between the pre-exit case law of the CJEU and the case law of the European Court of Human Rights, it would be open to the Supreme Court or the High Court of Justiciary to depart from the retained EU case law. Alternatively, Parliament could legislate to deal with the issue if that was considered necessary and appropriate.

In relation to the post exit decisions of the CJEU, the Bill provides that our courts may take such decisions into account if it considers it appropriate to do so, as is the existing position in relation to judgments from other jurisdictions. Again, we do not see that this creates any difficulties as regards the obligation on the courts under section 2 of the Human Rights Act.

The Bill also has no effect on the current position as regards the duty on courts set out in section 2 of the Human Rights Act 1998. The duty on domestic courts is to take into account any relevant judgment, decision or advisory opinion of the European Court of Human Rights when determining a question that has arisen in connection with a Convention right. Domestic courts are not bound by Convention jurisprudence.

The image shows a handwritten signature in black ink. The signature is written in a cursive style and consists of two parts: 'David' on the left and 'Davis' on the right. The 'D' in 'David' is large and loops around the 'a'. The 'D' in 'Davis' is also large and loops around the 'a'. The signature is centered horizontally.

**RT HON DAVID DAVIS MP
SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

EUROPEAN UNION (WITHDRAWAL) BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
MEMORANDUM BY THE DEPARTMENT FOR EXITING THE EUROPEAN UNION

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the European Union (Withdrawal) Bill. The memorandum has been prepared by the Department for Exiting the European Union.
2. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). David Davis, the Secretary of State for Exiting the European Union, has made the following statement: “In my view the provisions of the European Union (Withdrawal) Bill are compatible with the Convention rights.”

The Bill

3. The aim of the European Union (Withdrawal) Bill is to ensure a smooth and orderly transition as the UK leaves the EU. The Bill converts the body of existing EU law into domestic law on the day the UK leaves the EU and preserves the laws Parliament has made in the UK to implement the UK’s EU obligations. The Bill creates temporary, limited powers to make secondary legislation, including to enable corrections to be made to the laws that do not operate appropriately once we have left the EU. This will ensure that, as a general rule, the same rules and laws will apply on the day after the UK leaves the EU as they did before. Parliament (and, where appropriate, the devolved legislatures) will then be able to decide which elements of that law to keep, amend or repeal.
4. A key objective of the Bill is to preserve rights that individuals and businesses currently enjoy as a result of the UK’s membership of the EU. Those rights are found across the body of existing EU law: in the EU Treaties and in direct EU

legislation, (which currently flow into domestic law under section 2(1) of the European Communities Act 1972 (“ECA”)), and in domestic legislation made under section 2(2) of the ECA to implement EU obligations. Generally speaking, the Bill preserves and converts those rights; it does not pick and choose between the different sources of EU rights but takes a comprehensive approach to ensure that, as a general rule, the same rules and laws will apply and the same rights will be available before and after exit. If the Bill were not enacted the automatic effect of the UK’s withdrawal from the EU would be to remove a large number of those rights. However, the act of leaving the EU in itself means that it is inevitable that some elements of the EU’s supranational legal framework will not - and should not - be retained.

5. Against this general background, further detail on specific clauses in the Bill, how they operate to protect rights, and their potential ECHR implications is set out below.

Overview of relevant provisions in the Bill

6. Clause 1 of the Bill repeals the European Communities Act 1972 (“the ECA”).
7. Clause 2 of the Bill comprehensively preserves the laws we have made in the UK to implement our EU obligations (e.g. the laws which implement EU directives). This includes domestic regulations made under section 2(2) (or paragraph 1A of Schedule 2) of the ECA, which would otherwise lapse when the ECA itself is repealed. The clause is however deliberately drawn more widely than this, to also include any domestic legislation which relates to converted EU law, or otherwise to the EU and the EEA.
8. Clause 3 ensures certain direct EU legislation which has effect in the domestic legal system prior to exit day as a result of section 2(1) of the ECA will be converted into domestic legislation at the point of exit (specifically, this includes EU regulations, directly effective EU decisions and EU tertiary legislation).

9. Clause 4 saves other directly effective rights, obligations etc which currently flow through section 2(1) of the ECA, including those that flow through the Treaties. However, it provides that any directly effective rights arising under directives will not be saved, unless they are of a kind which has already been recognised before the Court of Justice of the European Union or a domestic court in a case decided prior to exit (see clause 4(2)(b)). Clause 4(2)(b) also needs to be read with paragraph 26 of Schedule 8 which provides that clause 4(2)(b) does not apply to legal proceedings which have been commenced prior to exit but are decided on or after exit.
10. Clause 5 provides for certain exceptions to the saving of EU derived domestic legislation and incorporation of EU law. It provides that the Charter of Fundamental Rights does not form part of domestic law on or after exit day and that the principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.
11. In addition, Schedule 1 to the Bill sets out that after the UK has left the EU it will not be possible for:
- someone to challenge the validity of retained EU law on the basis that immediately before exit day an EU instrument (e.g. an EU regulation that is incorporated by clause 3 of the Bill) was invalid.
 - someone to bring a challenge on the grounds of a failure to comply with any of the general principles of EU law, or for a court to disapply legislation or quash administrative action which is incompatible with the general principles (see further below).
 - someone to bring a claim for *Francovich* damages.
12. Paragraph 2 of Schedule 1 provides that only general principles of EU law which have been recognised by the CJEU before exit day (such as subsidiarity, protection of legitimate expectations and non-retroactivity) will become part of domestic law after exit.
13. Clause 5 and Schedule 1 should be read with paragraph 27 of Schedule 8 which makes specific saving and transitional provision for legal proceedings which have been commenced but not decided by a court or tribunal prior to exit.

14. Clause 6 sets out how retained EU law (the body of law that has been preserved or converted under the Bill) should be interpreted by the Courts after exit day. In particular, it provides that any question as to the meaning of retained EU law will, so far as that law is unmodified, be determined in UK courts in accordance with relevant pre-exit general principles of EU law and relevant case law. This means that retained EU law will need to be read consistently with the general principles of EU law (including those that constitute fundamental rights) where it is possible to do so. Where a consistent interpretation is not possible then, as mentioned above, retained EU law cannot be challenged or disapplied by the courts on the basis of the general principles. The effect of these provisions is that the general principles are being incorporated into UK law for interpretative purposes only.
15. At clause 7, the Bill contains temporary powers to make secondary legislation to enable Ministers (and (under Part 1 of Schedule 2) the devolved administrations) to deal with deficiencies in retained EU law. This is to ensure that the UK's legal systems continue to function properly outside the EU. For example, where a function is currently carried out by the Commission or another EU institution or agency, the power will enable Ministers to amend the EU-derived legislation to specify the UK body which will be responsible for exercising that function after exit.
16. Clause 8 of the Bill contains temporary powers to allow Ministers to make regulations to enable continued compliance with the UK's international obligations by remedying any unintentional breach that arises as a result of the UK withdrawing from the EU.
17. Clause 9 of the Bill is a time-limited power to enable legislative changes to be made to reflect the content of any withdrawal agreement under Article 50 of the Treaty on European Union. Regulations made using this power are restricted to implementing only those measures that should be in place for exit day.
18. The Government notes that the Bill clearly states that it will not be possible for the powers in clauses 7 to 9 of the Bill to be used to amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it (see

clauses 7(6)(e), 8(3)(d) and 9(3)(d)). The Government also notes that the exercise of the powers in clauses 7 to 9 may engage Convention rights, as might other exit-related legislation. The Government will consider this, in the usual way, as policy and associated legislation is developed, and, where relevant, will set out its analysis in explanatory memoranda accompanying the relevant statutory instruments.

19. The Government also notes that there are rights that are currently enjoyed by individuals living in the UK which are dependent on the UK's membership of the EU and which will make no sense and fall away automatically as a result of EU exit (such as the right to vote and stand in European Parliamentary elections). The powers in clauses 7 to 9 of the Bill may be used to amend the legislation concerned and, as noted above, the exercise of those powers could engage Convention rights. However it is important to recognise that this would be a natural consequence of withdrawal, following the UK's decision to leave the EU; the Bill simply puts that into effect.
20. Schedule 4 to the Bill gives ministers of the Crown and devolved authorities a power to make secondary legislation to enable public authorities to charge fees and other charges, such as levies, where the powers in clauses 7 to 9 have been used to confer a new function on the public authority.
21. Further detail on the provisions outlined above, and on the other clauses of and Schedules to the Bill, is set out in the Explanatory Notes that accompany the Bill.

The Human Rights issues

22. As noted above, the Bill converts EU law into UK law and preserves domestic laws made to implement EU obligations. Broadly speaking, therefore, it does not affect the substantive rights that are enjoyed by individuals across the UK. To do otherwise (that is, to not convert EU law into UK law) would result in the loss of rights, and it is therefore the Government's view that, as the decision to leave the EU is taken forward, the Bill makes a necessary and positive contribution to the protection of rights.
23. The majority of the provisions of the Bill do not engage ECHR rights. However, as explained above, the Bill does not incorporate some elements of EU law which form part of the EU's supranational legal framework. The Government has therefore considered in this Memorandum certain provisions relating to the exceptions to the saving and incorporation of EU law which it considers may engage rights under the ECHR.
24. Specifically, this memorandum deals with the transitional provisions in paragraphs 26 and 27 of Schedule 8, the provisions concerning challenges to the validity of retained EU law in paragraph 1 of Schedule 1 and the ECHR implications of the decision not to incorporate the Charter of Fundamental Rights into domestic law and to incorporate the general principles of EU law for interpretative purposes only. This Memorandum also contains an assessment of the powers to charge fees set out in Schedule 4 to the Bill and the non-textual amendment to the Human Rights Act 1998 at paragraph 19 of Schedule 8 (treatment of retained direct EU legislation for the purposes of the Human Rights Act 1998).
25. It is the Government's view that all the provisions of the Bill are compatible with ECHR rights.

Pre-exit proceedings and causes of action - paragraphs 26 and 27 of Schedule 8

26. Paragraph 27(1) of Schedule 8 provides that the exception relating to the Charter of Fundamental Rights in clause 5 and the other exceptions to the

preservation and conversion in Schedule 1 apply to anything occurring before exit day (as well as anything occurring after exit day). However, this is subject to the remainder of paragraph 27, which sets out important exceptions to the general proposition in paragraph 27(1), and also what may be set out in regulations made under clause 17. So:

- a. Paragraph 27(2) provides that the exceptions do not apply to any court or tribunal decision made before exit day. So where a court makes a decision pre-exit on the basis of, for example, the Charter, that decision will stand;
- b. Paragraph 27(3) provides that the particular exceptions on (i) the Charter (ii) the right to bring an action for failure to comply with a general principle and (iii) *Francovich* damages, do not apply to a claim initiated before exit day in any domestic court or tribunal but not decided before exit day. However, the effect of this provision taken with paragraphs 1 and 2 of Schedule 1 is that any claims which are pending as at exit day that allege the existence of a new general principle or challenge the validity of an EU instrument will be extinguished on exit (this will be subject to any relevant provision made under paragraph 1(2)(b) of Schedule 1 or clause 17(5));
- c. Paragraph 27(4) provides that the exceptions in Schedule 1 do not apply in relation to any conduct which occurred before exit day which gives rise to criminal liability;
- d. Paragraph 27(5) provides that a court may decide (by disapplying legislation or quashing conduct or otherwise declaring something unlawful) a claim brought post-exit on the basis that it is incompatible with any of the general principles only where that is a necessary consequence of a court or tribunal decision made before exit day. Broadly speaking, this preserves the effect of pre-exit case law in which the courts have disapplied a provision of pre-exit legislation on the grounds that it is incompatible with the general principles of EU law.

27. Transitional provision has also been included in paragraph 26 of Schedule 8

to deal with legal proceedings which are commenced prior to exit in which the claimant is arguing that a provision of a directive is directly effective. In such cases clause 4(2)(b) (see paragraph 9 above) will not apply.

28. As an overall approach, the Government believes that, as a consequence of the decision to leave the EU, where a decision has been made not to retain a particular element of EU law it should not, in general, be possible for claimants to continue to rely on that aspect of EU law in litigation after exit, including in circumstances where the facts that gave rise to the claim arose prior to exit. Allowing pre-exit causes of action to continue to be initiated and litigated under previous arrangements long after the UK has left the EU risks a potentially lengthy tail of cases processing through the court system based on outdated elements of law. However, it is important to note that (with two possible minor exceptions, explained at paragraphs 34 to 37 below) the Bill does not interfere with proceedings which have been commenced prior to exit. As such, individuals or companies who have already commenced proceedings prior to exit will be unaffected by the change in the law. Also, it would not prevent a claimant in the future from raising equivalent arguments under the Human Rights Act 1998.

29. Nevertheless, the Government has considered whether Articles 6 (right to a fair trial), Article 1 of Protocol 1 (A1P1) (protection of property) and Article 7 (no punishment without law) are engaged by paragraph 26 or 27.

30. There is a significant body of case law about whether pending claims are possessions for the purposes of Article 1 Protocol 1 ECHR (A1P1). This was considered in detail by the Court of Appeal in Reilly v SoS for Work and Pensions 2016. The Government's view is that it is only where legal proceedings have already been instituted that the courts have accepted that there may be a possession for the purposes of A1P1. As paragraphs 26 and 27 would not interfere with any proceedings that have been commenced prior to exit (subject to two possible exceptions set out below) the Government's view is that A1P1 is not engaged by this provision.

31. The Government has also considered whether some of the claims caught by paragraph 27 fall within the scope of Article 6 ECHR (right to a fair trial). As with the A1P1 case law, it is the Government's view that Article 6 is only engaged where legal proceedings have already been instituted. It is not engaged where a cause of action may have accrued but no proceedings have been brought. As the Court explained in Reilly, it is well-established in the case-law of the European Court of Human Rights that the rights recognised by article 6.1 may be infringed by the enactment of retrospective legislation which affects the result of *pending proceedings*. The Court goes on to cite the key passage from *Zielinski v France* (2001) 31 EHRR 19, in which the Court said at para. 57 (p. 551):

"The Court reaffirms that while in principle the legislature is not precluded in civil matters from adopting new retrospective provisions to regulate rights arising under existing laws, the principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute."

32. As paragraph 27 does not, in general, interfere with existing proceedings, and cannot influence the judicial determination of any dispute, the Government does not consider that Article 6 is engaged.

33. There are two situations where it is theoretically possible that paragraph 27 may result in some interference with existing proceedings. As set out above, the effect of paragraph 27(3) is that proceedings before a UK court or tribunal challenging the validity of direct EU legislation¹ or claiming the existence of a new general principle that have been commenced but not concluded prior to exit day would, in the absence of additional provision made under the Bill, be extinguished.

¹ Domestic courts do not currently have the power to declare EU legislation invalid. However, questions about validity can be raised before the domestic courts in which case the court or tribunal may refer the matter to the CJEU.

34. The Government accepts that because these aspects of paragraph 27 have the potential to interfere with pending claims, Article 1 of Protocol 1 and Article 6 are engaged in relation to claims based on these two narrow grounds of challenge. However, the Government considers that it is unlikely that these provisions will result in any interference with Article 6 or A1P1 rights. Such grounds of challenge are unusual. Furthermore, domestic courts cannot currently decide claims challenging the validity of EU law or alleging the existence of a new general principle. As such, these types of claims can be distinguished from other types of claim (dealt with at paragraph 27(1) of Schedule 8). The provision at paragraphs 1 and 2 of Schedule 1 and 27 of Schedule 8 is effectively a statement of the existing law in relation to these types of claims and does not represent any changes to the domestic law, because the domestic courts would not have the power to decide such cases in any event.

35. However, the Government accepts that it would currently be open to the domestic courts to make a reference to the CJEU, for it to determine the issue in such claims, and that this option will not be available after exit, as a consequence of the UK's withdrawal from the EU. The Government will consider what further transitional provision should be made in relation to these cases in light of the outcome of our negotiations to leave the EU. This approach would allow the Government to make specific and detailed provisions on the basis on which the domestic courts could hear the claim. This would be necessary because domestic courts would need to know, for example, the type of relief available (e.g. a quashing order). This would be necessary because without further detail it would be unclear and confusing for the domestic courts to, for example, find a 'new' EU general principle. On the basis that, should it become necessary to deal with such cases, the Government intends to exercise the power in clause 17 to allow such proceedings to proceed. It is the Government's view that the provisions will not give rise to any interference with an individual's' A1P1 or Article 6 rights.

36. There will also be a number of cases before the CJEU that will involve the UK as a party or which have originated as a preliminary reference from the

domestic courts in the UK. The position in relation to such cases is a matter for negotiations, and both the UK² and the EU have set out their approach to such pending cases in position papers. There has been constructive discussion about how these cases will be dealt with following our withdrawal from the EU.

37. The Government has also considered whether Article 7 is engaged by paragraph 27(1). Article 7 provides as follows:

“No punishment without law

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

38. Paragraph 27(4) expressly provides that the exceptions in Schedule 1 do not apply in relation to any conduct which occurs before exit day which gives rise to any criminal liability. This applies whether or not proceedings have been instigated before exit day. The effect of this is that someone charged with a criminal offence post exit, where the conduct in question took place before exit will (for example and if appropriate) still be able to rely on a defence that the offence in question is incompatible with one of the general principles of EU law. As this provision does not disapply the exception for the Charter of Fundamental Rights, a person would not be able to rely on the Charter as a

² The Government’s position paper on “Ongoing Union judicial and administrative procedures” can be found here; https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627910/FINAL_OFF_SEN_Position_paper_HMG_Ongoing_Union_judicial_and_administrative_proceedings_Position_Papers_FINAL_120717_2_1.pdf

defence in criminal proceedings where the conduct occurred pre-exit but the charges are brought post-exit. We do not think this approach gives rise to any breach of Article 7 because the Charter does not create new rights; the fundamental rights in the Charter on which an individual may be able to rely in such cases are rights which exist in EU law irrespective of the Charter and these rights will continue to be available as a defence. Further procedural detail for these transitional cases would be set out in regulations made under the Bill. Paragraph 27(4) ensures that no-one is deprived of a defence to criminal liability that would have been available to them otherwise and as such, the Government considers that the provisions are compatible with Article 7.

Challenges to the validity of retained EU law - paragraph 1 of Schedule 1

39. Paragraph 1 of Schedule 1 provides that after exit no challenge can be brought in the UK courts to retained EU law on the basis that, immediately before exit day, an EU instrument (for example, an EU regulation or decision) was invalid. Domestic courts do not currently have the power to declare EU legislation invalid. Only the CJEU can annul an EU instrument or declare it to be invalid (although questions about validity can be raised before the domestic courts who may refer the matter to the CJEU). The Government considers that as we leave the EU it would not be appropriate to create for our domestic courts an entirely new jurisdiction in which they are required to, in effect, step into the shoes of the CJEU and consider, for example, questions around whether the relevant EU institution misused its powers or complied with the applicable procedural requirements when making the instrument.³

40. Nevertheless, the Government recognises that in some circumstances individuals and businesses may be individually affected by an EU instrument. For example, a decision of an EU institution or body may be addressed directly to an individual or business. After exit the individual or business would continue to be able to challenge the validity of such decisions before the CJEU under

³ The grounds on which the CJEU may declare an EU instrument or an act of an EU institution invalid are: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

Article 263 of the Treaty on the Functioning of the European Union, subject to meeting the strict tests of standing and complying with the 2 month time-limit. Paragraph 1(1) of Schedule 1 would, however, prevent the individual or business from challenging the validity of the converted version of the decision that forms part of UK law after our exit from the EU by virtue of clause 4.

41. The Government recognises that Article 6 ECHR (right to a fair hearing) may be engaged in some such cases and has therefore included a power in paragraph 1(2)(b) of Schedule 1 to enable Ministers to make regulations allowing individuals or businesses to challenge the validity of retained EU law in the circumstances specified in the regulations. It is expected that specific provision will be needed to set out who any such challenge should be brought against. As such, paragraph 1(3) of Schedule 1 provides that the regulations may (among other things) include provision enabling a challenge which would have been against an EU institution to proceed against a relevant UK public authority instead.

The EU Charter of Fundamental Rights and the general principles of EU law

42. The Government's view, which is reflected in Protocol 30 on the Charter, is that the Charter simply codifies rights and principles set out elsewhere in EU law. Therefore, it is not necessary for the Bill to convert the EU Charter of Fundamental Rights into UK law. The Bill makes clear at clause 5(5) that the removal of the Charter from UK law does not affect the retention in UK law, in accordance with the Bill, of fundamental rights or principles that exist irrespective of the Charter⁴. It is important to note that not all of the Charter articles codify directly effective rights that can be relied upon by individuals before national courts. Some articles set out only principles, intended to guide the EU institutions when they legislate, and others codify a mixture of rights and principles. In addition, it is important to note that the Bill makes no changes to the Human Rights Act 1998, which gives further effect to the

⁴ For example the right to equal pay between men and women as codified in Article 23 of the Charter is a restatement of Article 157 TFEU. The rights under Article 157 are being brought into UK law by clause 4 of the Bill which saves directly effective rights contained in the EU treaties.

ECHR, or to other domestic legislation which protects rights such as the Equality Act 2010. People will still be able to bring a claim under the Human Rights Act 1998 as they can now.

43. As noted above, the Charter of Fundamental Rights does not create any new rights. It simply catalogues the rights that already existed in EU law.

Consequently, the Government's position is that all of the rights contained in the Charter can be found elsewhere in the EU acquis - in the Treaties, in EU legislation or as general principles of EU law (as recognised through the case law of the CJEU) - or in domestic law.

44. For example, the right to protection of personal data (Article 8 of the Charter) is based on provisions in the EU Treaties, the Data Protection Directive (due to be replaced by an EU Regulation) and the respect for private life in Article 8 of the European Convention on Human Rights (ECHR), which is given effect domestically by the Human Rights Act 1998. It is also a general principle of EU law. Similarly, the specific right to integrity of the person (Article 3 of the Charter) is not found in the ECHR but is nonetheless protected by Article 8 ECHR (respect for private and family life) and in domestic legislation through the Human Fertilisation and Embryology Act 1990 (which prohibits reproductive cloning and regulates ex-vitro human embryo creation and research) and section 32 of the Human Tissue Act 2004 (which prohibits commercial dealings in human material for transplantation). All of these things will continue to be available in UK law after exit.

45. Under the Bill, fundamental rights that have been codified in the Charter and which are general principles of EU law will continue to be available and followed for interpretative purposes (see clause 6(3)). However, the Government considers it a natural consequence of the decision to leave the EU - and the UK ceasing to be subject to the requirements that apply to member states - that the wider role of the general principles⁵ should not continue and that UK legal principles and human rights protections should be

⁵ As well as being relevant to the interpretation of EU law, the general principles can be used to challenge the validity of EU legislation and the lawfulness of actions of EU institutions and of Member States when acting within the scope of EU law. They do not apply to areas of domestic law which fall outside the scope of EU law.

relied on instead. After exit therefore it will not be possible for individuals to challenge legislation or administrative action taken under retained EU law on the grounds that it is incompatible with the general principles or for a court to disapply a provision of legislation or quash administrative action on those grounds.

46. The Government considers that the impact of this should be limited. Firstly, many of the general principles which constitute fundamental rights under the Charter are equivalent to or based on rights in the ECHR which have been given further effect in UK law via the Human Rights Act 1998. In those circumstances, a challenge against administrative action or against legislation could instead be brought under the Human Rights Act 1998 and the remedies available to the court would be those provided for in that Act. Whilst this does mean that where a challenge is brought to *primary* legislation a court will be able to make a declaration of incompatibility under the Act but will not be able to strike the legislation down, the Government believes that this is the correct approach to take following the UK's decision to leave the EU and put power back in the hands of our sovereign Parliament. Secondly, as set out above, even those rights that do not correspond to an ECHR right will be protected domestically through a combination of other sources, including domestic legislation, the common law and retained EU law.

Schedule 4 - powers to impose fees and charges

47. The Government has considered whether the powers to impose fees and charges contained in Schedule 4 to the Bill engage A1P1. The power allows for fees or other charges to be imposed in connection with the exercise of a function which has been conferred on a public authority under the powers in clauses 7 to 9. The Government notes that section 56 of the Finance Act 1973 currently provides a specific power for fees or other charges with tax-like qualities in connection with EU obligations and section 2(2) of the European Communities Act allows the creation of fees and charges with no tax-like qualities in connection with EU obligations. Paragraph 1 of Schedule 4 is intended to provide a similar power for fees or other charges connected to functions public bodies will be taking on after exit, and is therefore to a large extent a continuation of existing fee charging powers.

48. The Government accepts that the exercise of this power to establish fees and other charges such as levies could engage A1P1. This Article provides:

“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

49. “Contributions” within the meaning of the second paragraph of A1P1 have been held to include, for example, compulsory contributions to state benefit schemes and employers’ associations. The payment of a fee or other charge provided under the power in Schedule 4 may constitute a tax or a “contribution” for these purposes, and the money used to pay the fee or charge would clearly be a “possession”.

50. It is the Government’s view therefore that, as with other provisions allowing for tax-like fees and charges, the power in Schedule 4 prima facie engages A1P1, but in and of itself does not constitute any interference with A1P1 rights. The question of whether any interference with A1P1 rights is proportionate and justifiable will depend on the manner in which the power is exercised, particularly the nature of the function that the fee or charge relates to, the level of the fee or charge imposed and population upon which any fee or charge is imposed. The Government notes that States are, as is appropriate and necessary for the functioning of the State, accorded a very wide margin of appreciation in relation to exercising their sovereign rights to raise taxes, and tax-like fees and charges on their population. The Government will consider the justification for any interference with A1P1 rights as and when the power is exercised and in light of the appropriate context.

The Human Rights Act 1998

51. The Bill also makes provision about the status of converted EU legislation for the purposes of the Human Rights Act. It provides, at paragraph 19 of schedule 8, that this new body of legislation shall be treated as primary legislation for the purposes of the Act. The Government's view is that the alternative approach of treating all converted EU law as secondary legislation could create considerable difficulties. This is because, when a court strikes down a statutory instrument, or a provision of a statutory instrument under the 1998 Act, there is an opportunity to use the same power again to make a new piece of secondary legislation that is compatible with the Human Rights Act. Swift action here prevents a hole from appearing in the statute book.
52. By contrast, were a court to strike down all or part of an EU Regulation which had been converted by clause 3, the original enabling power which was relied on by the EU institution(s) which made the regulation would not be available domestically to fill the gap that had been created. We would therefore have a hole in our statute book, and a new Act of Parliament would be required to correct it. This would be cumbersome and would cause uncertainty – the exact opposite of what we want to do with this Bill.
53. The Government acknowledges the power under section 10 of the Human Rights Act to use secondary legislation to make amendments to incompatible legislation to remove incompatibility, if there are compelling reasons to do. However, this power is not intended to be the default means by which compatible legislation is remedied. In addition, through remedying an incompatibility, further policy changes may be required such that it may be necessary to make further changes to the legislation which go beyond the incidental, supplementary, consequential or transitional provision possible as part of a remedial order, and, as set out above, such changes could only be enacted by primary legislation in the absence of any other enabling power. The approach taken in the Bill means that if an incompatibility is identified, a declaration of incompatibility can be made and Parliament can take action to deal with it without a hole being created in the statute book.

54. “Retained direct EU legislation” is defined in clause 14 as “any direct EU legislation which forms part of domestic law by virtue of section 3 (as modified by or under this Act or by other domestic law from time to time, and including any instruments made under it on or after exit day)”. The result is that anything which is retained direct EU legislation on exit (as defined in clause 3(2)), anything which modifies it thereafter and any instrument made under it thereafter are all to be treated as primary legislation. The Government recognises that this approach means that some subordinate legislation will be treated as primary legislation for the purposes of challenges under the Human Rights Act 1998, with the result that it will be open to the courts, if that legislation is challenged, to make a declaration of incompatibility under section 4 of the Human Rights Act 1998.

55. The Government notes that broadly speaking this is consistent with the current approach in section 21 of the Human Rights Act 1998, which provides that an order or other instrument which amends primary legislation is to be treated as primary legislation for Human Rights Act 1998 purposes. This approach taken in the Bill is intended to reduce complexity, ensuring that the status of the whole body of ‘retained direct EU legislation’ for the purposes of the Human Rights Act is clear to the courts and to individuals. The Government’s view is that to do otherwise and to treat some elements of retained direct EU legislation differently from others for the purposes of the 1998 Act would create complexity for the courts and for the public. The Government also considers that over time this body of law will be replaced by new primary legislation (and secondary legislation made under those new Acts), which will be subject to the provisions of the Human Rights Act 1998 in the usual way.

DEPARTMENT FOR EXITING THE EUROPEAN UNION

20 NOVEMBER 2017