



# HOUSE OF LORDS

Select Committee on the Constitution

House of Lords  
London  
SW1A 0PW

Tel: 020 7219 1228  
constitution@parliament.uk  
www.parliament.uk/lords

Lord Callanan  
Minister of State for Exiting the European Union  
9 Downing Street  
SW1A 2AG

23 November 2018

Dear Lord Callanan,

## **Validity Challenges and the EU (Withdrawal) Act**

I write on behalf of the Constitution Committee in relation to the Department for Exiting the European Union's discussion paper on validity challenges and the European Union (Withdrawal) Act 2018 (EUWA).

We note that the power that would be conferred on UK courts under these proposals is a significant one, in that the effect of the powers' exercise would, in practice, be the striking down of retained EU law. The importance of that point is heightened given that some aspects of retained EU law will deal with matters that are so significant that they would most likely have been dealt with via primary legislation had they been legislated upon in a purely domestic setting.

We recognise that this does not mean that the proposed powers' exercise would technically entail the striking down of primary legislation, but it is nevertheless the case that their exercise might, in some circumstances, amount to the functional strike-down of legislative provisions that would, but for the unusual situation that will apply post-exit, have been dealt with at the level of primary legislation. In our view, this requires particular care to be taken in relation to questions concerning the framing and the scope of the powers. It also requires clarity in terms of the conceptual basis upon which the proposed powers are intended to operate. For reasons that we set out below, such conceptual questions bear directly upon important practical issues.

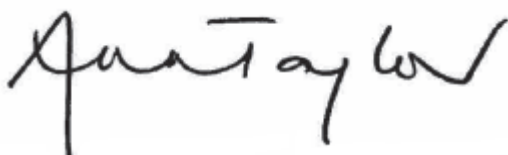
Although such reasoning is not explicit in the discussion paper, it appears to be envisaged that declaring a provision of EU law to have been invalid immediately prior to exit will render corresponding provisions of retained EU law invalid on the basis that the EUWA generates retained EU law only in respect of *valid* underlying provisions of EU law. If this is indeed the basis upon which a declaration of invalidity issued by a UK court in respect of EU law is expected to result in the invalidity of corresponding provisions of retained EU law, then an important question arises: Why should a post-exit determination of invalidity made by the CJEU not also have implications for the validity of relevant provisions of retained EU law?

It is difficult to see, in analytical terms, how valid retained EU law could in the first place have been generated if it transpires (as a result of a post-exit CJEU ruling) that no valid underpinning EU law exists. Is it intended that such analytical difficulties will be rendered practically irrelevant by precluding UK judges from taking account of post-exit CJEU determinations of invalidity, such that UK courts will be required to treat relevant provisions of EU law *as if they were valid*, even though as a matter of legal analysis the EUWA is (implicitly taken by the discussion paper to be) incapable of generating retained EU law on the strength of invalid EU law? More generally, we are concerned about the potential implications that may arise if the CJEU declares EU law to be invalid when such EU law serves as the basis for retained EU law. As a matter of policy, why should a UK court not be able to take into account such a ruling if it considers it appropriate to do so? If it is not for the UK courts to take account of such rulings, does the Government agree that it has a duty to consider the need to legislate to amend or replace retained EU law in those circumstances?

We are also concerned that it is not clear what impact a declaration of invalidity would have on a piece of retained EU law that had been subsequently modified by the powers in the EUWA. If retained EU law is heavily amended, such that it differs significantly from the EU law from which it was originally derived, a UK court faced with a domestic invalidity challenge would have to decide whether the invalidity of the underlying EU law necessarily rendered the (amended) retained EU law invalid as well. Is it the Government's view that, if the underlying EU law is invalid, then no valid retained law ever existed, such that there was nothing that could be validly amended? If this is not the case, and amended retained EU law may continue in force after the originating EU law is declared invalid, how and in what circumstances does the Government expect that this would be determined? And how would this be achieved in the light of the conceptual assumption that appears to underlie the discussion paper, namely that retained EU law can be generated only on the strength of valid pre-exit EU law?

The discussion paper highlights some of the many legal complexities that will result from the UK's departure from the EU in respect of the post-exit relationship between domestic and EU law. Given the highly technical issues raised by the proposal, it is difficult to form a firm view on the appropriateness of what is envisaged in the absence of a draft of the regulations that will implement it. In constitutional terms, we regard the key issue to be one of clarity and legal certainty. It will therefore be essential for the regulations to be as clear as it is possible to be about the circumstances in which validity challenges can be brought and how such challenges will bear upon retained EU law that differs, thanks to post-exit amendment, from the invalid EU law from which it was originally derived. We recommend that draft regulations are published at the earliest opportunity in order to allow for further consideration and consultation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Baroness Taylor of Bolton', written in a cursive style.

Baroness Taylor of Bolton  
Chairman of the Constitution Committee