**ALBA SUMMER CONFERENCE 2017**

**QUESTIONS LEFT UNANSWERED BY**

**THE GREAT REPEAL BILL**

**KELYN BACON QC AND EMMA MOCKFORD**

**BRICK COURT CHAMBERS**

**INTRODUCTION**

1. The topic addressed by this paper is “unanswered questions following the Great Repeal Bill”. “Questions answered by the Great Repeal Bill” might have been a more manageable subject matter. For whilst the Great Repeal Bill (“**GRB**”)[[1]](#footnote-1) does succeed in setting out the basic building blocks for the transmogrification of the EU law acquis into domestic law, it does not go further. The foundations for this particular project may thus be laid in statute, but the upper storeys will have to be designed and constructed by practitioners and judges over the coming years.
2. Given the scale of the topic, this paper does not aim to be exhaustive. Instead, we have focussed on three of the most significant “unknowns” for public lawyers at this point in time:
	1. the hierarchy of legal norms that will exist post-Brexit, and how that will affect the ability of individuals to bring public law challenges on EU-law based grounds;
	2. the role that post-Brexit EU law will play in our domestic legal order; and
	3. the role of the EU Charter of Fundamental Rights and general principles of EU law following Brexit.
3. The significance of these issues for public lawyers is, in general terms, twofold. First, there is the basic need for us, as practitioners and advisers, to be able to work out what the law is at any given point in time. What we require in order to do that is, in jurisprudential terms, a predictable hierarchy of legal norms to enable the resolution of conflicts between inconsistent declarations of law (be those legislative or judicial). The conversion of what has been, until now, supreme and directly effective EU law into domestic law represents a fundamental challenge for our traditional hierarchy of laws. Practitioners will need to work through the three unknowns set out above, which all raise issues going to the sources and hierarchy of law post Brexit, in order to be able to advise their clients as to what the law in any given area actually is or may be.
4. Secondly, as public practitioners, we have become used to EU law providing a broad head of challenge in actions for judicial review. Litigants in the UK courts have since 1972 been able to challenge national measures on the basis that they are contrary to a rule of EU law. Before the EU courts, it has also been possible to challenge the validity of Union acts. The overarching task now for public practitioners is to work out the extent to which comparable administrative law actions will continue to be viable once the UK has left the EU.

**THE STORY SO FAR: THE FOUNDATIONS LAID BY THE BILL**

*The purpose of the Bill and its intended role in achieving Brexit*

1. The intention to introduce a “Great Repeal Bill” was first canvassed by the Government in October 2016.[[2]](#footnote-2) In March 2017, the Department for Exiting the European Union (“**DExEU**”) published a White Paper setting out detailed proposals for the content of the GRB.[[3]](#footnote-3) A draft of the bill was subsequently published on 13 July 2017, a number of weeks into the current parliamentary session. The date for its second reading in the House of Commons has not yet been announced.[[4]](#footnote-4) It is already clear, however, that the GRB is set to become a political flash point, with Labour’s public position being that it will not support the bill in its current form.[[5]](#footnote-5)
2. The stated purpose of the GRB, as set out in the White Paper, is to preserve the status quo in the immediate aftermath of Brexit by converting the body of EU law, as it applies immediately prior to Brexit, into domestic law. In the words of the David Davis, Secretary of State for Exiting the European Union:

“We will provide for a smooth and orderly exit. The Great Repeal Bill will convert EU law as it applies in the UK into domestic law on the day we leave – so that wherever practical and sensible, the same laws and rules will apply immediately before and immediately after our departure.”[[6]](#footnote-6)

1. Importantly, the GRB is only one element of the intended legislative Brexit package. The Government’s overall approach is threefold:
	1. first, the GRB will convert existing EU law into UK law, with a view to ensuring that the “same rules and laws will apply after we leave the EU as they did before”.[[7]](#footnote-7) The Government has explicitly said that it is not the aim of the GRB to make major changes to policy or establish new legal frameworks in the UK;[[8]](#footnote-8)
	2. secondly, there will be a raft of secondary legislation which will make those changes necessary to ensure the continued “functionality” of EU law in the UK, following withdrawal. The White Paper provides various examples of the sorts of corrections that will be needed – including removing references from the statute book to “EU law”, the UK’s “EU obligations” and the various EU institutions.[[9]](#footnote-9) The Government estimates that between 800 and 1,000 statutory instruments will be required for this purpose.[[10]](#footnote-10) Further detail in relation to the terms in which the enabling power for this secondary legislation is currently couched in the GRB is provided below; and
	3. thirdly, separate primary legislation will be introduced by the Government for the purpose of achieving substantive policy change and/or replicating, at a UK level, EU designed common policy frameworks (such as the Common Agricultural Policy). Thus, the White Paper discusses the need for primary legislation to be introduced in the fields of immigration, customs, agriculture and fisheries, and the environment.[[11]](#footnote-11)
2. The intention appears to be that all of the foregoing legislation will have been made ahead of, and will then be commenced on, Brexit day.

*The mechanics of conversion of the acquis, as contemplated in the GRB*

1. In terms of the mechanics of conversion of the EU acquis into domestic law, the starting point is that the GRB will repeal the European Communities Act 1972 (the “**ECA**”) in its entirety. This is achieved by section 1 GRB. The consequence of repealing the ECA is that the “conduit pipe” by which EU law becomes part of the UK’s domestic legal order will be closed.
2. In the absence of contrary statutory provision in the GRB, the repeal of the ECA will have several particular consequences:
	1. EU law which is currently directly applicable or effective under section 2(1) ECA will cease to be part of our domestic law. This encompasses directly effective Treaty provisions, all regulations, provisions of directives with direct effect and decisions of the EU institutions which are currently binding on addressees of those decisions;
	2. EU law which has, prior to Brexit day, been domestically implemented under section 2(2) ECA (i.e. transposed directives) will fall away; and
	3. the existing statutory obligation on domestic courts (under section 3(1) ECA) to determine questions of EU law in accordance with the jurisprudence of the Court of Justice of the European Union (“**CJEU**”) will disappear.
3. That starting position is, however, modified by the draft GRB insofar as EU law which pre-dates Brexit is concerned. Specifically, the GRB provides that certain aspects of existing EU law will be retained and/or incorporated into our domestic law. The way in which the GRB seeks to achieve this is by numerous deeming provisions. There is no attempt in the GRB to set out an exhaustive list of those elements of EU law which are going to be converted. Rather the bill takes a conceptual approach, employing broad definitions to capture different types of EU law to which different treatment should be accorded.
4. In its current form, the GRB makes provision for preserving the following categories of EU law post-Brexit:
	1. **Domestic legislation that implements EU law.** EU law which has already been implemented by way of domestic legislation prior to the commencement of the GRB will be saved and continue to have effect in the same way that it currently does. This is achieved by section 2 GRB which creates a concept of “EU-derived domestic legislation” that encompasses section 2(2) ECA secondary legislation as well as domestic legislation which, while not made under section 2(2) ECA, was either specifically passed or made for the purpose of implementing EU obligations (sections 2(2)(b)-(d) GRB).[[12]](#footnote-12) Section 2(1) GRB provides that, to the extent that such EU-derived domestic legislation “has effect in domestic law immediately before exit day”, it shall “continue to have effect in domestic law on or after exit day” (section 2(1) GRB).
	2. **EU regulations, decisions and tertiary legislation.** Section 3 GRB provides that certain categories of EU legislation will “form part of domestic law on and after exit day” (section 3(1) GRB). Specifically, this is the case for “direct EU legislation” which is defined in section 3(2)(a) GRB as encompassing any EU regulation, EU decision and EU tertiary legislation “which has effect in EU law immediately before exit day” (subject to certain exceptions[[13]](#footnote-13)). Sections 3(2)(b) and (c) GRB ensure the same approach is taken in relation to such EU legislation as it applies to the EEA. A number of additional points are worth noting about this new concept of “direct EU legislation”:
		1. The Explanatory Notes to the GRB make clear that where EU legislation is converted into domestic law under section 3, it is the full English language text of any EU instrument which will form part of domestic legislation (including the recitals).[[14]](#footnote-14)
		2. To the extent that direct EU legislation is converted into domestic law under section 3 of the GRB, such legislation then becomes “retained direct EU legislation”, in accordance with the definitions contained in section 14. Under paragraph 1(1) of Schedule 5 to the GRB, “retained direct EU legislation” will have to be re-published in the UK by the Queen’s printer in order to ensure that this new species of domestic legislation is publicly accessible – i.e. from a practical perspective, it will not be the EU versions of these texts that are authoritative post-Brexit; rather, the UK will produce its own versions of the relevant EU legislation that is to form part of its domestic law going forwards.
		3. Paragraph 18 of Schedule 8 to the GRB provides that “for the purposes of the Human Rights Act 1998, any retained direct EU legislation is to be treated as primary legislation and not subordinate legislation”. The consequence of this is that it will not be possible for the domestic courts to quash any “retained direct EU legislation” on the basis of incompatibility with the rights guaranteed by the European Convention on Human Rights – remedies will instead be limited to a section 4 Human Rights Act 1998 declaration of incompatibility. No provision is made in the GRB in relation to the status to be accorded to “retained direct EU legislation” in other circumstances.
	3. **Directly applicable or effective EU law.** In addition, a general sweep up provision has been created in the form of section 4 GRB, which applies to directly applicable and effective EU law that is not captured by section 3. Specifically, section 4(1) GRB provides that any “rights, powers, liabilities, obligations, restrictions, remedies and procedures” which are recognised and available in domestic law immediately before exit day by virtue of section 2(1) ECA will “continue on and after exit day to be recognised and available in domestic law”. This language (of “rights, powers …” etc.) is lifted from section 2(1) ECA itself.

The basic effect of section 4 GRB is that any directly applicable or effective provisions of EU law (including Treaty articles and provisions of EU directives) will also form part of domestic law post-Brexit.

That is, however, subject to section 4(2) GRB, which contains an important exception. In particular, section 4(2)(b) states that section 4(1) does not apply to rights, powers, liabilities etc. so far as they “arise under an EU directive … and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in this case)”. The Explanatory Notes offer the following explanation as to the intended effect of this section:

“Where directly effective provisions of directives have been recognised by a court of tribunal before exit day, these will be converted into domestic law. However, any directly effective provisions of directives that have not been recognised prior to exit day (to the extent these might exist) will not be converted by this clause.”[[15]](#footnote-15)

* 1. **EU jurisprudence.** Section 6 GRB makes provision for the interpretation of retained EU law and the role to be played by EU jurisprudence post Brexit. Specifically, under section 6(3), any question as to the “validity, meaning or effect” of any retained EU law (i.e. law which is domestic law by virtue of either sections 2, 3 or 4 GRB) which arises after Brexit day is to be determined by the UK courts: (a) “in accordance with any retained case law and any retained general principles of EU law”; and (b) “having regard to the limits of EU competence immediately before exit day”. Taking each of these requirements in turn, the phrase “retained case law” encompasses both judgments of domestic courts and decisions of the EU courts, that were made prior to Brexit day and relate to anything to which sections 2, 3 or 4 apply (section 6(7) GRB). The combined effect of sections 6(4) and (5) is that EU jurisprudence will be given the same binding status as decisions of the UK Supreme Court. Accordingly, pre-Brexit EU jurisprudence will be binding in all domestic courts and tribunals except the Supreme Court itself, which will have the jurisdiction to depart from such decisions “when it appears right to do so”.[[16]](#footnote-16) The binding or precedential status of domestic judicial decisions which relate to EU law is not touched upon by the GRB and is therefore unaltered.

As to the requirement that the UK courts must have regard to the limits of EU competence in interpreting retained EU law, this may mean that domestic courts will be required to take into account Treaty provisions or provisions of a directive that although not directly effective are, under the current EU rules, relevant to the interpretation of either secondary EU legislation or domestic implementing legislation (e.g. because they provide the legal basis for the adoption of such legislation).

* 1. **General principles.** The position in relation to general principles is rather convoluted. The starting point appears to be that such principles are converted by virtue of section 4 GRB, insofar as they confer rights or obligations as a matter of EU law. This also appears to be borne out by paragraph 2 of Schedule 1 to the GRB which excludes from conversion general principles that have not been recognised by the European Court in a case decided before exit day. There would presumably be no need to do that unless general principles that pre-date Brexit day are being converted. However, it is also clear that to the extent general principles are being converted into domestic law, it is a partial conversion only. As currently drafted, the GRB makes clear that general principles will be relevant when domestic courts, post Brexit, are considering the validity, meaning or effect of retained EU law – i.e. they will be relevant to interpretation (see section 6(3)(a) GRB). However, they will no longer be able to found a cause of action post Brexit. Thus, paragraph 3(1) of Schedule 1 to the GRB provides that “there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law”. And paragraph 3(2) goes on to say that “no court or tribunal or other public authority may, on or after exit day – (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law”.
1. In this way, the GRB effectively takes a freeze-frame of EU law as it applies on Brexit day. However, the GRB also makes further provision for certain categories of EU law to be positively excluded from that freeze-frame such that they will simply disappear post-Brexit. Chief amongst these is the EU Charter of Fundamental Rights (the “**Charter**”). Section 5(4) GRB provides that the Charter will not form part of domestic law post Brexit. However, section 5(5) GRB says that this “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 implications of this are considered further below. In addition, paragraph 4 of Schedule 1 to the GRB expunges the *Francovich* damages remedy from UK law from Brexit day onwards.
2. As for EU law that post-dates the commencement of the GRB, this receives limited attention in the bill. Section 6(1) GRB makes clear that the UK’s domestic courts will not be bound by any principles laid down or decisions made on or after exit day by the EU Courts and cannot refer any matter to the EU Courts. Under section 6(2) GRB, however, although domestic courts and tribunals “need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU”, the court “may do so if it considers it appropriate to do so”. This opens the door for continued reliance on EU case law and soft law post Brexit.
3. Finally, the GRB also makes substantial provision for amendments to be made to the EU law that is converted into domestic law in order to ensure its “functionality”. The inclusion of wide delegated powers for this purpose was foreshadowed in the White Paper as follows:

“It is crucial that the Government is equipped to make all the necessary corrections to the statute book before we leave the UK to ensure a smooth and orderly withdrawal. To achieve this, the power to enable this correction will need to allow changes to be made to the full body of EU-derived law. This will necessarily include existing primary as well as secondary legislation which implements our EU obligations, as well as directly applicable EU law which will be converted into domestic law once we leave. It will also include the power to transfer to UK bodies or ministers powers that are contained in EU-derived law and which are currently exercised by EU bodies. This does mean that the power will be wide in terms of the legislation to which it can be used to make changes.”[[17]](#footnote-17)

1. Section 7 of the GRB contains extensive delegated powers (colloquially known as “Henry VIII clauses” to the extent that they enable the amendment of primary legislation by secondary legislation). In broad terms, Ministers are enabled to make “such provision” as is considered appropriate to “prevent, remedy or mitigate” any failure of retained EU law to operate effectively or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU (section 7(1)). This broad power is subject to certain limitations, including that any such regulations will have to be made within two years of Brexit day (section 7(7)) and that they may not be used for the purpose of imposing taxation, creating a criminal offence, making retrospective provision, amending, repealing or revoking the Human Rights Act 1998 or amending or repealing the Northern Ireland Act 1998 (section 7(6)). It is already clear that the scope of section 7 is going to be a highly controversial issue during the passage of the bill.

**THE HIERARCHY OF LEGAL NORMS POST GRB**

1. Set against the framework described above, the first “unknown” for discussion relates to the hierarchy of legal norms that will exist post-Brexit, as a result of the GRB, and the impact that a changed hierarchy will have on the ability of individuals to challenge domestic measures or aspects of retained EU law on EU-law based grounds.
2. Two particular questions arise. First, there is the issue of how EU-derived law which, per sections 2, 3 and 4 GRB, is now to become domestic law, will interact with other domestic law (“original” domestic law). Secondly, there is the issue of how the hierarchy of laws within the EU legal order itself is to be replicated within the body of EU-derived domestic law.

*The relationship between “EU-derived” domestic law and “original” domestic law*

1. It is a fundamental feature of EU law that it is supreme vis-à-vis the national law of individual Member States and can have direct applicability or effect in national legal systems. The foundations for the doctrines of supremacy and the direct effect of directives were laid by the CJEU in its earliest jurisprudence. EU practitioners will be familiar with the Court’s declaration in *Costa v ENEL* that:

“The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”[[18]](#footnote-18)

1. The consequences of the line of jurisprudence that started with cases such as *Costa* and *Van Gend en Loos* have been far-reaching. It is now well established, as a matter of EU law, that:
	1. in the event of a conflict between a directly applicable or effective provision of EU law and a provision of national law, the latter must be disapplied, regardless of its form or place in the national legal hierarchy;[[19]](#footnote-19)
	2. the obligation to disapply conflicting national laws applies not only to national courts but also to relevant administrative agencies;[[20]](#footnote-20)
	3. it is open to individuals to challenge a Member State’s failure to implement a directive properly or at all and individuals can rely on provisions of a directive before their national court in order to achieve that (provided they are unconditional and sufficiently precise to be capable of having direct effect).[[21]](#footnote-21) Individuals can also challenge the incorrect application of a directive even after it has been domestically implemented;[[22]](#footnote-22)
	4. the principle of harmonious interpretation imposes a strong interpretive obligation on national courts, as a result of which they are required to interpret all national law (and not merely specific implementing measures) in the light of relevant directives;[[23]](#footnote-23) and
	5. Member States are required to ensure that procedures and remedies available for the enforcement of an EU law cause of action are effective for the purpose of exercising the EU right in question and equivalent to (i.e. no less favourable than) those governing the same right of action on an internal matter.[[24]](#footnote-24)
2. The issue which therefore arises upon the transmogrification of the EU acquis into domestic law is how the long-established doctrines of supremacy and direct effect, entailing all the constituent elements described above, will manifest themselves in the new domestic order. Several “conflict” scenarios might arise.
* Conflict between EU-derived domestic law and pre-Brexit “original” domestic law
1. Imagine the situation where a provision of EU-derived domestic law conflicts with a provision of “original” domestic law, both of which pre-date Brexit. Section 5(2) GRB tells us that “the principle of supremacy of EU law 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”. The White Paper explains the intention behind this provision in the following terms:

“If, after exit, a conflict arises between two pre-exit laws, one of which is an EU-derived law and the other not, then the EU-derived law will continue to take precedence over the other pre-exit law. Any other approach would change the law and create uncertainty as to its meaning. This approach will give coherence to the statute book, while putting Parliament back in control. Once the UK has left the EU, Parliament (and, where appropriate, the devolved legislatures) will be able to change these laws wherever it is considered desirable.”[[25]](#footnote-25)

1. In other words, the intention appears to be that the supremacy doctrine will be replicated in respect of pre-Brexit EU derived law. But the way in which section 5(2) GRB will apply in practice is likely to vary significantly depending on the type of EU law that has been converted. In respect of regulations and directly effective Treaty provisions, for example, one can anticipate that the section will apply in a relatively straightforward manner. Such regulations and Treaty provisions will continue to provide a basis for the disapplication of “original” domestic legislation, whether primary or secondary, that pre-exists the commencement of the GRB. A challenge to such domestic legislation on the basis of incompatibility with an EU Treaty provision or regulation will therefore remain possible post-Brexit.
2. But for EU law challenges that are currently based on directives, the position becomes significantly more complex. This is for a number of reasons.
3. At the outset, the current approach taken in the GRB to the question of the conversion of directives is liable to lead to substantial uncertainties as to precisely what has been converted into domestic law immediately on or after exit day. As explained above, the starting point in the GRB is that all directly effective provisions of directives will continue to form part of domestic law after exit day, as a result of section 4(1) GRB. However, that is subject to section 4(2)(b) GRB which excludes from conversion any rights, powers, obligations etc., insofar as they arise under an EU directive “and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in this case)” (emphasis added). In other words, the test for whether a provision of a directive is being converted into domestic law is not whether, as a matter of EU law, it would be capable of having vertical direct effect on the basis of EU jurisprudence as it stands at exit day; rather, the approach taken is whether the right or power has been “recognised” by either the EU judicature or domestic courts prior to exit day as being capable of having direct effect.
4. This approach gives rise to substantial uncertainties as to precisely which elements of which directives are being converted. An immediate question (which one can easily imagine giving rise to satellite litigation) is what is meant by the term “recognised”? The subsection makes clear that the recognition does not have to form part of the essential reasoning of the case – i.e. it does not have to constitute binding *ratio* but could be an *obiter* reference. But of course there is a sliding scale of *obiter* recognition and the bill provides no further guidance as to what degree of recognition is to be regarded as sufficient. What if a court has, prior to exit day, accepted that it is likely that a provision of a directive is capable of having direct effect but has not conclusively decided the point? What if a pre-exit judgment records that a case was argued on the premise that a provision of a directive is capable of having direct effect, but says nothing further about whether that premise is correct? Will such passing references suffice to convert the EU law obligation into a domestic obligation? And how will the position be affected by subsequent appeals? All of that will presumably fall to be worked out through litigation, but in the meantime the position is unclear.
5. Another difficulty is in identifying what it is that is required to have been recognised by the EU / UK courts prior to Brexit. As noted at §12.c above, the Explanatory Notes suggest that the effect of section 4(2)(b) is that for a provision of a directive to be relied on in the UK courts post-Brexit that specific provision must have been recognised as having direct effect prior to Brexit.
6. However that will lead to arbitrary results. Whether a specific provision of a specific directive will have been litigated prior to Brexit is far more likely to be the product of chance than design. For directives whose implementation period lapses shortly before Brexit there may well be little time to litigate before exit day. And in respect of longer-standing directives, there can be no automatic assumption that the reason why a particular provision of the directive has not been specifically pronounced upon by the courts is because it is not capable of having direct effect. Making the future recognition of the vertical direct effect of directives contingent upon whether a specific provision has been litigated prior to exit day (rather than making it consistent with the substantive EU law test) is therefore both arbitrary and inconsistent with the Government’s stated objective of ensuring that “legal rights and obligations in the UK should where possible be the same after we have left the EU as they were immediately before we left”.[[26]](#footnote-26)
7. An alternative construction is, however, suggested by the language of section 4(2)(b) which refers to “rights, powers, obligations” etc. that are “of a kind” that has been recognised by the courts prior to Brexit. That wording (“of a kind”) might indicate that the proper question is not whether the specific provision of the directive which is sought to be relied upon post-Brexit has previously been recognised as having direct effect, but whether it is in a category of provisions that has, prior to Brexit, been recognised as capable of being directly effective. This may be a way of reintroducing the “sufficiently precise and unconditional test” (for as a matter of EU law, it is rights of that kind which have been recognised as being directly effective) or it may be that there are narrower categories which could be employed in this regard – e.g. provisions of directives which require equal treatment could be said to be generally “of a kind” which have previously been recognised by the EU courts to have direct effect.
8. A further issue that may arise is the interaction between the section 4(2)(b) exclusion for non-recognised directive rights and the retention of the supremacy doctrine for pre-Brexit law, as provided for by section 5(2) GRB. As explained above, it is currently the case that the vertical direct effect of directives can lead to the disapplication of conflicting provisions of national law. However if, after Brexit, a particular provision of a directive cannot be relied upon in order to do this because it is not “of a kind” that was recognised by the EU or UK courts pre-Brexit, then what it does it mean to say that the principle of supremacy of EU law “continues to apply” pursuant to section 5(2)? In particular, will there be any scope to argue, in the future, that supremacy can instead attach to section 2(2) ECA legislation which has implemented provisions of EU directives that themselves have fallen away by virtue of section 4(2)(b)? The argument would be that the continued application of the principle of supremacy of EU law post-Brexit requires implementing section 2(2) legislation which is now “EU-derived domestic legislation” to take precedence over a subsequent (but still pre-Brexit) piece of incompatible “original” domestic legislation.
9. A fourth problem is that the GRB does not address the indirect effect of directives and the principle of harmonious interpretation at all. As noted above, as a matter of EU law, national courts are currently required to interpret the entire body of UK law consistently with provisions of relevant directives, to the extent possible. The consequences of the harmonious interpretation obligation have at times been dramatic: in the *Pfeiffer* case for example, the CJEU considered the appropriateness of German legislation which purported to implement the Working Time Directive and which permitted derogation from the 48 hour weekly limit found in the Directive. The Court said that the interpretive obligation required the national court to do whatever lay within its jurisdiction to ensure that the maximum period of weekly working time, was not exceeded – in other words, it required the national court to search for interpretive methods which would enable to read the national legislation permitting derogation from the 48 hour limit as precluding derogation from the 48 hour limit.[[27]](#footnote-27) The GRB offers no guidance as to how an equivalent case would be approached post-Brexit. It is likely that the GRB’s silence on this specific issue (when combined with section 5(2) and the general obligation under section 6(3) on the domestic UK courts to decide questions in accordance with retained case law) will mean that the principle of harmonious interpretation continues to apply to the entire domestic statute book as it is at the moment of exit. To conclude otherwise would undoubtedly have the effect of substantially changing the meaning and construction that can be attributed to domestic legislation immediately before and immediately after Brexit. Moreover, for section 2(2) ECA secondary legislation, the UK’s membership of the EU and the terms of the directive being implemented, were no doubt a critical part of the landscape in which the legislation was made. Even on usual common law principles, it would be proper for the UK courts to have regard to that background when interpreting the secondary legislation. However, the position is far from certain.
* Conflict between EU derived law and subsequent domestic legislation
1. The second scenario to think through is where a conflict arises between EU derived law as converted by the GRB and post-Brexit domestic legislation. The approach suggested by the White Paper on this issue was as follows:

“Where a conflict arises between EU-derived law and new primary legislation passed by Parliament after our exit from the EU, then newer legislation will take precedence over the EU-derived law we have preserved”.[[28]](#footnote-28)

1. The GRB adopts this approach, stating “the principle of supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day” (section 5(1)). The Explanatory Notes illustrate the intended operation of this section: “if an Act of Parliament is passed on or after exit day which is inconsistent with EU law which is preserved or converted by the Bill (for example, a retained EU regulation), that new Act of Parliament will take precedence”.[[29]](#footnote-29)
2. Again, in some contexts, the application of this section is likely to be straightforward. It is axiomatic to the Government’s threefold plan (as outlined at §7 above), and the political imperative of “taking back of control”, that changes to substantive policy made by primary legislation after Brexit will be able to alter the position under the body of EU retained law.
3. But the position in relation to post-Brexit secondary legislation is less clear. In general, one would expect where subsequent secondary legislation conflicts with existing secondary legislation that the newer legislation would take precedence. However, section 5(3) GRB provides that section 5(1) “does not prevent the principle of the supremacy of EU law from applying to a modification made on or after exit day of an enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification”. This suggests that there may well be post-Brexit secondary legislation which, for example, modifies a pre-Brexit section 2(2) ECA statutory instrument, which could nonetheless be trumped by retained EU law. Whether or not that is the case will depend on the “intention of the modification”.

*The internal hierarchy as between EU derived laws*

1. The second “hierarchy of norms” issue is how the hierarchy of laws that currently exists within the EU legal order is to be replicated within the body of retained EU law post-conversion. EU regulations and directives are both a form of EU secondary legislation which, as a matter of EU law, require a legal basis for adoption under the EU treaties and must be within the competence of the EU. Challenges to EU measures on the basis of a lack of legal basis or competence are commonplace.
2. Two questions arise from this. First, will it continue to be open to litigants in the UK, post Brexit, to argue before the national courts that e.g. an EU regulation which has been converted into direct EU legislation under section 3 GRB was made without the requisite legal basis? If so, what will the consequence of that be at a domestic level? Secondly, in the event that a legal basis or competence based challenge is successfully brought before the CJEU after Brexit (by a litigant based in another Member State) but in relation to an EU measure which pre-dated commencement of the GRB, and has therefore been converted into domestic UK law, what impact will that have for the UK statute book?
3. The current draft of the GRB appears to provide conflicting answers to these questions. On the one hand, as noted at §12.d above, section 6(3) requires that “any question as to the validity, meaning or effect of any EU retained law” has to be decided by the domestic courts, post-exit, having regard to the limits of EU competence immediately before exit. The Explanatory Notes add that “a matter could not fall within EU retained law if the EU had no competence in that area”.[[30]](#footnote-30)
4. This implies that competence is going to be an important consideration for the UK courts when interpreting EU retained law post Brexit, and that domestic UK courts might, post-Brexit, be required to adjudicate on the competence of the EU to this extent. If that is the case it will be a significant and novel development that is particularly likely to raise eyebrows in Brussels and Luxembourg. The CJEU jealously guards its jurisdiction to examine the validity of EU measures. The national courts of a Member State of the EU are only ever permitted to conclude that a Union measure is valid; to the extent they are contemplating a declaration that a Union measure is invalid (e.g. for want of competence), that issue must be referred to the CJEU.[[31]](#footnote-31) Historically, the CJEU has also demonstrated an extreme hostility to the idea of any extra-Union bodies ruling on matters of EU law.[[32]](#footnote-32)
5. On the other hand, however, paragraph 1 of Schedule 1 provides that “there is no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid”. It is not at all clear how this is to be reconciled with section 6(3). Why would there ever be a question about the “validity” of retained EU law (as section 6(3) explicitly envisages) if there is no right in domestic law to challenge on the basis of invalidity of an EU instrument?
6. There may be a partial solution to this in another of the many sections in the GRB which confers delegated powers on the executive. Under paragraph 1(2) of Schedule 1 a Minister of the Crown may make regulations describing or providing for kinds of challenges that may still be brought post exit on the basis of invalidity of an EU instrument. Paragraph 1(3) specifies that those regulations may provide for a challenge that would otherwise have been made against an EU institution to be made against a public authority in the UK. The answer may, therefore, lie in finding an appropriate defendant. If an EU Commission decision can be challenged via an action directed at a UK entity (such as the Competition and Markets Authority or the Medicines and Healthcare Products Regulatory Agency) then that might enable validity challenges to be brought in the future.

**THE RELEVANCE OF EU LAW POST BREXIT DAY**

1. The second big unknown relates to the status of EU law that is made after Brexit.
2. The White Paper was completely silent on this issue – with the consequence that after its publication there were public exhortations from the judiciary for statutory provision to be made on the topic in the draft of the GRB. Baroness Hale, for example, on 29 March 2017 said as follows, during the course of evidence provided to the House of Lords Select Committee on the Constitution:

“One major concern that we have in the court, and probably throughout the judiciary, is that it should be made plain in statute what authority or lack of authority, or weight or lack of weight, is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left and, more importantly, to matters after we leave. That is not something we would like to have to make up for ourselves, obviously, because it is very much a political question, and we would like statute to tell us the answer.”[[33]](#footnote-33)

1. Unfortunately the GRB does not answer such pleas in any meaningful way. Its treatment of the issue is skeletal, at best. Section 6(1) GRB makes clear that decisions of the EU Courts taken after exit day will not be binding as a matter of UK law on any domestic court or tribunal. Section 6(2) adds, for good measure, that domestic courts “need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU”. However, section 6(2) then goes on to say that domestic courts may have regard to things done by EU entities if they “consider it appropriate to do so”. In other words, the position under the GRB is that domestic courts are neither required to, nor prohibited from, taking post-Brexit EU level developments into account.
2. If this ambiguous position is maintained upon enactment of the Bill into law, it will be necessary to revert to first principles and current common law approaches to issues of comparative and foreign law in order to work out the likely state of affairs post Brexit. It will also be important to separate out transitional issues (e.g. what will happen in relation to preliminary references that have been requested but not answered before Brexit day) from the longer-term consequences of EU law changes.[[34]](#footnote-34)
3. As a starting position, it seems clear that legislative changes made at the EU level, post-Brexit, will not have any bearing on the UK domestic legal system unless Westminster or the devolved administrations, as appropriate, take positive steps to introduce some kind of copy-cat legislation in the UK. The reality is that the EU and UK legal systems will be on different paths from Brexit day +1 and it is probable that, in certain areas at least, they will diverge rather rapidly given the likely priorities of the respective administrations.
4. In relation to other forms of EU law, however, there is a greater likelihood that these will continue to be relevant domestically. In general terms, the English courts have become increasingly adept at, and happy to, consider comparative law materials in recent years and one can well imagine that both case law of the European courts and EU soft-law, such as Commission decisions, guidelines or notices, will continue to be relied upon in domestic courts as a tool for the interpretation of retained EU law, even where that case law and soft law post-dates Brexit. This would potentially be permissible under usual principles of construction or, where there is ambiguity, under the *Pepper v Hart* rule. International law and, in particular, Articles 31 and 32 of the Vienna Convention may also allow such a course of action, if and to the extent that the UK continues to participate in international agreements with the EU following Brexit.
5. Importantly, Part 2 of Schedule 5 to the GRB does make clear that questions as to the meaning of EU law post-Brexit are to be treated as questions of law. This is an exception to the general position that questions as to the meaning or effect of the law of foreign jurisdictions have to be proved as a matter of fact on the basis of expert evidence.
6. It may also be that different approaches are taken in certain sectors. For example, in fields that were previously subject to EU common regulatory frameworks, which are retained post-Brexit, it may be that a specific policy need is perceived for UK jurisprudence to develop consistently with the EU. For example, section 60 of the Competition Act 1998 currently imposes a positive obligation on domestic courts to deal with questions arising in relation to UK competition law “in a manner which is consistent with the treatment of corresponding questions arising in [EU] law in relation to competition within the [EU]”. Nothing in the GRB will repeal that obligation. The question of whether or not it remains post-Brexit will therefore fall to be addressed separately.

**THE CHARTER OF FUNDAMENTAL RIGHTS AND GENERAL PRINCIPLES OF EU LAW**

1. The third area of uncertainty relates to the scope that is likely to exist, post Brexit, for challenges to domestic action on the basis of either the Charter and/or general principles of EU law.
2. As outlined at §12.e and §13 above, the Charter is to be excluded from the conversion project, whilst general principles are to be partially converted into domestic law, subject to the critical caveat that they will not be capable of founding a cause of action.
3. The government’s rationale for refusing to convert the Charter into domestic law is explained in the Explanatory Notes as follows:

“The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill. … Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will be interpreted in light of those underlying rights and principles.”[[35]](#footnote-35)

1. The question of whether this reasoning is correct and justifiable is beyond the scope of this paper. Of course it is true that the Charter did purport to merely codify those basic rights and principles which already existed under EU law. And it has been the UK’s consistent position ever since the inception of the Charter that it cannot and does not create new legal rights or obligations. Suffice it to note for present purposes that, to the extent the position is not as straightforward as the Explanatory Notes suggest, then the approach mandated by section 5(5) GRB (which requires references to the Charter in any case law “to be read as if they were references to any corresponding retained fundamental rights or principles”) is likely to raise a number of complex issues. In particular, does section 5(5) mean that, if the Charter does, in a given respect, go beyond the underlying fundamental right that it is said to have codified, the fundamental right should be interpreted as though it were as wide as the Charter right?
2. Even leaving aside such differences of scope, however, the rather blithe proposition in the Explanatory Notes that removal of the Charter will not “remove any underlying fundamental rights or principles which exist” simply cannot be right. This is because it also has to be recalled that under paragraph 3(1) of Schedule 1 to the GRB there is to be no right of action post-Brexit based on a failure to comply with any of the general principles of EU law. And as a matter of EU law, it is well established that fundamental rights are a subset of the general principles. Thus, the CJEU has repeatedly stated (since at least 1988) that “fundamental rights form an integral part of the general principles of law whose observance the Court ensures”.[[36]](#footnote-36) Amongst the general principles which have been recognised by the EU courts are, therefore, the rights to due process, equal treatment, non-discrimination on the grounds of age and sex, legitimate expectation, legal certainty and transparency.
3. Moreover, general principles and, consequently, fundamental rights, have a constitutional status in the EU legal order and, in terms of the hierarchy of laws, are essentially equivalent to the provisions of the Treaty.[[37]](#footnote-37) As a result, Union measures which are in breach of the general principles are void. In addition, Member States are bound by the general principles when they implement Union measures or otherwise take action within the scope of EU law.
4. Therefore, the reality is that if the approach taken in the GRB remains unchanged the types of actions that it will be possible to bring on the basis of fundamental rights post-Brexit will be radically different. A recent example which neatly illustrates the point is provided by the case of *Benkharbouche* in which both the Divisional Court and the Court of Appeal disapplied domestic primary legislation (namely the State Immunity Act 1978) on the basis of incompatibility with the provisions of the Charter.[[38]](#footnote-38) Such a challenge will simply not be possible post Brexit – assuming the GRB remains in its current form – since both the cause of action and the remedy will be unavailable to equivalent claimants.

**KELYN BACON QC**

**EMMA MOCKFORD**

**BRICK COURT CHAMBERS**

 **20 JULY 2017**

1. Formally titled the “European Union (Withdrawal) Bill” and available online at: <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html> [↑](#footnote-ref-1)
2. Specifically, a statement was given by the Secretary of State for Exiting the European Union to Parliament on 10 October 2016 (House of Commons Hansard, 10 October 2016, Volume 615, column 40). [↑](#footnote-ref-2)
3. ‘Legislating for the United Kingdom’s withdrawal from the European Union’, 30 March 2017, available online at: <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper> (the “**White Paper**”). [↑](#footnote-ref-3)
4. The bill’s progress can be followed online at: <http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html> [↑](#footnote-ref-4)
5. See, for example: <https://www.theguardian.com/politics/2017/jul/12/labour-tories-great-repeal-bill-brexit-eu> [↑](#footnote-ref-5)
6. Foreword to the White Paper, p 7. [↑](#footnote-ref-6)
7. White Paper at §1.12. [↑](#footnote-ref-7)
8. White Paper at §1.21. [↑](#footnote-ref-8)
9. White Paper at pp 20-21. [↑](#footnote-ref-9)
10. White Paper at §3.19. [↑](#footnote-ref-10)
11. White Paper at §1.2, and §§4.2-4.4. [↑](#footnote-ref-11)
12. The Explanatory Notes to the GRB give the example of domestic health and safety law which is often made to implement EU obligations but is normally made under the powers in the Health and Safety at Work etc. Act 1974, rather than the ECA (Explanatory Notes at §74). [↑](#footnote-ref-12)
13. For example Schedule 6 to the GRB sets out various “exempt EU instruments” which will not be converted into domestic law. Primarily these exemptions reflect the fact that certain EU instruments do not currently apply to the UK because of opt-outs which the UK has secured (e.g. in the area of freedom, security and justice). Similarly EU decisions which are addressed only to a Member State other than the EU are not to be converted (section 3(2)(a)(ii)). [↑](#footnote-ref-13)
14. Explanatory Notes at §80. See also section 3(4) GRB. [↑](#footnote-ref-14)
15. Explanatory Notes at §92. [↑](#footnote-ref-15)
16. Practice Statement (Judicial Precedent) [1966] 3 All ER 77, [1966] 1 WLR 1234, endorsed by the Supreme Court in *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28 at §25. [↑](#footnote-ref-16)
17. White Paper at §3.16. [↑](#footnote-ref-17)
18. Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585 at 593. [↑](#footnote-ref-18)
19. Case C-221/89 *Factortame I* [1991] ECR I-3905 continues to be the classic example. In *Factortame*, the Merchant Shipping Act 1988 was disapplied on the basis that it violated Community rules prohibiting discrimination. [↑](#footnote-ref-19)
20. Case C-118/00 *Larsy v INASTI* [2001] ECR I-5063, §§52-53. [↑](#footnote-ref-20)
21. Case C-41/74 *Van Duyn v Home Office* [1974] ECR 1337, Case 8/81 *Becker v Fananzamt Munster-Innestadt* [1982] ECR 53 [↑](#footnote-ref-21)
22. Case C-62/00 *Marks & Spencer* [2002] E.C.R. I-6325, esp at §27. [↑](#footnote-ref-22)
23. Case 14/83 *Von Colson* [1984] ECR 1891 and Case C-106/89 *Marleasing* [1990] ECR I-4135. In *Marleasing* the Court of Justice said (at §8): “It follows that, in apply national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter …”. [↑](#footnote-ref-23)
24. Case C-2/06 *Willy Kempter v Hauptzollamt Hamburg-Jonas* [2008] ECR I-411 at §57. [↑](#footnote-ref-24)
25. White Paper at §2.20. [↑](#footnote-ref-25)
26. White Paper at §2.7. [↑](#footnote-ref-26)
27. Joined Cases C-397-403/01 *Pfeiffer* [2004] ECR I-8835 at §§118-119. [↑](#footnote-ref-27)
28. White Paper at §2.19. [↑](#footnote-ref-28)
29. Explanatory Notes at §96. [↑](#footnote-ref-29)
30. Explanatory Notes at §106. [↑](#footnote-ref-30)
31. Case 314/85 *Firma Foto-Frost* [1987] ECR 4199 [↑](#footnote-ref-31)
32. In 2014, for example, the CJEU effectively vetoed the EU’s accession to the ECHR on the basis that the accession agreement would have conferred powers on the European Court of Human Rights to adjudicate upon questions of EU law and therefore compromised the autonomous nature of EU law (see Opinion 2/2013 delivered on 18 December 2014). [↑](#footnote-ref-32)
33. Available here: <https://www.parliament.uk/documents/lords-committees/constitution/Annual-evidence-2016-17/ucCC290317SupremeCourt.pdf> [↑](#footnote-ref-33)
34. The issue of cases which are pending before domestic courts at the moment of exit which raise EU law issues are dealt with in Part 4 of Schedule 8 to the GRB. No provision is currently made in the GRB for cases which are pending before the CJEU at the point of exit. That will be the subject of negotiation with the EU and is likely to be dealt with in the Withdrawal Agreement. The UK government has published a position paper on the topic which is available online at: <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu> [↑](#footnote-ref-34)
35. Explanatory Notes at §§99-100. [↑](#footnote-ref-35)
36. See, for example, Case 5/88 *Wachauf* [1989] ECR 2609 at §17; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611 at §17; Case C-94/00 *Roquette Freres* [2002] ECR I-9011 at §23. [↑](#footnote-ref-36)
37. Case 40/84 *Sgarlata v Commission* [1965] ECR 215. [↑](#footnote-ref-37)
38. *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2015] EWCA Civ 33 (currently on appeal to the Supreme Court). [↑](#footnote-ref-38)