



Legislating for transition / implementation: implications for the EU (Withdrawal) Bill

Swee Leng Harris

April 2018

The views expressed in this publication are those of the author alone. The Hansard Society provides a non-partisan forum for the exchange of ideas and, in publishing this paper, aims to contribute to public knowledge and debate.

The author of this publication is Swee Leng Harris and it has been produced in her personal capacity. The author would like to thank those with whom she has discussed the issues raised. Swee Leng Harris is the Head of Policy and Public Affairs at The Legal Education Foundation, and a member of the Bingham Centre's Expert Working Group on the EU (Withdrawal) Bill and the Rule of Law.

Published by the Hansard Society
5th Floor, 9 King Street,
London EC2V 8EA
0207 710 6070
contact@hansardsociety.org.uk

© All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form by any means, without the prior permission of the Hansard Society.

The Hansard Society is an independent, non-partisan political research and education society working in the UK and around the world to promote democracy and strengthen Parliaments.

For more information about other Hansard Society publications please visit our website at www.hansardsociety.org.uk

Introduction

Questions are mounting about how the UK will provide for a post-Brexit implementation / transition period in UK law and what the implications of such a period will be for the European Union (Withdrawal) Bill. The Government's answer has been the promised Withdrawal Agreement and Implementation Bill (WAI Bill), but now that a *status quo* implementation / transition period has been more-or-less agreed, the EU (Withdrawal) Bill will need to be amended accordingly.

When the EU (Withdrawal) Bill was introduced into Parliament in July 2017, an implementation / transition period was merely a possibility. Agreeing such a period reflecting the *status quo* was not UK Government policy until the Prime Minister's speech in Florence in September 2017. Accordingly, it was hard to determine how the EU (Withdrawal) Bill could provide for implementation / transition until the UK and European Council agreed text on it in the draft Withdrawal Agreement on 23 March 2018.

However, now that the Withdrawal Agreement is significantly more likely, in the interests of the rule of law the government needs to provide greater clarity and certainty about the next steps in legislating for Brexit and the relationship between the provisions in the EU (Withdrawal) Bill and the proposed WAI Bill.

Without this clarity, MPs and Peers risk spending many hours in the coming weeks scrutinising legislation that will shortly need to be amended or will be superseded. More widely, individuals and businesses in the UK will not know what to expect from this Brexit legislation: how should they prepare to comply with the regulatory provisions that will flow from the EU (Withdrawal) Act if it is likely that some of them will soon be outdated and supplanted by the provisions of the WAI Bill?

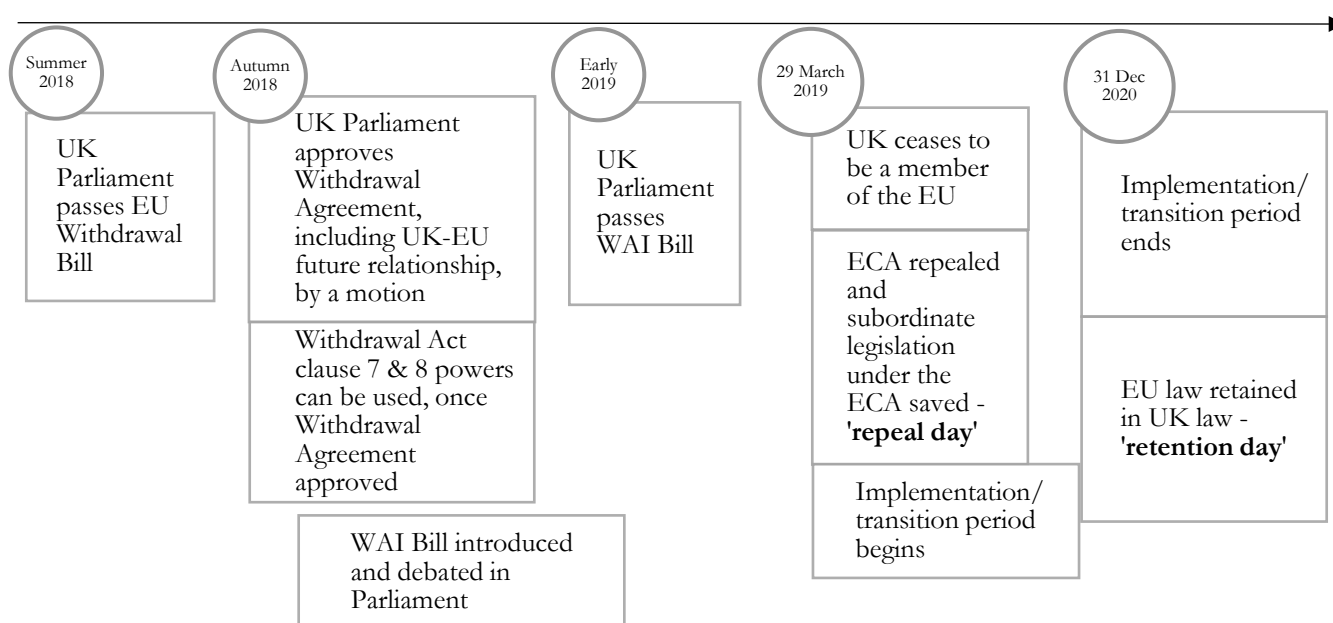
This paper considers what the likely scope and content of the WAI Bill will be, and what amendments are needed to the EU (Withdrawal) Bill to accommodate an implementation / transition period. It assumes that a Withdrawal Agreement will be reached between the EU and UK, and proceeds based on the available evidence of the UK and EU's positions and intentions. Inevitably, these positions may change, and the intentions may not be achieved. An anticipated timeline of negotiations and legislation is set out in the appendix.

The paper concludes that a number of legislative changes are needed in order to accommodate an implementation / transition period. Some amendments to the EU (Withdrawal) Bill could be made after it becomes law, via provisions in the WAI Bill. But some amendments could and should be made earlier, while the EU (Withdrawal) Bill is still being scrutinised by MPs and Peers, to ensure that it is fit for purpose before it receives Royal Assent.

- The WAI Bill will need to replicate the effect of the European Communities Act (ECA) to bring EU law into the UK for the implementation / transition period. Notably, EU law will develop and change during the implementation / transition period, and the WAI Bill will need to enable those changes in EU law to be reflected in UK law, including through amendments to delegated legislation made under the ECA.
- The WAI Bill will also need to insert a new provision in the EU (Withdrawal) Act so that EU laws that enter into UK law through the WAI Bill form part of '*retained EU law*'.

- 'Exit day' serves multiple functions in the EU (Withdrawal) Bill, and needs to be split into at least two if not more different points in time:
 - 'repeal day' — the beginning of the implementation / transition period when the ECA is repealed under clause 1 and regulations under that Act are saved under clause 2 (as noted above, there will need to be a power, perhaps in the WAI Bill, to update delegated legislation made under the ECA that has been saved by the EU (Withdrawal) Bill); and
 - 'retention day' — the point in time at which EU law is retained, i.e. the 'snapshot' of EU law is taken under clauses 2-4, which should be the later of the day on which the UK ceases to be a member of the EU or the end of the implementation/transition period. If no transition / implementation period were agreed between the EU and UK, then 'retention day' will be the same day as 'repeal day'.
- Consequential amendments will be needed to enable retention of EU law under clauses 2 and 4 if the ECA is to be repealed on 'repeal day' (at the beginning of the implementation / transition period) and the snapshot of EU law to be taken on 'retention day' (at the end of the implementation / transition period).
- The delegated legislative powers in clauses 7 and 8 should be amended so that they are subject to Parliament's approval of the future EU-UK relationship.
- Clause 9 could be repealed and replaced with a new clause providing for the next steps in the Brexit legislative process.

If these recommendations were followed, the timeline for the process of Brexit would look something like this:



The remainder of this paper sets out these considerations and recommendations in more detail.

1). The Withdrawal Agreement and the Withdrawal Agreement and Implementation Bill

The UK Government has indicated that the WAI Bill will implement the Withdrawal Agreement between the EU and UK so that UK law is in accordance with that agreement. It is anticipated that the Withdrawal Agreement between the UK and EU will provide for the:

- terms of UK withdrawal from the EU;
- terms for the implementation / transition period; and
- framework for the future relationship between the UK and EU after the end of the implementation / transition period.

Although the European Commission and UK have released draft text for the Withdrawal Agreement on which some agreement has been reached, this paper does not consider that text in detail as the paper focuses on the consequences of an implementation / transition period for the EU (Withdrawal) Bill.

Terms of withdrawal

The WAI Bill will provide for the terms of the UK's withdrawal from the EU as agreed in the Withdrawal Agreement between the UK and EU. The Bill might do so by including the text of the Withdrawal Agreement, or by referring to the Agreement. In any case, in light of the negotiations and agreed negotiating priorities, the withdrawal issues will include at a minimum citizens' rights, Northern Ireland, and money to be paid by the UK to the EU.¹

Terms for transition / implementation period

Based on statements by UK ministers, the WAI Bill will also provide for the agreed terms of the transition / implementation period.²

The terms of implementation / transition have yet to be finally agreed in full, but the Council of the EU's directives on negotiation issued on 29 January 2018 set out the EU's position that the *status quo* should continue, including all four freedoms of the single market and compliance with the trade rules of the customs union. Furthermore, the UK has agreed with the EU at negotiators' level that it wants an implementation / transition period that will largely or completely reflect the *status quo*, with EU law being applicable to and in the UK during that period with only a few specified exceptions.³

¹ The terms for withdrawal are also likely to include 'governance of the Withdrawal Agreement, intellectual property rights, ongoing public procurement procedures, customs-related matters needed for an orderly withdrawal from the Union, protection of personal data and use of information obtained or processed before the withdrawal date'. See <http://www.consilium.europa.eu//media/32504/xt21004-ad01re02en18.pdf>.

² <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/oral/75689.pdf>.

³ Article 122 of the draft Withdrawal Agreement of 19 March 2018 (highlighted to reflect agreed text) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

One way to achieve this continuation of the *status quo* would be to extend the Article 50 period, so that the UK remained within the EU and hence bound by the treaties of the EU. However, this appears to have been ruled out by the EU's position that negotiations to agree the detailed terms for the future relationship between the UK and EU cannot proceed while the UK remains within the EU. Accordingly, the terms of implementation / transition in the Withdrawal Agreement between the EU and UK will need to provide for the UK complying with the treaties of the EU and adhering to the decisions of the Court of Justice of the European Union (CJEU) and other EU institutions without the UK being an EU member. These terms will need to be implemented in UK law by the WAI Bill.

Framework for the future relationship

The Withdrawal Agreement will not include detailed terms for the future relationship between the UK and EU after the implementation / transition period. Rather, the EU and UK will only have agreed a framework outlining broadly the anticipated future relationship after the end of implementation / transition. Therefore, the framework for the future relationship between the UK and EU is unlikely to be sufficiently detailed to be implemented in UK law under the WAI Bill. David Davis MP, Secretary of State for Exiting the EU, has referred to a series of agreements on different areas of the UK and EU future relationship, and it may be that some or all of these agreements will require a new piece of UK legislation to implement that agreement in UK law.⁴

2). The EU (Withdrawal) Bill and an implementation / transition period

In order for the implementation / transition period to proceed with a continuation of the *status quo*, the EU (Withdrawal) Bill must be amended. These amendments would change the 'when' of the EU (Withdrawal) Bill, but not the 'how' or 'what' of the EU (Withdrawal) Bill in terms of retaining and correcting EU law in UK law.

In short, the EU (Withdrawal) Bill/Act will:

1. Repeal the European Communities Act 1972 (ECA);
2. Retain EU law in UK law, after which it will be 'retained EU law', a category of law defined by the EU (Withdrawal) Bill/Act that will be part of UK law; and
3. Give powers to Ministers to modify retained EU law by delegated (or secondary) legislation.

To accommodate an implementation / transition period during which the *status quo* will be maintained, all of these functions of the EU (Withdrawal) Bill could be kept and left unchanged. So far, the UK Government has given no indication that it has changed its policy on how it wants to deal with EU law as a result of Brexit, so the 'what' and 'how' of the EU

⁴ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-union-committee/scrutiny-of-brexit-negotiations/oral/77707.pdf>.

Withdrawal Bill need not be changed. That is, it appears to remain Government policy to retain EU law in UK law, to make technical 'corrections' in the near term, and for substantive policy changes to retained EU law to be made in the longer term.

Rather than changing what the EU (Withdrawal) Bill does or how it does it, amendments need to change the timing of when provisions of the EU (Withdrawal) Bill take effect and have an impact.

Maintaining the dynamic *status quo*

The UK and EU have agreed at negotiators' level that 'Union law shall be applicable to and in the United Kingdom during the transition period' with certain specified exceptions, which has been endorsed by the remaining EU 27.⁵ EU law will not remain the same during the implementation / transition period — like any body of law, it will develop and change. Thus, there will need to be a dynamic, rather than static, *status quo* during implementation / transition, and UK law will need to reflect changes in EU law.

There are two ways in which the dynamic *status quo* might be able to be maintained for implementation / transition:

- It is possible that the ECA could continue to be the legal vehicle by which EU law is brought into UK law, as its terms do not appear to be contingent on EU membership, consistent with the view of the majority of the Supreme Court in *Miller* that the ECA is a conduit through which EU law flows into UK law. Accordingly, until repealed, the ECA could ensure that EU law continued to apply in the UK regardless of whether the UK was a member of the EU. If this approach were adopted, then the WAI Bill might need to amend the EU (Withdrawal) Bill so as not to repeal the ECA before the end of the implementation / transition period. The WAI Bill might also need to amend the ECA since some aspects of EU treaties (e.g. UK citizens participating in EU Parliament elections) will no longer apply to the UK during implementation / transition.

However, this approach could be an awkward fit for the context of the UK's exit from the EU given that the ECA was passed in the context of the UK becoming a member of the European Economic Community. Continuing to use the ECA as the conduit for EU law into UK law during implementation / transition would be adapting the ECA for a purpose for which it was not designed.

- Instead, the WAI Bill could replicate the effect of the ECA so that the WAI Bill becomes the legal vehicle through which EU law applies in the UK, including direct effect and UK adherence to decisions of the CJEU for the areas of law and period of time agreed in the Withdrawal Agreement. The WAI Bill will therefore likely include an equivalent provision to section 2(2) of the ECA, as well as a power to amend existing delegated (or secondary) legislation under the ECA to reflect changes in EU law.

⁵ Article 122 of the draft Withdrawal Agreement of 19 March 2018 (highlighted to reflect agreed text) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

The former option has merit in terms of simplicity, continuity, and certainty. However, the realities of Brexit make the latter option more likely. Accordingly, **it is likely that the WAI Bill will be the legal mechanism through which EU law applies in the UK during the implementation / transition period, implementing a dynamic *status quo* in UK law.** This would only be the case for changes to EU law that came into force and took effect during implementation / transition. The recent Hansard Society report by Brigid Fowler, exploring Parliament's upcoming transition tasks, makes important observations about the difficulties and options for UK parliamentary scrutiny of new EU law during this period.⁶

Furthermore, in order for EU law to continue in the UK during the implementation / transition period, delegated legislation 'correcting' retained EU law under what is now clause 7 of the EU (Withdrawal) Bill and the related devolved powers would need to come into effect at the end of the implementation / transition period. Only delegated legislation concerning the areas of EU law expressly excluded from applying in and to the UK during the implementation / transition period should be able to come into force before the end of implementation / transition.

Exit day

The term 'exit day' presently serves four main functions in the EU (Withdrawal) Bill. It is the day:

1. when the European Communities Act 1972 is repealed;
2. when the snapshot of EU law is taken, and converted into 'retained EU law' in UK law;
3. after which the CJEU ceases to have jurisdiction over the UK; and
4. that marks the beginning of the sunset period for some delegated powers in the Bill (some powers are not subject to a sunset clause).

A practical difficulty with the use of 'exit day' as a term in the EU (Withdrawal) Bill is that it conflates a question of international law — whether the UK is a member of the EU — with questions of domestic UK law such as what happens in UK law as a consequence of exit. This conflation of questions has been the source of confusion in discussion of the EU (Withdrawal) Bill.

The following sections take each of the functions of 'exit day' in the Bill in turn, discussing amendments to 'exit day'. These amendments could be made to the EU (Withdrawal) Bill before it is passed by Parliament, or by the WAI Bill, or by regulations under the EU (Withdrawal) Bill. As discussed at the end of this section, if amendments to exit day in the EU (Withdrawal) Bill are not made during the Bill's passage through Parliament, then the amendments should be made by the WAI Bill.

(1) 'Exit day' as the day on which the European Communities Act 1972 is repealed

The above discussion indicates that the ECA will probably be repealed by clause 1 of the EU (Withdrawal) Bill at the beginning of the implementation / transition period, and the effect of

⁶ B. Fowler (2018), [Brexit: Parliament's Five Transition Tasks](#), (Hansard Society, London), pp. 3-6.

the ECA replicated by the WAI Bill to maintain the application of EU law in and to the UK (depending on the approach the government takes to maintaining the *status quo*).

Accordingly, the key point in time for clause 1 would be at the beginning of implementation / transition, and the reference in clause 1 could be amended to refer to '*repeal day*' instead of '*exit day*'. Consequential amendment would be needed to clause 14 to define '*repeal day*' as the day on which the UK ceases to be a member of the EU.

(2) 'Exit day' as the day on which the snapshot of EU law is converted into 'retained EU law' in UK law

Assuming that the Government wants legal continuity after the implementation / transition period (which is the underlying logic of the EU (Withdrawal) Bill), then the snapshot of EU law taken under clauses 2-4 of the EU (Withdrawal) Bill must be taken at the end of the implementation / transition period and not at the beginning. Otherwise, there will be a lack of legal continuity in relation to EU laws made during the implementation / transition period, and legal uncertainty as to the status of those laws after the end of the implementation / transition period.

Accordingly, references to '*exit day*' for the purpose of retaining EU law should be replaced with another term such as '*retention day*' in clauses 2-4, being a different point in time to '*repeal day*' in clause 1. Consequential amendment would be needed to clause 14 to define the term used, e.g. '*retention day*' meaning '*the later of the day on which the UK ceases to be a member of the EU or the end of the [implementation / transition] period*'.

(3) 'Exit day' as the day after which the CJEU ceases to have jurisdiction over the UK under clause 6

This is a matter about which the UK and EU continue to negotiate: the draft Withdrawal Agreement text would continue CJEU jurisdiction during the implementation / transition period, but the UK has not agreed to this text.⁷ Furthermore, in her Mansion House speech the Prime Minister stated that '*if, as part of our future partnership, Parliament passes an identical law to an EU law, it may make sense for our courts to look at the appropriate ECJ judgments so that we both interpret those laws consistently*'.⁸ This indicates that there may be areas where CJEU decisions will have particular significance for law in the UK. Therefore, there is not sufficient clarity as yet on the Withdrawal Agreement to make recommendations concerning '*exit day*' for the purposes of clause 6.

(4) 'Exit day' as the beginning of the sunset period for some delegated powers in the Bill

⁷ See e.g. articles 82-86 of the Draft Withdrawal Agreement of 19 March 2018 (highlighted to reflect agreed text)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

⁸ Prime Minister Theresa May's speech on our future economic partnership with the European Union, 2 March 2018, <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>.

The sunset period for delegated powers would in effect be extended if the definition of exit day for the purposes of the EU (Withdrawal) Bill was changed to the end of the implementation / transition period as proposed by some amendments.⁹ So, for example, the power presently provided in clause 7 of the EU (Withdrawal) Bill to correct deficiencies in retained EU law would not be sunsetted until 31 December 2022, being two years after the agreed end of the implementation / transition period on 31 December 2020.¹⁰ This extension from current plans may be undesirable given the important safeguard on executive law-making power that sunset clauses provide (although see below for discussion of when the clause 7 and 8 powers should begin to be able to be exercised).

How and when to amend 'exit day'

The above discussion concerns the four different functions of 'exit day' in the current provisions of the EU Withdrawal Bill. The amendments on 'repeal day' and 'retention day' would alleviate some of the uncertainty as to what happens to law in the UK after the UK ceases to be a member of the EU, and at the end of the implementation / transition period. One way in which these amendments could be made is by amendment to the EU (Withdrawal) Bill during its passage through Parliament so that there is greater certainty as to the effect of the EU (Withdrawal) Act when it is passed.

If the present provisions on exit day are not amended during the EU (Withdrawal) Bill's passage through Parliament, then the better way to amend 'exit day' in the EU (Withdrawal) Bill would be by provisions in the WAI Bill and not by delegated legislation using powers under the EU (Withdrawal) Bill. Clause 14 of the EU (Withdrawal) Bill was amended in the House of Commons so that 'exit day' was defined as 29 March 2019 at 11.00 pm, but could be amended by regulation 'if the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with Article 50(3) of the Treaty on European Union is different from that specified in the definition of "exit day"'. If the UK's membership of the EU ceases on 29 March 2019, but the UK is required to comply with the Treaties of the EU for the implementation / transition period, it is unclear whether the treaties would 'cease to apply' for the purposes of changing the definition of 'exit day'. Thus, a regulation changing the definition of 'exit day' might be vulnerable to judicial review.

Taking a 'snapshot' of EU law after the ECA has been repealed

As noted above, the 'snapshot' of EU law under clauses 2-4 would need to be taken on 'retention day' at the end of the implementation / transition period in order to achieve legal continuity and certainty following the implementation / transition period. However, clauses 2 and 4 would require further amendment by reason of repeal of the ECA on 'repeal day' under clause 1.

Clause 2 as presently drafted both saves regulations under the ECA and takes a snapshot of EU derived legislation. **Assuming that the ECA is to be repealed by clause 1 at the**

⁹ See e.g. amendment 335 tabled by Lord Wigley at committee in the House of Lords.

¹⁰ Article 121 of the draft Withdrawal Agreement of 19 March 2018 (highlighted to reflect agreed text) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

beginning of the implementation / transition period (*'repeal day'*), then regulations under the ECA would need to be saved by clause 2 at the same time (on *'repeal day'*). Then, assuming that the WAI Bill replicates the effect of the ECA, regulations made under the WAI Bill to implement EU law during the implementation / transition period will also need to be included in the snapshot of retained EU law after the end of the implementation / transition period. All of which requires delicate redrafting of clause 2.

Clause 4 as presently drafted retains rights, power, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day, are recognised and available under section 2(1) of the ECA under clause 4(1)(a). If the ECA has been repealed at the beginning of the implementation / transition period (*'repeal day'*), but clause 4 takes its snapshot of retained EU law at the end of the implementation / transition period (retention day), then **clause 4(1)(a) will need to be amended to ensure that the section 2(1) ECA rights, powers, liabilities etc. are retained.**

Furthermore, assuming that the WAI Bill replicates the effect of the ECA, then the rights, power, liabilities, obligations, restrictions, remedies and procedures which, immediately before *'retention day'*, are recognised and available under the WAI Bill will also need to be included in the snapshot of retained EU law that the EU (Withdrawal) Act takes on retention day at the end of the implementation / transition period.

Correcting retained EU law

As set out above, one of the functions of the EU (Withdrawal) Bill is to give delegated powers to ministers to modify retained EU law by delegated (or secondary) legislation to 'correct' it so that it functions post-exit. This power is provided in clause 7, sub-clause 1 of which provides:

- (1) *A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate —*
- (a) *any failure of retained EU law to operate effectively, or*
 - (b) *any other deficiency in retained EU law arising from the withdrawal of the United Kingdom from the EU.'*

Clause 7(2) sets out a list of deficiencies, for example when retained EU law confers functions on EU entities which *'no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it'*. This list of deficiencies is broadened by clause 7(3), which allows ministers to add to the list of deficiencies by regulation.

It is useful to distinguish between two aspects of delegated legislative powers:

- 'the 'trigger' of a power, i.e. the condition(s) that have to be met for a minister to exercise it; and
- the 'reach' of a power, being the legal changes which the power may be used to make.'¹¹

¹¹ Bingham Centre for the Rule of Law, *The EU (Withdrawal) Bill and the Rule of Law Expert Working Group*, Discussion Paper for Meeting 5: Scope of Delegated Powers, p.4.
https://www.biicl.org/documents/1806_bingham_centre_eu_withdrawal_bill_-_discussion_paper_-_27_11_2017_-_final.pdf?showdocument=1.

The trigger for clause 7 as set out in clause 7(1) is:

1. a Minister considers it 'appropriate to prevent, remedy or mitigate' a 'failure of retained EU law to operate effectively' or 'any other deficiency in retained EU law';
and
2. the failure or deficiency arises 'from the withdrawal of the United Kingdom from the EU'.

Debate on clause 7 has focused on its use of the word '*appropriate*' rather than '*necessary*' as the threshold for its trigger, failure to clearly define '*deficiency*', and its reach to amend primary legislation.

However, there is a further point about the trigger for clause 7 that emerges in the context of the anticipated sequencing of the Brexit process: when will there be sufficient certainty about the consequences of the UK's withdrawal from the EU for clause 7 to be triggered?

Clause 7 is due to come into force on the day the EU (Withdrawal) Act is passed under clause 19. So, perhaps as early as June 2018, UK ministers could start exercising powers to amend what will be retained EU law after exit. Yet, the government has agreed with the EU that it wants an implementation / transition period that will largely or completely reflect the *status quo*, with EU law being applicable to and in the UK during that period with only a few specified exceptions.¹² Therefore, as noted above, presumably regulations under clause 7 would not come into force until the end of the implementation / transition period so as to retain the *status quo* for that period.

Furthermore, the Prime Minister's Mansion House speech indicated that the UK may continue to participate in some areas of EU activity. The Prime Minister stated:

*'We will also want to explore with the EU, the terms on which the UK could remain part of EU agencies such as those that are critical for the chemicals, medicines and aerospace industries: the European Medicines Agency, the European Chemicals Agency, and the European Aviation Safety Agency.'*¹³

So, how will the Government know which aspects of retained EU law need to be changed using clause 7 before, at a minimum, a high-level agreement on the UK and EU's future relationship has been reached? How can Parliament scrutinise regulations under clause 7 without certainty about the areas where there will definitely be divergence between the UK and EU, and the areas where there might be ongoing co-operation and perhaps alignment? Rather than increasing legal certainty for business and individuals in the UK about what the law will be in the UK post-exit, premature regulations under clause 7 would create uncertainty as to the UK's capacity to co-operate with the EU or retain alignment with EU laws if agreed in negotiations. Such doubts would have an international as well as a domestic rule of law dimension.

¹² Article 122 of the draft Withdrawal Agreement of 19 March 2018 (highlighted to reflect agreed text) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/691366/20180319_DRAFT_WITHDRAWAL_AGREEMENT.pdf.

¹³ Prime Minister Theresa May's speech on our future economic partnership with the European Union, 2 March 2018, <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union>.

The clause 7 power should therefore be amended so that it is subject to Parliament's approval of the future relationship between the EU and UK, i.e. the relationship between the EU and UK after the end of the implementation / transition period.

The above arguments similarly apply to the trigger for the clause 8 delegated legislative power and so **clause 8 should be amended in line with the recommendation for clause 7.**

Certainty of next steps in the process of legislating for Brexit

The clause 9 power in the EU (Withdrawal) Bill, providing for implementation of the Withdrawal Agreement by regulation following Parliament's approval of the deal by legislation, appears redundant given the likely scope and purpose of the WAI Bill and should arguably be removed. On day 7 of committee stage scrutiny of the EU (Withdrawal) Bill in the House of Lords, the need for clause 9 was debated at length, especially in light of the reports of the Constitution Committee and Delegated Powers and Regulatory Reform Committee, both of which raised concerns about clause 9.

Statements made by ministers about clause 9 have yet to provide an explanation of the need for it that makes sense in legal certainty and rule of law terms. The Government's explanation seems to be that it will be used for minor technical changes implementing the Withdrawal Agreement,¹⁴ but that does not explain why the power should be in the EU (Withdrawal) Bill rather than the WAI Bill. Deletion of clause 9 would require consequential amendments to schedule 7 and schedule 4 of the EU (Withdrawal) Bill. Similarly, powers of the devolved nations to implement the Withdrawal Agreement by delegated legislation under schedule 2 part 3 of the EU (Withdrawal) Bill would appear to be redundant.

It is likely that a power similar to that in clause 9 of the EU (Withdrawal) Bill would be included in the WAI Bill so that UK ministers could make necessary changes to legislation to implement the Withdrawal Agreement. The WAI Bill may also include similar powers for the devolved nations to implement the Withdrawal Agreement through delegated legislation. Any delegated legislation needed for the terms of withdrawal and implementation / transition would need to come into effect prior to the beginning of implementation / transition (before 'repeal day').

There may be a concern that removing clause 9 would deprive Parliament of its 'meaningful vote' on Brexit as inserted by amendment 7 in the House of Commons tabled by Dominic Grieve QC MP. However, the effect of that amendment was not to require that the government bring legislation to Parliament implementing the Withdrawal Agreement. The government need only do so in order to be able to use the powers in clause 9.

The rule of law would be served by greater clarity and certainty on the next steps of legislating for Brexit because at this point the lack of clarity or certainty means that individuals and businesses in the UK do not know what to expect from the EU (Withdrawal) Bill, or the WAI Bill, or other Brexit legislation. How should individuals and business in the

¹⁴ House of Lords, *Hansard*, 14 March 2018, vol. 789, cols. 1651-52.

UK know whether to comply with the EU (Withdrawal) Act and regulations made under it if they are also told that it will soon be amended by the WAI Bill?

There are different ways to achieve greater clarity and certainty on the next steps of legislating for Brexit. One way would be a Written Ministerial Statement. **Another is that a new clause could be inserted into the EU (Withdrawal) Bill by which Parliament sets the next steps in the process of legislating for Brexit, including a requirement that the government seek Parliament's approval of the Withdrawal Agreement by way of the WAI Bill.** This latter method would have the additional certainty of Parliament imposing legal obligations on government. Amendment 150 tabled by Baroness Hayter and Lords Wallace, Hannay and Patten aimed to have this effect in the context of an amendment to clause 9, and the debate on that amendment on day 7 of committee stage scrutiny of the EU (Withdrawal) Bill reflected the current uncertainty on the next parliamentary and legislative processes for Brexit.¹⁵

In response to that debate, Minister of State Lord Callanan stated:

'The Government have committed to hold a vote on the final deal in Parliament as soon as possible after the negotiations have concluded. Let me say, in direct response to the noble and learned Lord, Lord Falconer, and the noble Baroness, Lady McDonagh, that this vote will take the form of a resolution in both Houses of Parliament and will cover both the withdrawal agreement and the terms of our future relationship. The Government will not implement any parts of the withdrawal agreement until after this vote has taken place.

As we have repeatedly made clear, we fully expect, intend and will make every effort that this vote will take place before the European Parliament votes. However, I hope noble Lords will understand that we do not control the EU's timeframe for approving the withdrawal agreement and therefore cannot make any statutory assurances where it is concerned.¹⁶

...

We have, however, made clear that it is our objective to reach an agreement with the EU by October 2018. This objective is shared by the EU and is one which we consider we are on course to deliver. We expect, therefore, that the vote will take place substantially before exit day...¹⁷

...

After Parliament supports the resolution to proceed with the withdrawal agreement and the terms for our future relationship, the Government will bring forward a withdrawal agreement and implementation Bill. That Bill was announced on 13 November 2017 by the Secretary of State and followed on 13 December 2017 by a Written Ministerial Statement committing the Government not to implement any parts of the withdrawal agreement until this vote on the final deal takes place. I hope it is clear how the withdrawal agreement will be implemented and that Parliament will have ample opportunity to scrutinise it before it is given effect in our law.

¹⁵ House of Lords, *Hansard*, 14 March 2018, vol. 789, cols.1607-1617 and 1631-1645.

¹⁶ House of Lords, *Hansard*, 14 March 2018, vol. 789, col. 1645.

¹⁷ House of Lords, *Hansard*, 14 March 2018, vol. 789, col. 1646.

*I reassure noble Lords that the withdrawal agreement itself will be subject to the provisions of the Constitutional Reform and Governance Act 2010 before ratification, in addition to the vote on the final deal that we have already promised and the scrutiny of the implementing legislation. There will therefore be ample opportunity to scrutinise the agreement and its implementation.'*¹⁸

Given the recent context of the *Miller* case and ongoing uncertainty as to the next steps in the process of legislating for Brexit, legal certainty would be enhanced by clear information or legislative provisions on when Parliament will make decisions or legislate in the Brexit process. This paper has proceeded on the assumption that the UK and EU will reach a Withdrawal Agreement, but information or legislative provisions concerning the next steps in the process of legislating for Brexit should include what happens if no deal is reached.

¹⁸ House of Lords, *Hansard*, 14 March 2018, vol. 789, col. 1651.

Appendix: Anticipated timeline

When	What	Who
23 March 2018	The draft Withdrawal Agreement of 19 March 2018 with text agreed at negotiators' level between the EU and UK was approved by leaders of the remaining EU 27 countries.	UK government, EU Commission and remaining EU 27
May 2018	EU (Withdrawal) Bill finishes House of Lords stages.	UK Parliament (HL)
May – July 2018	EU (Withdrawal) Bill subject to parliamentary 'ping pong' between House of Commons and House of Lords (if necessary).	UK Parliament
July 2018	EU (Withdrawal Bill) passed before summer recess.	UK Parliament
October 2018	End of UK-EU negotiations on withdrawal - draft 'final deal' agreed. Final deal understood to be detailed terms of withdrawal and transition / implementation, and framework for future relationship.	UK government and EU Commission
October 2018	UK Parliament votes on final deal in a motion separate to the Withdrawal Agreement and Implementation Bill. <i>Per the analysis in this paper, the powers in clauses 7 and 8 of the EU (Withdrawal) Bill should not be able to be exercised until this motion has been passed at the earliest.</i>	UK Parliament
November / December 2018	Withdrawal Agreement and Implementation Bill making final deal 'directly effective' introduced in UK Parliament.	Introduced by UK government into UK Parliament
Late 2018 / early 2019	European Parliament votes on Withdrawal Agreement	EU Parliament
Early 2019	Final sign off on the Withdrawal Agreement by the EU Council acting by a qualified majority	EU Council

February/March 2019	Withdrawal Agreement subject to treaty ratification process as required under the Constitutional Reform and Governance Act 2010 (CRAGA) and potential veto by UK Parliament. ¹⁹	UK Parliament
March 2019	Withdrawal agreement ratified.	EU and UK
March 2019	Withdrawal Agreement and Implementation Bill passed (as set out by DExEU minister, Steve Baker MP, to the House of Lords Constitution Committee on 13 December 2017).	UK Parliament
29 March 2019	UK exits from the EU. <i>As proposed in this paper, this would be 'repeal day' on which the European Communities Act 1972 is repealed.</i>	
TBC	UK-EU negotiations on the future relationship.	UK government and EU Commission
TBC	One or more draft agreements covering different aspects of the future relationship.	UK government and EU Commission
TBC	Future relationship draft agreement(s) subject to CRAGA in UK Parliament.	UK Parliament
TBC	Future relationship draft agreement(s) subject to approval of European Parliament and conclusion by the Council.	EU Parliament and Council

¹⁹ As Secretary of State David Davis MP's written statement of 13 December 2017 explained: 'the Constitutional Reform and Governance Act 2010 (CRAG) normally requires the Government to place a copy of any treaty subject to ratification before both Houses of Parliament for a period of at least 21 sitting days, after which the treaty may be ratified unless there is a resolution against this. If the House of Commons resolves against ratification the Government can lay a statement explaining why it considers the treaty should still be ratified and there is then a further 21 sitting days during which the House of Commons may decide whether to resolve again against ratification. The Government is only able to ratify the agreement if the House of Commons does not resolve against the agreement.' See: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-13/HCWS342/>

TBC	Where the agreement(s) on future relationship include member state competence / require amendment of the treaties, approval by parliaments of the remaining 27 EU member states, including regional parliaments in some instances.	Parliaments of the remaining EU 27
TBC	Agreement(s) on future relationship ratified.	EU and UK
31 December 2020	End of implementation / transition (draft Withdrawal Agreement). <i>As proposed in this paper, this would be 'retention day' when the snapshot of EU law is taken and converted into 'retained EU law' in UK law.</i>	

Sources used for the anticipated timeline

<http://www.bbc.co.uk/news/uk-43518096>

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2017-12-13/HCWS342/>

<https://www.gov.uk/government/news/new-bill-to-implement-withdrawal-agreement>

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/constitution-committee/european-union-withdrawal-bill/oral/75689.pdf>

<https://www.reuters.com/article/us-britain-eu-davis/amid-brex-it-timetable-confusion-uk-aims-for-transition-outline-by-early-2018-idUSKBN1CU0YH?il=0>

<https://www.parliament.uk/documents/lords-committees/eu-select/brexit-negotiations/brexit-negotiations-timeline.pdf>

<http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf>

[https://hansard.parliament.uk/Lords/2018-03-14/debates/1186F7D7-9820-4E11-96A0-59B6B3169F0D/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/Lords/2018-03-14/debates/1186F7D7-9820-4E11-96A0-59B6B3169F0D/EuropeanUnion(Withdrawal)Bill)

[https://hansard.parliament.uk/Lords/2018-03-14/debates/DDCD4B7C-74AA-4583-BA6C-16E01F8C5182/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/Lords/2018-03-14/debates/DDCD4B7C-74AA-4583-BA6C-16E01F8C5182/EuropeanUnion(Withdrawal)Bill)

Enquiries about the Hansard Society should be directed to:

The Director
The Hansard Society
5th Floor, 9 King Street
London
EC2V 8EA
0207 710 6070
contact@hansardsociety.org.uk

