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Implementing Transition: How Would it Work?

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Executive Summary

A transitional or 'implementation' period

In her speech in Florence on 22 September 2017, Prime Minister Theresa May reiterated that: 'The United Kingdom will cease to be a member of the European Union on 29th March 2019.' However, she also acknowledged the need for a 'period of implementation' once the UK leaves the EU and before any new 'deep and special partnership' agreement is negotiated and ratified.

Negotiations on any transitional framework will not commence until the European Council is satisfied that 'sufficient progress' has been made in the first phase of negotiations on citizens' rights, outstanding UK financial liabilities and the impact of Brexit on Ireland. And the EU's chief negotiator, Michel Barnier, has made clear that he currently has no mandate to begin talks on transition. But assuming that his mandate is in due course extended beyond the first phase of negotiations, the key question is how might transition be structured in legal terms.

This raises two sets of interlocking issues.

- What form would a transitional agreement take and, in particular, what would its legal basis be in European Union law?
- How would domestic law accommodate a transitional period when the UK would no longer be an EU member, but during which (at least some) EU law would continue to apply?

Transition and EU law

The uncharted nature of the territory in which the EU finds itself means that there is uncertainty about how, in EU law terms, a transitional agreement might be provided for. We consider a number of possibilities, noting potential difficulties:

- Article 50 of the Treaty on European Union might be used, but it is unclear to what extent, if any, it can be used as the basis for a transitional agreement. The more that such an agreement merely perpetuates membership subject to minor modifications, the less easy it is to characterise as a 'withdrawal' agreement within the meaning of Article 50.
- Transition might instead be achieved through a separate 'association agreement' under Article 218 of the Treaty on the Functioning of the European Union. This would allow many of the obligations of membership to lapse, but some form of free trade agreement to be continued. Yet an agreement under Article 218 would require unanimity among the other Member States and the consent of the European Parliament.
- None of the foregoing options is without legal and political difficulty. A further possibility is that the Article 50 negotiation period be extended — and so the UK's exit deferred — under Article 50(3). This would offer a legally secure and straightforward option, but the political difficulties would be considerable, both in domestic terms (given the likely unpalatability to pro-Leave voters and politicians of formally deferring exit) and in EU terms (because of the need for unanimity among the EU27 if the two-

year negotiation period were to be extended).

Transition and UK law

How any transitional agreement might be accommodated by domestic law depends in large part upon the nature of any such agreement. In our paper, we focus upon a 'standstill' form of transition: that is, one that requires the UK to remain in sync with some or all EU law during the transitional period. Other forms of transition can certainly be envisaged. But even this most straightforward of models may create significant legal difficulties, thus suggesting that the problems arising from more complex models would be even more profound.

Against that background, we consider the following possibilities and note a number of potential difficulties:

- If the Article 50 period is extended, the position is straightforward: the UK Government would simply defer defining 'exit day' for the purpose of the EU (Withdrawal) Bill, thus leaving the European Communities Act 1972 in force. However, such a course is, as noted above, politically difficult.
- It might be thought that even if the Article 50 period is not extended, 'exit day' could be deferred for domestic purposes and the ECA left in force. But in fact that would be problematic. The ECA presupposes EU membership, and would not continue to give domestic effect to EU law if the UK were no longer a Member State.
- A further possibility would be to draft the Withdrawal Agreement and amend the ECA to ensure that EU-law norms retain their current status in the UK legal system. However, there are three

difficulties with this approach: it is unclear whether the primacy of EU would survive Brexit; the basis provided in s. 2(2) of the ECA for delegated legislation implementing EU obligations might no longer be secure; and whether the Court of Justice could continue to play a role in respect of the UK post-Brexit is uncertain.

- If a Withdrawal-Agreement-plus-ECA-amendment model were adopted, it would also be necessary consider where that would leave the EU (Withdrawal) Bill. In the ECA were to continue give effect in domestic law to (some) EU law, it would make little sense to bring into force those parts of the Withdrawal Bill that are intended to 'freeze' EU law by taking a snapshot of it and turning it into domestic law at the moment of exit. Having both the ECA and relevant parts of the Bill in force would create duplication at least and significant confusion at worst.
- Thought would also have to be given to the legal basis on which new EU-derived obligations would be given effect in the UK during the transitional period. The Withdrawal Bill could be amended so as to provide a legal basis for temporarily implementing EU during the transitional period, but this would result in a very cluttered post-exit legal landscape, with a variety of EU-law norms adopted under the ECA, other norms created on a different legal basis during the transitional period, and yet other norms created or amended post-Brexit under the powers granted by the Withdrawal Bill.

Conclusion

The most convenient legal vehicle for transition is the extension of the Article 50

period coupled with the deferral of 'exit day' under the Withdrawal Bill. But this most straightforward of legal solutions is fraught with political difficulty. Political and legal reality are thus at odds with one another, meaning that some very hard choices will have to be made. As with so many things Brexit-related, there are few, if any, easy solutions.

Introduction

In economic and political terms, a period of implementation – better understood as a ‘transitional period’ – is now widely recognised as necessary to manage the UK’s withdrawal from the EU. Yet there is little clarity about the concept of a ‘transitional period’.

An uncontroversial approach would be that there should be a period before exit day during which certain practical adjustments are made on both the UK and EU side to smooth withdrawal. One suggestion the UK Government has made relates to the voluntary registration of EU citizens prior to withdrawal. There will have to be many other such practical steps which are not normally permitted under EU law but may be provided for in an agreement between the UK and the EU.

It seems that the use made by the UK Government of the concept of a ‘period of implementation’ relates to a post-exit framework whereby some of the existing rules and practices continue to operate between the UK and the EU. As the Prime Minister said on 9 October 2017:

The framework for this period which can be agreed under Article 50 would be the existing structure of EU rules and regulations. This might best be termed a ‘period of standstill’.

It is clear that the long-term relationship is not governed by Article 50 TEU, but by Article 218 TFEU. The basis in UK domestic law for that long-term relationship lies outside the purview of this paper. Here, we focus on what a ‘transitional period’ might look like, especially in UK domestic law.

Without a transitional framework, and unless and until a new trade agreement is

secured between the EU and the UK, trade would be conducted under World Trade Organization rules, with tariffs imposed as between the EU and the UK.

The UK also needs time to put in place the sorts of regulatory structures which have been shared with the EU during its period of membership and which has facilitated frictionless movements of people, capital, goods and services in the Single Market. All of this will take far longer than the two-year period for negotiating the UK’s withdrawal from the EU under the Article 50 TEU process.

The UK has chosen to repeal the European Communities Act 1972 through the European Union (Withdrawal) Bill. The aim of the Bill is also to create a short-term holding position by which EU law is domesticated, with it being for future governments and parliaments to decide what legislative changes they want to make. It is a challenging legal undertaking but it has a clear purpose.

Much less clear, however, is how transition, as distinct from the position following ‘full’ exit, might be structured in legal terms at both EU and UK levels. In the sections that follow, we analyse from both perspectives how a standstill transitional period could operate.

We take this approach for two reasons, one practical, one analytical.

From a practical point of view, a standstill transitional period is the only arrangement currently on offer from the EU. As the EU Council’s negotiation guidelines state: ‘Should a time-limited prolongation of Union *acquis* be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply’.

From an analytical point of view, if a standstill transitional period – the *status quo* – is difficult to implement as a matter of EU and UK law, the implication is that ‘bespoke’ transitional arrangements will be even more complex to implement.

Negotiating Transition: EU Law and its Constraints

The European Council Guidelines for the negotiations do envisage that transitional arrangements might be necessary, but that such arrangements could and should be made only to the extent that they are necessary and legally possible. The legal limits of what is possible under Article 50 have, however, never been articulated or tested.

Article 50 TEU

Article 50 TEU only envisages the negotiation of a withdrawal agreement in the light of a 'framework for future cooperation' once the Member State leaves the EU. It tells us nothing about what scope there is for using Article 50 to agree a transitional arrangement. Nonetheless, it seems to be the UK's position that this 'framework for future cooperation' can include a transitional framework

It is important to keep this question distinct from the clear power under Article 50 for the EU and the UK to extend the period for negotiations provided all Member States agree. Doing so would prolong the UK's *membership* of the EU pending a withdrawal agreement rather than managing the UK's interim relationship with the EU once the UK *ceases* to be a Member State. If an extension is agreed by all the other Member States, the UK would not leave the EU on 29 March 2019. EU law would continue in full force, unless special derogations are agreed by way of an interim withdrawal agreement or by EU legislation.

The more pressing legal issue is to what extent Article 50 can be used to create the

sort of 'stand-still' transitional framework that a UK government might seek.

The legal issue has two components. The first is the recognition that the EU is not a sovereign entity but only has conferred powers. More specifically, any sort of agreement within the scope of Article 50 has to be one that it is legally competent for the EU to adopt under that provision. This is a classic "legal basis" issue in EU law.

The second point is related. Any agreement adopted under Article 50 only requires a qualified majority vote of EU states. And unlike an accession treaty, association agreement or a revision to the existing treaties, as a matter of EU law, it does not require national approval in each of the Member States.

So the legal question for a transitional arrangement falls into two parts: is such an arrangement actually within the competence of the Union under Article 50 and if so, to what extent do the procedural rules limit what such a transitional framework might contain?

The Accession Agreement Analogy

Given that Article 50 TEU does not rule out a transitional arrangement, it could be assumed that Article 50 can act as a legal basis for a transitional arrangement either as a distinct legal instrument or as an intrinsic part of a single withdrawal agreement. After all, Article 49 TEU which provides for the accession of new Member States simply refers to the negotiation of an agreement between the Member States and the applicant state. These accession agreements often provide for transitional arrangements.

For example, Part Four of the Treaty of Accession which saw the UK join the

European Economic Community in 1973 set out the transitional arrangements that would apply, not least in terms of the phasing in of customs and free movement of goods rules.

But it is not clear that an accession agreement, which by definition envisages rapid convergence and permanent harmonisation of domestic and EU law, provides an appropriate analogy for a withdrawal from the EU, for the purpose of which withdrawal is to bring harmonisation to an end (at least in some areas) and facilitate divergence from EU law.

Indeed, it might be objected that, as a matter of law, there is no parallelism between the transition that applies from the moment a country becomes a Member State and becomes bound by the EU treaties, and a transitional framework that would be triggered once a country ceased to be a Member State. Article 50(3) is clear that the treaties cease to apply to the withdrawing state from the date of entry into force of the withdrawal agreement.

It is at this boundary between membership and non-membership that putting in place a transitional framework might be particularly testing in legal terms.

We consider three potential models: (1) a transitional arrangement that has many of the qualities of an **interim association agreement** and which might be a bridge towards a deep and special partnership based on an association agreement in terms of Article 218 TFEU; (2) rejoining **EFTA** and retaining access to the Single Market through the European Economic Area agreement; (3) a **bespoke** withdrawal agreement where the cessation of the application of the treaties is functionally and temporally differentiated

and operates as a bridge towards a future free trade agreement.

An 'Interim' Association Agreement

Pending a final agreement with the EU on its future relationship, an associated status might be offered to the UK. This would be especially important were the UK to seek a deep and special partnership in the form of an association agreement as its ultimate Brexit endpoint.

So a transitional agreement could be a type of interim association agreement which would contain and replicate many of the UK's existing obligations of EU membership while others would fall away.

The difficulty is that an Article 218 TFEU association agreement involves unanimity and consent of the European Parliament rather than the qualified majority rule in Article 50.

Association agreements also typically require domestic approval before ratification and could even trigger a referendum in other Member State, as was the case when the Netherlands held a vote on the EU-Ukraine Association agreement. As a matter of EU law, an Article 50 agreement does not require domestic approval.

An association agreement can be provisionally applied before the relevant consents have all been obtained. Creating a transitional association agreement outside the scope of Article 218 would seem to further stretch the temporal application of EU law to a non-Member State.

Assuming that such an interim association agreement could, nonetheless, be adopted under Article 50, it need not entail direct effect and could be implemented either by

incorporating it directly into UK law or by powers under the Withdrawal Act to implement provisions via delegated rules.

European Free Trade Association/European Economic Area

If the UK were to re-join EFTA, there would be an off-the-peg relationship to the EU. EFTA membership would detach the UK from certain obligations of EU membership, but would open the way to the UK retaining membership of the European Economic Area. If the UK were an EEA and EFTA state, then European Union law would apply in many fields and would be updated through the EEA agreement.

But the rules would be made by the EU without formal involvement of the UK. The implementation of the EEA rules would require special provisions in UK law, similar to those which exist under the current European Communities Act. There would also need to be obligations on the courts to interpret UK law implementing EEA agreements in the light of decisions of the Court of Justice. In our view, the EFTA/EEA option, and variations on it, are best viewed as a medium- to long-term solution to the problem of establishing a post-Brexit relationship between the UK and the EU. Even as a short-term strategy, there would still likely need to be a legal framework for transition to an EFTA/EEA model. And for present purposes, it wouldn't represent a 'stand-still' as such but rather a variation of existing obligations.

Extending the Application of the Treaties

Article 50 depicts a moment in time when the treaties cease to apply to a withdrawing state. That moment is either the moment specified in a withdrawal agreement or, failing that, two years after notification. Either way, a state ceases to be a Member State and the treaties cease to apply.

Could the UK stop being a Member State, but without all the provisions of the treaties – and the laws made under them – ceasing to apply to it? Could there be a phasing out of the application of the treaty?

What would be significant about this type of interim framework would be that the rights and duties of the UK would continue to be defined by EU law. If the withdrawal agreement created such an interim framework by reference to the continued application of the treaties – albeit limited to a number of specific provisions and limited in time – then the EU might well consider that the domestic implementation and enforcement of these rights and obligations would be under the same conditions as under full membership including, direct effect and supervision by EU institutions including the Court of Justice.

In summary, there is significant uncertainty about the scope of Article 50 TEU and, as a result, the types of interim agreement that might fall within it. Moreover, different interim agreements might produce different sorts of legal effects and have different implementation demands.

The Current Status of EU Law in the UK: the European Communities Act 1972

In order to explore how a transitional period might be accommodated at the domestic legal level, it is important, as far as is possible, to have firmly in mind both what the UK would be transitioning *from* and what it would be transitioning *to*; after all, it is inherent in the notion of a transitional period that its designers lack the luxury of starting with a blank sheet of paper. It is therefore necessary to consider the European Communities Act 1972 ('ECA') and the EU law concepts with which it interacts, as well as the European Union (Withdrawal) Bill 'Withdrawal Bill', which is designed with post-exit, as distinct from transitional, circumstances in mind.

ECA as Conduit Pipe

Currently, as a Member State, the UK has numerous obligations under the EU Treaties. Among other things, those obligations require that EU law be accorded domestic effect: as a 'legal order' in its own right, it is axiomatic that the EU's laws should have effect within the EU's constituent national legal systems.

For present purposes, a broad distinction can be drawn between two types of EU law: (i) that which needs to (and must) be implemented by Member States, and (ii) that which does not need to be implemented because it has 'direct effect'. In relation to category (i), the ECA plays a central role; in relation to (ii), the ECA's role is indispensable and unique. It is helpful to take these two points in turn.

When EU law lacks direct effect and therefore needs to be implemented, this

can be, and occasionally is, done by enacting UK primary legislation. For instance, the Equality Act 2010 implements a number of the UK's obligations arising from EU equality law. However, the lion's share of domestic implementation occurs by way of secondary legislation: and the vast majority of that secondary legislation is made under the ECA, s. 2(2) of which authorises the making of such legislation for the purpose of (among other things) implementing any of the UK's EU obligations. The conventional view is that without further action all of the delegated legislation made under s. 2(2) will, by default, fall away when the UK ceases to be a Member State or when the ECA is repealed (whichever is sooner). Avoiding such a default consequence — and legal 'cliff-edge' it implies — will be imperative to the legal success of any transitional period.

Different considerations apply to EU law that has direct effect. Below, we consider how the ECA operates upon such EU norms. First, however, it is necessary to examine the notion of direct effect itself.

Direct Effect

When EU law has direct effect, it is — as far as EU law is concerned — effective and enforceable in Member States from the moment of its inception. (The significance of our 'as far as EU law is concerned' caveat is explained below.) Treaty provisions can have direct effect provided that they are sufficiently clear, precise and unconditional. Legislation enacted by the EU under the Treaties, such as regulations and decisions, can also have direct effect. Core to the notion of direct effect is the absence of any need for domestic implementation of directly effective provisions of EU law.

However, while the UK *agreed* to the direct effect of EU law by becoming a party to the EU Treaties, that was, on its own, insufficient to *secure* the direct effect of EU law within the UK legal system. Also needed was domestic legislation providing for the direct effect of EU law, thereby aligning the domestic legal framework with the UK's EU Treaty commitments. That alignment is secured by the ECA, s. 2(1) of which provides for the direct effect of EU law in the UK. The ECA can thus be thought of as a 'conduit pipe'. EU law that is directly effective *as a matter of EU law* is given effect *in the UK* by means of the ECA: law is made at the EU level and moves along the conduit pipe to enter the UK legal system. It follows that repealing the ECA will break the pipeline, because that legislation *is* the pipeline. And, in any event, as we will see, leaving the EU will, render the pipeline devoid of directly effective EU law in the first place.

Primacy of EU Law

What if directly effective EU law passes along the conduit pipe supplied by the ECA and enters the UK legal system, only to run up against conflicting provisions of UK law? According to EU law, the answer is clear: EU law takes priority. This is so because, as a matter of EU law, EU law has 'primacy' over the laws of Member States. As the Court of Justice put it, Member States 'have restricted their sovereign rights' by creating a body of law that binds them (*Costa v Enel* [1964] CMLR 425, 455). National courts are thus obliged to 'apply [EU] law in its entirety' and must disregard 'any provision of national law which may conflict with it' (*Simmenthal* [1978] ECR 629).

The primacy principle does not sit comfortably with the doctrine of parliamentary sovereignty, according to

which the UK Parliament has legally limitless law-making powers. Nevertheless, in its seminal judgment in *Factortame (No 2)* [1991] 1 AC 603, the Appellate Committee of the House of Lords accepted that UK courts can 'disapply' Acts of Parliament that are incompatible with EU law. In so concluding, the House of Lords reached a highly pragmatic conclusion that EU membership demanded. Yet the constitutional basis for that conclusion is opaque. It is true that the ECA, s. 2(4) provides that all legislation 'shall be construed and have effect subject to' (among other things) s. 2(1) which, as we have seen, gives direct effect to EU law. However, prior to *Factortame*, it was far from clear that Parliament was capable of legislating so as to assign such priority to EU law, the generally accepted principle being that Parliament cannot limit its own power and that courts must always give effect (in the event of conflict) to the most recent legislation. However, the Supreme Court was unequivocal in the recent Article 50 case, saying that the ECA had given EU law 'an overriding supremacy in the hierarchy of domestic law sources' (*R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5, [81]). In doing so, the Court appeared to go rather further than its earlier jurisprudence, in which it was suggested that the ECA may have assigned to EU law primacy over most domestic law, but perhaps not over the most fundamental constitutional provisions and principles (*R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3).

The Withdrawal Bill

The Withdrawal Bill, which is currently making its way through Parliament, does not appear to be designed with a transitional period specifically in mind. If

a transitional period amounts to a sort of halfway house version of Brexit, then the Bill's focus appears to be on Brexit proper. We explain below that this raises questions about the Bill's capacity to accommodate a transitional period prior to full exit. First, however, we briefly explain how the Bill will work.

The Bill begins from the sensible premise that a great deal of what is currently EU law will remain necessary, at least in the immediate term, following exit. The UK has relied heavily upon the EU to make law over the last five decades, and if all of that law were to evaporate on exit day, legal chaos would doubtless ensue. To avoid such an eventuality, the Withdrawal Bill preserves the vast majority of EU law. It does so in two principal ways. First, it ensures that existing domestic law that implements EU law will continue in force: in particular, clause 2 of the Bill provides that delegated legislation made under the ECA, s. 2(2) will remain in force even after the ECA itself is repealed. Second, the Bill takes directly effective EU law and converts it into domestic law.

The Bill thus creates a new category of UK law, to be known as 'retained EU law'. Membership of that category will carry a number of significant implications. First, the Bill provides that 'the principle of the supremacy of EU law' (i.e. the primacy principle) will continue to apply in respect of pre-exit domestic law, the intention, it appears, being that (at least some) retained EU law will have priority over UK laws, including Acts of Parliament, made before exit day. Second, 'retained EU law' will limit the powers of devolved institutions. And, third, any 'deficiencies' in 'retained EU law' will trigger very broad ministerial powers to amend or repeal domestic (including retained EU) law so as to address the deficiency.

In summary, the Withdrawal Bill removes the primacy of EU law and removes the conduit pipe. To keep appropriate UK legal rules in harmony with EU legal rules will, in future, require a deliberate act of the UK legislators. If the intention of the Government is that the UK should, for a period, operate in a synchronised fashion on some matters with EU law, it needs to provide a mechanism similar to s.2(2) ECA in order for this to happen.

Options for Transition in UK Law

If, as the Prime Minister indicated in her recent speech in Florence, the UK wishes to make transitional arrangements so as to provide additional time for the negotiation of its long-term future relationship with the EU, some fundamental – and difficult – questions arise about how such a transitional period would be managed in domestic legal and constitutional terms. In considering such questions, it is useful to have in mind the objectives that are, or should be, in play.

One option would be to incorporate certain parts of the corpus of EU rules – the EU *acquis* – into the Withdrawal Agreement itself. Although narrower in scope than the domestic Withdrawal Bill, it would have a similar aim, namely, to produce a category of law – a ‘retained EU *acquis*’ – that would be binding on the parties to the Withdrawal Agreement for such a period as was agreed between the EU and the UK. Such a model would legally *require* the UK to abide by that retained *acquis*, whereas the Withdrawal Bill reflects a domestic *choice* to preserve much EU law upon exit.

But the choice of which approach to follow also has significant consequences for how such a transitional arrangement might be given domestic legal effect. This is a question of the interaction of the Article 50 agreement(s) with the Withdrawal Bill and other Brexit-related legislation. The decision in the Withdrawal Bill to end the application of the Treaties and to domesticate ‘retained EU law’ has important implications for the post-exit transition period. The only applicable EU law is that which has formally been incorporated into domestic UK laws. So when EU law subsequently changes,

domestic ‘retained EU law’ becomes out of step. The Bill has no specific mechanism to keep UK laws in step with the EU in whole or in part until a permanent relationship has been agreed.

The point of a transitional period is to provide a bridge, such that the risks of a ‘cliff-edge’ Brexit are avoided. A successful transitional period will provide for the maximum degree of stability and clarity, subject to the inevitable provisos that a transitional period is by definition temporary and that what it supplies a ‘bridge’ *to* is unlikely to be known, at least in any detail, at the outset. Those considerations play out on a number of fronts, including the economic, the social and the legal. As far as the legal is concerned, good sense dictates that the legal design of any transitional arrangements should uphold legal certainty, should not be unnecessarily complicated or otherwise unwieldy, and should fulfil those objectives in relation to the transitional period itself while also preparing the ground for the post-transitional period. It will therefore be important to ensure that transition is undertaken, in domestic legal terms, in a way that does not needlessly add to the complexities liable to be wrought by the Withdrawal Bill following full exit.

Leaving the ECA in Force

One possibility is to simply leave the most important provisions of the ECA in force during any transitional period. The Withdrawal Bill would either not be enacted or, alternatively, not brought into force.

At first glance, this seems like an attractive option, because it would leave the status quo intact domestically. On closer inspection, however, difficulties emerge.

Consider, for instance, s. 2(1) of the ECA, which refers to ‘rights, powers, liabilities, obligations and restrictions from time to time *created or arising by or under the Treaties*’. At present, this clause gives life in the UK to a variety of EU-law norms. As the Supreme Court explained in *Miller*, [63], ‘*where the effect of the EU Treaties is that EU legislation is directly applicable in domestic law, section 2(1) provides that it is to have direct effect in the UK without the need for further domestic legislation*’. But once the UK is no longer a party to the Treaties, it is doubtful that the norms referred to will continue to flow into UK law. The ‘effect’ of the Treaties, to which the UK will no longer be a party, will not require EU-law norms to be directly effective in the UK: ‘Parliament cannot have intended that section 2 should continue to import the variable content of EU law into domestic law...after the UK had ceased to be bound by the EU Treaties’ (*Miller*, [77]).

Similarly, s. 2(2) of the ECA enables ministers to make delegated legislation ‘for the purpose of implementing any EU obligation of the UK, or enabling any such obligation to be implemented’. Again, however, once the UK leaves the EU, it will no longer have ‘EU obligations’ to implement; it will not have an ‘international law obligation’ (*Miller*, at para. 63) to which s. 2(2) could give effect.

In short, as the Supreme Court observed in *Miller*, ‘EU law in EU Treaties and EU legislation will pass into UK law through the medium of section 2(1) or the implementation provisions of section 2(2) of the 1972 Act, *so long as the UK is party to the EU Treaties*’ (at para. 64).

Moreover, the principle of primacy is a core feature of EU law. In the UK, the principle of primacy is given its force by s. 2(4) of the ECA, which provides that Acts

of Parliament ‘shall be construed and have effect subject’ to EU-law norms. The effect of s. 2(4) was explained by Lord Bridge in the *Factortame* litigation: ‘Under the terms of the Act of 1972 it has always been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law’ (*Factortame*, 659; see also *Thoburn v Sunderland City Council* [2003] QB 151, [60-70]).

Recognition of the principle of primacy is essential to the proper functioning of EU law in domestic legal systems. But the principle of primacy – with the ‘overriding supremacy’ that it attaches to EU law (*Miller*, at para. 81) – is premised on membership of the EU. The key passages of the seminal decisions of the Court of Justice in *Van Gend en Loos* (Case C-26/62) [1963] ECR 1 and *Costa* (Case C-6/64) [1964] ECR 585 are replete with references to the obligations of *Member States* under the Treaties. Once the UK ceases to be a member of the EU, UK courts will no longer be obliged by EU law to apply the principle of primacy.

To sum up, EU law operates effectively in the UK under the ECA *because the UK is a member state of the EU*. Once the UK ceases to be a member state, the provisions of the ECA will no longer function.

The ECA and A Withdrawal Agreement

One possible means of circumventing these difficulties would be to draft the Withdrawal Agreement and amend the ECA to ensure that EU-law norms retain their current status in the UK legal system.

Consider Article 2 of the Treaty of Accession concerning the accession of the

Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the EU:

From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.

Similar terms could be included in the Withdrawal Agreement. It would be possible to adapt the text of Article 2: 'the date of accession' could be modified to take account of the transitional period between the UK's departure from the EU and the entry into force of a post-transitional trading arrangement; 'new Member States' could be replaced by 'UK'; and 'those States' could be altered to read 'UK'.

But there are severe difficulties in drawing an analogy between accession treaties and the Withdrawal Agreement. At a conceptual level, it is not clear that accession and withdrawal are comparable: agreeing to be bound indefinitely by EU law, with the regulatory convergence EU membership entails, is different by several orders of magnitude from agreeing a withdrawal from the EU, the purpose of which is to create a legal space for regulatory divergence. Courts are likely to take a different approach to the interpretation and implementation of a withdrawal agreement. Moreover, the Accession Treaties contain significant powers to allow the European Council to amend the Treaties to give effect to the accession agreement. And it is clear that

not all EU law will remain in force under the Withdrawal Agreement. For instance, the Common Agricultural Policy and the Common Fisheries Policy would lapse. So there will need to be an Annex to the Withdrawal Agreement specifying in minute detail where the UK retains obligations.

Assuming that these difficulties could be overcome by a combination of political will and legal craft, on the domestic level, the UK could amend the definition of 'Treaties' in the ECA to include the Withdrawal Agreement.

This dual mechanism would thus involve, on the international plane, a Withdrawal Agreement providing for the continued binding effect of EU law and, on the domestic plane, an amended definition of the international agreements to which the ECA gives effect.

Provision would also have to be made, however, for the continuing role of the Court of Justice of the EU. Article 267 of the TFEU permits 'a court or tribunal of a Member State' to refer a question of EU law to the Court for authoritative resolution. Currently, s. 3 of the ECA recognises that the Court – not the UK courts – has the final word on the interpretation of EU law. The Withdrawal Agreement would thus have to contain a clause providing for the Court's continued jurisdiction over the UK during the transitional period and the authority of the Court's decisions would have to be recognised in the UK. Giving the Court such continued jurisdiction over a non-Member States would, however, be an entirely novel proposition. No equivalent exists at present in any agreement reached between the EU and a non-Member State.

It is difficult to predict whether this dual mechanism would resolve the difficulties

created by the UK's departure from the EU. On the one hand, an agreement to ensure the continued flow of EU-law norms through the ECA conduit pipe would presumably give domestic effect to directly effective EU-law norms. On the other hand, and regardless of the language used in the Withdrawal Agreement, it will necessarily be the case that the UK will no longer be a member of the EU and will no longer be a party to the Treaties. In the absence of EU membership, it is not clear that the principle of primacy will continue to apply as it does at present; it might thus be possible for Parliament to legislate inconsistently with EU-law norms without the UK courts having the ability to disapply the offending provisions. Whether this would be possible depends upon sharply contested questions concerning the domestic constitutional status of EU law that have never been definitively resolved. In particular, it raises questions about whether the ECA's capacity to assign primacy to EU law arises purely as a matter of domestic constitutional law or whether it also turns upon the applicability of the EU law primacy doctrine to the UK.

A related problem would arise in relation to s. 2(2) of the ECA. If there are no EU 'obligations', the provision might no longer provide a solid legal basis for the introduction of delegated legislation designed to implement EU directives. One might well take the view that the Withdrawal Agreement itself would provide the necessary source of EU 'obligations'. However, anyone affected by such delegated legislation would have a strong incentive to bring a challenge, in the UK courts, to the government's authority to introduce new delegated legislation during the transitional period, and it is difficult to predict the outcome of such litigation.

It is difficult to know how the Court of Justice would reply to a question about the compatibility with EU law of an arrangement pursuant to which it would continue to provide authoritative interpretations of EU law for a jurisdiction that had ceased to be a Member State. On the one hand, if the UK accepted in the Withdrawal Agreement to continue to be bound by EU law, a continuing role for the Court might help to ensure the effectiveness of EU law. On the other hand, giving the Court such a role in respect of a non-Member State (with the risk that the courts of the non-Member State might refuse to follow decisions of the Court) could be thought to undermine the autonomy of the EU legal order, of which the Court is a committed supporter. At a minimum, if such an arrangement were provided for in the Withdrawal Agreement, it is highly likely that the Court would be asked to pronounce on its legality from an EU-law perspective; legal proceedings of this nature would take many months, introducing a further time constraint on the Article 50 negotiations, and might well result in a negative answer that would, in turn, require a re-drafting or renegotiation of the Withdrawal Agreement, and the extension of the Article 50 process to beyond the date set for new elections to the European Parliament in May 2019.

To sum up, there are three difficulties with using the Withdrawal Agreement and the ECA to implement a transitional period: there is no guarantee that the principle of primacy will survive Brexit; the basis provided in s. 2(2) of the ECA for delegated legislation implementing EU obligations might no longer be secure; and whether the Court of Justice can continue to play a role in respect of the UK post-Brexit is uncertain.

The Withdrawal Bill, the ECA and A Withdrawal Agreement

A possible means of addressing the primacy and s. 2(2) difficulties would be to introduce new statutory provisions to address those matters whilst preserving those components of the ECA that would continue to function post Brexit.

The Withdrawal Bill already provides for powers capable of preserving components of the ECA. Clause 17(5) of the Withdrawal Bill creates a broad power for the making of 'such transitional, transitory or saving provision as the Minister considers appropriate in connection with the coming into force of any provision of this Act or the appointment of exit day'. Pursuant to clause 17(5), ministers could provide by regulations for the continuation of the ECA, in whole or in part, for the duration of the transitional period. But this is not explicit.

As outlined in the previous section, ss. 2(1) and 3 could continue to operate post-Brexit, assuming appropriate arrangements are made in the Withdrawal Agreement.

However, if ss. 2(1) and 3 were to continue to operate, it would make little sense to bring the Withdrawal Bill into force in its entirety. For instance, clauses 3 and 4 of the Withdrawal Bill are intended to incorporate directly effective EU law into domestic law, much as s. 2(1) ECA does now. Having all of these provisions operative simultaneously would create duplication at least and significant confusion at worst. Similarly, clause 6 sets out an analytical framework for the taking into account by the UK courts of the jurisprudence of the Court of Justice of the EU. But this analytical framework is very different from s. 3 ECA and could not

operate alongside it. However, there is scope within the Withdrawal Bill to defer the effective date of its provisions. Most obviously, the clause 17 powers to make transitional arrangements, which include a power to modify 'any provision made by or under an enactment' (clause 17(2)) could be used for this purpose, as could the clause 19(2) powers to specify the dates on which clauses 1 to 6 and Schedules 1, 3, 5 and 8 will come into force. In addition, clauses 3, 4 and 6 can take effect only on 'exit day', a term that is to be defined by regulations (clause 14). It is conceivable that regulations could specify a different 'exit day' for different clauses.

Additional provision would have to be made, in the Withdrawal Bill, to take account of the primacy and s. 2(2) difficulties.

As to the primacy difficulty, the Withdrawal Bill already makes reference, albeit obliquely, to the principle of primacy (called the 'principle of supremacy') in clause 5. Clause 5(1) abolishes the principle of primacy for post-Brexit purposes. However, clause 5(2) purports to preserve the principle of primacy 'so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'. But it is not clear that Parliament can *itself* legislate such a principle. Recall what the primacy of EU law requires: 'The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it' (*Miller*, at para. 67). Yet the classical understanding of the doctrine of the sovereignty of Parliament is that 'it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-

matter there can be no implied repeal' (*Ellen Street Estates Ltd* [1934] 1 KB 590, at p. 597). Enacting a strong interpretive obligation is certainly within Parliament's powers (see *e.g.* Human Rights Act 1998, s. 3), but classical theory holds that protection against implied repeal is not. Parliament *could*, notwithstanding these concerns, legislate a principle of primacy. But it is not clear that any such legislation would achieve its intended objective. It is possible that the courts would ultimately conclude that the Withdrawal Bill, when enacted, is a 'constitutional statute'. This is a common law concept, developed by the UK courts, the effect of which is that a 'constitutional statute' is immune from implied repeal such that it would take priority over a subsequent 'ordinary statute'. However, the UK courts have yet to develop a set of criteria for identifying 'constitutional statutes', which makes it difficult to predict with any degree of certainty whether this status will be accorded to the Withdrawal Bill.

As for the s. 2(2) difficulty, the Withdrawal Bill seeks to provide a new legal basis in domestic law for delegated legislation introduced during the UK's membership of the EU (clause 2). Following 'exit day', all such legislation would thus continue in force, including if 'exit day' was followed not by full exit but by the commencement of a transitional period. The Withdrawal Bill also creates ministerial powers to make regulations to remedy deficiencies or failures in the statute book caused by Brexit (clause 7), to comply with international obligations (clause 8) and to implement the Withdrawal Agreement (clause 9). These clauses are not designed to function during a transitional period. Modified versions of these clauses, or a new clause modelled on s. 2(2) ECA could provide a legal basis for the introduction of

delegated legislation to implement EU-law obligations arising during the transitional period. But this would give rise to further difficulties, because a new type of legal norm would be created. The post-Brexit legal landscape would be very cluttered, with a variety of EU-law norms adopted under the ECA, other norms created on a different legal basis during the transitional period, and other norms created or amended post-Brexit under the powers granted by the Withdrawal Bill. It would be very difficult to determine how pre-Brexit, transitional period and post-Brexit norms interact with each other, with other statutes and with common law principles.

Finally, as far as the role of the Court of Justice is concerned, clause 6 envisages that the UK courts will be able to depart from decisions of the Court. This is not compatible with EU law and thus would not facilitate a standstill transitional period.

Accordingly, the combination of a Withdrawal Agreement that replicates current features of EU law, transitional effect for the ECA and new powers under the Withdrawal Bill would not necessarily solve the primacy, s. 2(2) difficulties and Court of Justice difficulties.

Rewriting the Withdrawal Bill

Yet another possibility would be for the drafters to add a new section to the Withdrawal Bill, designed to deal with a transitional period. As drafted, the Withdrawal Bill is designed solely to deal with the post-Brexit legal landscape, not a transitional period. This is reflected in the definition of 'withdrawal agreement' in clause 14(1).

A new section on 'Transition' would have to be added. The drafter would have to identify a concept of 'continuing EU

obligations' (which would have to be designated by an Order in Council) and then empower a Minister of the Crown to make regulations to implement the UK's continuing obligations, including the power to amend Acts of Parliament. This would be the equivalent of s.2(2) ECA. Clause 6 would have to be completely re-written to ensure the courts interpreted UK law in consistency with continuing EU obligations. But – again – there might be no reference procedure to the Court of Justice. There would need to be an additional 'infringement procedure' which replaces the procedures under the EU Treaties and enables a designated body to bring infringement proceedings both administratively and in the UK courts. The extent to which the primacy of EU law would be legally assured under such an arrangement is doubtful.

the member of the Court of Justice of the EU that it previously nominated.

Extending Article 50

A final possibility is to preserve the status quo in full by extending the period for Brexit negotiations in accordance with the process set out in Article 50(3) TEU. In this scenario, the ECA would continue to operate as it does at present during the transition period. Everything would continue as before. None of the problems discussed above would arise.

From a legal perspective, we take this to be the most plausible of the available options. That is not to say that there would be no difficult political choices to make. As a member of the EU, the UK would be expected to elect Members of the European Parliament (Article 22(2) TEU). Subject to any limitations imposed by the Treaties, the UK may choose not to participate fully in the work of the EU – already the UK's EU Commissioner has resigned his position – or participate differentially – the UK has re-nominated

Conclusion

It is clear from the negotiations that have so far been conducted and from the domestic legal preparations being made by way of the EU (Withdrawal) Bill that there are few, if any, straightforward solutions to the legal issues posed by Brexit. Nor is transition, whatever its attractions in economic terms, likely to be any easier viewed from a legal perspective. The difficulties arise for a series of interlocking reasons. First, there are myriad uncertainties, including about what the UK might be transitioning *to* as well as about what the EU and the UK are likely to deem acceptable within a transitional period. Second, the negotiation of a transitional agreement is fraught not only with political difficulty but also legal uncertainty at an EU level. Third, accommodating transition at the level of domestic law raises a set of difficult legal questions that are likely to further complicate a legal position that, as the complexity of the EU (Withdrawal) Bill illustrates, is already highly complicated.

Against this background, our view is that the most straightforward and legally viable mechanism for securing a transitional period is the extension of the Article 50 period and the deferral of 'exit day' for domestic legal purposes. This would, as we have already noted, be far from straightforward in political terms, for it would amount to nothing less than deferring Brexit itself. However, all of this gives rise to a fundamental question about the purpose of 'transition' in this context. Viewed in one way, transition might be taken to imply the adoption of interim arrangements that represent a staging post from one state of affairs to another: a step-change, as distinct from a fatal encounter with a cliff-edge.

Yet it is far from clear that that is what transition is intended to achieve in the present context. Indeed, it is far from clear whether 'transition' — or an 'implementation period' — is really anything more than a euphemism for the purchasing of breathing space, as the still-unfolding complexities of Brexit are laid bare and grappled with by both the UK and the EU. If the purpose of transition is conceived in this way, then it is difficult to see why it should not amount to a perpetuation of the *status quo*, rather than some form of temporary, bespoke arrangement.

Of course, the politics and the presentation of the matters are another issue entirely, and there is undoubtedly a strong political imperative in favour of designing transition in a way that looks like something other than simply kicking the can down the road. But as a matter of law, the more significantly transition differs from the *status quo*, the more complex its accommodation, both in EU and domestic legal terms, is liable to become. It will therefore be necessary for the Government to decide to what extent it is willing to sacrifice legal simplicity, stability and continuity in the interests of securing a transitional arrangement that can be sold as form of Brexit in and of itself, rather than as a mere precursor to — and so a deferral of — Brexit.