



**EU Withdrawal Bill
Second Reading Briefing**

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Introduction

1. Established in 1957, JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the British section of the International Commission of Jurists. JUSTICE has been working on the role of the European Union with regards to fundamental rights in the UK for over a decade, both in relation to the role of the Charter of Fundamental Rights and criminal justice.
2. This briefing sets out our initial concerns regarding the Bill. Where we do not comment on a particular clause, it should not be assumed that we agree with its contents.
3. There are four areas of concern for us in the drafting of the Bill and presumptions raised in it, borne out of one overarching difficulty. While we accept that legislating for exit is a monumental task, and this Bill is attempting to find a path through this, we nevertheless consider that more can be done to ensure that Parliament has full scrutiny over the transition:
 - I. There is far too much resort to delegated powers in the Bill. While the Referendum on Exiting the EU did not reveal specific reasons for the decision to leave, it is widely accepted that, rightly or wrongly, those in the Leave campaign were unhappy with the amount of decision-making by the EU affecting British people without the scrutiny of the UK and devolved parliaments. This Bill enables Ministers of the Crown to legislate for potentially huge changes to our law through secondary legislation, which cannot hope to have the level of scrutiny by Parliament required for such significant change. A better balance must be struck between those amendments that will require primary legislation and what can be handled through secondary legislation.
 - II. Preservation of acquired fundamental rights. The EU *acquis* of law has enabled, over many years, the development and recognition of certain fundamental rights, which are now the rights of UK citizens and of EU citizens living in the UK. The Bill converts these rights into domestic law on exit day in clause 4. However, the delegated powers created by the Bill can also remove these substantive rights. The Bill provides certain exceptions to the application of these delegated powers. These include not amending or repealing the Human Rights Act and its consequential subordinate legislation. However, the

fundamental rights created by EU law are not given any preservation mechanism by the Bill.

- III. The loss of reciprocal justice arrangements and procedures. As an organisation that exists to strengthen the UK justice system, we are aware that there are many EU instruments that enable justice processes to take place – from the European arrest warrant, through mutual enforcement and recognition of judgments, to the allocation of responsibility for processing the claims of asylum seekers who have entered the EU through other member states. These all need reciprocal agreements, and in some cases pan-European authorities, to administer them successfully. Government must not simply use a correcting power to delete these, but rather ensure that these, or equivalent arrangements, are preserved.
- IV. The interpretation of EU law following exit day. Greater guidance must be given to the superior courts on how to exercise this role and on how to address disagreement as to interpretation in the reciprocal agreements that follow exit.

Clause 7 – Dealing with deficiencies arising from withdrawal

4. Clause 7 of the Bill enables Government to address the problem of a wholesale transfer of EU law into UK domestic law, by allowing a two year period after exit day to address how the laws might no longer operate properly. The Government refers to this as the ‘correcting power.’¹ This might be due to a reference to an EU Member State, authority or procedure that no longer applies. While some of these will clearly be deficient for any purpose, such as reference to ‘*other* Member States’ when legislation will need to say ‘EU Member States,’ at this stage, it is not possible to know what procedures might still apply after exit day, since the negotiations are ongoing. It is no doubt for this reason that such broadly drafted delegated powers have been provided to Ministers of the Crown across Government. In its Memorandum on Delegated Powers, it justifies these provisions by the time constraints, practicality of dealing with thousands of laws, and flexibility required for dealing with the negotiation process.²

¹ Memorandum concerning the Delegated Powers in the Bill for the Delegated, page 8 onwards.

² *Ibid.*

5. However, this level of delegated power, in such a period of change to the law, is unprecedented. As set out in the introduction above, we are concerned that this will prevent the proper scrutiny of legislation by Parliament that many in voting to leave the EU sought to ensure. We accept that many small, practical and innocuous amendments will be necessary and therefore straight forward, such as changing 'other' to 'EU' as we set out in the preceding paragraph. Yet the provision to remedy deficiencies set out in clause 7(2) envisages something far broader than this. Clause 7(1) explains that this is a power 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.

The clause enables a Minister to exercise the power when they consider this "appropriate." Moreover, the Government's explanations of what may fall under this power make clear that current procedures conferring rights and remedies could even be amended:

Once the UK leaves the EU, there will be areas of law where policy no longer operates as intended. One element of EU law is reciprocal arrangements between states including reciprocal rights of citizens. As a matter of international law, those obligations will fall away for the UK at the point where the UK leaves the EU. At the same point, EU states' obligations to the UK and its citizens will also fall away. Any such obligations beyond that time would only exist if they were agreed between the EU and the UK as part of the negotiations that have recently commenced. However, without a correction, the UK's law would still include recognition of the EU citizens' rights. The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where

Powers and Regulatory Reform Committee, available at

[https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf)

there has been no agreement and EU member states are providing no such rights to UK nationals.³

6. The breadth of these changes may therefore be very wide and involve the removal not only of reciprocal arrangements that become inoperable post-Brexit, but also the removal of rights that the UK is perfectly capable of continuing unilaterally – such as residence rights for EU citizens, but the Government decides not to, as the example above suggests.
7. This is compounded by the power for regulations to make any provision that could be made in an Act of Parliament (clause 7(4)); the power for regulations to replace, abolish or otherwise modify the functions of public authorities that are currently carried out by EU authorities or Member States (clause 7(5)); and the power to make regulations to give effect to the withdrawal agreement, which can also change the provisions of the Bill (clause 9).
8. A few exceptions to these powers are set out in clauses 7(6), 8(3) and 9(3); the power is limited to two years; and the affirmative procedure is needed for certain limited actions.⁴ JUSTICE considers that these are very narrow limitations on what should be a correcting power exercised only in exceptional circumstances (i.e. essentially because primary legislation cannot be adopted in time) and we consider that they must be more heavily circumscribed.
9. As the House of Lords Sub Committee on the Constitution has stated:

We recognise that, following the UK's exit from the EU, the Government will no doubt wish to implement new policies in areas which were formerly within EU competence. We would be concerned, however, should the Government seek to do so using delegated powers which were granted for the purpose of converting the body of EU law into UK law. We would be similarly concerned if the Government, via the 'Great Repeal Bill', sought to secure delegated

³ Explanatory Memorandum, para 25, available at <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en03.htm>. Many more examples are set out in the Memorandum Concerning Delegated Powers, *supra*.

⁴ Schedule 7, Part 1.

powers for the broader purpose of implementing new policies post-Brexit. EU law should initially be transferred into UK law with as few changes as possible (taking into account the result of the Article 50 negotiations with the EU and the need to adapt EU law to make sense in the UK's domestic legal framework). If the Government subsequently wish to make changes of a substantive nature then those changes should be brought forward as primary legislation and be subject to the usual degree of parliamentary scrutiny.⁵

10. The Committee suggested that a general provision be placed on the face of the Bill to the effect that the delegated powers granted by the Bill should be used only:

- so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework; and
- so far as necessary to implement the result of the UK's negotiations with the EU.⁶

We agree with the Committee that an express commitment to this effect would help the scrutiny process of the secondary legislation that follows. The test for exercise of power by a Minister is currently "appropriate." At a minimum, this should be enhanced to "necessary".

11. The definition of deficiencies suitable for amendment or replacement could also be tightened. Clause 7(1)(a) – the power to prevent, remedy or mitigate any failure of EU law to operate effectively - seems uncontroversial. The sole aim of amending powers through secondary legislation should be to prevent obsolescence, and unworkable legislation. However, clause 7(1)(b) goes on to provide for "any other deficiency," which from Government's memorandum on delegated powers, could be used for almost anything. It is not clear to us why this additional provision should be available. Government must explain why this provision is necessary in addition to the justification in clause 7(1)(a) and if clear reasons for it are not established, it should be left out of the Bill.

⁵ House of Lords, Sub Committee on the Constitution, *The 'Great Repeal Bill' and Delegated Powers*, 9th Report of Session, HL Paper 123 (7 March 2017), para 49, available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/123.pdf>

⁶ *Ibid*, at para 50.

12. We are particularly concerned about the breadth of “Henry VIII” powers, allowing Government to change Acts of Parliament with virtually no principled limitation. One possible principled limitation on scope, suggested by an Oxford academic,⁷ is a “constitution protection” clause. The Bill should specify that Ministers could not use secondary legislation to make any changes of “constitutional significance” to any Act of Parliament. An example of a “constitutionally significant” change might be removing fundamental rights or principles, such as non-discrimination and citizenship rights. We discuss this in more detail below under the “exceptions” heading.

Scrutiny

13. What will be essential is for there to be sufficient Parliamentary time, in both UK and the devolved parliaments, to consider the anticipated raft of secondary legislation. Given the broad powers this Bill will authorise, Parliament must have the opportunity, resources and assistance of Government to properly scrutinise the new provisions. As the House of Lords Sub Committee on the Constitution recommends, Government should set out in the explanatory memorandum to each statutory instrument whether it does no more than necessary to ensure that the law operates effectively; what the original law provided; what the amendments do to change this; and why they are necessary. A heightened scrutiny process should also take place where the instrument would determine significant policy interests or principle.⁸ Most secondary legislation made using the correcting power will come into force through the negative resolution procedure. In our view, the affirmative procedure would be more appropriate for all the measures under this Bill. But an additional heightened scrutiny process would at least go some way to ensuring that where policy change rather than merely technical change is proposed, more detailed scrutiny can take place of the proposals being made.

Clause 7 - exceptions

Loss of EU Rights

⁷ See <https://ukconstitutionallaw.org/2017/07/19/tarun-khaitan-a-constitution-protection-clause-for-the-great-repeal-bill/>

⁸ House of Lords, Sub Committee on the Constitution, *supra*, para 102.

14. EU citizens have acquired a number of rights as a result of EU law. They have been created through the Treaties, the directives and regulations that seek to give life to those Treaties, are reflected in the Charter of Fundamental Rights (“the Charter”) and have been advanced through the case law of the Court of Justice of the European Union (CJEU). These rights include, amongst others, the right to free movement, to reside, to non-discrimination, to due process, to access health services, to the right to work in another Member State and to environmental protection. These rights are based on the principle of non-discrimination of citizens of Member States, but are now established rights in UK law, some for many years.
15. The UK’s withdrawal from the EU brings the continuation of these rights into question. Clause 4 of the Bill enables any rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from EU law and recognised in the UK to continue⁹ and clause 5(5) clarifies that although the Charter is not considered to be retained law, fundamental rights and principles that exist irrespective of the Charter and that are recognised in the CJEU case law should be considered as such. This means any rights that are derived from EU laws, such as the Citizenship Directive,¹⁰ will form part of UK domestic law on exit day.
16. However, as discussed above, under Clauses 7 and 9, this retained EU law may then be modified, should a Minister of the Crown deem it to be deficient. While there are restrictions on what the Minister can do in clauses 7(6) and 9(3), these do not preserve fundamental rights derived from EU law. Clause 7(6)(e) states that regulations under the section cannot “amend, repeal or revoke the Human Rights Act 1998 (“HRA”) or any subordinate legislation made under it.”¹¹ But the rights in the HRA do not protect all rights derived from EU laws. There is therefore no provision in the Bill to prevent the removal of these rights in pursuance of clauses 7 and 9.

Retention of rights

17. We accept that not all rights conferred by EU citizenship should, or could, continue following withdrawal. The Court in *R (Miller) v Secretary of State for Exiting the*

⁹ Unless already saved by clause 2 or 3.

¹⁰ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.

¹¹ This is mimicked in clause 9(3)(d).

European Union,¹² separated the rights created by the EU into three types: (1) rights capable of replication in the law of the United Kingdom, such as rights under the Working Time Directive, or rights of residence for EU citizens in the UK; (2) rights enjoyed in other Member States of the EU, such as freedom of movement for British citizens in other EU states; and (3) rights that could not be replicated in UK law, such as the right to petition the CJEU or vote in the European Parliament elections.¹³

18. It is the first category of rights that we are concerned should be preserved in UK law. In order to do so, JUSTICE recommends that an exception be included in clauses 7(6) and 9(3) that the powers under these clauses cannot be used to modify fundamental rights obtained through EU citizenship and that are capable of retention in UK law. These rights should be set out in a Schedule to the Bill for certainty. We find it hard to imagine how retained EU law providing these rights could fail to operate effectively. Therefore, any modification of these rights by Regulation would be a policy, rather than a technical decision, and this should be prevented by the Bill.

19. Two examples of important rights that might otherwise be lost are:

Citizens' Rights

The Citizenship Directive will form part of domestic law on exit day. This directive provides for the right of EU citizens to reside within another Member State for up to three months without conditions; reside for longer subject to conditions; and permanently reside after five years of continuous residence within that Member State. Clause 7 will allow a Minister of the Crown to modify this legislation, if they deem it deficient. The right to reside in another Member State beyond three months is the right that many of the citizenship rights depend upon. Any modification to this retained EU law could negatively impact not just on EU citizens' ability to remain in the country they have made their home, but also on a whole host of other rights contingent on the right of residency, such as access to healthcare, pension rights or right to work. This would create unnecessary uncertainty for thousands of people. Although the Government may argue that this is an example of where, without a reciprocal arrangement in place for UK citizens in other countries, the rights under the Citizen Directive could be removed by secondary legislation because it fails to operate

¹² [2016] EWHC 2768.

¹³ Paragraphs 58 – 62.

effectively, we would disagree with this interpretation. These rights are not dependent upon a body or procedure in another Member State. Rather they are solely a matter of provision in the UK, for the benefit of people living here. It would be a policy decision to remove them, not an operational one.

Data protection

Article 8 of the Charter provides for the right to protection of personal data. This right is not included in the HRA and although EU directives and subsequent domestic legislation have given effect to this right, they will lose their constitutional foundation once the Charter no longer forms part of UK law. When the government introduced the Data Retention and Investigatory Powers Act 2014, David Davis MP and Tom Watson MP were able to successfully challenge the bulk interception of call records and online messages carried out by GCHQ. Although winning their initial case in the High Court, the government appealed and it was referred to the CJEU, which confirmed that EU standards on data retention need to be respected by domestic legislation. Without the foundation of data protection resting in the Charter, it would not have been possible to challenge domestic legislation, and the bulk collection of data would not have been found in violation of any applicable law.

Constitutional protection

20. Building on a provision to protect fundamental rights in the exemptions clause, JUSTICE thinks it appropriate to consider the adoption of a constitutional protection clause in response to the broad Henry VIII powers created by the Bill. As Oxford academic Dr Tarun Khaitan has identified, this protection clause has repeatedly been used by Parliament to address concerns about overreach of Ministerial power.¹⁴ The provision states:

¹⁴ See <https://ukconstitutionallaw.org/2017/07/19/tarun-khaitan-a-constitution-protection-clause-for-the-great-repeal-bill/> He gives the examples of section 3(2)(f) of the Legislative and Regulatory Reform Act 2006; section 5D(2)(e) of the Fire and Rescue Services Act 2004 (as amended in 2011); and section 6(2)(e) of the Localism Act 2011. Section 83(2)(e) of the Local Government Act (Northern Ireland) 2014 includes a similar limitation on the powers delegated upon the Department of the Environment.

A Minister may not make provision under section...unless he considers that the conditions in subsection (2), where relevant, are satisfied in relation to that provision.

(2) Those conditions are that—

(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;

(b) the effect of the provision is proportionate to the policy objective;

(c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;

(d) the provision does not remove any necessary protection;

(e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;

(f) the provision is not of constitutional significance.

21. A suitably adapted constitution protection clause could be used here to prevent undue overreach in the same way.

Operation of Reciprocal arrangements

22. As an organisation committed to strengthening the JUSTICE system, we are aware that there are many reciprocal arrangements in place between EU Member States, which enable legal problems to be remedied. These relate to a vast array of legal procedures such as the arrest of fugitive criminals, the service of claims for breach of contract or payment for goods, the enforcement of judgments which apply to a business operating across borders, the contact arrangements for children and the allocation of responsibility for processing the claims of asylum seekers who have entered the EU through other member states. These complex EU agreements have been helpfully summarised by the Bar Council in a number of short policy briefings, “Brexit Papers”.¹⁵ The House of Lords EU Committee also discussed the problem Brexit poses for reciprocal justice agreements at length in its 2017 report.¹⁶ We have

¹⁵ <http://www.barcouncil.org.uk/media-centre/publications/2017/2017/june/the-brex-it-papers-third-edition/>

¹⁶ HL European Committee Report, Brexit: justice for families, individuals and businesses? (17th report of Session 2016-17), HL Paper 134, 20 March 2017, available at <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf>

set out in the Annex to this briefing how some of these measures operate. The Government's Delegated Powers Memorandum at page 6 explains that the Bill aims to achieve as much certainty as possible – "*This will enable the UK to leave the EU in a smooth and orderly way, minimising uncertainty for business, workers and consumers.*"

23. However, if the negotiation process for these arrangements fails, the suggestion set out in the explanatory memorandum and highlighted above, is that the UK would no longer have such arrangements, and Government would use a correcting power to remove the reciprocal obligation on the UK. The Delegated Powers Memorandum suggests "These rights are based on the UK's membership of the EU; without that membership, or an alternative deal, *they become deficient by incurring a disadvantage on the UK.*"¹⁷ This interpretation is concerning. Clearly, we could not unilaterally continue any of these arrangements, they rely on public authorities and reciprocal processes in other Member States, as well as EU bodies. But the solution is not simply to use a correcting power to remove them.

24. For a vast array of measures creating procedures that enable justice to be done across the EU to be abandoned by Ministerial instrument, and buried in a long list of other measures which may be more or less innocuous is in JUSTICE's view wholly inappropriate. This illustrates something of the problem that these correcting powers may create. We echo the House of Lords EU Committee, which stressed that the only solution is to ensure that reciprocal justice arrangements are dealt with in the eventual withdrawal agreement. Given the complexity of these matters, transitional measures that continue such arrangements exactly as they are for a specified period are likely to be necessary and it would create certainty if the Bill clarified this intention.

Clause 6 – interpretation of EU law

24. The Court of Justice of the European Union is the ultimate arbiter on the meaning of EU law under the EU treaties. At the moment, the UK courts are bound to determine issues of EU law in accordance with the CJEU's interpretation (section 3, European Communities Act 1972). Where the issue is not clear, the national court is under a duty to

¹⁷ *Supra* at 26.

make a “preliminary reference” to the CJEU – i.e. to ask it for a definitive interpretation (Article 267 TFEU).

25. The duty to refer issues to the CJEU will no longer apply once the UK withdraws from the EU Treaties. However, the “retained EU law” (i.e. all the pre-Brexit EU law that will be brought into our domestic law by clauses 2-4) will still have to be interpreted by our courts. By clause 6 of the Bill, after exit day, our courts will no longer be under a duty to follow the interpretation of the CJEU. Despite this, the CJEU will obviously continue to give judgments on what the “retained EU law” means. So the case-law of the CJEU may still offer useful guidance for our courts.
26. Lord Neuberger has expressed concern that judges need clarity about how to treat decisions of the CJEU made *after* Brexit, and recommended that a test be spelt out in statute.¹⁸ The only guidance that our courts are given by the Bill at present is that they are not *bound* by the CJEU after Brexit (clause 6(1)), but a court may have regard to anything the CJEU says “if it considers it appropriate to do so” (clause 6(2)).
27. “Appropriate” gives judges an extraordinarily wide discretion, but no guidance on in what circumstances it is *proper* for them to look at CJEU decisions. The Institute for Government has said that if Parliament passes the buck on this question to the judges, it leaves them open to fierce political criticism.¹⁹ JUSTICE shares this concern.
28. JUSTICE urges Parliament to provide courts with a specific, legal test on the face of the Bill governing the treatment of CJEU case-law after Brexit. A possible clear and workable test is to place a *duty* on our courts, when interpreting retained EU law, to pay due regard to any **relevant** decision of the CJEU.²⁰ This duty leaves it open to our courts to disagree with the CJEU’s interpretation, *even if* its case-law is relevant to the case. However it does not give the courts an unfettered, politically controversial *discretion* to consider or ignore CJEU decisions as it sees fit.

¹⁸ <http://www.bbc.co.uk/news/uk-40855526>

¹⁹ https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_Euro_Court_Justice_WEB.pdf page 10.

²⁰ This borrows language from Article 1 of the Lugano Convention on mutual recognition and enforcement of judgments 2007, to which both EU and non-EU States are party – however we would suggest substitution of the phrase “pay due account” for the clearer language of “pay due regard to”.

29. Parliament and the Government must also carefully consider the complicated issue of which body will adjudicate on disputes over *future* agreements between the UK and the EU. The Bill does not even mention this problem at the moment. Future agreements with the EU will include arrangements concerning EU citizens living in the UK after Brexit, and replicating existing reciprocal justice agreements e.g. on mutual recognition of judgments. The Government has previously indicated that it does not want the CJEU to have *any* interpretive role going forward. JUSTICE would point out that new agreements on reciprocal matters are likely to have very similar language to existing EU agreements, which the CJEU will continue to interpret. Other EU Member States will continue to follow the CJEU's interpretation. Whichever court or body is charged with interpreting future agreements with the EU, a duty to pay due regard to relevant CJEU case-law may be sensible. Otherwise, the uniformity of the law as it applies in the UK and in EU Member States will be undermined, and so reciprocal arrangements might not function effectively.

JUSTICE

5th September 2017

Annex

Policing and judicial cooperation in criminal matters

The European arrest warrant (EAW)²¹ is an example of how multiple EU and national bodies work together to enable crime to be prosecuted effectively through the courts across the EU. JUSTICE has criticised its operation for a number of reasons.²² Nevertheless, the instrument is in our view better than the alternative, and the negotiations for withdrawal present an opportunity to ensure some of the remaining problems with the instrument are solved.²³ The EAW ensures that where Member State A cannot find within its territory a person that it seeks to prosecute, it can issue a warrant that every other police force in the EU must treat with the same celerity as a national warrant. Once the person is arrested in Member State B and taken before the appropriate national court, the prosecutor may liaise with Eurojust for assistance in understanding the law of Member State A or for further time to respond to the warrant due to national legal processes; the court may seek further information from the judge in Member State A about the warrant; the police may liaise with Europol as to whether the crime is part of a wider organised enterprise also being investigated in other jurisdictions; the defence lawyer may obtain assistance from defence lawyers and experts in Member State A to put forward any reasons for why the person should not be returned.²⁴

²¹ Council framework decision, of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), O J L190/1 (18.7.2001). See also the Extradition Act 2003, which gives effect to the Framework Decision.

²² See for example: J. Blackstock, *European arrest warrants: Ensuring an effective defence* (JUSTICE, 2012) available at <https://justice.org.uk/european-arrest-warrant/>; JUSTICE Response to the House of Lords EU Select Committee Inquiry: The 2014 opt-out decision, 2013, available at <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/Protocol36OptOut/VolofevidenceP36asat250313.pdf>

²³ See Baroness Ludford MEP's work on amending the warrant culminating in European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (2013/2109(INL)), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2014-0174+0+DOC+PDF+V0//EN> and its accompanying study EPRS, *Revising the European Arrest Warrant*, EAVA 6/2013, available at [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/510979/IPOL-JOIN_ET\(2013\)510979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/510979/IPOL-JOIN_ET(2013)510979_EN.pdf)

²⁴ The provision that enables this to occur is set out in a subsequent legislative act, Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest

The EAW forms one of 35 measures that due to Protocol 36 of the Lisbon Treaty, the UK had the choice to no longer take part in, but after extensive review of their processes, concluded are necessary for the investigation and prosecution of crime in the UK.²⁵ In the year 2016/17, the UK arrested 1,735 individuals pursuant to EAWs and EU Member States arrested 207 individuals on the UK's behalf.²⁶ Without these measures, and the bodies that enable us to have a speedy and effective response to crime, the UK will be put at risk in relation to increasingly global criminal activity.

Immigration

The issue of British Citizens in the EU and EU Citizens in the UK has already been well publicised and we do not repeat concerns raised by others here. However, in the immigration context, the operation of the Dublin III regulations are also noteworthy.

Dublin III

European Union Regulation 604/2013, commonly known as Dublin III, establishes a method for deciding which country amongst the signatories²⁷ should process a claim for asylum. (With exceptions, this is the signatory country the asylum seeker first entered the EU

warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ (6.11.2013) L 294/1. The UK has not adopted this Directive as a result of exercising its option under the Lisbon Treaty, but gives effect to this aspect of it as national procedure anyway.

²⁵ See HM Government, Decision pursuant to Article 10(5) of Protocol 36 TFEU, July 2014, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326698/41670_Cm_8897_Accessible.pdf and House of Lords, EU police and criminal justice measures: The UK's 2014 opt-out decision, 13th Report of Session 2012-13, HL Paper 159, (23 April 2013), <https://publications.parliament.uk/pa/ld201213/ldselect/lducom/159/159.pdf>

²⁶ National Crime Agency Annual Report and Accounts 2016–17, page 26.

²⁷ All EU member states plus four non-EU signatories to the regulations, Norway, Iceland, Liechtenstein and Switzerland.

through.) In 2015, the UK made 3,489 requests to other signatories under the Dublin III²⁸ and received 1,173 requests.²⁹

Failure to agree and implement an agreement on Dublin III post-Brexit could see an increase in asylum seekers seeking to reach the UK from the territory of the EU (since asylum seekers would no longer risk being returned to the territory of the EU). It would also give France and other neighbouring signatory states (e.g. Belgium and the Netherlands) an incentive to facilitate the departure of asylum seekers from their territory to the UK, knowing that they could not be returned to them, and could put further pressure on France to withdraw from Le Touquet Treaty which otherwise restricts the flow of migrants to the UK.³⁰

Mutual recognition and enforcement in civil and family justice

In both civil and family justice, multiple arrangements currently exist that impose reciprocal obligations on the UK and other EU Member States. These include matters as diverse as high-value commercial litigation and contact arrangements for children. Where a dispute is multi-jurisdictional or parties live in different countries, we currently rely on these complex agreements – for example to avoid conflicting proceedings in different countries, and to ensure that court decisions can be effectively and speedily enforced. Clear EU-wide rules can have important real-life consequences. Family lawyers, for instance, have expressed concern that Brexit could leave abducted children in a “legal limbo”.³¹

The Recast Brussels Regulation

²⁸ Figures supplied by Eurostat, the EU's statistics agency, available at

http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubro&lang=en

²⁹ Eurostat figures, available at

http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_dubri&lang=en Figures for 2016 only currently state the number of outgoing requests (4,237).

³⁰ Treaty between the Government of the United Kingdom and the Government of the French Republic concerning the implementation of frontier controls at sea ports of both countries on the Channel and North Sea) 2003.

³¹ <https://www.thetimesbrief.co.uk/users/39175-the-brief-team/posts/19757-abducted-children-face-legal-limbo-after-brexit-warn-lawyers>

One important example of the problem that Brexit will create is the “Recast Brussels Regulation”.³² This EU law covers a wide range of issues, including mutual recognition and enforcement of judgments in civil and commercial matters across the EU.

The Recast Brussels Regulation creates various rules that ensure uniformity and certainty for litigating parties. For example, subject to various exceptions,³³ any judgment given by a UK court must be recognised³⁴ and enforced³⁵ across the other EU Member States, who may use “protective measures” to do so (e.g. injunctions).³⁶ In addition, if parties have agreed that disputes should be heard in a particular jurisdiction like London, other Member State’s courts must respect this so long as the agreement is valid in its national law.³⁷ Where proceedings have already begun in a first Member State within the EU, other states must stay later proceedings in the same matter until the jurisdiction of the court in the first Member State is established.³⁸ The ability of parties “to have judgments which they have obtained in the UK courts efficiently enforced, and to have the jurisdiction of the UK courts recognised, throughout the EU” is vital for upholding the rule of law, and “of the utmost importance” for maintaining the UK’s attractiveness as a place for commercial parties to litigate.³⁹

The Recast Brussels Regulation is just one part of the “pan-European system of civil justice cooperation”.⁴⁰ It is an important example of how the UK depends on the consent of the EU 27 to preserve reciprocal civil procedure arrangements essential to our justice system.⁴¹

³² Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L351/1 (‘Recast Brussels Regulation’).

³³ Recast Brussels Regulation, Articles 45 and 46.

³⁴ Recast Brussels Regulation, Article 36(1).

³⁵ Recast Brussels Regulation, Article 39.

³⁶ Recast Brussels Regulation, Article 40.

³⁷ Recast Brussels Regulation, Article 25.

³⁸ Recast Brussels Regulation, Article 9.

³⁹ Bar Council, Brexit Policy Paper, Civil Jurisdiction and the Enforcement of Judgments http://www.barcouncil.org.uk/media/575175/brexit_paper_4_-_civil_jurisidiction_and_judgements.pdf

⁴⁰ <https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf>

⁴¹ *Supra* fn 16. The House of Lords’ EU Committee, with the benefit of “clear and conclusive” expert evidence, concluded that the Regulation’s important benefits can *only* be maintained by mutual agreement with the EU (page 20). See also page 3: “it is not clear how [the Great Repeal Bill] could possibly deliver the reciprocity that is necessary for the functioning of these Regulations.”