Chartered Institute of Taxation
Excellence in Taxation

The European Union (Withdrawal) Bill
Comments by the Chartered Institute of Taxation

1 Introduction

1.1 We refer to the European Union (Withdrawal) Bill which was published in July 2017. This Bill is intended to create the legal basis on which EU law will be incorporated into UK domestic law on the exit of the UK from the EU (Brexit). It repeals the 1972 European Communities Act and creates a new category of law: retained EU law (as defined in the Bill).

1.2 We welcome the early publication of this Bill, which provides all interested stakeholders with an opportunity to consider it.

1.3 The Explanatory Notes say that the principal purpose of the Bill is to provide a functioning statute book on the day the UK leaves the EU. It is also intended that, as a general rule, the same rules and laws will apply on the day after leaving the EU as on the day before.

1.4 We welcome the intention to provide legal continuity following Brexit. However, we question the scope and effect of some of the provisions of the Bill. Some of the concepts addressed by the Bill are not dealt with adequately. As currently drafted, there would be a great deal of uncertainty around what is and is not incorporated into UK law and how the law would be applied.

1.5 In addition, there are a number of provisions which go beyond incorporating EU law as it stands at exit day (as defined in the Bill) into UK law and which result in the position of taxpayers after exit day being different from, and potentially worse than, their position immediately before exit day.

1.6 We think that these consequences should be clearly identified and the rationale for them articulated so that there can be a fuller discussion around the extent to which the Bill should change the existing legal position of taxpayers. Ordinarily, we would expect any decision regarding a change of policy in relation to tax to be made after consultation in accordance with the Tax Policy Framework. Although this Bill has

ARTILLERY HOUSE
11-19 ARTILLERY ROW
LONDON SW1P 1RT

REGISTERED AS A CHARITY NO 1037771

Tel: +44 (0)844 251 0830
Fax: +44 (0)844 579 6701
E-mail: technical@tax.org.uk
Web: www.tax.org.uk

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been published for public discussion, given the magnitude of the body of law that it is covering, it will be difficult for there to be any meaningful discussion of the implications of changes in each and every area of law. As a result, there may be unintended consequences. For that reason, we suggest that the Bill should, so far as possible ensure that the same rules and laws will apply on the day after exit as on the day before in accordance with the general rule outlined in the Explanatory Notes. It does not currently achieve this.

1.7 In addition, it is our view that any changes should only operate prospectively. We object to the clauses of the Bill that would apply retrospectively and impact on the position of taxpayers in respect of events which occurred before exit day. There is a general presumption against retrospective legislation under the rule of law. We suggest that the retrospective aspects of the Bill may be liable to challenge on the basis that they are contrary to the European Convention on Human Rights. Such uncertainty is unhelpful for taxpayers.

1.8 As an educational charity, our primary purpose is to promote education in taxation. One of the key aims of the CIOT is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.

1.9 In our view objectives for the tax system should include a legislative process which translates policy intentions into statute accurately and effectively, without unintended consequences and results in legislation which provides certainty, so businesses and individuals can plan ahead with confidence.

2 Executive summary

2.1 The Bill is unclear in its scope and effect in several areas.

2.2 The Bill gives rise to an unusually complex mix of legal and technical issues within equally complex political constraints. It is not our remit to enter into debate about the political constraints, but a lack of clarity around the political constraints makes the technical analysis somewhat more difficult. . We have sought to consider the issues arising from the Bill on their technical merits, but have noted the actual or potential political constraints where appropriate.

2.3 The key point, in our view is that without further thought and clarity around the concepts explored below, the effect of the Bill will be uncertainty for taxpayers. This uncertainty is already making it difficult for taxpayers to plan ahead with confidence. It could also result in litigation once the Bill has been enacted, as taxpayers seek to determine through the courts its scope and effect.

2.4 We would argue that the uncertainty arises where the Bill deviates from its primary purpose: which is to preserve the existing law as at exit day. Specifically, most of the complications arise as a result of the Bill not giving full effect, at least initially, to the general principles of EU law, given their impact on the jurisprudence of the European Court and on EU law in general.

2.5 It appears to us that Individuals' rights are being altered by the Bill without any consideration about the desirability of the change in each, or in any particular, individual case. Clearly, if the consequences of the general principles of EU law on

the existing UK law (including existing rights arising from EU case law) are considered unsatisfactory in the future, the law can be changed by Parliament at a later stage. But this should be done at a time when there can be a fuller discussion and consideration of the implications of the change.

2.6 Given the unusual pressure which is being placed on Parliament as a result of the Brexit process, it will be difficult for there to be any meaningful discussion of the implications of changes in each and every area of law. As a result, there may be unintended consequences. Given the overall policy decision to generally give effect to the full *acquis* of EU law, we do not understand the policy rationale for departing from this principle, as the Bill does in certain respects.

2.7 We discuss below the key areas where the approach that is being taken would give rise to uncertainty:

- **The interaction of the curtailment of general principles of EU law with the principle of supremacy.** Because of the importance that the Court places on these principles, we fear that the failure to incorporate these principles will give rise to considerable uncertainty about the extent to which prior case law remains good law;
- **Principle of abuse of rights.** It seems likely that the principle of abuse of rights is a general principle of EU law for these purposes: this principle currently operates to protect the revenue from egregious tax avoidance in the sphere of VAT. On the face of it the Bill would seem to inadvertently retrospectively remove this protection. It would of course be possible in time to enact substitute protections, but this merely highlights that the Bill is changing the law in ways that have not been identified, but go beyond what seems necessary to achieve Brexit;
- **Identification of the general principles of EU law.** We consider that the general principles of EU law should be incorporated for reasons of legal certainty. But if they are not incorporated, we consider that it is important that the Bill defines what is and is not a general principle of EU law. In particularly we would hope that it would be clarified that the specific principles that underlie the Principal VAT Directive are not general principles of EU law for this purpose;
- **The extent to which the general principles of EU law or aspects of EU law that do not confer rights or obligations can be used as interpretative aids in relation to existing legislation.** The Bill does not make it clear what relevance EU law has an interpretative aid to existing law when clause 4 does not apply to convert it into retained EU law, because it does not confer rights or impose obligations;
- **The availability and application of directly effective rights arising under treaties going forward**. We assume these are intended to continue to be relevant and available on the same basis as if the UK was part of the EU until such time as Parliament decides otherwise. However, we consider this could be made clearer;
- **Resulting duplication and conflict within the overall body of UK law.** In the interests of legal certainty, we consider that it would be desirable if rights that remain binding and are incorporated into UK law as a result of clause 4 could, in so far as possible, be enacted into UK law in order to minimise the need to refer to EU law.
- **Retrospective curtailment of general principles and remedies of EU law**. We oppose the retrospective aspects of the Bill.

2.8 We also comment on the role of the courts and the transition from one 'system' to another, together with the procedural implications of ending the jurisdiction of the CJEU.

3 General principles of EU law – curtailment and supremacy

3.1 We welcome the recognition in the Bill and the Explanatory Notes that the *acquis* of EU law is derived from a variety of sources including regulations, Directives, CJEU case law and also what are described as 'general principles of EU law'.

3.2 The importance of general principles of EU law are discussed at paragraph 50 of the Explanatory Notes and, in particular, it is noted here the role that the application of the general principles of EU law has in determining the lawfulness of legislative and administrative measures within the scope of EU law, as well as being an aid to interpretation of EU law. We agree with this summary.

3.3 There is no conclusive list of general principles of EU law, which are part of the over-arching constitutional aspect of the EU legal framework. While it may be difficult to determine the full scope of general principles of EU law that would have been available prior to exit day, we suggest that it would be helpful to provide as full a list as possible of general principles of EU law that are intended to be part of retained EU law to aid clarity. If it were to be consistent, the list would include the principle of abuse of rights: this principle currently operates to protect the revenue from egregious tax avoidance in the sphere of VAT. On the face of it the Bill would seem to (presumably inadvertently) retrospectively remove this protection. We also consider that it would be helpful to explicitly state what is *not* considered to be a general principle of EU law, particularly if it remains the position that full effect is not given to the general principles of EU law. We discuss below how the general principles of EU law are currently curtailed by the Bill.

3.4 In particular, it would be helpful to expressly state that the ability to rely on the direct effect of Directives or the treaty fundamental freedoms are not relevant. We do not understand that these are intended to be considered to be general principles of EU law for these purposes, but the contrary position may be argued. It is also unclear whether the 'general' principles of EU law are intended to extend to principles that underlie a particular area of law: for example the principles of neutrality and equality of treatment that apply in relation to VAT law.

3.5 As discussed below (in paragraphs 3.13 and 3.14), because of the reliance that the courts place on the principles of neutrality and equality of treatment in the VAT context, treating such principles as general principles of EU law, which are not given full effect, will add considerable uncertainty to the law in this area after exit day. Therefore, if it remains the position that full effect is not to be given to general principles of EU law, we consider that it would also be desirable to make it clear that such 'VAT' principles are not general principles of EU law for this purpose. If these 'VAT' principles are not general principles of EU law within the meaning of the Bill, we envisage that they will converted to UK law as part of the directly effective '*rights, powers liabilities, obligations, restrictions, remedies and procedures*' arising under treaties and Directives which are brought into UK law under clause 4. In this way, such principles will become part of retained EU law in so far as they have been used to give effect to EU law prior to exit day, providing certainty for taxpayers and ensuring the continuity of law which is the purpose of the Bill.

3.6 The way in which general principles of EU law are to be incorporated into UK domestic law under the Bill, and will apply after exit day, erodes the way in which the general principles of EU law can currently be applied and used by taxpayers. Specifically, (a) it will no longer be possible to use general principles as the basis of a stand-alone action to disapply domestic law which contradicts general principles of EU law and (b) no court will be able to disapply or quash any enactment on the basis that it is incompatible with any of the general principles of EU law.

3.7 While these provisions may reflect a policy decision going forward this curtailment is also done with retrospective effect, which gives rise to a number of questions.

3.8 In particular, the interaction of the general principles of EU law with the rule of supremacy of EU law up to exit day would benefit from further thought and clarification. The difficulty arising from disentangling the use of general principles of EU law from other facets of EU law in determining whether UK legislation can be disapplied will give rise to much uncertainty and difficulties in practice. This is discussed further in paragraphs 3.10 to 3.18 below; we first set out how we understand the general principles of EU law are incorporated into UK domestic legislation.

How the general principles of EU law are incorporated

3.9 Clause 6(3) of the Bill says that '*the validity, meaning or effect of any retained EU law is to be decided ….. in accordance with any retained general principles of EU law*'. Thus, the retained general principles of EU law are to be used as an aid to interpretation of retained EU law. This is confirmed to be the intention in paragraph 105 of the Explanatory Notes.

3.10 However, the use of general principles of EU law is curtailed by Schedule 1 paragraph 3. Paragraph 3(1) provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. Paragraph 3(2) says that no court will be able to disapply or quash any enactment on the basis that it is incompatible with any of the general principles of EU law.

3.11 More specifically, Schedule 1 paragraph 4 says that there is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich* (that rule being a general principle of EU law).

Supremacy of EU law up to exit day

3.12 There is tension between the restrictions in Schedule 1 paragraph 3 and the principle of supremacy of EU law which is intended to continue to apply after exit day in respect of any enactment or rule of law passed or made before exit day pursuant to clause 5(2). Clause 5(2) refers to the principle of supremacy applying in respect of interpretation and disapplication and quashing of any enactment of rule of law passed or made before exit day. However, this is subject to Schedule 1.

3.13 In respect of applying the law after exit day but in relation to the period before exit day and events occurring before exit day, the question of supremacy will be between existing EU law (which will become retained EU law) and the current UK legislation (pre-exit domestic legislation). The intention of clause 5(2) seems to be that where a conflict arises between pre-exit day domestic legislation and retained EU law, for example, a retained EU regulation, the retained EU regulation would take precedence over pre-exit day domestic legislation that is inconsistent with it

(Explanatory Notes paragraph 96). This, would also seem to be the case where the EU law consists of directly effective rights arising under treaties and Directives which are incorporated into UK legislation by clause 4. Thus if a conflict comes to light after exit day between any of these things and UK pre-exit day domestic legislation, this could result in a disapplication of the pre-exit day domestic legislation.

3.14 In addition, the Bill causes the result that on and after exit day there could be two conflicting rules within the body of UK law, namely the EU law which will be converted into retained EU law as a result of the Bill and the UK pre-exit day domestic legislation which remains on the statute book and has not yet been changed to comply with a pre-exit day ruling that it is in contravention with EU law[1]. Further, it is our understanding that, as a result of the rule of EU law supremacy in respect of any enactment or rule of law passed or made before exit day, the EU law, which has been converted into UK law as retained EU law, will prevail, pending any specific change to the law following exit day. Unless Parliament chooses to amend the law on a different basis, in the interests of legal certainty and making the law as accessible as possible, we consider that it would be desirable for the UK statute law to be amended so that it gives effect to what would otherwise be part of UK law as a directly effective right which existed as at exit day and, therefore, within retained EU law. In this way it should hopefully be possible to minimise the need for individuals to investigate the issue of whether they have retained EU rights as a result of clause 4.

3.15 However, our concerns arise from the potential effect of Schedule 1 paragraph 3(2) which says that there can be no disapplication of any enactment on the basis that it is incompatible with any of the general principles of EU law. Currently, in determining whether any EU law is incompatible with UK legislation, and thus that the UK legislation should be disapplied, the courts inevitably consider the general principles of EU law in determining how the EU law should be applied. Consequently, in reaching a conclusion that UK domestic legislation is incompatible with EU law, it is often difficult to distinguish in practice whether this is as a result of the underlying rule of EU law or as a result of the application of the general principles of EU law. For example, in the recent case of *The Learning Centre* (*Romford) Ltd v HMRC* TC05946 the decision turned on a directly effective provision of the Principal VAT Directive (PVD), which, when interpreted in accordance with the general principles of EU law, led to the conclusion that the UK law was contrary to EU law.

3.16 This case demonstrates the difficulties in practice of extracting the individual strands of EU law and it is not clear how the UK courts would approach these same facts if the case was brought post exit day and the courts were seeking to operate in accordance with the wording of this Bill – either in respect of periods prior to exit day or periods after it.

3.17 Other examples of where the Courts have considered that the UK should extend VAT exemptions within the Principle VAT Directive because of the principle of

[1] Examples include: (1) *London Borough of Ealing* (C-633/15) - the CJEU ruled that UK law (Note (3) to Group 10 of Schedule 9 to the VAT Act 1994), that expressly excludes public bodies from exempting sporting services is incompatible with Articles 132(1)(m) and 133 of the Principal VAT Directive; HMRC has indicated that it is not minded to amend this Note. (2) *Polihim-SS EOOD* (C-355/14) – the CJEU ruled that the sale of excise goods held by an authorised warehousekeeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from the tax warehouse; UK Customs rules do not operate in accordance with this principle. (3) *HSBC Holdings PLC and Vidacos Nominee Ltd v Commissioners for HM Revenue & Customs (HMRC)* (C569/07) – the CJEU ruled that where shares in a UK incorporated company are issued, the imposition of a 1.5 per cent Stamp Duty Reserve Tax (SDRT) charge (under sections 93(4)(a) and 96(4)(a) Finance Act 1986 is incompatible with EU law. This SDRT charge remains on the statute books but is currently not collected by HMRC as a result of these cases, which is confirmed by HMRC in guidance (STSM 053060)

neutrality (see further paragraph 4.4 below) is *JP Morgan Fleming Claverhouse Investment Trust plc v HMRC* [2008] STC 1180. This case also demonstrates the difficulty of determining whether case law has arisen based on the application of general principles of EU law or some other facet of EU law, such as directly effective rights under a Directive or a Treaty.

3.18 The lack of clarity around the scope of the provisions of Schedule 1 paragraph 3 will not only make the task for the courts difficult, but, more importantly, before an issue gets before a court, it will be necessary for taxpayers to form a view when self-assessing and HMRC in raising assessments to tax how the law may be applied in respect of events occurring in the period before exit day.

3.19 We discuss below at paragraph 9 below our objections to the retrospective nature of Schedule 1 paragraph 3 on the basis of principles of rule of law and susceptibility to challenge. However, in our view the practical difficulties of restricting the use of general principles of EU law in the way suggested by Schedule 1 paragraph 3, in respect of events and laws passed before and after exit day, are also considerable. At the very least, we suggest, therefore, that consideration should be given to ensuring that Schedule 1 paragraph 3 is only applicable in respect of any enactment or rule of law passed or made on or after exit day.

3.20 The neutering effect on general principles of EU law in the way currently envisaged by the Bill could have considerable impact on taxpayers going forward, both in respect of events pre-exit day and post exit day. The Bill currently goes beyond the general aim of seeking to achieve a functioning statute book on exit day. It would be effecting a major change to the established legal framework, which is something that, at paragraph 14 of the Explanatory Notes, is said to not be the aim of the Bill.

4 General principles of EU law - identification

4.1 In clause 6(7) of the Bill 'retained general principles of EU law' are defined as:

'*the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they—*
(a) relate to anything to which section 2, 3 or 4 applies, and
(b) are not excluded by section 5 or Schedule 1,
(as those principles are modified by or under this Act or by other domestic law from time to time)'.

4.2 We do not think that the purpose or implications of Schedule 1 paragraph 2 are clear. This states that '*No general principles of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court … before exit day*'. We have difficulty in seeing what this paragraph adds to the definition of retained general principles of EU law which is set out in clause 6(7). The very definition of retained general principles of EU law is by reference to principles which have effect in EU law on exit day – does this not necessarily mean that the principles have been determined by the courts? Thus we cannot see what could be incorporated by the definition in clause 6(7) which is then excluded by Schedule 1 paragraph 2. Whilst we can see that it can be argued that Schedule 1 paragraph 2 provides a clearer exposition/explanation of how a general principle of EU law is determined, if it is considered that this is required, it would be preferable to have this concept included within the definition at clause 6(7) – so that the meaning is all in one place.

4.3 Paragraphs 50 and 153 of the Explanatory Notes give some examples of general principles of EU law as equivalence, effectiveness, fundamental rights, non-retroactivity and proportionality.

4.4 As we note above at paragraph 3.4, currently no mention is made of principles of EU law that apply in respect of a particular area of law. An example would be the principles of neutrality and equality of treatment which apply in VAT law, but which it might be suggested is not a 'general' principle but a specific principle that applies only in respect of VAT. Please can the Government clarify whether it is intended that principles of EU law such as these are intended to fall within the scope of the definition of general principles of EU law. For the reason set out in paragraph 3.5 above, in the interests of legal certainty, we consider that it would be preferable if it were made clear that such rules should not be considered to be general principles of EU law within the meaning of the Bill, but should instead become part of retained EU law under clause 4.

4.5 Also as mentioned above, we suggest consideration should be given to providing, either in the Bill or in guidance, a fuller list of general principles of EU law that are intended to be part of retained EU law to aid clarity. We also suggest that it would be helpful to expressly state what is not intended to be a general principle of EU law.

4.6 The CIOT would be very willing to work with the Government to draw up as full a list of general principles of EU law as possible (and a corresponding list of things which are not general principles of EU law) to be published in order to achieve certainty for taxpayers.

5 General principles of EU law – aid to interpretation

5.1 In any event, the effect of paragraphs 3 and 4 in Schedule 1 appears to be to limit the use of general principles of EU law to aid interpretation of retained EU law only.

5.2 On that basis, we would be interested in the Government's view as to the scope of interpretative principles that have been developed by the CJEU and UK Courts in relation to the application of EU law and the general principles of EU law. The Explanatory Notes (paragraph 105) acknowledges that the use of general principles of EU law will include taking a purposive approach to interpretation where the meaning of the measure is unclear. We would also expect that the rule of interpretation developed in *Marleasing* will be available to the UK Courts going forward in relation to legislation that was enacted before exit day. However, this is not made clear and we suggest that it should be.

6 Treaty Rights – Clause 4: Saving for rights etc under section 2(1) of the ECA

6.1 Clause 4 of the Bill purports to incorporate into UK law any remaining EU rights and obligations which do not fall within clauses 2 and 3.

6.2 In particular, this clause is intended to incorporate directly effective rights contained within EU treaties. Paragraph 89 of Explanatory Notes contains a list of what the Government considers to be directly effective rights arising under the TFEU. This list is illustrative only and stated that it is not intended to be exhaustive. It does,

however, contain the four fundamental freedoms: Free movement of workers, freedom of establishment, freedom to provide services and free movement of capital.

6.3 We think it would be helpful if the Government could explain a little more fully how it is intended that these rights would apply post exit day. Consider for example the freedom of establishment. Our understanding is that a taxpayer will be able to rely on this right of establishment after exit day if he was able to do so before exit day. We understand that this will be the case even if he exercises the right of establishment after exit day, as he will be notionally treated as remaining within the EU for this purpose. Is this correct?

6.4 Thus, in our view the effect of clause 4(1) in respect of treaty rights and, in particular, the fundamental freedoms, is intended to be that if a person could rely on such rights before exit day, then he will continue to rely on them if he starts acting in the same way after exit day. We raise this point because we do not think that the legislation is clearly drafted. It is possible to argue that the fundamental freedoms as incorporated into domestic law as a result of clause 4 simply cannot apply as a matter of fact post exit day, when the UK is not a member state of the EU. To avoid any uncertainty on the issue, we consider that it would be helpful if this aspect of the Bill could be clarified. It is noted in this regard that the Explanatory Notes (paragraph 88) say that it is the right and not the text of the treaty that is converted.

7 Directly effective provisions of Directives – Clause 4: Saving for rights etc under section 2(1) of the ECA

7.1 In addition to treaty rights, the general wording in clause 4(1) would also include directly effective rights arising under an EU directive. Clause 4 is especially important in the VAT context, since it is the clause that will incorporate, for example, the directly effective provisions of the PVD into UK law which will enable taxpayers to continue to rely on the rights so incorporated in circumstances where the PVD has been incorrectly implemented into UK law.

7.2 The rights incorporated by clause 4(1) are those which are '*recognised and available*' in domestic law immediately before exit day. It is not clear to what extent these words provide a filter to any rights that may be incorporated into UK law. Clause 4(1) continues that such rights should be recognised and available *by virtue of section 2(1) of the ECA 1972*. This arguably would include any rights which would be directly effective before exit day by virtue of the UK's membership of the EU, whether or not a right had been considered specifically by the Courts.

7.3 However, clause 4(2)(b) states that, in relation to rights arising under an EU Directive, it is only rights etc which are '*of a kind*' (emphasis added) that have been recognised by the CJEU or a UK court or tribunal before exit day which will be incorporated.

7.4 Conceptually, we do not see any justification for this distinction (to the extent that one exists). We cannot see why a person should lose the right to invoke a provision of a Directive on the basis that it has direct effect just because before exit day there has not been a case on the specific provision of the Directive. This is inconsistent with the overall principle that the same rules and laws will apply on the day after exit day as on the day before. However, in any event, in our view the scope of this wording in clause 4(2)(1b) of the Bill is unclear and the words do not necessarily lead a reader to the view seemingly being given by the Explanatory Notes. It is not clear

what clause 4(2)(b) adds to the general requirement in clause 4(1) that the rights must be *recognised and available* immediately before exit day. There are two possible readings:

7.4.1 The Explanatory Notes suggest a narrow reading of the Bill, being that it is only if there is a court decision stating that the particular provision of a Directive has direct effect that the right arising under that provision will be incorporated into UK law. Paragraph 92 of the Explanatory Notes says that '*any directly effective provisions of directives that have not been recognised prior to exit day (to the extent these might exist) will not be converted by this clause*.'.

7.4.2 A second reading of the wording of the Bill is that *any* provision of a Directive that is sufficiently precise, certain and clear, so as to be '*of a kind*' to which direct effect would attach will persist post exit day as a directly effective right, even if no case has pronounced specifically on the provision, or even on another provision in the same Directive.

7.5 The second wider reading is the one we prefer; principally because it sits better with the overall scheme of EU law. Thus a provision of a Directive can be said to be '*of a kind*' recognised by the CJEU as generating directly effective rights, even if there has not yet been litigation on the particular point. This would also be consistent with the general intention of the Bill which is to bring the entire *acquis* of EU law as it stands on exit day into domestic law.

7.6 We would like to see a clarification of the words in clause 4(2)(b) and confirmation that these will not be read restrictively. The current wording is unclear in its scope and would generate uncertainty.

8 Provisions of Treaties and Directives and to what extent are these applicable in determining supremacy of EU law - Clause 4 and Clause 5

8.1 We discussed at paragraphs 3.10 to 3.18 above the complications arising from the curtailment of the general principles of EU law and the purported rule of supremacy of EU law until exit day. We can also see a tension between clause 4 and clause 5.

8.2 This is because clause 5(2) says that supremacy of EU law continues to be relevant in relation to pre-exit day legislation. However, as we understand it, clause 4 only gives effect to existing EU law in so far as the EU law comprises '*rights, powers, liabilities, obligations, restrictions, remedies and procedures*'. Ignoring direct EU legislation, which is enacted by clause 3, this suggests that EU law over and above such '*rights, powers, liabilities, obligations, restrictions, remedies and procedures*' is not intended to have any effect – it does not appear to be incorporated into UK law by the Bill. It is, therefore, not clear to what extent, if at all, clause 5 is intended to be of any relevance in relation to aspects of EU law, which do not comprise of '*rights, powers, liabilities, obligations, restrictions, remedies and procedures*'.

8.3 It is not clear how these aspects and parts of treaties and Directives, which do not have direct effect, are intended to be treated, nor the part they are to play in giving effect to clause 5(2) regarding the continued supremacy of EU law. Are they intended to be an interpretative aid in order to comply with the general rule of supremacy of EU law in respect of law passed or made before exit day? It would be helpful if the Bill could make the intended position clearer. If they are intended to be an interpretative aid, it would also be helpful to state how strong the presumption is

intended to be: for example are the principles of interpretation arising from them intended to be similar to those set out in the *Marleasing* case and the Human Rights Act?

9 Retrospective effect of Schedule 1

9.1 Schedule 1 paragraph 4 specifically removes the right to damages in accordance with the rule in *Francovich* after exit day. The rule in *Francovich* permits a damages claim against the UK government for breaches of EU law, including a failure to properly implement EU law.

9.2 We assume, but it would be useful to clarify, that paragraph 3(1) is intended to similarly prevent restitutionary claims after exit day in so far as EU law principles confer greater rights to restitution than UK common law or statute. Thus, as we understand it, the effect of these provisions is to prevent a taxpayer invoking EU law after exit day to require UK domestic law to create a route to a remedy either by way of damages under *Francovich* (paragraph 4) or some other remedy such as restitution or a declaration of ineffectiveness (paragraph 3).

9.3 As noted above, both Schedule 1 paragraph 3 and paragraph 4 operate with retrospective effect because they will apply from exit day in relation to periods prior to exit day and events which occurred prior to exit day.

9.4 There is a general presumption against retrospective legislation in the context of the rule of law on the grounds that respective legislation erodes the principle of legal certainty. However, it is recognised that retrospective legislation can sometimes be justified on grounds of public interest. In particular, previous Governments have recognised the international standards, including those of the European Convention on Human Rights which is incorporated into UK law by the Human Rights Act 1998, which govern the legality of retrospective legislation.

9.5 We suggest that retrospective effect of the provisions in Schedule 1 may be liable to challenge on the basis that they are contrary to European Convention of Human Rights because they remove from a taxpayer the right to bring action against the Government in respect of breaches of law by the Government which arose prior to exit day. The relevant provisions are Article 6 (Right to a Fair Hearing) and Article 1 of the First Protocol (the right to peaceful enjoyment of possessions without arbitrary state interference). We understand that the Government's view is that rights under *Francovich* (Schedule 1 paragraph 4) are linked to EU membership and should, therefore, cease on exit day[2]. We assume that the same policy reasoning would apply in relation to the retrospective prohibition on restitutionary claims under Schedule 1 paragraph 3. However, while this may be true in relation to rights accruing going forward from exit day, in our view it is more difficult to see this reasoning as proportionate justification (satisfying the tests that have been developed by the courts) for removing those rights in respect of breaches which have occurred before exit day.

9.6 We would prefer to see Schedule 1 paragraphs 3 and 4 operate only with prospective effect as this is more consistent with the rule of law and, in our view, also with the stated policy reasoning for the paragraphs. However, we suggest that, if the Government does intend for these provisions to operate with retrospective effect, the

[2] Taken from Politics Home, 11 August 2017

Government should unambiguously announce this now; rather than simply leaving the provisions in the Bill to be teased out and discussed as part of the general scrutiny and debate of the Bill. An announcement would give the Government a stronger defence against any challenge to the provisions which may be mounted under the ECHR, as notice that is given of retrospective provisions will be taken into account in determining whether they are proportionate.

10 Clause 6: Interpretation of retained EU law - and procedure

10.1 Clause 6 is intended to give effect to the principle that the CJEU will cease to have jurisdiction in the UK after exit day. We recognise that this is an important political principle. However, we suggest that further thought should be given to the transitional consequences in the Bill itself.

10.2 Clauses 6(1)(a) and 6(2) of the Bill provide that:

- 6(1)(a) a court or tribunal is not bound by any principles laid down or decisions made on or after exit day by the CJEU; and
- 6(2) a court or tribunal need not have regard to anything done on or after exit day by the CJEU or another EU entity or the EU but 'may do so if it considers it appropriate to do so'.

The most difficult aspect of these clauses is what the impact will be on questions which were referred to CJEU before exit day, but on which the CJEU gives its judgement after exit day.

10.3 If the intention is that clauses 6(1)(a) and 6(2) should apply to such judgements, then these are (to that extent) inconsistent with the Government's position paper published during the Summer on *Ongoing Union judicial and administrative proceedings*, which clearly proposes that it may be right that at least beyond a certain point in proceedings, such pending cases should continue to a CJEU judgement (see paragraph 11 of Position Paper). In not providing for any exception for such cases, the draft Bill does not seem to accord with the Government's stated policy position.

10.4 In addition, clause 6(1)(b) says that, after exit day, there will be no ability for UK courts to refer matters to the CJEU. This has practical consequences for taxpayers and HMRC, in that they will be faced with a different route to determining any question regarding the interpretation of retained EU law that arises after exit day.

10.5 Currently a referral to the CJEU can be at any point in court proceedings, including, at the earliest stage, from the First Tier Tribunal. Although a referral is not without cost and time implications, it does mean that a conclusion is often reached on a point of EU law at an early stage in the proceedings. However, this is not always the case. In some circumstances what comes back from the CJEU is a statement of a principle, which then must be applied by the UK courts, and the application of that principle can then be appealed in the normal way.

10.6 After exit day each UK court (including the First Tier Tribunal) will have to reach a conclusion on the point of EU law itself (considering CJEU case law as per clause 6 of the Bill), regardless of whether or not the point is considered to be sufficiently

clear[3]. This conclusion will be subject to appeal in the ordinary way, meaning that there would be no certainty on the point, potentially until the case reaches the Supreme Court, with the associated costs arising.

10.7 There are differing views as to whether this change in procedure is in the best interests of an efficient and fair legal system. We think that this is an area where the Government could encourage further public discussion to gather views as to whether or not there should be some sort of new procedure for UK courts to deal with retained EU law. Possible ideas include:

- developing a right to leap frog directly to the Supreme Court (say in the same circumstances in which a referral to the CJEU would have been made, with the Supreme Court being required to give its permission), or
- a new specialist tribunal staffed with EU law experts which can be referred to in circumstances where previously UK courts could have made a referral to the CJEU. In this regard, we understand that in France where a question of interpretation of law can be referred immediately to the Conseil D'Etat.

These options could be developed to provide greater certainty for taxpayers and HMRC at the earliest possible stage in relation to matters of retained EU law. In addition, since the forum would be staffed by English lawyers, it is more likely that they will be in a position to deliver judgements that resolve the issues because they will have a greater appreciation of the full domestic legal context. The aim should be to avoid a question as to retained EU law having to be considered at all possible stages using the appeals process.

10.8 Clause 6(1)(b) will also have retrospective effect as it will apply in respect of pre-exit day matters as it applies to any question of EU law (which will in any event at that point be UK law) arising from events occurring after exit day. Thus, in respect of an issue arising in, say, December 2018, the taxpayer is in a different position on the day after exit day than he was in on the day before exit day, in terms of his ability to challenge the issue and how judicial proceedings will proceed.

10.9 As noted above, we note that the Government's aim in the Position Paper is to allow some scope for cases either currently before or pending to continue to be determined by the CJEU. The EU Commission's *'Position paper on Ongoing Union Judicial and Administrative Procedures*', available on the Europa website, goes further and includes the view that CJEU is competent to adjudicate in preliminary references submitted by UK courts after the withdrawal date relating to facts that occurred before the withdrawal date.

10.10 We would encourage the government to explore these issues during its negotiations on Brexit. The aim should be to maximise the certainty for taxpayers and HMRC at the earliest possible stage in relation to matters of EU law.

11 Clauses 7, 8 and 9: Main powers in connection with withdrawal

11.1 Clauses 7, 8 and 9 of the Bill contain the so-called 'Henry VIII' powers. With regard to tax, we note that clauses 7(6) and 9(3) contains an express imitation that regulations made under these provisions cannot impose or increase taxation. We welcome this and suggest that there should be an equivalent limitation in clause 8. Is

[3] *Ex parte Else* [1993] QB 534; *Littlewoods Organisation plc* [2001] EWCA Civ 1542

there any reason why one has not been included? An inference may be drawn from this omission that provisions made by Ministers under this clause can impose or increase taxation, which we do not think should be the case.

11.2 We accept, of course, that over time changes will be made to retained EU law which will result in divergence of how those rules incorporated into domestic law apply going forward in the UK with the same rules applying in the EU. Indeed, some of the laws and rules may be repealed altogether. This is to be expected. However, it should be done in a clear and transparent way and in accordance with the existing tax policy framework, rather than changes arising inadvertently.

12 Acknowledgement of submission

12.1 We would be grateful if you could acknowledge safe receipt of this submission.

13 The Chartered Institute of Taxation

13.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities.

13.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

13.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

13.4 The CIOT's 18,000 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation
10 October 2017