

# 'THE GREAT REPEAL BILL'

## DOMESTICATING EU LAW



## **The International Regulatory Strategy Group**

The International Regulatory Strategy Group (IRSG) is comprised of leading UK-based figures from the financial and related professional services industry. It is one of the leading cross-sectoral groups in Europe for the financial and related professional services industry to discuss and act upon regulatory developments.

Within an overall goal of sustainable economic growth, it seeks to identify opportunities for engagement with governments, regulators and European and international institutions to promote an international framework that will facilitate open and competitive capital markets globally. Its role includes identifying strategic level issues where a cross-sectoral position can add value to existing industry views.

TheCityUK and the City of London Corporation co-sponsor the IRSG.

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# FOREWORD

The UK is the world's leading centre for financial and related professional services, a position that rests firmly on its robust regulatory regime, legal certainty and the general business environment.

As we negotiate our new trading relationship with the European Union (EU), we also face the task of separating UK law from EU law, and establishing the new administrative and regulatory functions that the country will need once it is outside the EU. This is widely seen as the biggest legislative challenge the UK has ever faced, not least because it will have to be completed in under two years. The exercise will especially affect industries that are highly regulated under EU law, such as financial services.

Given the scale of the task our industry faces in planning for and adapting to Brexit, we urge government not to use the Great Repeal Bill to make policy changes.

The UK government's approach has been outlined in the white paper 'Legislating for the United Kingdom's withdrawal from the European Union' and the Queen's Speech on 21 June 2017. This report builds on both and proposes a simple and effective approach to the adoption and adaptation of EU and EU-derived law. It aims to minimise the number of instances where the law will need to be amended while enabling appropriate parliamentary oversight. We hope that this approach will contribute to a smooth and orderly exit from the EU, enabling businesses to continue serving their customers and clients.

This report does not address areas where particular policy responses, including transitional arrangements to address specific issues arising from Brexit, might be needed. These questions should be considered and discussed separately and proposed solutions consulted on in an appropriate manner. We encourage government to undertake this planning alongside the work of the Great Repeal Bill so that relevant legislation can be enacted in preparation for exit, including on a contingent or expedited basis where necessary.

While this report is primarily intended to assist government in its preparations for Brexit, we hope that it will also serve to clarify issues surrounding the Great Repeal Bill for individuals and businesses and help them plan for the future.

The report has been written by Linklaters LLP on behalf of the International Regulatory Strategy Group (IRSG), which is a practitioner-led body convened under the auspices of TheCityUK and The City of London Corporation. The approach set out in this report is therefore primarily illustrated using examples from the financial services industry.

We are grateful for the support of all contributors to this report.

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# EXECUTIVE SUMMARY

This report addresses the issue of ‘domesticating’ EU law.<sup>1</sup> This means adopting EU law as UK law, preserving UK law that would lapse on repeal of the European Communities Act 1972 ('ECA') and adapting the adopted and preserved law (as well as other UK legislation and rules implementing EU law) to ensure a continuing stable legal framework on the UK’s exit from the EU.

This report responds to and builds on the approach set out in the white paper ‘Legislating for the United Kingdom’s withdrawal from the European Union’, in which the government sets out its proposals for a Great Repeal Bill to convert existing EU law into domestic law at the same time as repealing the ECA. The objective of this report is to provide a clear and comprehensive methodology for domestication, which maximises certainty and ensures a functioning legal system across all sectors. It proposes a principles-based approach to adapting the EU and EU-derived law that will apply in the UK following its exit from the EU.

Key benefits of this approach include:

- avoiding the risk of a legal vacuum or gaps in the law
- providing clarity and certainty as to how the law will apply
- minimising the scope for unintended consequences
- enabling policy changes to be kept separate from the overall objective of maintaining legal stability
- reducing the burdens of making, tracking and complying with new legislation.

Recommendations that the government should adhere to include:

- setting continuity, certainty, timeliness, simplicity and consistency as its overarching objectives
- publishing eight guiding principles to be followed in the adaptation and interpretation of the domesticated law
- adopting, in the Great Repeal Bill, five rules of statutory interpretation for EU and EU-derived law which would, at a stroke, deal with most of the corrections needed without using ‘Henry VIII’ powers
- establishing a statutory advisory body, under parliamentary supervision, able to give guidance on issues of construction and application if ambiguities arise.

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<sup>1</sup> Alternative terms for domesticating include ‘nationalising’, ‘onshoring’, ‘patriating’ and ‘repatriating’. This term has been adopted from the paper of the House of Lords Select Committee on the Constitution (the Select Committee) entitled ‘The ‘Great Repeal Bill’ and Delegated Powers’ (HL Paper 123, March 2017).

This report also considers:

- the diversity of sources of EU and EU-derived law and how this influences the mechanics of their adoption or preservation
- the question of how and for what reasons domesticated law may be amended in the future (other than by Act of Parliament)
- practical steps that will be needed to promote the accessibility of the newly domesticated law to the public and to legal practitioners, not only promoting legal certainty but strengthening the rule of law in the UK.

The general approach set out in this report has the merit of enabling consistency across all the areas of law. However, specific exclusions or further legislation may be needed to address some of its consequences. For example, in relation to specific areas of former EU competence, exclusions may be needed where continuity is not the intended policy outcome, and new administrative functions and powers may need to be created. This is recognised by the white paper which states that legislation separate from the Great Repeal Bill will be introduced for measures that go beyond ensuring continuity or that implement new policies.

Exactly what further legislation is required will depend on policy decisions which may in turn be dependent on the outcome of the UK's negotiations with the EU27 on a future framework for trade in goods and services, or on transitional arrangements that may reduce the impact of any changes. This report does not make any assumptions about the outcome of these negotiations.

# GUIDING PRINCIPLES

THIS REPORT RECOMMENDS THAT THE GOVERNMENT ADOPT EIGHT GUIDING PRINCIPLES TO GOVERN DOMESTICATION.

PRINCIPLE

**1**

The acquis and implementing legislation will continue to apply, as UK law, as they stand at the exit date.

PRINCIPLE

**2**

Policy changes will be dealt with separately from domestication.

PRINCIPLE

**3**

Exclusions from the scope of domestication will be made expressly.

PRINCIPLE

**4**

UK law rights and obligations to continue on exit day (subject to policy change or exclusion).

PRINCIPLE

**5**

The acquis and implementing legislation will come with its history.

PRINCIPLE

**6**

The territorial scope of the domesticated acquis will generally be limited to the UK.

PRINCIPLE

**7**

UK courts will take a purposive approach to interpreting the acquis, implementing legislation and the Great Repeal Bill.

PRINCIPLE

**8**

Government will provide guidance and consult.

# RULES

THESE ARE THE FIVE RULES OF STATUTORY INTERPRETATION.

## RULE 1

### **References to other EU legislation**

References in any UK or EU legislation and regulation to other EU legislation, law or acts shall, as regards any time after the exit date, be to the relevant legislation, law or act as at the exit date, as amended by or under the authority of Parliament or relevant devolved assembly. Terms defined in such legislation, law or acts shall be construed accordingly.

## RULE 2

### **References to EU Member States**

Although the UK will have left the EU, EU legislation and UK implementing legislation and rules shall be construed as if the UK were a Member State.

## RULE 3

### **Territorial scope**

Except where expressly provided, nothing in any EU legislation or UK implementing legislation or rules shall, in respect of any time after the exit date, give any right, power, or obligation to do or refrain from doing anything outside the UK.

## RULE 4

### **Functions of European institutions (for example, the European Commission and ESMA)**

The functions of any EU institution or agency shall, in respect of any time on or after the exit date, be construed as being functions of the relevant Minister or department in accordance with a matrix allocating responsibilities.

## RULE 5

### **Obligations of the UK and UK institutions**

- A: Obligations to co-operate become powers.
- B: Restrictions on national measures are disapplied.
- C: No dependence on prior acts.

# 1.0 THE NEED FOR, AND SCOPE OF, DOMESTICATION

## 1.1

This report considers one key aspect of Brexit – ‘domesticating’ EU and EU-derived law.

Domestication means:

- adopting the body of existing EU law applicable to the UK (the ‘acquis’<sup>2</sup>) into UK law
- preserving UK law that implements EU law and that would otherwise lapse on the repeal of the European Communities Act 1972 (the ‘ECA’)
- adapting the adopted and preserved law, as well as other UK law that implements EU law, so that it continues to operate coherently

Therefore domestication involves two aspects. Firstly adoption or preservation as necessary. Secondly adaptation so that the law continues to function even after the UK exits the EU.<sup>3</sup>

## 1.2

Without domestication, there would be a legal vacuum on exit date.<sup>4</sup> The *acquis* would cease to apply to the UK on exit and UK law implementing the *acquis* through the ECA would lapse. For example, rules protecting the integrity of securities markets, such as those on the disclosure of inside information, would no longer apply. The detailed provisions that govern how banks can meet their regulatory capital obligations would similarly fall away. Legal continuity – that is, avoiding a legal vacuum – will be vital to maintain business confidence and stability and ensure the proper functioning of the state and society.

## 1.3

Domestication not only requires adopting the *acquis* and preserving UK implementing law, but making consequential amendments so that it all functions appropriately after exit.

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<sup>2</sup> The *acquis* is defined by the EU as “the body of common rights and obligations that is binding on all the EU Member States. It is constantly evolving and comprises:

- the content, principles and political objectives of the Treaties;
- legislation adopted pursuant to the Treaties and the case law of the Court of Justice;
- declarations and resolutions adopted by the Union;
- instruments under the Common Foreign and Security Policy;
- international agreements concluded by the Union and those entered into by the Member States among themselves within the sphere of the Union’s activities.”

The European Commission, European Neighbourhood Policy and Enlargement Negotiations, [https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/acquis_en)

<sup>3</sup> This report assumes that exit will occur on a single date. Implementation arrangements and any future agreement with the EU27 will need separate consideration. If the *acquis* continued to apply to the UK during the implementation period, our approach would be useful when the implementation period comes to an end. If the *acquis* did not continue to apply in that period, our approach would (with minor modifications) facilitate the UK meeting any obligations under its future agreement with the EU27 that depended on the *acquis* remaining in force.

This report distinguishes between ‘implementation arrangements’ of the kind described above and ‘transitional arrangements’ which allow individuals and businesses to continue, in some circumstances, to rely on rights acquired under a previous legal framework (for example, so-called grandfathering or provisions to clarify that certain types of contract entered into before exit may continue to be performed after exit).

<sup>4</sup> ‘Exit’, ‘exit day’ and ‘exit date’ are used throughout this report to mean the day on which the UK leaves the EU – 29 March 2019 (unless a withdrawal agreement enters into force prior to this date or the period is extended with the unanimous agreement of the EU27).

## **1.4**

The quantity of legislation – there are more than 12,000 EU regulations and 7,900 statutory instruments which implement EU legislation<sup>5</sup> – the unprecedented nature of the task and the limited timeframe mean that domestication could be an overwhelming task. In the white paper, the government has recognised that cutting and pasting EU law into UK legislation would be impractical and undesirable. However, it appears to envisage the extensive use of delegated powers and has not ruled out a line-by-line approach to consequential amendments, which would also be a massive undertaking both in terms of time and cost. Lawmakers, businesses and legal practitioners would struggle to cope with such vast changes. The approach set out in this report would significantly reduce the volume of specific detailed legislation required for domestication while maintaining appropriate parliamentary oversight.

## **1.5**

This report does not consider what the law could or should be. It makes no recommendations on policy changes, whether intended as transitional measures or as permanent settlements and whether unilateral or negotiated, other than that they should be dealt with separately from domestication. The aim of domestication is not to determine transitional or final outcomes for every policy area but above all to ensure certainty and stability at the point of exit.

## **1.6**

There will be areas where people may consider that the law does not operate appropriately after domestication. This will usually involve a policy judgment. The government has been scrutinising EU-derived legislation and that work will be important in identifying where policy change is needed. Some policy areas will be subject to separate primary legislation as part of leaving the EU. The white paper, for example, specifically indicated that there would be bills on immigration and customs<sup>6</sup> and it is possible that financial services would receive the same treatment. In these cases, any problems identified could be solved by a relevant Act of Parliament. In other policy areas, delegated powers to amend legislation, subject to parliamentary scrutiny, might be helpful. If our recommendations are adopted, ideally there would be relatively few instances where such powers would be needed.

## **1.7**

Domestication cannot deal with rights to the extent that they depend on the actions or laws of other Member States. While the UK may unilaterally legislate for transitional or final arrangements taking effect in the UK on exit, it cannot ensure the EU27 will make reciprocal provisions. Issues such as future access to the single market for UK businesses will be determined by the UK's withdrawal and future relationship negotiations with the EU27 and require the agreement of other Member States. This report does not deal with anything beyond what the UK can do as a matter of its domestic law.

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<sup>5</sup> Department for Existing the European Union ('DExEU'), *Legislating for the United Kingdom's withdrawal from the European Union* (white paper, Cm 9446, 2017) (the 'white paper'), DExEU, op. cit., para 2.6.

<sup>6</sup> DExEU, op. cit., para 1.22.

## **1.8**

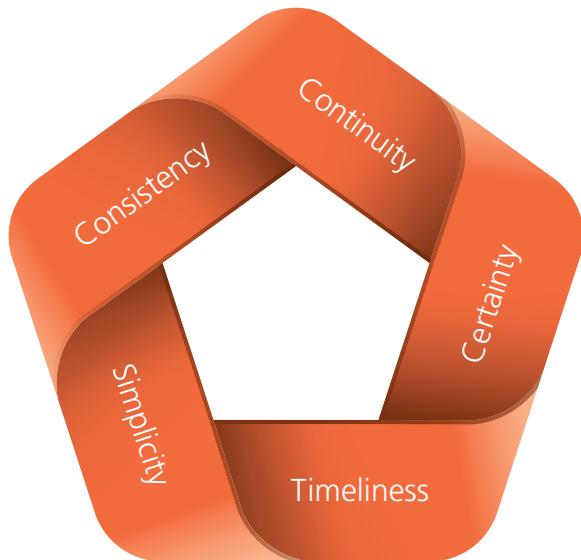
Whether UK domestic policy changes are needed to achieve desirable outcomes will depend partly on what the UK agrees with the EU27. For example, as discussed in section 9.1, domestication without policy change would mean European Economic Area (EEA) individuals and businesses continuing to have market access to the UK for the provision of financial services. There is a policy tension between the benefits of continuity (such as being open for business and offering greater choice for UK consumers of financial services) and various difficulties associated with it (such as possible imbalances of reciprocity and loss of regulatory cooperation). While such debates are beyond the scope of this report, a strength of the approach set out in this report is that it would not prejudice their outcome. If it were considered that change was appropriate, legislation could be passed to make that change. For example, in the absence of agreement with the EU27, existing regulatory cooperative arrangements would lapse; if, in the context of any policy changes proposed by the government, this would mean gaps in regulatory coverage, those gaps could be filled by new legislation or rules. Such legislation could even be passed before the conclusion of withdrawal negotiations on a contingency basis (i.e. entry into force could be made dependent on negotiation outcomes).

## **1.9**

Finally, this report has considered and rejected the case for interference with private contracts (for example, where they implicitly assume that the UK is a member of the EU) as an ancillary to domestication. The common law is very well developed for the interpretation of contracts and any intervention would have an arbitrary impact that could undermine confidence in the UK's legal systems without providing commercially satisfactory outcomes.

# 2.0 OVERARCHING OBJECTIVES

This section sets out five overarching objectives that should govern domestication.



## 2.1 Continuity

Continuity of law is required to avoid a legal vacuum when EU law ceases to apply to the UK and section 2(2) of the ECA is repealed. As far as possible, businesses operating in the UK should be subject to the same obligations and procedures the day after exit as the day before. Although even the broad scope of a new partnership with the EU<sup>27</sup> is not yet known, maintaining continuity will facilitate cooperation and convergence, if necessary, and allow the flexibility to provide for any agreed transitional provisions during any implementation phase. It would also reduce the amount of change businesses would have to face on exit day.

## 2.2 Certainty

A key concern of UK businesses has been the lack of certainty as to the effect of Brexit on the UK. The white paper is welcome as a source of guidance on the legal and regulatory environment post-Brexit and itself recognises businesses' need for certainty. However, line-by-line amendments would risk inadvertent changes to the substance of the law and involve a huge volume of legislation which would be difficult for businesses and legal practitioners to keep abreast of.

## **2.3 Timeliness**

We have assumed that the exercise needs to be completed by March 2019. In practice, clarity about the approach to domestication is needed much sooner. The approach set out in this report should enable this deadline to be met. A roadmap of the process should be set out at an early stage. Policy changes, except where absolutely necessary, or consolidating legislation can come later.

## **2.4 Simplicity**

To the greatest possible extent, the domestication of the acquis should be formulaic and based on guiding principles. Where changes can be made by way of a generic approach this should be done. Simplicity allows clarity and minimises cost in terms of government, parliamentary and business time and resources. It enables certainty and timeliness and reduces the risk of unintended consequences.

## **2.5 Consistency**

Although different government departments are tasked with reviewing different areas of legislation and with implementing changes, a common approach should be taken both to issues that straddle multiple sectors or departments and to those within specific areas. This will require careful governance and coordination, cross-departmental oversight of the process of analysing the changes needed and collaboration between departments. Not doing so would, when subsequently using the resulting legislation, risk extra work and confusion for individuals, businesses, the judiciary and others for whom departmental boundaries are not relevant. A single business may be subject to one field of EU-derived law as the producer of a good, another as a participant in financial markets, and to yet others as a consumer of intermediate goods and services or as an employer. A consistent approach to domestication will make life easier for such businesses, while a fragmented one would risk unnecessary complications and expenses over the long term for both them and their advisers.

This report considers that the approach outlined meets these objectives.

# 3.0 GUIDING PRINCIPLES

This report recommends that the government adopt guiding principles to govern domestication. These principles should describe the approach to domestication and be applied by government across all sectors, regardless of subject matter, to meet the objectives of simplicity and consistency. Initially framed as guidance, these would be expressed in plain English and be designed to promote immediate legal certainty. They should be incorporated into the Great Repeal Bill as aids to its interpretation and as binding standards for government action taken under its authority (such as making subordinate legislation or developing further rules of statutory interpretation). So, for example, the courts would use them to resolve any ambiguities arising during the domestication process and would be able to strike down subordinate legislation that contradicted them. In this way, incorporation of the principles into law would ensure consistency between government departments and promote certainty.

The guiding principles would be most effective with appropriate oversight. Government will need to monitor progress and compliance and seek stakeholder feedback, escalating and resolving issues that emerge (for example, finding bespoke solutions for intractable issues), and to share knowledge and experience across government departments and with wider society.

This report suggests eight guiding principles, set out below:

## Principle 1

### **The acquis and implementing legislation will continue to apply, as UK law, as they stand at the exit date**

This is necessary because:

- it will allow time for a measured assessment of what policy changes are desired for the future
- it avoids having a legal vacuum (for example, not having any rules on market abuse)
- it avoids business and government having to deal with wholesale changes to the detail of law and regulation at this time.

## Principle 2

### **Policy changes will be dealt with separately from domestication**

This follows logically from the continuity overarching objective. Policy changes require changes to law and will be dealt with in the normal way, i.e. by primary or secondary legislation. Some changes may come into force immediately on exit (having been enacted before exit), others over time. Deciding on and implementing policy changes should not be allowed to interfere with the essentially mechanical and time-constrained exercise of ensuring continuity. To free up everyone's time (including government's, Parliament's, regulators', businesses') for other matters and to avoid the risk of running out of time, as much as possible should be done automatically by application of the approach outlined in this report. This would greatly reduce the amount of legislation needing more specific attention, freeing resources. Dealing with policy changes separately will also help to ensure that there is greater clarity as to what is changing.

### Principle 3

#### **Exclusions from the scope of domestication will be made expressly**

This also follows from the continuity overarching objective. Exclusions may take the form of separate legislation on particular issues (for example, immigration and customs).

Some elements of EU law would not need to be domesticated. Examples include provisions:

- only applicable (expressly or by implication from their subject matter) to other Member States
- which solely relate to a time in the past.

Rather than separately identifying and excluding all such provisions in the acquis, domesticating the whole acquis would be easier and less likely to have unintended consequences (for example, by accidentally overlooking particular laws or omitting provisions that would otherwise have served as aids to the interpretation of the acquis). Redundant provisions would simply not have any practical effect. Although a tidying-up exercise might be desirable, it could be carried out later and should not be prioritised. There is ample precedent for this approach in the wholesale adoption of the laws of predecessor states to be found in constitutions around the world.

This report would nevertheless recommend expressly excluding provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union (the 'Treaties') except to the extent that they create rights or obligations in private law. This reflects the government's position as set out in the white paper.<sup>7</sup> This exclusion would cover provisions relating to the internal powers and workings of EU institutions and agencies (for example, the establishment and working of the European Securities and Markets Authority ('ESMA'), or the establishment of committees under Regulation (EU) No 182/2011)<sup>8</sup> to avoid any argument that the UK itself continues to have rights and obligations associated with membership. It would also cover the more declaratory aspects of the Treaties committing the UK to various political aims in common with the EU27.

### Principle 4

#### **UK legal rights and obligations to continue on exit day (subject to policy change or exclusion)**

In practical terms domestication means that, subject to any specific exceptions provided expressly in legislation, legal rights and obligations existing in the UK at the point of repeal of the ECA will continue as if the ECA had not been repealed.

Domestication will not affect the continued existence of rights in the EU27; this will be a question of EU and other Member States' laws. It follows logically from the continuity overarching objective that, under UK law, the rights of nationals of other Member States to do things in the UK (for example, maintenance of UK branches or the validity within the UK of prospectuses approved in other Member States) will continue unless otherwise provided. To the extent this is not a desired policy outcome, changes can be implemented separately, whether at the same time or later.

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<sup>7</sup> DExEU, op. cit., para 2.11.

<sup>8</sup> The committees established under this regulation are intended to provide Member States with collective control over the European Commission as it drafts implementing acts under Article 291 TFEU.

## Principle 5

### **The acquis and implementing legislation will come with its history**

Domestication means giving the acquis continued validity while changing the source of its authority. Parliament is not creating new law but is maintaining the existing law (with its existing meaning and principles of interpretation) with necessary amendments. The existing law is broader than just the operative provisions set out in individual pieces of legislation. For example, regulations and directives contain detailed recitals that give the context and background for their introduction. The recitals are important aids to the interpretation of the legislation. It is important to keep them to avoid the risk of inadvertently changing the meaning of the substantive provisions. Similarly, the acquis and other EU-derived law must be read in the light of judgments of the Court of Justice of the European Union ('CJEU') handed down before exit.

Although this report recommends that the Treaties should generally be excluded from scope as substantive law, except as discussed in principle 3 above, the position in the white paper that there should be continuing recourse to them to the extent that they affect the interpretation of the acquis and implementing legislation is supported.

## Principle 6

### **The territorial scope of the domesticated acquis will generally be limited to the UK**

The acquis creates rights and obligations across the EU and EEA. Once the UK has left the EU, the acquis as preserved by the UK should not result in extraterritorial rights and obligations under UK law in respect of activities in other Member States, except to the extent that these already existed under the acquis as applied in the UK before exit (for example, in competition or market abuse law). The rights and obligations of individuals and businesses in the EU27 after the UK's exit should be primarily a matter of the laws of the rest of the EU27 and not of UK law. This principle would provide clarity for businesses and citizens and help prevent the UK from breaching restrictions on extraterritorial jurisdiction under international law (which permits extraterritorial effects only in accordance with certain principles) and conforms to the longstanding conventions and principles of legal interpretation against extraterritorial jurisdiction under UK law.<sup>9</sup>

## Principle 7

### **UK courts will take a purposive approach to interpreting the acquis, implementing legislation and the Great Repeal Bill**

The UK courts will interpret the domesticated acquis and other EU-derived law in accordance with these principles. A provision requiring the courts to apply the Great Repeal Bill and related legislation in such a way as to achieve a result reflecting the Bill's objectives and to avoid unnecessary disputes, or a practice direction issued by the Supreme Court to this effect, would be desirable. Given the challenges of domestication, it would be welcomed if the courts were to interpret domesticated law in a way that disregards infelicities and oversights that result from the application of generic amendments in favour of an interpretation that achieves the intended outcome.

<sup>9</sup> For a recent discussion of the UK's approach to extraterritorial effect in the context of sanctions, see the government's consultation on the legal framework for sanctions. HM government, Public consultation on the United Kingdom's future legal framework for imposing and implementing sanctions (Consultation paper, Cm 9408, 2017), p. 16.

## Principle 08

### **Government will provide guidance and consult**

Business, and society more generally, will need early guidance. The government must generate certainty by advising, as early as possible, where (and how) there will be deviations from the *acquis* and which (if any) forthcoming EU<sup>27</sup> legislation will be adopted by the UK. Businesses will also need to know where responsibility lies for domesticated regulations and for functions previously exercised by EU institutions. UK bodies that take on responsibilities (some of which will need to be established) will need to indicate how they intend to exercise them. The faster the government and regulators act on these issues, the sooner they can provide certainty, the better for the economy and society. Throughout, businesses should be consulted early to harness their experience and to give them time to prepare for any resulting changes. Such an approach will contribute to stability. Given the large number of weighty issues on which consultation may be needed, this report would encourage more informal and interactive modes of consultation than are traditional.

This is important especially for the financial services industry because businesses are already facing operational and project management challenges arising from the EU legislative pipeline. Financial services businesses are also particularly affected because they frequently operate cross-border and have benefited from regulatory convergence. They are already preparing for the implementation of the second Markets in Financial Instruments Directive ('MiFID II')<sup>10</sup> and have been investing for compliance with recent and forthcoming laws covering such disparate areas as bank capital requirements, data protection, payment services and cybersecurity. Therefore, the government should prioritise guidance about its intentions in these and similar areas: systems builds are time-consuming and expensive, and businesses would need ample advance notice if they were to be required to comply with diverging rules.

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<sup>10</sup> (EU) No 2014/65.

# 4.0 ADOPTION AND PRESERVATION

This section looks in more detail at:

- what needs to be adopted into UK law or preserved
- the mechanics of adoption and preservation
- the status of the acquis when adopted
- the status of the CJEU and its decisions.

## 4.1 What needs to be adopted into UK law or preserved

The acquis comes in several forms, summarised below. Specific action is needed to preserve those parts of the acquis that would otherwise lapse.

### Treaty provisions

These include provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union ('TFEU'). They apply directly in Member States and would lapse as a matter of UK law on repeal of the ECA if not preserved. As mentioned above, this report would recommend allowing the Treaties to lapse except to the extent that they create rights and obligations in private law or affect the interpretation of the acquis.

### Regulations

Regulations are provisions of general effect which are directly applicable in Member States. These would no longer apply in the UK on repeal of the ECA if not preserved by the Great Repeal Bill.

### Directives

These instruct Member States to achieve a particular outcome, leaving them to decide the form and methods. In the UK, directives have been implemented in several different ways including through: primary legislation; secondary legislation passed under powers conferred by section 2(2) ECA; secondary legislation passed under other powers; and/or rules made by regulators such as the Financial Conduct Authority ('FCA') or Prudential Regulation Authority ('PRA') in accordance with their powers. Secondary legislation implementing directives passed under powers conferred by section 2(2) ECA would lapse on repeal of the ECA if not preserved by the Great Repeal Bill. This follows from the general principle that secondary legislation does not survive repeal of the act giving the power to make it. However, there are also reasons for preserving directives that have been implemented in other ways. Although they are not directly applicable, UK law implementing them is interpreted in the light of the wording and purpose of the directive (for example, as set out in their recitals). UK legislation also often makes references to directives and so imports them or parts of them by reference into the domestic law. Finally, directives impose obligations on the government that can in some cases be enforced by individuals. In principle, these should remain.

## **Delegated and implementing acts**

Regulations and directives (together sometimes known as ‘Level 1’ legislation) may confer power on the European Commission to adopt ‘delegated acts’ under Article 290 TFEU (which add detail to a Level 1 text) or ‘implementing acts’ under Article 291 TFEU (which make rules in areas where a high degree of uniformity among Member States is desired). Such ‘Level 2’ legislation would no longer apply to the UK on repeal of the ECA if not preserved by the Great Repeal Bill.

## **EU decisions**

Decisions are directly applicable and may bind only particular persons. Decisions made before exit would no longer apply to the UK on repeal of the ECA if not preserved by the Great Repeal Bill.

## **CJEU decisions**

These take precedence over national laws and have been incorporated into UK law under section 3 of the ECA. This means they take precedence over the decisions of UK courts. The existing decisions are an important part of the acquis and would no longer apply to the UK on repeal of the ECA if not preserved by the Great Repeal Bill.

The EU institutions produce non-binding materials that nevertheless have official status and can influence interpretation of the acquis. The Great Repeal Bill should provide that the existing materials retain the same status after as before the exit date. These include:

### **– Recommendations and opinions made in accordance with the TFEU**

Several EU institutions are empowered to make official recommendations and opinions. An example would be the Recommendation of the European Central Bank on bank dividend distribution policies of 13 December 2016.<sup>11</sup>

### **– Guidance**

Certain bodies, such as the financial European Supervisory Agencies ('ESAs')<sup>12</sup>, may address guidance to national competent authorities on a comply or explain basis. The ESAs may also issue formal guidelines directed at market participants or informal guidance (for example, Q&As). Other examples of guidance include European Commission FAQs (for example, on the European Market Infrastructure Regulation ('EMIR')), ESMA FAQs (for example, on EMIR and on the Implementation of the Credit Rating Agency Regulation) and the internal market questions and answers website. Such ‘Level 3’ guidance is important to provide certainty to businesses and citizens on how the law affects them.

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<sup>11</sup> ECB/2016/44.

<sup>12</sup> These are the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA).

## – Background materials

The history of regulatory decisions (for example, consultation papers setting out the reasoning behind ESA recommendations on a Level 2 text) may be relevant to the interpretation of that text. More generally, EU laws may be interpreted in light of their *travaux préparatoires* (the official record of the negotiations leading to their adoption).

### **Interaction between the acquis and UK law**

In many areas, the EU legislative sources on a given subject are complex, consisting of multiple instruments. Similarly, UK implementation may consist of a mixture of primary legislation and rules made under delegated powers. Often, directives are implemented by UK legislation in such a way as to cross-refer back to the text of the directive rather than by creating entirely free-standing UK law. Some examples are set out below:

#### **1. Forms of legislation**

In some areas of EU legislation, a directive and regulation may be used in combination: for example, CRDIV/CRR<sup>13</sup> and MiFID II/MiFIR.<sup>14</sup> In addition, supplementary directives, regulations and guidance are used to provide more detailed regulation and to assist practitioners in understanding and complying with their obligations. Under MiFID II/MiFIR, there are more than 28 separate delegated acts as well as several implementing acts. Under the Market Abuse Regulation ('MAR')<sup>15</sup> there are around 11 delegated and implementing acts and two sets of Level 3 guidelines. EU case law on the Market Abuse Directive (which was replaced by MAR) is relevant to the interpretation of MAR, as are the consultation documents published by ESMA in relation to the draft delegated and implementing acts.

The directives are typically implemented into UK law in primary legislation, secondary legislation and PRA or FCA rules. However, the regulations apply directly and a similar concept applies in respect of guidance and case law.

#### **2. References in UK legislation to EU legislation**

Many of the essential defined terms used in UK legislation (for example, 'regulated market', 'home state', 'insurance undertaking', 'credit institution' and 'investment services business') depend upon references to EU directives or regulations. Directives and regulations may be referred to generally, as in expressions such as 'requirements imposed by or under this Act in pursuance of the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive' (section 55(7ZA) the Financial Services and Markets Act 2000 (FSMA)), or with references to specific sections, such as in the definition of the term 'investment firm' which 'has the meaning given in Article 4.1.1 of the markets in financial instruments directive' (section 424A FSMA 2000).

<sup>13</sup> Capital Requirements Directive ((EU) No 2013/36) and Capital Requirements Regulation ((EU) No 575/2013).

<sup>14</sup> Markets in Financial Instruments Regulation ((EU) No 600/2014).

<sup>15</sup> (EU) No 596/2014.

## **4.2 The mechanics of adoption and preservation**

The acquis and acquis-derived legislation can be adopted by defining the acquis as at a 'snapshot date' and providing that, except as otherwise expressly set out:

- The acquis and official EU texts and guidance relevant for the interpretation of rights and obligations under the acquis continue to have the same effect under UK law as they did immediately before the UK's exit.
- The repeal of the ECA shall not affect anything done under it, and all instruments made under it shall continue to have the same effect as they did immediately before the repeal.

This approach does not require the identification of all EU laws, judgments and guidance that will become part of UK law. They would simply apply by virtue of the Great Repeal Bill, as they do today by virtue of the ECA. It avoids the legal risks inherent in making a definitive list (for example, accidental omissions).<sup>16</sup>

Other adoption methods are conceivable. The House of Lords Select Committee, for example, noted that Ministers could be given the power to transpose individual elements of EU law by making statutory instruments. However, such an approach has severe drawbacks: aside from the extreme scale of the task, the transposed acquis would lose its context, thereby risking changes to its meaning and undermining continuity and certainty and creating a significant burden for users and their advisers.

In principle, the 'snapshot' time should be immediately before the moment of exit. There are, however, two factors that should be addressed explicitly to ensure certainty.

UK statutes often require commencement orders to bring provisions into effect. For example, the bulk of Schedule 2 to the 2013 Banking Reform Act was on the statute book for over a year before coming into force through a series of statutory instruments. Under EU law, however, all provisions of an act 'enter into force' at the same time (usually 20 days after publication in the Official Journal). The date from which the provisions actually come into effect may vary from provision to provision. There may be laws in force on the exit date but with application dates that are after the exit date. For example, the current Prospectus Directive is to be replaced by a new Prospectus Regulation. The new Prospectus Regulation is expected to enter into force in June or July 2017 (20 days after publication in the Official Journal). Some of its provisions (on exemptions from the requirement for a prospectus) will apply immediately when it enters into force. HM Treasury ('HMT') has already taken steps to ensure that those provisions starting to apply in 2017 will be implemented promptly in the UK. The bulk of the Regulation's provisions, however, are not due to apply until around June 2019, which could be after exit.

In addition, there will be Level 2 legislation under domesticated Level 1 legislation which will only be made and enter into force after the exit date.

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<sup>16</sup> As a practical matter, however, identifying the body of domesticated acquis would be highly desirable. This is discussed in greater detail in point 7.1.

Summarised below are recommendations taking these factors into account:

**– EU legislation in force and which already applies on exit date**

These laws will be domesticated in the form they are in immediately prior to exit as outlined above.

**– EU legislation in force but with provisions that do not start to apply until after exit**

These laws will be domesticated into the UK and will start to apply in the UK as specified in the relevant EU legislation. For example, provisions of the Prospectus Regulation scheduled to apply in June 2019 would start to apply at that time.

**– EU legislation not yet in force but in the pipeline and necessary for the full implementation of other EU legislation in force**

This category refers to Level 2 legislation that has not yet been made at exit, but relates to domesticated Level 1 legislation. The Great Repeal Bill should, as a default, provide powers for the domestication of such subsequent Level 2 legislation by statutory instrument. This would be desirable to ensure adoption of the acquis in a complete form and would maintain consistency with the EU27. Of course, Parliament would be free to decide not to adopt such provisions and to adopt alternatives.

**– All other future EU laws**

These will not be imported by the Great Repeal Bill. This is consistent with government policy that in the future the UK should be solely responsible for its own laws. If, exceptionally, there were other future EU27 law which the government wished to adopt, it could be domesticated by separate legislation. The Great Repeal Bill could also provide for a specific procedure for new EU27 law (perhaps in certain sectors or areas of law) to be adopted in this way – see also point 5.3.

### 4.3 Status of the adopted acquis

Some legal commentators have queried the legal status of an adopted acquis: would it be primary or secondary legislation, or something else?

This report does not think it is necessary to give a specific status to domesticated law in this way. The acquis has functioned as a body of law in the UK legal system for decades without fitting into the traditional UK categories. It is not only the acquis which has this status. For example, the Rome Convention was given force of law in the UK under the Contracts (Applicable Law) Act 1990. The distinction in UK law between primary legislation and secondary legislation reflects how it is made (i.e. by Act of Parliament or by instruments made by government pursuant to parliamentary authority) but does not of itself affect the extent to which it is capable of future amendment. How the adopted acquis might be amended is addressed in point 6.

## **4.4 Status of the CJEU and its decisions**

### **Future jurisdiction**

The government has confirmed that the UK will, on its exit, ‘bring an end to the jurisdiction of the CJEU in the UK’.<sup>17</sup> UK courts would no longer be able or required to refer questions to the CJEU once the UK leaves the EU: “The Great Repeal Bill will not provide any role for the CJEU in the interpretation of that new law, and the Bill will not require the domestic courts to consider the CJEU’s jurisprudence.”<sup>18</sup>

### **Pre-existing cases**

There will be a number of cases with a UK element pending before the CJEU on exit date. How these cases should be treated is a politically sensitive question and will need to be addressed in negotiations between the UK and the EU<sup>27</sup>. This report believes it is important to agree clear transitional provisions dealing with the status of cases that are in progress or pending. The outcome should as far as possible protect the position of litigants. These questions have been considered in detail in the area of competition law by the City of London Law Society’s Competition Law Committee.<sup>19</sup>

### **CJEU jurisprudence**

This report agrees with the approach proposed by the white paper that judgments of the CJEU prior to the exit date would be given the same status as judgments of the Supreme Court and House of Lords. This is necessary to ensure continuity of interpretation of the *acquis*. As the white paper notes, “it is very rare for the Supreme Court to depart from one of its own decisions or [those of] the House of Lords”, although it will do this “when it appears right to do so.”<sup>20</sup>

This report recommends that CJEU judgments after exit should be treated in the same way as judgments of other foreign courts sharing a legal heritage. That is, they would be persuasive rather than binding, providing UK courts with examples of how other jurisdictions have dealt with similar legal issues. The UK courts routinely take advantage of foreign experience in this way. There is no need for specific legislation to ensure that they will have regard to CJEU judgments where and to the extent appropriate.

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<sup>17</sup> DExEU, op. cit., para 2.12.

<sup>18</sup> Ibid., para 2.13.

<sup>19</sup> City of London Law Society Competition Law Committee, *The Implications of Brexit for UK Competition Law: Practical Issues and Priorities*, 15 March 2017. [www.citysolicitors.org.uk/attachments/category/108/Brexit%20implications%20for%20UK%20Competition%20Law.pdf](http://www.citysolicitors.org.uk/attachments/category/108/Brexit%20implications%20for%20UK%20Competition%20Law.pdf)

<sup>20</sup> DExEU, op. cit., para 2.16.

# 5.0 ADAPTATION

This section sets out rules of statutory interpretation that form the heart of the approach advocated by this report. They would make the necessary changes simply and effectively. They would greatly reduce the need for line-by-line amendments and so allow Parliament, government, regulators and businesses alike more time to focus on the key issues relating to the UK's exit from the EU. They would also significantly reduce the need for delegated authority to amend existing primary and secondary legislation.

The rules as set out below are not drafted as statutory provisions but as points that statutory provisions should cover. They would apply (where the context requires) to the adopted acquis, primary and secondary UK implementing legislation and any EU27 legislation adopted by the UK after exit. They would cover all sectors: departments would not need to develop separate approaches to adaptation. This would promote consistency and certainty. It may be appropriate for some of the rules (for example, rules 1 to 3) to be inserted into the Interpretation Act 1978. Others (particularly rule 4, which refers to a matrix allocating responsibilities of EU institutions) may ultimately be split across several pieces of legislation.

## 5.1 References to other EU legislation

### Rule 1

*References in any UK or EU legislation and regulation to other EU legislation, law or acts shall, as regards any time after the exit date, be to the relevant legislation, law or act as at the exit date, as amended by or under the authority of Parliament or relevant devolved assembly. Terms defined in such legislation, law or acts shall be construed accordingly.*

There are thousands of cross-references in existing EU and UK legislation to other EU legislation, either directly or by use of terms defined in other EU legislation. EU legislation will continue to evolve after the UK's exit but this should not change rights and obligations under UK law.

This rule of statutory interpretation would freeze the acquis at the exit date (subject to any changes subsequently decided on by the UK).

## **5.2 References to EU Member States**

### **Rule 2**

*Although the UK will have left the EU, EU legislation and UK implementing legislation and rules shall be construed as if the UK were a Member State.*

Many provisions relate or refer to EU Member States and to things done in Member States. For example, the Rome I Regulation on applicable law applies to Member States; there are restrictions on the use of financial benchmarks administered by a person not authorised in a Member State; an EEA-incorporated company has to have its equity prospectus approved by its home state competent authority (the home state being the Member State in which it is incorporated); and so on.

Given the continuity overarching objective and the fact that the acquis is predicated on the UK being a Member State, these provisions need to continue to be read as if the UK were a Member State. Otherwise they would cease to operate or cause unintended absurdities – such as causing the UK to be treated, for the purposes of its own laws, as a ‘third country’<sup>21</sup> – merely because it would no longer fall within the definition of Member State.

This rule of interpretation would cover the cases where there is a specific reference to Member States as well as the other terms which depend on that definition, such as home state, host state and national regulatory authority. The precise wording or the explanatory guidance that might accompany it would also need to make clear that related terms such as ‘Union’ or ‘Community’ would also be construed similarly.

## **5.3 Territorial scope**

### **Rule 3**

*Except where expressly provided, nothing in any EU legislation or UK implementing legislation or rules shall, in respect of any time after the exit date, give any right, power, or obligation to do or refrain from doing anything outside the UK.*

Provisions that are expressed to apply to all Member States or persons within the EU, and similar expressions, need to be interpreted as applying only within the UK or where there is appropriate nexus with the UK, in accordance with the general principle of avoiding extraterritorial scope in UK legislation. This rule is designed to achieve this and to remove any suggestion that there are enforceable rights or obligations under UK law to do (or not to do) things in other EU Member States, except as expressly provided.

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<sup>21</sup> In EU legislation, this means either a non-EEA or a non-EU country, depending on context. Either way, the UK would be a third country in EU law terms after it exits.

## 5.4 Functions of European institutions (for example, the European Commission and ESMA)

### Rule 4

*The functions of any EU institution or agency shall, in respect of any time on or after the exit date, be construed as being functions of the relevant Minister or department in accordance with a matrix allocating responsibilities.*

Many regulations give extensive functions to the European Commission and other European institutions. Their acts before exit would remain effective after exit but these institutions would then no longer have jurisdiction in the UK. To fill the void, the functions of European institutions should, with respect to anything to be done after the exit date, be given to the relevant UK authority (a similar concept to the ‘designated Minister or department’ in section 2(2) of the ECA). In most cases, the identity of the relevant UK authority should be clear. For example, ESMA’s credit rating agency supervisory powers would be most naturally transferred to the FCA: it is already designated by the Credit Rating Agencies Regulations 2010 as the competent authority for credit rating agencies for the purposes of the Credit Rating Agencies Regulation.<sup>22</sup>

This report would recommend mapping all the responsibilities of a particular EU institution to a single UK equivalent wherever possible, for simplicity and certainty. However, some institutions may have such an extensive range of functions that a more detailed approach is required. The European Commission, for example, should have its functions mapped according to the directorates-general under which they fall.

In each case, government will need to ensure that the UK institutions assuming responsibilities through this rule have the necessary systems, resources and people to fulfil their additional roles. The civil service may need to undertake significant work establishing operating procedures and processes that relate to transferred functions. A standard template could facilitate the establishment of new agencies, where these are required.

In some cases, this will not be a satisfactory permanent solution. Particularly in areas where EU competence is at its most developed, some responsibilities will be too detailed for the receiving UK institution or may otherwise be better placed elsewhere. For this reason, the Great Repeal Bill should contain a general power for ministers assuming responsibilities from EU institutions to transfer some of these responsibilities ‘down’ (i.e. to regulatory bodies) or ‘across’ (to other departments) by statutory instrument. This would ensure responsibilities end up where they are best placed, with appropriate parliamentary oversight.

This report notes that there are ongoing discussions between the UK government and the governments of Scotland, Wales and Northern Ireland over the division of responsibility over areas currently within the EU’s competence. The Great Repeal Bill will need to reflect the outcome of these discussions.

<sup>22</sup> (EC) No 1060/2009.

## **5.5 Obligations of the UK and UK institutions**

### **Rule 5a: obligations to co-operate become powers**

*Obligations under any EU legislation or UK implementing legislation for any Minister or department, agency or regulator, whether expressly or pursuant to rule 4, to interact with other Member States or any EU institution or agency (ignoring for these purposes the transfer of functions pursuant to rule 4) shall, in respect of any time on or after the exit date, not be obligations but shall be construed as powers to do such things. Provisions relating to the manner and consequences of any interaction may be disregarded. ‘Interacting’ shall include, without limitation, consulting, notifying, coordinating, cooperating, responding and providing information and shall include obligations to publish in the Official Journal.*

### **Rule 5b: restrictions on national measures are disapplied**

*Any provision (however expressed) in any EU legislation or UK implementing legislation which purports to restrict a Member State from taking any national measures or which requires regard to be had by public bodies to the effects on other Member States, the functioning of the single market or consistency with EU law or jurisprudence or European Commission decisions shall, in respect of any time on or after the exit date, not apply.*

### **Rule 5c: no dependence on prior acts**

*Where an action is expressed to be dependent on an act of another Member State or an EU institution or agency or other competent authority, the relevant UK body may perform that action without the necessity for such prior act.*

Member States and EU institutions are required to interact in various ways. The extent to and manner in which this continues as regards the UK will depend on what is agreed between the UK and the EU. It should be kept separate from the process of domesticating the acquis, particularly as the detail may not be known until late in the process.

Requirements for government bodies (including as successors to European institutions under rule 4) to consult, coordinate with, notify, etc. other Member States and EU institutions should be construed as merely powers to do so. This would give the UK flexibility to cooperate with the EU and Member States where appropriate, whether formally or informally. The government should consider how these powers should be framed from the perspective of administrative law and operating procedures in order to give government bodies and their staff certainty and comfort when deciding whether and how to exercise them.

Restrictions on Member States taking action should be disapplied as regards the UK. The UK should be free to decide whether to take actions currently prohibited by the EU (unless it agrees otherwise with the EU<sup>27</sup>).

Examples in the acquis include the Short Selling Regulation (restriction on acting other than with the consent of the relevant competent authority) and, in the context of capital ratios, Article 11(5) of the CRR (“not to entail disproportionate effects on the whole or parts of the financial system in other Member States or in the Union as a whole nor form or create an obstacle to the functioning of the single market”).

There are also examples in UK implementing legislation. Part I of the Competition Act 1998 creates a UK competition law regime modelled on Articles 101 and 102 TFEU (anti-competitive agreements and abuse of a dominant position). As a result, section 60 requires the UK courts to avoid inconsistency with CJEU jurisprudence, and to take European Commission decisions and statements into account, when interpreting Part I.

There are also provisions where an act by a Member State is linked to or dependent on an act by another Member State or its competent authority. For example, a prospectus approved in one EEA Member State may be used in connection with an offering or admission to trading in other EEA Member States. Before the prospectus can be used in another EEA Member State, the competent authority which approved the prospectus must send a certificate of approval to the competent authority of that other EEA Member State.<sup>23</sup>

## 5.6 Dealing with unanticipated gaps and ambiguities

The scope and scale of the exercise is unprecedented. It is inevitable that some issues will slip through the net and throw up illogicalities, gaps or ambiguities. Despite best efforts, domestication carries risks of consequential errors and unintended consequences. This report would recommend establishing a statutory body (chaired by a respected independent person) with power to deal quickly with instances where the legislation does not work. The body could deal with matters not already determined by one of the senior courts that are referred to it, without the need for a dispute. The body would be able to give guidance on issues of construction and application of the acquis and UK legislation implementing the acquis to the extent that those issues result from the process of domestication. This guidance could be relied upon until any subsequent legislative changes were made. This would help maintain confidence in the legal system, promote legal certainty, forestall unnecessary litigation, remove unintended consequences and lessen the risk of inadvertent contravention of regulatory requirements. This body would function under parliamentary supervision and could make recommendations for further legislation if the matter could not be satisfactorily resolved.

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<sup>23</sup> Section 87H FSMA.

## 6.0 AMENDING DOMESTICATED LAW

The acquis has been created through EU legislative processes which will not apply to domesticated law after exit. As a result, the Great Repeal Bill needs to provide clarity as to how domesticated law can be amended. Given the breadth and complexity of the acquis, there is not necessarily a one-size-fits-all solution.

In the absence of any specific delegation of powers, domesticated law (like other law) would only be capable of amendment by Act of Parliament. The white paper pledges not to make ‘major policy changes’ through the Great Repeal Bill process itself, but to allow Parliament to debate and decide on future changes through separate Bills.<sup>24</sup> This leaves open the question of what delegated powers are needed to make other changes without having to find parliamentary time for primary legislation. With the return of competences from the EU to the UK, Parliament is likely to face a significant increase in the demands on its time and resources. There could be adverse consequences if domesticated law is frozen and cannot be changed reasonably quickly to make relatively minor ‘business as usual’ amendments and adaptations (for example, to react to market, technological or international regulatory developments). On the other hand, maintaining an appropriate balance between the need for flexibility and appropriate parliamentary scrutiny is important. Where this balance lies will differ between sectors. Whereas consistency in the application of the principles and rules of statutory interpretation set out in this report is crucial for legal certainty, there is scope for greater flexibility in the delegation of amendment powers.

For example, the financial services sector is subject to highly detailed and technical EU legislation. The ‘single rulebook’ approach to much recent EU financial services regulation has meant that more detail has been included in Level 1 regulation than was the case 10 or more years ago or than is found in other sectors. A full review of the scope of delegated powers (with appropriate consultation) is likely to be a prerequisite for future financial services primary legislation.

Set out below are possible general exceptions to the rule that only Parliament may amend domesticated law:

### **– Existing UK delegated powers**

Where parts of domesticated law would fall within the scope of existing UK delegated powers, those powers could be used to amend domesticated law. This would mean, for example, that the FCA and PRA would be able to use their general powers, under sections 137A and 137G FSMA respectively, to make or amend rules relating to the conduct of authorised persons, including those implementing MiFID or CRD, subject to the existing limitations on the scope of their rule-making powers (pursuance of statutory objectives etc.) and to the usual procedures for making rules. It may be necessary to consider whether further limitations or objectives should be set in relation to the use of these powers.

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<sup>24</sup> Ibid., para 1.22.

### **- Powers contemplated by the acquis**

Where a directive or regulation delegates a power to make acts<sup>25</sup> or decisions, the power should be transferred to the relevant department (with power to delegate to an appropriate regulator) under rule 4. The scope of the power would be subject to the same limitations as in the original EU legislation but UK procedures should be applied (for example, a regulatory technical standard would be made by a statutory instrument). Likewise, powers or obligations to produce Level 3 guidance should be transferred to the relevant department or regulatory body under rule 4, subject to normal procedures for making or amending guidance.

### **- Powers relating to international cooperation and convergence**

Powers might be delegated, perhaps in relation to specific areas of activity, to make amendments or adopt new law where necessary to maintain alignment or achieve convergence with future EU legislation or to effect compliance or convergence with World Trade Organization (WTO) rules or other international standards or agreements to which the UK is a party.

### **- Powers to adopt EU legislation in the pipeline before exit**

As suggested in point 4.2, there may be EU legislation not yet in force but in the pipeline before the UK exits the EU, which the government considers desirable to adopt. An overarching objective of domestication is to provide certainty and to ensure continuity. Businesses have made long-term decisions expecting that they would need to comply with upcoming EU legislation (and particularly amending or supplemental legislation). Government departments should, prior to exit, be able to identify EU legislation due to come into force after exit which they wish to domesticate. The Great Repeal Bill could provide a mechanism to achieve this. Such a process would require careful consideration given the government's objective of control over future legislation, and so may not be appropriate where pipeline legislation is still subject to substantive changes as part of the EU legislative process (although, of course, there would be no obligation to use such a power).

The distribution of amendment powers will need to reflect the outcome of discussions between the UK government and the governments of Scotland, Wales and Northern Ireland in the same way as the division of EU institutional functions under rule 4.

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<sup>25</sup> More specifically, Level 2 delegated and implementing acts.

# 7.0 ACCESSIBILITY

The ability to access accurate legal texts is crucial for legal certainty and is fundamental to the rule of law. The process of domestication in the manner set out in this paper involves some risks, for example:

- The rules of statutory interpretation will need to be applied by the reader of a text, but will not appear on the page (however, they would be few in number and consistent across all legislation).
- There is an EU legislation database but (like the UK legislation database) it does not always present consolidated texts showing the law as amended.
- Over time, EU texts may be amended without the UK following suit and vice versa, compounding the difficulty of finding an accurate text of the law as it is in force.

This threatens the accessibility of domesticated law, and thereby the rule of law more generally.<sup>26</sup> The government should therefore adopt a plan to promote the accessibility of domesticated law. Set out below are recommendations for the key elements of such a plan.

## 7.1 Guidance

Guidance should be published to explain how new changes will work in practice. Clarity will be key to ensuring a smooth transition on exit day and maintaining confidence. Guidance should also be given to drafters throughout the process to ensure consistency. Supportive tools, such as a glossary of defined terms, could be developed.

## 7.2 Getting hold of the acquis

Identifying the acquis is essential. Having a complete up-to-date national collection in a format that can be accessed and researched electronically will be necessary. This relates both to the parts that emanate directly from the EU such as regulations and also to primary and secondary UK legislation and rules which implement EU directives. On leaving the EU, the acquis as at the exit date will need to be clearly identifiable so that it can be distinguished from the EU27 acquis as it subsequently evolves. Finding what a regulation said as at the exit date when the regulation has subsequently been amended or repealed by the EU could be difficult if this is not done.

## 7.3 Keeping it up to date

Getting hold of the acquis is only a starting point. At present, the EU publishes EU legislation on its website EUR-Lex. The UK will have to do this for itself in relation to the domesticated acquis to the extent the UK decides to change it or does not amend it in line with future EU legislation. As with legislation.gov.uk, it is vital that users can have confidence that information is up to date. Maintaining an online database of the domesticated law will require significant investment and new processes.

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<sup>26</sup> Linklaters LLP, 'In Defence of the Rule of Law: Challenging the erosion of the legal certainty and fairness that business needs,' <http://www.linklaters.com/Insights/Thought-Leadership/rule-of-law/Pages/Index.aspx>.

## 7.4 Monitoring changes to EU27 law

Depending on the arrangements between the UK and the EU27 after exit, the government may need to keep itself informed about forthcoming EU27 legislation. If, for example, the government decided that regulatory convergence or cooperation were desirable, then it will need to know when and how relevant EU27 law is changing. The government would need to be proactive enough when monitoring changes for it, regulators and industry to have sufficient time to anticipate these changes. This would be a very substantial task and would benefit from stakeholder involvement. In any case, under the approach set out in this report, the government would need to track the development of Level 2 and Level 3 texts that are in the pipeline and are necessary for the proper implementation of Level 1 law.

## 7.5 Nomenclature

Distinguishing the UK's and EU27's acquis without comprising ease of identification is important. One solution would be to label regulations as 'ExEU' or 'EU-UK' in place of 'EU' but retaining the same identifying number and year. This would make it easy to associate the UK and EU27 versions of the same legislation so that jurisprudence and commentary on the EU27 version can easily be found either for comparative purposes or to assist in the interpretation. It would also be helpful for businesses who need to comply with both the UK and EU27 versions.

## 7.6 Use of Artificial Intelligence

Reviewing, monitoring and managing the acquis and the expanded body of UK legislation in a cost-effective and efficient manner will be daunting. This will be the case both for making policy changes in the context of exit and for future changes to domesticated law. Artificial Intelligence could be a useful tool to help.

## 7.7 Engagement with publishers

Engagement with publishers as early as possible will enable a smoother process of printing updated legislation and new editions of companions and developing online resources. This is a massive task that will have a bearing on the level of certainty within the UK post-exit day.

## 7.8 Embedded metadata

Given the scale of the exercise, this could be a good opportunity to develop further the work started by the National Archives to tag UK legislation in such a way that users (government, private sector, legal profession, academia) who embed similar tags in their own documentation can be automatically alerted that their document may need amending if a piece of legislation is amended (for example, where particular provisions of a contract, memorandum or compliance manual are designed to ensure compliance with specific regulations). This could be a powerful tool in the soft power projection of the UK in helping to maintain English law as one of the widely used global legal systems.

# **8.0 ILLUSTRATION OF THE APPROACH WITH EXAMPLES**

This section illustrates how the approach would work at the level of individual parts of the acquis and UK implementing legislation. It begins with the white paper case studies, demonstrating the way that the approach would reduce the need for delegated powers to ‘correct the statute book’. It then analyses other examples, drawn from across the acquis, to show how the rules of statutory interpretation set out in point 5 would work together to produce a workable outcome.<sup>27</sup>

## **8.1 White paper case studies**

### **The white paper’s ‘Case study 1’<sup>28</sup>**

Refers to section 171 of the Enterprise Act 2002 which requires the Competition and Markets Authority ('CMA') to publish advice and information about the operation of certain provisions of the act, including information about the effect of 'EU law' on those provisions. The white paper indicates that this means the section will need amending or repealing. However, following rule 5b, the requirement to consider the effect of EU law would not apply on exit.

### **The white paper’s ‘Case study 2’<sup>29</sup>**

Considers the requirement under the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001 for an opinion to be obtained from the European Commission on offshore oil and gas projects. The white paper suggests that the power to correct the law would allow amendment of the existing domestic legislation to replace this reference or remove it completely. Under rule 4, the power to issue such opinions would be transferred to the relevant UK body.

### **The white paper’s ‘Case study 3’<sup>30</sup>**

Highlights the requirements for the UK to send information to EU institutions or Member States and the fact that, unless agreed with the EU<sup>27</sup>, there may be reasons why the UK no longer wishes to send such information. The white paper gives the example of the requirement to provide the European Commission with data in relation to inland waterways, which may need to be amended or repealed. Under rule 5a, this obligation to provide information would be converted to a power to do so, enabling the system to continue to function should agreement in this regard be reached with the EU<sup>27</sup>, but not requiring information to be provided if it is not.

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<sup>27</sup> The examples in this section are intended only to demonstrate the mechanics of the approach and not to provide an exhaustive analysis of legal outcomes in specific policy areas following exit.

<sup>28</sup> DExEU, op. cit., p. 20.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., p. 21.

## **8.2 Rome I Regulation on applicable law in contracts ((EC) No 593/2008)**

The Rome I Regulation requires Member States to recognise and give effect to laws of contract chosen by the parties (whether or not those laws are laws of other Member States). Recognition of the choice of a UK legal system will still be required in the rest of the EU despite the UK leaving the EU. However, the Regulation would cease to apply in the UK without being domesticated and interpreted in line with our approach.

This is because it applies to Member States and contains cross-references to other EU legislation and a reference to 'Community law'. Following adoption, rules 1 and 2 would cause it to continue to work in the UK as it did immediately before it left the UK: the established framework within which UK courts recognise choice of foreign laws to govern contracts would continue to apply.

Similarly, the Rome II Regulation on the law applicable to non-contractual obligations would, by application of rules 1 and 2, continue to work in the UK.

## **8.3 Brussels 'Recast' Regulation on jurisdiction and enforcement of judgments ((EU) No 1215/2012)**

The same point arises on Member States as in the Rome Regulations. Following application of the rules of statutory interpretation, the regulation would work in relation to the rules on jurisdiction and for enforcing judgments in the UK. It would not work the other way around (enforcement of UK judgments in the EU); that would be a matter for negotiations.

Article 76 contains provisions on notifications to the European Commission, which would be transformed from an obligation to a power under rule 5a.

## **8.4 Regulation on the international trade in endangered species ((EC) No 338/97 and (EC) No 865/2006)**

The UK is an original party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES'), having adopted it in March 1973. Its obligations under CITES were initially implemented in domestic law in the Endangered Species (Import & Export) Act 1976. The Act, however, was repealed in 1984 when CITES was largely implemented at a European level.<sup>31</sup>

Adopting the acquis and applying rules 1 and 2 would keep the CITES regime in force in the UK as at present. More generally, the approach outlined in this report would prevent the accidental cessation of rights and obligations contained in EU regulations but which implement international treaties and conventions by which the UK is bound.

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<sup>31</sup> Provisions relating to the enforcement of the European regulations are contained in UK regulations made under section 2(2) ECA.

## **8.5 Regulation on wholesale energy market integrity and transparency ('REMIT') ((EU) No 1227/2011)**

Applying rule 4, the powers of the Agency for the Cooperation of Energy Regulators under REMIT would be transferred to a UK body (i.e. Ofgem, which is currently the national regulatory authority for the UK) and UK market participants would report relevant transactions in wholesale energy markets to that body.

Market participants subject to REMIT must register with only one national regulatory authority.<sup>32</sup> It is a matter for the withdrawal negotiations/future partnership agreement whether the EU27 will recognise registration with Ofgem as meeting this requirement after exit. Conversely, applying rule 5b, the rule restricting Member States from requiring a market participant already registered in another Member State to register again would be disapplied (although a policy decision may be taken to recognise market participants which have been recognised by an EU27 national regulatory authority).

## **8.6 Clearing obligations for non-financial counterparties under EMIR ((EU) No 648/2012)**

EMIR requires non-financial counterparties which take positions in over-the-counter ('OTC') derivative contracts to clear their contracts through an approved central counterparty where those positions exceed a clearing threshold.<sup>33</sup> To be within scope, a non-financial counterparty must be established 'in the Union'. Applying rules 1 and 2, UK businesses established in the UK will be treated as being 'in the Union' for this purpose and so will continue to take the clearing threshold into account. Rule 3 means that the territorial scope is not extended beyond the UK, however.

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<sup>32</sup> Article 9 REMIT.

<sup>33</sup> Article 10 EMIR.

## 8.7 European law relating to prospectuses<sup>34</sup>

Following domestication, UK prospectuses would continue to be subject to the same content requirements and approval requirements as now in the UK (rule 1) and could be used for the same purposes as now in the UK (rule 2).

Set out below is how the analysis flows through a number of legislative provisions:

- Section 85 FSMA says that an ‘approved prospectus’ is required before an offering of securities to the public or admission to trading on a regulated market.
- An ‘approved prospectus’ (section 85(7)) is a prospectus that has been approved by the competent authority of the relevant home state and, when approving a prospectus, the FCA must be satisfied that the UK is the issuer’s home state.
- The definition of ‘home state’ is determined (section 102A) in accordance with Article 2.1(m) of the Prospectus Directive. This would be interpreted by reference to the Prospectus Directive (rule 1).
- Under the Prospectus Directive, for equity issuers incorporated in an EEA state, the relevant home state is the one where they are incorporated.
- Interpreting ‘EEA’ as including the UK for these purposes (rule 2) means that the FCA can still approve the prospectuses of UK issuers and new non-EEA issuers. Issuers whose home state was not the UK under the Prospectus Directive would still need to get their prospectus approved elsewhere.

Under section 87H FSMA, a prospectus approved in another Member State is not an ‘approved prospectus’ for the purposes of section 85 unless it is ‘passported’ into the UK. This requires the relevant competent authority that approved it to notify ESMA and send the FCA a certificate of approval. However, after exit and (subject to the outcome of negotiations with the EU<sup>27</sup>), Member State competent authorities will not be obliged to send the FCA a certificate of approval. Rule 5c solves this issue. Acceptance by the FCA would no longer be dependent on a competent authority having sent it a certificate of approval, although the FCA would still need to be satisfied that the passport had in fact been approved elsewhere.

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<sup>34</sup> The current Prospectus Directive will have been replaced by the Prospectus Regulation by the time that the UK leaves the EU, but the relevant provisions and analysis remain the same.

# 9.0 THEMATIC APPLICATION TO FINANCIAL SERVICES REGULATION

This section considers the application of the approach set out in this report to the area of financial services regulation on a broad and thematic basis.

Financial services regulation is complex and large in volume. Much of it is derived from the EU, through both directives and regulations, with UK implementing legislation where necessary through both legislation and PRA and FCA rules and guidance. The single market in financial services and the concept of the single rule book mean that much regulation is cross-border in nature, and involves mutual recognition, reciprocity, EU-level supervision and institutional cooperation between UK and EU regulators.

Adaptation in this area will be particularly complicated and applying the simple generic approach may result in unsatisfactory policy outcomes. The examples discussed below demonstrate that further measures may need to be taken as a matter of policy as a direct result of the UK's exit. The form of such measures may depend on the outcome of negotiations with the EU as well as policy objectives. The examples also highlight that ensuring business continuity in the UK does not resolve issues arising from exit for businesses operating in the EU<sup>27</sup>. In many cases, the consequences of the UK's exit from the EU under EU law are not clear. Nevertheless, the approach set out in this report would provide a workable legal foundation for ensuring continuity in the UK, on which policy changes (whether made in preparation for exit or subsequently) could be based.

## 9.1 Recognition and reciprocal rights

As noted in point 1.7, rights of UK-authorised persons in the EU<sup>27</sup> and the rest of the EEA cannot be legislated for by the UK and would be a matter for the withdrawal agreement and future partnership agreement.

As a logical consequence of the principles and rules set out in this paper:

- UK businesses would be subject to the same rules as at present, rather than being treated as 'third country' businesses (rule 2).
- The ability of EEA firms to carry on business in the UK will be unchanged as EEA rights will continue to operate (rules 1 and 2).
- There would be continuity of client service through grandfathering, for example, UCITS<sup>35</sup> marketing approvals (rules 1 and 2). The current regime for recognising new schemes constituted in other EEA states would remain in UK law, except that under rule 5c the FCA would not need notification from the home regulator (which might not be forthcoming after exit) before granting recognition.

The continuation of EEA businesses' passporting rights raises obvious issues from a regulatory perspective. The concept of home state regulation underpins the regime for businesses or other persons established in a Member State to carry on passported activities in other Member States. UK legislation and FCA or PRA Handbook rules do not apply to incoming businesses or activities where a matter is reserved under an EU

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<sup>35</sup> A UCITS is an undertaking for collective investment in transferrable securities.

instrument to the incoming EEA firm's home state regulator. Typically, authorisation and prudential supervision are reserved home state matters while host state conduct of business rules (including investor protection rules) would apply to the business conducted by the firm in or with customers in that state.

UK law after exit would also continue to treat incoming regulated businesses as being regulated on a home state basis with respect to certain matters. For example, the FCA and PRA would continue to recognise supervision of the organisational requirements under MiFID II<sup>36</sup> of an incoming investment firm as the responsibility of the home state regulator. As another example, the FCA's client assets regime ('CASS') does not apply to incoming EEA businesses (other than insurers) with respect to passported activities. Applying the continuity overarching objective and rule 1, an incoming EEA firm which continues to passport into the UK after exit could hold client financial instruments subject to its home state rules on safekeeping of client assets as opposed to the CASS rules.

Currently, if the FCA has material concerns about the conduct of an incoming EEA person, it can address them directly with that person's home state regulator. After exit, subject to the withdrawal negotiations/future partnership agreement, it may no longer be able to do this in the same way.

For these reasons, it would be imagined this may be one area in which the government would seek policy changes. If reciprocity were not forthcoming from the EU27, such changes could involve relatively straightforward amendments to domesticated law (for example, providing that incoming EEA businesses should be treated in the same way as third country incoming businesses), perhaps using special amendment powers as discussed in point 6. Should negotiations with the EU27 provide for mutual access to financial services, domesticated legislation may need even less amending.

## 9.2 Reporting obligations

In common with other sectors, EU financial services legislation requires the reporting of data to EU institutions. For example, under EMIR, data relating to derivative transactions and their counterparties is reported to trade repositories by EU derivatives market participants. Trade repositories then report to ESMA. Under MiFID II, investment firms must report details of certain transactions which they execute or conclude to the relevant competent authority, which must make available such information to ESMA.<sup>37</sup> Also, for post-trade transparency purposes, specified information about trades are made public through central trade repositories and authorised reporting mechanisms.

Under rule 4, any requirement to report directly to ESMA would become a requirement to report the same information to the FCA.<sup>38</sup> Applying rule 5a, any requirement on the FCA to make information available to ESMA would become a power to do so which could

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<sup>36</sup> MiFID II will be in force as at exit date.

<sup>37</sup> Article 26 MiFIR.

<sup>38</sup> For example, applying article 9(3) EMIR, where a trade repository is not available to record the details of a derivative contract, counterparties and CCPs shall report the relevant details to the FCA (as opposed to ESMA).

be exercised if needed under any future arrangements for market access or regulatory cooperation. Information could also be shared on a voluntary basis if there were a regulatory benefit in doing so.

Finally, businesses would not be required (as a matter of UK law) to report to any EEA body, by virtue of rule 3. Under MiFID II, investment firms trading in commodity derivatives off-venue must provide a breakdown of their positions in those derivatives and economically equivalent OTC contracts to either the competent authority of the trading venue for that derivative or (where there is more than one trading venue) the competent authority of the trading venue where the largest volume of trading takes place (the 'central competent authority'). Rule 3 would mean that this obligation would not apply to the extent that the relevant competent authority is in the EEA.

### **9.3 Market infrastructure**

Applying the continuity overarching objective, the aim of domesticating the acquis would be for businesses to be able to continue using existing market infrastructure located in the UK as a matter of UK law, even where EU27 rules require such infrastructure to be based in the EU27.

For example, as mentioned in point 9.2, trade repositories receive reports relating to derivative transactions. Under EMIR and the Securities Financing Transaction Regulation, a trade repository must (among other things) be registered with ESMA and located in the EU.<sup>39</sup> There are currently six trade repositories recognised by ESMA, four of which are in the UK. By applying the continuity overarching objective and rules 2 and 3 domestication should allow:

- Businesses to continue to meet their reporting obligations under UK law by reporting to trade repositories in (and only in) the UK.
- Investment firms subject to the share trading obligation under MiFID II to meet that obligation under UK law when they trade shares on UK markets such as the London Stock Exchange (LSE). This would not depend upon EU27 or EEA recognition or otherwise of the LSE as a regulated market, multilateral trading facility, systematic internaliser<sup>40</sup> or equivalent third country trading venue.

In each case, however, it is not clear how the EU27 and the rest of the EEA will treat the status of institutions that are no longer sited in a Member State, and it is possible that businesses will encounter divergence between UK and EU regulation in practice. UK policy in response to such divergence is outside the scope of this report.

Similarly, while the UK may be able to maintain business continuity within the UK in its treatment of Settlement Finality Directive provisions through the Great Repeal Bill process, the consequences at the EU level are uncertain. Under the Settlement Finality Directive,

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<sup>39</sup> Article 55 EMIR and article 5 SFTR.

<sup>40</sup> These are MiFID II concepts which require the trading venue to be located within the EU.

EU Member States are required to ensure that their laws protect payment and settlement systems established in any Member State from the impact of insolvency proceedings. For example, if a bank becomes insolvent, the regime allows a designated clearing institution of which the bank is a participant to net the bank's positions against those of other participants in line with its rules. Only the net amount owed by or to the bank could be claimed. Settlement finality is implemented in UK law through the Financial Markets and Insolvency (Settlement Finality) Regulations 1999. The approach outlined in this report would preserve these regulations. UK insolvency laws would continue to be subordinate to the default rules used by clearing systems designated by other EEA states (rule 2). The regulations would continue to protect the rules of UK-designated clearing institutions against insolvency laws and officers of any jurisdiction – but, crucially, only as a matter of UK law. From an EU27 perspective, there would be no guarantee of this position under EU law, given the UK could change its laws at any time (absent an agreement to the contrary with the EU). Moreover, EU27 countries will no longer have an obligation to apply the same rules in relation to UK-designated clearing institutions.

## 9.4 Thresholds

Many rules apply thresholds by reference to volumes of activity taking place across the EU/EEA. These would continue to apply, as far as the UK is concerned, on the same basis as they currently do under the operation of rule 2. The EU27/EEA may of course take a different approach, meaning that businesses operating in both the UK and the EU27/EEA would need to perform two sets of threshold calculations where one had previously been sufficient. This is a logical consequence of businesses being subject to two regulatory regimes; co-ordination (if desired) would have to be achieved either by unilateral policy change or negotiations with the EU27. The following examples illustrate this point.

- An investment firm must adhere to position limits when it trades commodity derivatives on a trading venue or holds positions in economically equivalent OTC contracts.<sup>41</sup> Competent authorities set the position limits for commodity derivative contracts in accordance with a methodology determined by ESMA under regulatory technical standards.<sup>42</sup> Applying rule 1, the FCA would continue to set position limits by applying the ESMA methodology. Where the same commodity derivative is traded in significant volumes on trading venues in more than one jurisdiction, the central competent authority (as defined in point 9.2) sets the single position limit to be applied on all trading in that contract.<sup>43</sup> Applying rules 1 and 2, under UK law the UK may be the central competent authority for a commodity derivative so that the FCA should set the single position limit. By contrast, after exit, the EU27 may calculate where the largest volume of trading takes place excluding the UK and a different competent authority would be responsible for setting the position limit.

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<sup>41</sup> Article 57 MiFID II.

<sup>42</sup> Article 57(3) MiFID II.

<sup>43</sup> Commission Delegated Regulation (EU) 2017/591 supplementing Directive 2014/65/EU with regard to regulatory technical standards for the application of position limits to commodity derivatives.

- Persons who deal in commodity derivatives may fall outside the scope of MiFID II if certain conditions are met.<sup>44</sup> One condition is that their commodity dealing activities must be ancillary to the main business of their group. MiFID II sets thresholds for different asset classes to determine what size of activity would be more than ancillary relative to the overall market in that asset class. Part of the calculation involves aggregating the gross notional value of all contracts within the relevant asset class to which any person located ‘in the Union’ is a party.<sup>45</sup> Again, applying rules 1 and 2, UK businesses would continue to treat the UK as part of the EU for this calculation which may be inconsistent with the approach taken by the EU27/EEA after exit.

## **9.5 Prudential consolidation**

Generally speaking, banks and investment firms subject to the Capital Requirements Regulation are assessed for capital adequacy on a solo and on a consolidated basis. Currently, consolidated supervision is triggered when the EU bank/investment firm has an EU holding company or if one EU bank holds another EU bank as its subsidiary.

In accordance with the continuity overarching objective and rules 1 and 2, for a consolidated group with a UK bank/in-scope investment firm and a UK holding company, the relevant rules on prudential consolidation will continue to apply in the UK.

However, where the group also includes a German bank and a German intermediate holding company sitting above the bank, the EU27 may no longer recognise the UK parent undertaking as being in the EU for consolidation purposes after the UK leaves.

The impact will be fact-specific but there is the possibility, inherent in the UK’s exit from the EU, that UK and EU27 regulators may take different approaches to determining the scope of a consolidated group and the regulator which is responsible for supervising the group. Divergence in approach between the UK and the EU27 would result in increased complexity for banking and investment groups with both UK and EU27 entities.

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<sup>44</sup> Article 2(1)(j) MiFID II.

<sup>45</sup> Article 2 Commission Delegated Regulation (EU) 2017/592 supplementing Directive 2014/65/EU with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business.

## 9.6 Data protection

Data protection and cybersecurity regulation are important for the financial and related professional services industry, as for many other sectors where the ability to transfer data easily is crucial. The General Data Protection Regulation ('GDPR') comes into force in 2018. It will, among other things, generally prohibit the export of personal information outside the EEA. This report assumes that the government does not envisage radical policy changes immediately on exit.

On this assumption, the approach set out in this report would allow UK-origin data to be shared across the EEA, as well as other jurisdictions for which adequacy findings have already been made. After exit, the UK data authorities would have responsibility for adequacy findings under rule 4.

However, importing information into the UK from the rest of the EEA would require a European Commission adequacy finding for the UK, or another exception such as an equivalent to the EU/US Privacy Shield or adoption by individual businesses of model contracts, which would be a massive documentary exercise.

Domesticating the GDPR into UK law would help support an adequacy finding for the UK, should this be a priority for the government, but would not guarantee its timeliness (i.e. that the European Commission would make its finding in time to coincide with the UK's exit) or that such a finding would be maintained subsequently if UK and EU27 law began to diverge. Moreover, an adequacy finding requires a commitment to cooperate with Member States' data protection authorities – possibly requiring something stronger than the power that would result from rule 5a.

The role and functions of the new European Data Protection Board, whose role includes advising the European Commission and determining disputes between national supervisory authorities under the GDPR, might be dealt with in accordance with rule 4, as might the functions of the EU Agency for Network and Information Security ('ENISA'), which provides advice and assistance to Member States on cybersecurity issues, although the UK might remain a member of ENISA as membership is open to third countries.

## **9.7 Taxation**

Clarity and certainty as to the application of tax law is crucial for all businesses.

The current interpretation and application of domestic direct and employment tax regimes, as well as the EU-based VAT regime, are influenced by EU treaty freedoms and jurisprudence. Maintaining continuity of the *acquis* in the way set out in this report is necessary to avoid unintended consequences. A change in the basis of interpretation or scope of VAT could, for example, have significant revenue implications for financial services businesses. Any intended changes to the basis of taxation should therefore be undertaken in a reasoned manner at an appropriate time and with proper consultation, outside the domestication process.

Other uncertainties will remain outside the control of the UK after it leaves the EU. Financial services businesses actively considering or initiating corporate reconstructions across borders are having to do so without clarity on some of the future tax implications of their decisions. There may be reciprocity issues. It may not be desirable as a matter of tax policy for the UK to continue, for example, recognition of cross-border loss relief or application of the provisions of the Merger Directive<sup>46</sup> where EU27 countries no longer recognise or apply these as far as the UK is concerned. This may warrant special scrutiny by Government. Another significant area for financial services is social security contributions. These are currently subject to EU regulations determining liability to contributions where individuals live and work in two different countries, work in a number of countries or are seconded to another country. They also regulate entitlement to certain social security benefits. In the absence of agreement between the UK and the EU on future tax arrangements, the government will need to consider how existing double taxation treaties and agreements on social security that the UK has with some Member States will apply and whether they need updating.

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<sup>46</sup> (EC) No 2009/133.







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