Executive summary

Answer to Question 12

- Secondary legislation will be necessary to a great extent to convert the “acquis” into British law. This is because it is the most convenient vehicle for passing into law the amendments to existing EU Laws proposed in the course of an extensive editing exercise, which will need to be carried out, by civil servants, in respect of those laws, once they are entrenched within UK law, and the amendments to UK secondary legislation passed in implementation of EU Law, or that relates to EU Law, proposed in the course of a parallel extensive editing exercise, carried out, by civil servants, in respect of such secondary legislation.
- This would include amendments which carry with them ramifications for the devolved regions.

Answer to Question 13

- I envisage that it may be possible for Parliament to cope with the legislation likely to be required as a result of Brexit, without any changes being required to procedures related to the delegation of powers or secondary legislation.
- This would be the case as long as, in relation to secondary legislation, the Joint Committee on Statutory Instruments (“JCSI”) was prepared to use its relevant powers (House of Commons Standing Order No 151) to appoint subcommittees to assist it with its post-Exit Day workload and/or to appoint a Scottish Subcommittee, a Welsh Subcommittee and a Northern Irish Subcommittee whose role would be to re-scrutinize all statutory instruments already having been scrutinized by (one of the other subcommittees or) the JCSI itself specifically in reference to any potential ramifications they may entail for Scotland, Wales and Northern Ireland respectively.
- Some changes might be needed to the procedures related to primary legislation, but that is beyond the scope of the Committee’s Questions on Brexit.
Section 1: Introduction

1.1 I am a British national. I have some twenty years’ experience in European Union Law as both student and legal practitioner, including a stage at the European Commission, five years in practice in Brussels working on cases before the Court of Justice (including two cited cases in the European Court Reports), a PhD (Kings College London, 2011), numerous articles in learned journals, and two years as External Expert in Fundamental Rights to the Petitions Committee of the European Parliament (2012-14).

1.2 Having held the position of Senior Lecturer in Law, and later Principal Lecturer in Law, at the University of Bedfordshire from 2010 to 2015, since 2015 I have been Senior Lecturer in Law at the University of Brighton. I also undertake legal consultancy work on a part time basis. I am making this submission on an individual basis.

1.3 I will make it clear from the outset that, given my specialism, my interest is exclusively the UK’s withdrawal from the European Union, and I will therefore only be addressing Questions 12 and 13 of the Call for Evidence.

1.4 I would also like to make clear that the “version” of what one might call the Great Repeal process which I sketch out in Section 3 is just that: a thumbnail sketch. It is only an outline, created so that I could work out sensible and meaningful answers to Questions 12 and 13, and thus provide a useful contribution to the work of the Committee. I am quite sure that other potential models exist. Furthermore, it is axiomatic that the process of legislation, like all aspects of Parliamentary procedure, is exceedingly complex, and so, in this short contribution, any commentary about, or suggestions for changes to, that process will necessarily suffer from an excess of simplification, possibly fatally.

1.5 Although I will finish by answering both questions separately, in my analysis I will take them together.

Section 2: What is the Great Repeal Bill?

2.1 The Great Repeal Bill was announced by Theresa May at her party conference in Birmingham on 2 October 2016:

“[W]e will soon put before Parliament a Great Repeal Bill, which will remove from the statute book – once and for all – the European
Communities Act… As we repeal the European Communities Act, we will convert the ‘acquis’ – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free – subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses.”

2.2 Very little more is known about the Bill in terms of either what it will contain, or how the repealing which it promises will actually be carried out.

2.3 Although the Great Repeal Bill will certainly carry out one repeal, that of the European Communities Act 1972, I would agree with Ed Miliband that the rest of its task would seem to be more one of entrenchment than of repeal. I deal with this in the next section.

Section 3: One possible version of the process: Entrenchment, Triage and Amendment/Repeal

3.1 It may be assumed that much if not all of the entrenchment will be carried out by the Great Repeal Bill itself, and it may be conjectured that this will be done by use of lengthy Schedules, as can in fact already be seen in a couple of House of Commons Library documents on the subject. The entirety of the acquis, or at least EU Regulations and EU Decisions, will be made part of British law. One assumes, as has already been suggested by others, that caveats may also be used as a mechanism to ensure that the necessary changes are made by those reading these newly-incorporated British laws, such as, “For Member State, read the United Kingdom”.

3.2 However, I would suggest that the use of these caveats will only lend to the laws concerned what one might call jurisdictional independence; it will not necessarily

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2 “I think the Great Repeal Bill should be renamed the Great Entrenchment Bill.” Ed Miliband, “Ed Miliband: Any Brexit deal must command support of MPs” (Yorkshire Post, 14.10.16).

lend to them any kind of *sense*. In many cases, post-Exit Day, the laws concerned will simply be interesting descriptions of reciprocal arrangements in the complete absence of any actual EU reciprocity.

3.3 Further flaws, unintended consequences and lack of sense may arise from the fact that throughout such legislation, the EU’s founding Treaties are mentioned, indeed their legal base(s) is/are to be found there, but, apparently, and despite being part of the acquis, the Treaties will not be being entrenched into British Law:

“But, of course, we will be coming out of the treaties.”

3.4 One might then wish to consider what to do when a large number of British laws do not make sense.

3.5 Usually, one would expect matters to take their own course, and when litigation arose it would be for the judges to sort out the interpretation of the legislation. Parliament could then intervene to make amendments where this had been signalled as appropriate from the bench. One could even envisage a system of declarations of incompatibility similar to that adopted for the purposes of the Human Rights Act 1998; the logistics of how this would work would have to be set out in the Great Repeal Bill itself.

3.6 However, given on the one hand the sheer number of laws being discussed, and on the other hand the number of failures of logic and instances of non-intelligibility at issue, it might be thought prudent to set up panels of civil servants to go through all of these laws and take a decision as to whether the measure in question should remain as it is, should be amended, or should be repealed. The work of these panels I have referred to as an “extensive editing exercise”. The final decision-making stage I have called Triage.

3.7 Where repeal or amendment have been decided upon, the next question would be how those repeals are to be brought about and how those amendments are to be made. This last stage I call Amendment/ Repeal. I set out a flow chart showing all three stages at Annex I.

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4 Evidence of Mrs May, Liaison Committee Oral evidence: The Prime Minister, HC 833 Tuesday 20 December 2016 Ordered by the House of Commons to be published on 20 Dec 2016.
3.8 My feeling is that *prima facie* amendments should be made by statutory instrument (statutory instruments are indeed commonly used for making amendments to primary legislation) and that repeals should be made in primary legislation. One would of course not need a separate bill for each repeal, but simply a list of the repeals in question. One could therefore foresee a series of Great Repeal Bills over the next few years. However, both Houses, Standing Committees and – potentially – relevant Select Committees would then have an opportunity to scrutinise all of these laws to check, before it is too late, whether they are in fact needed.\(^5\)

3.9 An initially separate, but parallel, extensive editing exercise will also have to take place with respect to existing UK law which implements EU law, and perhaps even some pieces of existing domestic legislation which simply *relate* to EU law in some way. A Triage process would need to be carried out with regard to these pre-existing domestic laws as well, and the same three decisions would face those conducting such a “sift”: the laws could be left as they are, they could be amended or they could be repealed. Again it is my belief that amendments could be made via statutory instruments, but that repeals could be made more properly by Act of Parliament, and again one could foresee composite Acts repealing many such laws at once.

3.10 Some EU law of course has been implemented by primary legislation. In the case of such law, amendment by statutory instrument would involve the complicated process of inclusion of a Henry VIII clause, or clauses, into the Great Repeal Bill. However, this is a matter concerning primary legislation and therefore, beyond that observation, I will not comment further.

3.11 A further word is needed about on the one hand the Triage and on the other hand the Amendment/Repeal processes. It is clear that the Triage will take a great deal of manpower and indeed this has already been flagged in a number of Parliamentary Committees. Peretz has written:

＞＞＞ “There is a serious risk that swathes of legislation, drafted in a hurry by overworked civil servants with inadequate knowledge of the areas concerned, will be waived through...”\(^6\) ＜＜＜

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\(^5\) I leave aside logistical problems here. MPs and Peers may well complain bitterly if they only have a short period of time in which to go through a mammoth list of proposed repeals of ex-EU laws, such laws running to many hundreds of pages and often with significant ramifications for citizens and business.

\(^6\) G Peretz, “Theresa May’s Great Repeal Bill must not lead to rushed and incoherent legislation”, Civil Service
3.12 However, more pressingly for this inquiry, the current single Joint Committee on Statutory Instruments ("JCSI") would need to be joined by one, or perhaps many, additional JCSI’s to deal with the large number of amendments coming out of the Triage and needing to be scrutinised before taking effect. It should be remembered in this context that, according to my model, there will be two sets of proposed amendments emerging from Triage: those proposed amendments coming via the extensive editing exercise taking place with regard to the newly-incorporated laws, and those proposed amendments coming from the extensive editing exercise being performed on the current implementing legislation and possibly other EU-related legislation. Clearly the setting up of an additional committee, or many additional committees, would represent “changes [being] required to procedures related to the delegation of powers or secondary legislation”.

3.13 However, such changes could be circumvented if the JCSI instead used its existing powers to appoint the necessary number of subcommittees.

3.14 At this point, it would be appropriate to make a few comments about Devolution, which is without doubt a complicating factor.

3.15 There is no question that a huge amount of the legislation referred to above impinges upon the lives of citizens and businesses in the devolved regions of Scotland, Wales and Northern Ireland; indeed this was indirectly confirmed by judges in the Supreme Court’s “Brexit” judgment of 24 January 2017.\footnote{[L]egislation which implements changes to the competences of EU institutions…thereby affects devolved competences”: para 140 of the Majority Judgment, \textit{R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)} [2017] UKSC 5, [140].}

3.16 I leave aside Gibraltar, the Isle of Mann and the Channel Islands for now, although much of what I suggest below could be applied to these territories, \textit{mutatis mutandis}.

3.17 At the outset, one distinction needs to be drawn.

3.18 The distinction which needs to be drawn is between those EU laws which happen to impinge upon the devolved regions (“Devolution-Impinging EU Regulations”, “Devolution-Impinging EU Decisions” etc), and those which themselves fall to be implemented by the devolved administrations into Scottish, Welsh and/or
Northern Irish law, owing to the fact that they contain an instruction to Member States, the subject matter of which coincides with one of the devolved competences ("Devolution-Instructive EU Regulations", "Devolution-Instructive EU Decisions" etc). 8

3.19 As far as Devolution-Impinging EU Laws are concerned, it is likely that the devolved administrations will want to be part of or involved in the extensive editing exercise which takes place with respect to them. 9

3.20 With regard to Devolution-Instructive EU Laws, it is likely – if they are entrenched at all 10 – that the devolved administrations will want to deal with them themselves. 11

3.21 A key matter to be decided, though, is how the devolved administrations can be guaranteed, within the Great Repeal process, involvement in what one might call

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8 One recalls, for example, a Court of Justice case in which an English farmer sued the UK Government (qua Government of England only) for implementing Council Regulation (EC) No 1782/2003 of 29 September 2003 in a manner different from that adopted by the Scottish Government in its own implementation. He unsuccessfully argued that this represented discrimination. The English implementation was to be found within the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2004, SI 2004/3196: Case C-428/07 The Queen, on the application of Mark Horvath v Secretary of State for Environment, Food and Rural Affairs [2009] ECR I-6355.

9 And that observation is without prejudice to the observation that, as constituent countries of the UK, they may very well wish to be part of or involved in the “central” extensive editing exercise in toto!

10 A decision will have to be made in respect of EU Directives, which always entail national implementing legislation, and the very occasional EU Regulations which require national implementation, such as the one at issue in Horvath, supra n 7. That decision will be as to whether these instruments need to be entrenched alongside the existing national implementing measure or measures, or whether such measure or measures are sufficient. I leave the question here as I deal with it elsewhere: R Lang, “What will become of EU laws on the UK statute book after Brexit? Victims’ rights as a case-study” in Lang and Smyth (Eds.), The Future of Human Rights in the UK (Cambridge Scholars Publishing, forthcoming 2017). My suggestion would be that they are entrenched, as they do serve a purpose, but that they are entrenched into soft law. Naturally this cannot apply to those laws that have been passed by the EU institutions but which, by Exit Day, have not yet reached their implementation date and have not yet been implemented (or, if there is no implementation date, have simply not yet been implemented). It would seem to make sense that such laws are entrenched, with the EU Regulations and the EU Decisions, as there is no risk of duplication.

11 A political choice will need to be made, within the Great Repeal Bill, whether such Devolution-Instructive EU Laws as are entrenched into UK Law pursuant to this Bill, if indeed any of them are to be entrenched at all, will automatically be recognized as such and therefore automatically devolved, or whether such automatic recognition, followed by automatic devolution, will not take place. If the former scenario, it is simply a matter of fact that the devolved administrations will have to perform their own extensive editing exercise with relation to them, each extensive editing exercise entailing a Triage stage and an Amendment/Repeal stage. If the latter scenario, they will not have to do so, but clearly their case for having a role in the “central” extensive editing exercise will be even more pressing.
the “central” extensive editing exercise described above. I make no comment here about what would be the appropriate level of involvement, or levels of involvement if variable according to context, which would of course be a political decision to be made, or agreement to be reached, by the various parties involved.

3.22 In the context of secondary legislation, two possible means to this end suggest themselves, although I doubt that they are the only two:

- Altering the composition of the JCSI to include three Members of Parliament whose constituencies were located in Scotland, Wales and Northern Ireland respectively, and whose role on the JCSI would be to scrutinize the statutory instrument in question specifically in reference to any potential ramifications it may entail for Scotland, Wales and Northern Ireland respectively;
- The JCSI using its relevant powers (House of Commons Standing Order No 151) to appoint subcommittees to appoint a Scottish Subcommittee, a Welsh Subcommittee and a Northern Irish Subcommittee whose role would be to re-scrutinize all statutory instruments already having been scrutinized by (one of the other subcommittees or) the JCSI itself specifically in reference to any potential ramifications they may entail for Scotland, Wales and Northern Ireland respectively.

3.23 Clearly the first of these two options, the changing of the composition of the JCSI, would represent a change “required to procedures related to the delegation of powers or secondary legislation”. However, as long as the second option were the one selected, it seems that the necessary means could be found to guarantee the devolved administrations, within the Great Repeal process, involvement in the “central” extensive editing exercise using existing powers, and without requiring such a change.\(^\text{12}\)

\(^\text{12}\) I have decided on this occasion not to bring in the good work of the House of Lords Secondary Legislation Scrutiny Committee, although obviously this Committee could also carry out the actions/ and or be changed in the
Section 4: Conclusion

Therefore, my answers to the two questions are as follows:

Answer to Question 12

- Secondary legislation will be necessary to a great extent to convert the “acquis” into British law. This is because it is the most convenient vehicle for passing into law the amendments to existing EU Laws proposed in the course of an extensive editing exercise, which will need to be carried out, by civil servants, in respect of those laws, once they are entrenched within UK law,\(^\text{13}\) and the amendments to UK secondary legislation passed in implementation of EU Law, or that relates to EU Law, proposed in the course of a parallel extensive editing exercise, carried out, by civil servants, in respect of such secondary legislation.
- This would include amendments which carry with them ramifications for the devolved regions.

Answer to Question 13

- I envisage that it may be possible for Parliament to cope with the legislation likely to be required as a result of Brexit, without any changes being required to procedures related to the delegation of powers or secondary legislation.
- This would be the case as long as, in relation to secondary legislation, the Joint Committee on Statutory Instruments (“JCSI”) was prepared to use its relevant powers (House of Commons Standing Order No 151) to appoint subcommittees to assist it with its post-Exit Day workload and/or to appoint a Scottish

\(^{13}\) It could be done before, but one feels that there would not be time; indeed that seems to be the rationale for passing the Great Repeal Bill in the first place i.e. so that such “editing” as was needed could be carried out at the British Parliament’s “leisure”.
Subcommittee, a Welsh Subcommittee and a Northern Irish Subcommittee whose role would be to re-scrutinize all statutory instruments already having been scrutinized by (one of the other subcommittees or) the JCSI itself specifically in reference to any potential ramifications they may entail for Scotland, Wales and Northern Ireland respectively.

- Some changes might be needed to the procedures related to primary legislation, but that is beyond the scope of the Committee’s Questions on Brexit.

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Annex I: A flow chart showing the process of Entrenchment, Triage and Amendment/ Repeal

**Entrenchment**
EU Regulations and EU Decisions entrenched into UK Law probably via Schedules to the Great Repeal Act.

**Extensive editing exercise → Triage**
Provisional decision taken:-
No change/ amendment/ repeal.

**AMENDMENT**
Via statutory instrument.

**REPEAL**
Via primary legislation.

**ALMOST CERTAINLY MERGED**

**Extensive editing exercise → Triage**
Carried out on UK Law implementing EU Law or relating to EU Law.
Provisional decision taken:-
No change/ amendment/ repeal.

**AMENDMENT**
Via statutory instrument.

**REPEAL**
Via primary legislation.