A) Introduction

The UK’s withdrawal from the EU presents two important tasks for a national legal system which has, for over 40 years, evolved under the influence of and in combination with EU law.

- First, preparing the UK legal system for withdrawal without creating damaging legal vacuums or undesirable legal uncertainty. The main aim here is to preserve continuity and predictability, so to safeguard the finality of public decisions and guarantee the stability of private relationships.

- Secondly, taking more substantive decisions about which aspects of our EU legal heritage will remain part of the UK legal system; which will be removed; which will be reformed and, if so, in what ways.

The Government has already indicated its basic strategy for addressing these twin challenges: to achieve the aim of preserving legal continuity and legal certainty by retaining / incorporating existing EU rules into UK law at the point of withdrawal (through a so-called Great Repeal Bill); but to leave the task of making substantive decisions about which parts of EU law the UK will want to keep / amend / axe, for future parliaments and governments in the years and decades following withdrawal.

For the time being, our main source of information about the so-called Great Repeal Bill is the White Paper, *The United Kingdom’s exit from and new partnership with the European Union* (February 2017). For present purposes, the key points set out in the White Paper are as follows:

- The so-called Great Repeal Bill will retain EU law as part of the UK legal system where “practicable and appropriate”.
- There will be a programme of secondary legislation to make changes to incorporated EU rules which would otherwise not function sensibly once the UK has left the EU. This programme of secondary legislation will be subject to parliamentary oversight.
- Any significant policy changes will be underpinned by separate measures of primary legislation, e.g. in the fields of customs and immigration.
- In general, retained EU measures should continue to be interpreted in the same way after withdrawal as they have been before.

This written evidence seeks to aid the Procedure Committee of the House of Commons in its inquiry by highlighting a series of issues which will need to be considered during the drafting and scrutiny of the so-called Great Repeal Bill as well as the wider process of preparation for withdrawal set out in the White Paper.

However, it is important to highlight from the outset several important caveats. First, the tasks set out in the White Paper will inevitably involve an enormous work
programme, much of it of a very precise and detailed technical nature, though also with potentially fundamental economic and social implications. Given that we still know very little about the Government’s strategy, the best we can offer for the time being are some general observations about the key issues which are certain to require attention in the near future.

Secondly, this evidence is written from the perspective of EU law. We ask: what are the main characteristics of EU law that become relevant for the UK during the process of withdrawal? And what challenges might the particularities of EU law pose, when it is retained under / incorporated into national law outside the context of EU membership itself? The White Paper raises other important issues from a more specifically domestic perspective, e.g. the manner in which the so-called Great Repeal Bill and the White Paper’s wider process of legal adaptation and reform will interact with and impact upon the UK’s existing devolution settlement. Such domestic issues are perhaps better addressed by other commentators, possessed of more specialist knowledge of the relevant UK constitutional frameworks. Similarly, there are important considerations about how far various EU measures merely implement, for its Member States, obligations in fact created under international law, e.g. in fields such as environmental protection or the regulation of various financial services. Government as well as Parliament will need to be fully cognisant of such issues, so as to avoid placing the UK in breach of its international legal obligations through the very process of preparing the domestic legal order for withdrawal from the EU.

Thirdly, we will not consider the main issues raised by the more long term task, left aside for the time being under the Government’s strategy, of making substantive decisions into the future about what elements of our EU legal heritage will be retained, reformed or axed. Nevertheless, it is worth bearing in mind that that longer term process obviously not only raises important policy choices, but also poses fundamental legal and constitutional questions of its own; as well as being more obviously dependent upon the obligations assumed by the UK under international law, whether in its relations with the EU or under other multilateral and bilateral relationships.

B) Some key issues raised by the White Paper

1) Existing categories of EU measure under UK law

The natural starting point for understanding the White Paper’s strategy for retention / incorporation / adaptation is to look at how EU measures are currently given legal effect within the UK. On that basis, many commentators have identified three main categories of situation:

- EU provisions (especially EU directives) which are currently implemented by Act of Parliament will remain as such, unless and until the relevant legislation is amended or repealed.
- Similarly, EU provisions which are currently implemented by statutory instrument will also remain as such, unless and until the relevant secondary legislation is amended or repealed. However, it will obviously be important to ensure that the relevant statutory instruments retain a clear and secure legal basis under UK law.
- EU provisions (especially EU regulations) which have direct effect within the UK
legal order, i.e. are recognised as capable of producing autonomous legal effects, without the need for any specific transposition by UK legal instruments, will need to be given a new domestic legal basis which will preserve their legal force and effects even after withdrawal from the EU (since otherwise, they would simply disappear from the legal system upon repeal of the European Communities Act 1972). This category is obviously the main focus of the incorporation strategy set out in the White Paper.

While that general scheme certainly provides a useful starting point, it nevertheless has certain limits.

First and foremost, many of the issues identified and discussed further below arise right across all three categories of situation and are certainly not restricted to the case of directly effective EU regulations alone. Consider (for example) questions about the relevance of cross-border cooperation mechanisms; or the decision making powers of certain EU bodies and agencies; or the interpretative value of existing / future EU caselaw; or the rationale / mechanism for updating UK law in the light of changing EU standards. Each and every one of those issues will arise regardless of whether the underpinning EU measure is a directive or regulation and whether it has already been incorporated by primary legislation, statutory instrument or neither.

Secondly, the dividing line between each category is not always so clear cut as sometimes appears to be assumed. For example: the general proposition that EU regulations are directly applicable across the Member States does not mean that every provision of every regulation is capable of producing autonomous legal effects without some form of domestic legal intervention. Specific provisions of various EU regulations will have (explicitly or implicitly) called upon the Member States to adopt limited transposition measures so as to render the regulatory framework envisaged by the relevant regulation fully operational. Thus, there will be important elements of various EU regulations which have already been incorporated into UK law by acts of primary or secondary legislation. Particularly where those transposition measures called for the exercise of discretionary power by the Member State, it is important that such settled incorporation choices are not inadvertently contradicted by a process such as that envisaged under the White Paper.

2) Technical adaptation of EU provisions regulating internal situations

Many EU measures seek to regulate internal situations, including those with no particular cross-border element, through the (total or partial) harmonisation of applicable national laws: for example, EU directives on employment protection or EU regulations on consumer rights. In principle, such EU measures might appear relatively straightforward to deal with: they are either incorporated into UK law already; or they can be incorporated through the process envisaged under the so-called Great Repeal Bill.

However, such EU measures may still need more or less extensive technical adaptations in order to “make sense” within the context of a domestic legal order which is no longer part of the EU itself: for example, where national authorities are directed to reach discretionary decisions involving an assessment of barriers to trade or distortions of competition within the internal market at large; or of how far a
proposed action might impact upon the general interest of the EU as whole.

Moreover, not every EU measure – even those regulating purely internal situations with no relevant cross-border dimension at stake – will be apt for retention or incorporation into UK law in preparation for withdrawal. Some examples are already relatively well known even in the public imagination, such as EU regulations on the production of olive oil. Other examples are perhaps less obvious: consider that many provisions of individual EU instruments are incapable of having direct effect because they are essentially programmatic or aspirational in character; it is unclear what value there might possibly be in seeking to incorporate such non-directly effective provisions into UK law.

3) EU provisions predicted upon cross-border cooperation

Many EU measures seek to regulate cross-border situations, by creating systems of cooperation between national authorities across the Member States. Domestic decision makers – be they ministerial, from the central civil service, based in local authorities, or forming part of the national judiciary – will participate in pan-European networks aimed (for example) at accessing and exchanging relevant information; apportioning jurisdiction or responsibility to tackle particular categories of disputes; providing for the mutual recognition and / or enforcement of each other’s decisions etc. For many commentators, such cross-border networks of cooperation are the archetype of the EU’s regulatory activities: they aim to create structures and processes that enable disparate national authorities to identify and address cross-border challenges and problems in a way which is simply not possible for an individual country acting on its own or outside such frameworks of cooperation.

Such networks are embedded and operational right across the entire legal system – covering everything from toy safety, the protection of intellectual property rights, participation in emissions trading schemes, the coordination of cross border social security rights and payments, through to criminal and security cooperation through mutual assistance / recognition / enforcement etc.

In each and every case, during the process envisaged by the White Paper, we will have to decide whether the applicable EU rules can possibly serve any useful purpose when the UK is no longer part of the EU and thus of the networks of cooperation which are reserved for its Member States. And if the relevant EU networks of cooperation no longer make sense for the UK after withdrawal, what alternative arrangements should the UK seek to enact, in order to tackle the relevant regulatory challenges and problems for itself? Of course, such decisions will be partly influenced by whatever alternative relationships of cooperation the UK might eventually succeed in negotiating with the EU and / or the remaining Member States, either as part of the withdrawal agreement envisaged under Article 50 TEU or in any separate agreement/s reached after withdrawal has already become effective.

4) Decision making powers exercised by EU bodies / agencies

Many EU provisions confer decision making powers directly upon a range of EU institutions, bodies and agencies across a wide variety of policy fields, again scattered right across the legal system: for example, the imposition of anti-dumping duties upon
third country goods; the regulation of medicines and chemicals; the freezing of assets held by third countries, organisations and individuals as part of the international response to terrorism etc.

During the process envisaged by the White Paper, it will be necessary for the UK to decide who will exercise such decision making powers in the future. Will the UK still decide to confer binding legal effects upon certain decisions of EU bodies and agencies in particular policy fields? If the UK decides to entrust such powers instead to national decision-makers, then some obvious questions arise: who will that decision-maker be; and who will they be accountable to? Such questions obviously go beyond the purely technical and engage important questions of regulatory power, governance and accountability.

5) **Updating of EU-based measures**

What happens if UK law has retained / incorporated certain EU rules into domestic law at the point of withdrawal, but the original EU rules subsequently change, i.e. because the EU itself adopts new legislation, amends its current rules, or even abolishes the relevant EU act altogether?

It is difficult to answer such questions by reference to general propositions. For example: there is surely a significant difference between how the UK might react to a change in EU law which is prompted by new scientific evidence calling for a new regulatory response; as opposed to a change in EU law which is prompted rather by changing political preferences among the remaining Member States. Similarly: it is easy to be critical of the abstract principle that the UK should somehow automatically update its legislation whenever the relevant EU rules change; yet that might well be what is agreed between the UK and the EU, at least in certain regulatory fields, as part of a future trade or association agreement.

In the meantime, two particular points are worth bearing in mind.

First, the question of updating seems particularly relevant in the case of EU measures which are currently incorporated into UK law by mere cross-reference: for example, where a statutory instrument grants legal recognition to some EU act without doing anything more than citing the latter’s official reference. It may be necessary to clarify the UK’s future approach to such measures, e.g. whether the relevant EU act for the purposes of UK law is that which existed at the point of withdrawal and regardless of any subsequent amendments or repeal.

Secondly, we perhaps need to careful about the argument that automatically updating UK rules to match EU standards will in itself solve the problem of non-tariff barriers to trade. Contrary to what is often claimed by those with only a limited knowledge or understanding of international trade, it is rarely enough that two jurisdictions “have the same rules” in order to avoid or overcome regulatory barriers to trade in goods or services. It is true that regulatory convergence / equivalence is an important technique in international trade agreements whereby the contracting parties seek to address and reduce regulatory barriers to trade. But such regulatory convergence / equivalence is not sufficient in itself to ensure barrier-free trade: convergence / equivalence will only ever be one element of the wider relationship of cooperation
and coordination between the contracting parties. Obviously, that point is even more true when it comes to how far a single country can seek to overcome foreign regulatory barriers to trade for its own undertakings, by deciding unilaterally to align itself to the regulatory standards of another jurisdiction.

6) Other sources of EU law besides directives and regulations

It is tempting to focus attention on the White Paper’s strategy for ensuring the smooth, effective and appropriate retention / incorporation / adaptation of EU directives and regulations within the UK legal system in preparation for withdrawal. But it is important to recall that the EU legal order contains other sources of law which are either directly binding on the UK or otherwise relevant to the functioning of the UK legal system. For example:

- By and large, the provisions of the EU treaties (TEU, TFEU, protocols) are unlikely to be appropriate for incorporation into the UK legal system: after all, the Treaties are largely concerned with the institutions, processes and competences of the EU itself. Nevertheless, the Treaties do contain certain provisions capable of producing direct effect (i.e. acting as an autonomous source of legal rights and obligations) within the national legal system. That includes the free movement provisions; competition law; the state aid rules; and equal pay for men and women. Such directly effective Treaty provisions raise issues not dissimilar to those raised by directives and regulations. Should they be incorporated at all? If not: what will they be replaced with, if anything, under purely domestic law? If so: what adaptations will need to be made, in order for the relevant provisions to operate smoothly within the UK as a non-Member State?

- EU primary law is not only made up of the treaties and protocols; but also of the so-called “second order” sources, i.e. fundamental provisions which become applicable only once a matter falls within the scope of Union law, but once applicable, are of equal status to the Treaties themselves. Those second order sources consist of the Charter of Fundamental Rights of the European Union; and the general principles of Union law (in effect, Union administrative law) as developed in the caselaw of the European Court of Justice. At the moment, both the Charter and the general principles are capable of acting as autonomous sources of legal rights and obligations within the UK, i.e. whenever a dispute falls within the scope of Union law. On the one hand, if the aspiration of the White Paper really is to ensure maximum continuity and certainty in the legal framework applicable before and after withdrawal, then consideration should be given to whether / how far the Charter and general principles might also be accorded limited legal recognition under UK law. On the other hand, it would surely be significantly less complex simply to overlook both the Charter and general principles, and leave it to the Human Rights Act 1998 and the ordinary principles of domestic administrative law to provide an appropriate (even if not identical) level of judicial protection in the interpretation and application of all post-withdrawal legal acts.

- Another category of EU act which is rarely mentioned in discussions about the White Paper are “decisions”. Some EU decisions are of general application, in the sense that they are intended to produce legal effects without specifying individual addressees, e.g. decisions establishing new agencies or scientific programmes. Other EU decisions are essentially administrative acts, addressed to and binding
upon specified addressees, e.g. in fields such as competition law and state aid. At least in the case of decisions extant at the point of UK withdrawal, it may be necessary to make express provision for the preservation of their legal effects, i.e. to ensure that the stability of existing public decisions or individual relationships is not inadvertently opened to contestation by the “elimination” of any relevant EU decision from the UK legal order.

- Finally, the EU has adopted a significant body of “soft law” measures which, although not themselves legally binding, are nevertheless relevant to the interpretation and application of various more “hard law” acts and provisions. E.g. in some situations, adherence to the specifications suggested by relevant EU soft law measures will act as proof of compliance with regulatory standards laid down in an EU directive or regulation. During the process envisaged by the White Paper, the UK will have to decide whether there is any value or utility in according limited recognition, after withdrawal, to particular measures of EU soft law.

7) How will retained / incorporated rules be interpreted by the courts?

The White Paper states that “in general”, retained / incorporated EU rules should continue to be interpreted as before. This is the first concrete indication, albeit oblique, that the caselaw of the European Court of Justice may remain relevant to the UK courts even after withdrawal. However, the precise nature of that relevance will need to be clarified. For example:

- How far will it be a duty merely to take into account relevant ECJ caselaw; or instead to regard that caselaw as some form of binding precedent?
- Will any duty be limited to relevant ECJ caselaw delivered before withdrawal; or should the UK courts also have regard to certain ECJ rulings which are delivered also after withdrawal?
- How should the UK courts treat ECJ rulings whose interpretation draws not just upon the bare text of the relevant EU secondary measure but also upon a wider range of legal sources such as the Treaties, the Charter of Fundamental Rights and the general principles of Union law (even if such sources in themselves are neither directly binding upon nor applicable to the UK authorities and courts in the period after withdrawal)?

8) Situations where retention / incorporation is an insufficient regulatory strategy

As the White Paper itself acknowledges, not matter how ambitious the programme of retention / incorporation and adaptation undertaken in respect of existing EU measures, there will still be whole or partial policy fields where the objectives of legal continuity and legal certainty cannot be preserved simply by translating EU law into national law. In some situations, the UK will have no choice but to design an entirely new legal framework to govern public and private conduct within the relevant sector. In that regard, the White Paper identifies two examples where new and separate primary legislation will be required in preparation for withdrawal: customs and immigration. However, one anticipates that the same will be true in various other fields as well, e.g. agriculture and fisheries.

C) Some key questions about institutions and processes
It should by now be apparent that the strategy envisaged by the White Paper is far from simple or straightforward. In effect, it will require a comprehensive review of the legal system; it will entail a very large volume of highly complex yet crucially important technical work; and it will necessarily involve a range of significant if not fundamental policy choices across a wide range of sectors and fields. Who will be responsible for these tasks? And through which legal instruments will they proceed?

The Prime Minister, addressing the Conservative Party conference in Birmingham in October 2016, suggested that any changes to UK law in preparation for withdrawal will have to be the subject of full scrutiny and proper parliamentary debate. Similarly, when the Prime Minister spoke in January 2017, she stated that, when the so-called Great Repeal Bill incorporates all of existing EU law into UK law, any and every change to the law will directly involve Parliament.

The White Paper is perhaps more realistic in recognising that the situation will inevitably be more complex and contested than that. In particular, the White Paper highlights a number of points where important and potentially far-reaching discretionary powers will come into play.

First, the so-called Great Repeal Bill will not retain all of EU law in the UK legal system; EU law will only be retained where this is “practicable and appropriate”.

- There is as yet no indication of who will make those important discretionary choices, or according to which procedures and subject to what constraints / scrutiny.
- Furthermore, the White Paper does not offer any more detailed guidance about how we should understand the inherently vague criteria of practicability and appropriateness. Will those criteria correspond to the sorts of problems we identified above, e.g. rejecting EU measures which provide for cross-border relationships / actions and thus obviously no longer make any real sense for the UK once it leaves the EU? Or will those criteria be defined in potentially more far-reaching ways – in effect, offering the competent decision-maker leeway to make essentially subjective political choices about which EU-based measures to retain / incorporate and which to reject altogether?
- In addition, one assumes that this power to reject the incorporation of EU law, on the grounds that it is not practicable and / or appropriate, will apply not only to measures such as directly effective EU regulations which would require transposition into UK law at the point of withdrawal; but also to measures such as EU directives which are already incorporated into UK law by primary or secondary legislation. After all, as we have seen, the reasons that might render certain EU rules impracticable and / or inappropriate for the UK after withdrawal are just as likely to arise with previously incorporated directives as they are to arise with previously unincorporated regulations. It follows that this discretionary power will necessarily entail choices not just about the scope and nature of future acts of incorporation; but also about the retention, amendment or repeal of existing (primary and secondary) acts of incorporation.
Secondly, the Government envisages a programme of secondary legislation to make changes to those EU rules that would otherwise not function sensibly once the UK has left the EU.

- The White Paper simply states that this programme of secondary legislation will be subject to parliamentary oversight. The nature and extent of that oversight remains unclear.
- As before, the White Paper offers only an imprecise and potentially far-reaching formulation of the power to amend existing EU law as (already or imminently to be) incorporated into the UK legal system. Will the criterion of sensible functionality correspond to the sorts of problems we identified above, e.g. ensuring that EU-based measures refer to UK markets and interests, rather than EU-wide markets and interests; or transferring defined decision-making powers from EU bodies and agencies to domestic actors? Or will the relevant criteria be framed in looser and wider terms – again, offering the Government potentially significant discretionary powers about when and how to amend a wide range of EU-based measures?

Thirdly, as stated above, the White Paper recognises that any significant policy changes will be underpinned by separate primary legislation.

- The examples offered by the White Paper (customs and immigration) are surely far from exhaustive. We have also mentioned fields such as agriculture and fisheries.
- In particular, it is unclear at what point the process of retention / incorporation and adaptation of existing EU rules should be considered so far reaching as to amount to a “significant policy change” which should be undertaken directly through parliamentary legislation rather than by the Government subject to parliamentary oversight. The White Paper proposes to treat these two categories in fundamentally different ways – but the boundary between them is one of degree and it remains uncertain who will act as its umpire and according to which meaningful criteria.

Indeed, other important questions arise about the possible interaction between the various options and powers envisaged under the White Paper.

- For example: what happens when existing EU rules are not to be incorporated into UK law, on the grounds that this would be considered impracticable and / or inappropriate? In some situations, the simple non-retention of certain EU rules might well in itself provide a satisfactory end to the story, e.g. where the UK is simply withdrawing from an existing EU network for cross-border cooperation and nothing in particular needs to be done as a consequence of such withdrawal. But in other situations, the non-retention of previously applicable EU rules might well produce a regulatory vacuum which needs to be filled with an alternative domestic regime in order to protect the relevant public and private interests.
- Will some or all such situations be dealt with also by secondary legislation – such that the Government is laying claim to a power not only to amend (already or soon to be) incorporated EU rules; but also a power to re-regulate afresh those situations where EU law will no longer be retained? Or will some or all such situations be considered to involve “significant policy changes” – such that the
White Paper promises they will only be dealt with directly by Parliament through new primary legislation?

- In the former scenario, the scope of the Government’s claim to delegated legislative power could be very significantly expanded. In the latter scenario, the burden of new legislation to be passed through Parliament could be much heavier than anticipated.

Finally, in the absence of any more detailed proposals to work with, our discussion of the general challenges posed by the White Paper’s retention / incorporation strategy highlights several other important issues which will need to be borne in mind.

- For example, will the power to make decisions about what to retain / incorporate on grounds of practicability and appropriateness, and / or the power to make decisions about what / how to amend on grounds of ensuring sensible functionality, be available only in preparation for the moment of withdrawal; or will such powers also be extended for a certain period of time after withdrawal has already taken place, e.g. to deal with unforeseen circumstances?

- In the event that it is considered appropriate for the UK not only to retain / incorporate various EU measures before withdrawal, but also to update domestic law in the light of changes to the relevant EU regulatory provisions even after withdrawal, who will be entrusted with such powers; according to which criteria; and subject to what degree of oversight?

D) Conclusions

The strategy envisaged by the White Paper is to deal with the immediate challenges for the UK legal system of safeguarding legal continuity and legal certainty; while leaving more substantive questions about which elements of EU-based policy choices should be retained, amended or axed for future governments and parliaments.

This evidence has suggested that that distinction is not so watertight as has sometimes been presented: even the preparations for withdrawal go far beyond the purely technical, to raise important questions of policy and substance.

Moreover, despite the oft-repeated claim that the incorporation strategy envisaged by the White Paper is somehow a clean and simple solution to the basic goal of preserving legal continuity and legal certainty, this evidence has argued that the challenges are significantly more complex and contested, and far greater in scale, than the Government appears to have assumed or at least to have admitted.

Finally, the strategy envisaged by the White Paper poses a series of difficult yet uncertain questions about the balance of power and inter-relationship between Parliament and the executive. On the one hand, there is an obvious need to ensure that this enormous legal and indeed constitutional task is executed appropriately and effectively so as to produce only the minimum necessary disruption and damage to our own economy and society. On the other hand, the White Paper’s strategy will inevitably raise difficult questions about the accountability and legitimacy of this entire process, at a time when the reputation of our democratic institutions and processes already appears to be under critical scrutiny.