1. Decisions concerning the nature and extent of delegated legislation to be permitted under a broader parent Act of Parliament are always complex, and prompt questions about the proper constitutional roles of Parliament and the government, and the relationship between them. In relation to the Great Repeal Bill, these standard complexities are especially acute. The scale of the challenge of replacing EU law is key, because:
(i) the vast substantive scope of EU law means there is a huge (indeed, difficult to quantify) volume to consider over a range of areas; and
(ii) the ‘embedded’ nature of EU law in the domestic legal system (and over a period of more than four decades) means it is very significantly intertwined with ‘UK law’ (so far as a distinction can be drawn).

2. Following the 2016 referendum result, with exit from the EU now to be delivered by the domestic political institutions, the government is right that legal certainty is required in preparation for the withdrawal, and transition to the new arrangements. It is also correct that, with the inevitable replacement of the European Communities Act 1972, the right way to achieve this is to transpose EU law into domestic law, where necessary, and make subsequent amendments to those legal rules:
(i) in light of the outcome of the withdrawal negotiations (how much consistency with EU law will be required / desirable depends on the closeness of relationship sought / agreed with the remaining 27 EU member states);
(ii) over time, allowing for due reflection on any policy change, where desired; and
(iii) providing the government with a chance to seek an appropriate electoral mandate for the changes to domestic law envisaged, bearing in mind that such a broad range of policy choice were not open at the time of the previous general election.

3. Against the backdrop of the complexity and sheer extent of the interrelationship between EU legal norms and the domestic legal system, there will be a range of issues with the Great Repeal Bill which has been proposed for this task:
(i) it will be an immense technical challenge for the drafters, and those charged with scrutinising it;
(ii) there will be major questions about the way in which the Bill is to be designed to operate – for example, how clear and explicit can it be on its face about what is imported into UK law? How far, in contrast, will the Bill provide a general importation of EU law / authorisation of domestic effect? How clear and straightforward will it be to anticipate the parameters of any secondary legislative powers established under the Bill? If EU law of itself has domestic effect, by virtue of the Bill, how long will this last? It is difficult to know the answers to these questions – and many others that might be imagined – until we see, and can evaluate, the initial legislative choice made by the drafters.

4. The specific subject of the Procedure Committee’s present inquiry is the extent and nature of delegated legislative powers established under the Bill. It is inevitable that, to some extent, such an exercise will rely on delegated legislated powers for the government when we consider:
(i) issues of capacity and resources – despite its sovereignty and constitutional centrality, the UK Parliament has finite capacity to legislate, and to do so quickly – on this scale only the executive (if even the executive) has the resources, or ability to generate the resources, to review and cover such ground, subject to the oversight of Parliament;
(ii) this was reflected in the design of the European Communities Act 1972, which by s.2(2) provided the executive with broad subordinate legislative powers to implement EU law – by analogy, the withdrawal of EU law will require provision to make this possible to some extent. It is however, worth bearing in mind that such EU rules which could be the subject of domestic legislation under s.2(2) ECA 1972 were themselves a product of the
EU’s broader legislative process, whereas secondary legislation under the Great Repeal Bill would simply be the product of the UK government – the comparison is certainly not exact, as a result.

(iii) the time scale for withdrawal is relatively short, assuming that it occurs within two years from the end of the March 2017 (which is the government’s stated time table, but also fits with imperatives of the EU27, in clearly removing the UK from involvement in the summer 2019 European Parliament elections) – the need for adequate domestic transitional arrangements which have the flexibility to accommodate a range of withdrawal outcomes (whether in the form of an agreement or automatic withdrawal under the terms of Art 50 TEU) is therefore increasing urgent.

(iv) the Great Repeal Bill will also be required to make provision to underpin the authority of the existing array of delegated legislation made under s.2(2) of the European Communities Act 1972, given that power to implement EU law will be repealed. There may be debate about whether existing secondary legislation made under s.2(2) requires a new legal basis, given it was valid at the time of enactment by virtue of the existence of that power. In a case of legislative silence, this would be a matter to be determined by interpretation of the intention of the repealing Act (in this case, the Great Repeal Bill) – see e.g. this principle discussed in DPP v Inegbu (2008) EWHC 3242 (Admin); [2009] 1 WLR 2327. Moreover, the application of s.16 and s.17 of the Interpretation Act 1978 may then become relevant, although in my view those provisions are best understood as indicating that a new legal basis for secondary legislation made under a repealed parent Act is indeed required – this is because s.16(1)(b) seems designed to establish the general non-retrospective effect of repealing legislation in relation to administrative acts / decisions previously taken, rather than to underpin the authority of legislative rules into the future, and the requirement for a new legislative basis for secondary legislation is implied by the provision for the transfer of the underlying authority of subordinate legislation in s.17(2). Regardless, it will be essential for the Great Repeal Bill to minimise uncertainty, and the potential for litigation, by establishing a comprehensive new legal basis for all secondary legislation made pursuant to s.2(2) of the EC Act 1972, while also establishing powers for the repeal of any such legislation the application of which is no longer practical or appropriate.

5. If delegated legislation, to some extent, is inevitable, how might this be executed? First, and perhaps most crucially, given the scale of powers potentially envisaged, how might such powers for the government be framed in the statute? There are a number of important considerations, including:

(i) the definition of the powers as for specific purposes, which must be tied closely to the rationale for the Bill – provision of legal certainty and continuity in a time of political transition. In this context, it would arguably therefore be appropriate for the government to seek powers to:

(a) implement the outcome of the EU withdrawal negotiations – given this is at present uncertain, making appropriate preparations in effect requires the domestic legislation to facilitate withdrawal to be in place before the shape of the withdrawal agreement, and especially the framework of a future relationship, can be known;
(b) make alterations to domestic law necessary to ensure the effective continuing functioning of the UK legal system during a period of transition.

In contrast, it would not be acceptable, in my view, to legislative to establish powers defined – whether explicitly or implicitly, by legislative silence – permitting the government to make significant policy changes in the process of transposing EU law into UK law. Instead, the government should seek a more precise mandate to deliver any such change (the 2016 referendum result cannot be interpreted in such a way as to extend to cover this), and Parliament must be entitled to scrutinise directly and in detail policy change which is more than consequential on withdrawal (e.g. the loss of rights for UK citizens dependent on reciprocal obligations undertaken by other member states by virtue of membership of the EU). The scale of the Great Repeal Bill will not allow this, and the government should at the very least extend its own precedent that subject specific legislation will be required in relation to immigration and customs (as established in the
White Paper) to other fields where significant change is proposed. This programme of subject specific primary legislation in areas of significant policy change should be seen as a supplement, and not an alternative, to the Great Repeal Bill.

(ii) the use of specific exemptions, defining purposes for which the delegated powers may not be used – examples could include:
(a) preventing reduction in individual entitlements by secondary legislation, whether in general or defined in relation to specific areas (e.g. employment rights, consumer rights);
(b) impacting on devolved matters (whether extending or reducing those powers);
(c) more traditional exemptions preventing creation of new criminal offences / taxation.

(iii) the conditions which an exercise of the powers must satisfy – examples could include:
(a) the provision to Parliament of an explanatory statement by the relevant minister, setting out reasons for the use of powers, and justifying the specific exercise of powers as being within the scope of the authorising Act (i.e. the terms of the Great Repeal Bill);
(b) a requirement of proportionality in the use of delegated powers for the aim intended to be achieved;
(c) requirements of impact assessment;
(d) requirements of consultation with relevant stakeholders or the public.

(iv) the use of time limits / renewal clauses – given the potential scale of these powers, but also the stated statutory purpose of providing legal certainty in a time of political transition, it seems clear they must be time limited, and should not extend far beyond the UK’s formal exit from the EU. If the possibility for further flexibility is thought desirable, to deal with unanticipated circumstances or oversights, exceptional delegated legislative powers could be made subject to reauthorisation by Parliament on resolutions (whether in the Commons only or in both Houses) following substantive debates, and government having set out clearly in advance the reasons for the extension of the powers. Any powers open to renewal in a subsequent Parliament would need to be very limited in scope and extent, and confined to making purely technical changes to domestic law.

6. A second issue related to the creation of such powers is the level of parliamentary oversight over delegated legislation once made: the key issues will be how to affirm / negate secondary legislation, and whether a new process for oversight should be designed, tailored to the specific circumstances of EU withdrawal (i.e. taking into account the considerations of scale, significance, and complexity, and in light of the domestic embeddedness of EU law identified above)? In general, more technical matters (such as removing direct references to EU legal norms or instruments from domestic law) may be appropriate for negative affirmation processes, but given the importance of the executing domestic legal change necessitated by withdrawal effectively – and so the desirability of its subjection to valuable scrutiny – there is a compelling argument for affirmative procedures, especially in relation to secondary change to primary legislation (so called ‘Henry VIII powers’).

7. In addition to the formal powers for Parliament to approve / reject delegated legislation contained in the Great Repeal Bill, the process for identifying controversies concerning the scope or substance of statutory instruments will be vital to ensuring that the process of transposing EU law is done in a way which is effective, efficient, and constitutionally appropriate. It is difficult to reach definitive conclusions at this stage, but it will be an important matter for Parliament to consider what institutional mechanisms might be effective – there are advantages to using existing, well established mechanisms associated with the Joint Committee on Statutory Instruments and the Secondary Legislation Committee of the House of Lords (along with other Select Committee scrutiny in appropriate substantive areas, of which there has been a real intensity of initial activity grappling with the challenge of exiting the EU) as compared to novel processes. Yet equally, a new process established in recognition of the unique nature of this task for a specific period of time (especially since the demands on the existing committees regarding the scrutiny of delegated legislation are unlikely to lessen in relation to non-EU matters) may well be thought necessary. A key issue to consider in the creation of any new committee(s) to scrutinise the use of delegated law-making power under the Great Repeal Bill will be whether the
traditional distinction between consideration of the technical validity of statutory instruments, and
the merits or political significance of their content, would be maintained or collapsed, with a
single committee (perhaps a Joint Committee of both Houses) established with a broad remit to
scrutinise the secondary legislation made to prepare the UK’s legal system for exit from the EU.

8. Finally, to reflect on some broader issues of relevance – first, in informing these debates on
delegated power in the Great Repeal Bill, it may be helpful to try to identify precedents that may
better inform our understanding of what the legislative design might be, and how Parliament
might influence the development of the Bill. Yet it is difficult to think of something on this scale
or of this nature, perhaps unsurprisingly given the unique nature of the EU, the significant
requirements of domestic legal rearrangement that membership requires, and the legislative
reorganisation that withdrawal will therefore prompt. A useful comparator may be the Legislative
and Regulatory Reform Bill 2006, which – in very broad terms – started with an unduly broad
formulation of wide ranging secondary legislative powers to the government (for the purposes of
‘legislative reform’) but was, through detailed parliamentary scrutiny and engagement, amended
to a more precise series of powers subject to exemptions (see especially Davis [2007] Public Law
677). This provides a potential model for parliamentary activity if the Great Repeal Bill, when
drafted, appears to offer the government secondary legislative powers which are beyond the scope
of what might legitimately be justified as necessary to achieve the aims of the legislation.

9. Second, there is an important general point to be made concerning the expectations of
Parliament’s involvement in the process of legislating to effect withdrawal from the EU. There
are obvious and well-founded concerns about exit from the EU becoming an executive led and
dominated process. This is especially the case given the traditional allocation of responsibility
between Parliament and the government: Parliament has legislative sovereignty in relation to the
domestic legal system, but the deal it is required to implement will be negotiated by the
government with the EU27 as part of its executive powers to conduct international relations and
foreign affairs (once Art 50 notification is authorised by Parliament, as a result of the decision of
the Supreme Court in Miller [2017] UKSC 5; [2017] 2 WLR 583). Yet aside from some of the
complexity that litigation has generated about the constitutional roles of the executive and the
legislature in the UK, it is also clear that Parliament can be an effective and important actor in the
Brexit process, especially as regards the challenge of domestic legal change necessitated by
withdrawal from the EU, from the Great Repeal Bill onwards.

10. While common, claims as to our constitutional ‘elective dictatorship’ are in many ways based on
a misunderstanding of the role of Parliament, and its ability to exert policy influence, and
scrutinise and challenge the government, often through activities which shape government action
in ways which are difficult to measure, such as the power of the legislature’s anticipated reactions
and informal pressure (see e.g. Russell and Cowley (2016) Governance 121). But the thesis that
Parliament is in contemporary decline (on which see e.g. Flinders and Kelso (2011) BJPIR 249)
has not only prospered because of misunderstanding of Parliament’s role and capability
-especially in comparison with the resources of even a shrinking executive, and a civil service
subject to cost saving in an extended period of public sector funding cuts). Instead, the decline
thesis also prospers because the expectations of Parliament need to be appropriately set – rhetoric
of restoring parliamentary sovereignty, exhibited throughout the referendum campaign and since
(including in the recent White Paper), is not helpful in this regard. In contrast, the best view
constitutionally is that Parliament remained sovereign throughout membership of the EU – and,
indeed, the legislative facilitation of EU membership from 1972 onwards, and authorisation of a
referendum leading to the decision to withdraw, provide very different examples of the flexibility
of a constitution based on the legislative sovereignty of the UK Parliament (see e.g. Gordon,
Parliamentary Sovereignty in the UK Constitution (2015)).

11. In this context, Parliament will authorise (legally) and control (politically) government activity
associated with preparing the domestic legal system for EU withdrawal, but it is inevitable that
the execution of such a complex task will (i) require effective coordination (and also sometimes
conflict) between the two branches; and (ii) demonstrate the close constitutional fusion between
them. There can be no room for complacency in this regard (the classic claims of Bagehot that
this fusion was an ‘efficient secret’ of the constitution are certainly misplaced) – yet there is a
genuine role for Parliament to influence very significantly the shape of the UK after Brexit, if we
are clear about its role(s) in the process, and set challenging but realistic expectations of what it
might achieve. The sovereignty of Parliament does not prohibit the allocation to the executive of
delegated legislative powers – indeed to grant such powers is an exercise of legislative
sovereignty in recognition of the scale and complexity of modern state activity. But Parliament
has a constitutional responsibility to ensure these powers are appropriately constructed for
effective completion of the stated purpose of the Great Repeal Bill (and do not extend far beyond
this), and are designed in such a way that the legislature can exercise oversight of executive
activity in a meaningful way, ensuring it fulfils its constitutional role of ensuring the government
is held to account.

12. In conclusion, we should try to ensure (so far as is possible given the inevitable complexity of
their interactions) to separate transposition of EU law into UK law for purposes of ensuring legal
certainty during and after withdrawal, from change to domestic law which exiting the EU places
back within domestic competence. There will inevitably be difficult overlaps in practice, but as a
starting principle this has much to recommend it from a constitutional perspective – it respects the
need for legal certainty, and empowers government to prevent chaos, but prevents drastic policy
change from happening quickly, and without the considered and explicit authorisation of
Parliament (or indeed the electorate). To pursue such an approach to the Great Repeal Bill could,
in general, be one which respects Parliament’s role, authority and constitutional centrality in the
process of reshaping the domestic legal system. This will be a crucial position at least to protect -
and ideally, to reinforce – in a time of dramatic constitutional change, and as new political
responsibilities are reacquired by the domestic institutions of government from the EU.

3 March 2017