Summary

- Relying on Ministerial assurances is not good enough. There should be constraints on the face of the Act on the use of order-making powers so that they can only be used to reproduce the substance of the acquis with changes only where necessary. That would provide a fall-back of legal challenge to orders that changed the acquis.
- To ensure proper parliamentary control over new bodies, these should be set up by primary legislation and not for example as companies.
- The power to make orders under the Act should lapse after a time. However, Parliament will need to set up information flows in order to ensure that the power is not abused such that irksome parts of the acquis are forgotten. It would be best if the Act put a formal duty on Ministers to convert the whole acquis into law.
- Unless there is effective Parliamentary control over the commencement of the Act, the Government will be able to by-pass Parliament especially if it seeks to leave the EU with no deal. So the Act should not come into force without an affirmative resolution by both Houses. In order to provide MPs with up-to-date information from the electorate and because the June 2016 referendum was made without knowing what Brexit meant there should be a referendum on the terms before the affirmative resolutions are tabled. The options would be Brexit on the agreed terms (or no deal) or Remain.

Henry VIII Powers – to be constrained in statute

1. The aim of the “great repeal bill” is to maintain the substance of existing EU law while making only those changes that are necessary to reflect the fact of Brexit, for example replacing EU regulators by UK regulators.

2. It is common ground that the “great repeal bill” should not be used to make changes in the substance of EU law as a matter of policy, for example to change regulatory standards. That should be done separately as an explicit measure that can be considered properly at Parliament’s leisure.

3. It is important to put on the face of the Act as many constraints as are necessary to ensure that the Act performs that objective and
does not allow the substance of laws to be changed by accident or surreptitiously.

4. Nor should the “great repeal bill” provide a mechanism for later policy-driven changes by secondary legislation. Parliament should consciously decide in more leisure how it wishes future standards to be set.

5. If the constraints are set out in the Act, then an SI made outside the provisions would be unlawful and could be challenged in the courts. That will provide a useful fall-back to Parliamentary scrutiny.

6. If the constraints are only in Ministerial assurances there will be no such safeguard.

**Henry VIII Powers – not suitable for establishing new bodies**

7. One way for powers to be weakened surreptitiously would be for new bodies to be set up that were not wholly effective.

8. Accordingly, the House of Commons should insist that new UK bodies that are needed to replace EU bodies should be statutory bodies, set up by primary legislation.

9. Similarly, if the EU’s powers go to a new body (other than a government department) that is not a statutory body then the House of Commons should insist on the body being made a statutory body.

10. If bodies are not statutory but set up for example as companies, it is much harder for Parliament to exercise oversight.

**Sunset Provisions**

11. It is important to get the sunset provisions right – the Government has been ambiguous in this regard.

12. The power to make orders under the “great repeal bill” should lapse after a time.

13. However, Parliament will wish to make sure that the lapsing of the powers does not allow the Government to fail to introduce an equivalent provision into UK law as is found in the acquis. For example, the Government should be obliged to publish a list of all provisions in the acquis and what it had done with them. That list should be kept up to date. Then, if new parts of the acquis were
discovered it would be easier for Parliament to keep track of what had happened to them.

14. The Bill should provide a duty on the Government to convert the entire acquis into UK law. That too should make it easier for Parliament to exercise oversight.

15. It would be best if the orders themselves lapsed after a time – but only if Parliament could ensure that the Government had brought forward primary legislation first. One would not wish the lapsing of the powers to be a surreptitious way of dropping an irksome regulatory requirement.

**Commencement Provisions**

16. The Committee should pay particular attention to the Commencement Regulations.

17. If the normal commencement regulation is used – with no or limited Parliamentary intervention – then Parliament could lose control over the whole Brexit process especially if the Government decides to leave the EU with no deal.

18. In order to safeguard Parliamentary control, the commencement provision should contain two elements.

- The Act should not come into force unless there has been an affirmative resolution in both houses of Parliament.

- The debates on the affirmative resolution should not take place unless there has been a referendum on the terms of Brexit.

19. MPs will make an independent judgement on the merits of Brexit and of the Brexit deal when they vote on the affirmative resolution.

20. But they will also have to pay regard to the June 2016 referendum result – the major democratic event on Brexit in recent times. But referendum votes were cast without knowing what Brexit meant. Therefore the 2016 result will be a poor quality guide to MPs of what the public think at the end of the process. But even so it will not be possible for MPs to disregard it.

21. Therefore to better inform MPs there should be a referendum on the terms.
22. That is standard project management practice. No-one takes a project from idea to implementation without a project review once there is a definite plan whose benefits, costs and risks can be properly assessed. In the context of Brexit, that project review relates to the terms of Brexit agreed with the EU (or to a Brexit on no terms).

23. It would also align with the Chilcot Inquiry into the Iraq War. One of its lessons was the danger of making a final decision to go ahead without having studied an implementation plan.

24. Since we started the process with a referendum then as a matter of political legitimacy it must be for the electorate as a whole to say whether the project should go ahead or not once the terms are known.

25. It would also place an unfair burden on MPs to ask them to choose whether Brexit should go ahead if they think the terms are not good for Britain but the 2016 referendum is still the electorate’s last word.

26. The question in the referendum should be whether to leave the EU on the terms agreed by the Government (which might be no-terms), or whether to remain in the EU.

4 April 2017