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Peter King
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Dear Mr King

Memorandum on Private Contracts and Schedule 8 of the European Union (Withdrawal) Act 2018

The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The CLLS Regulatory Law Committee (the "Committee") responds to consultations and also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

The attached Memorandum has been prepared by a number of member firms on a joint basis. The Memorandum sets out the common position of the Committee on the construction of paragraphs 1 and 2 of Schedule 8 to the European Union (Withdrawal) Act 2018.

The position set out in the Memorandum has also been endorsed by the main CLLS Committee, and the chairs of the CLLS Commercial and Financial Law sub-committees.

If you would find it helpful to discuss the Memorandum then we would be happy to do so. Please contact me by telephone on +44 (0) 20 7466 2404 or by email at Karen.Anderson@hsf.com in the first instance.

Yours sincerely



Karen Anderson
Chair, CLLS Regulatory Law Committee

This paper has been prepared as part of a consultation process. Its contents should not be taken as legal advice in relation to a particular situation or transaction.

Memorandum

Private Contracts and Schedule 8 of the European Union (Withdrawal) Act 2018

This memorandum sets out the common position of the firms who jointly authored it¹ and the CLLS Regulatory Law Committee on the construction of paragraphs 1 and 2 of Schedule 8 to the European Union (Withdrawal) Act 2018.

1 Background

- 1.1 Paragraphs 1 and 2 of Schedule 8 to the European Union (Withdrawal) Act 2018 (the “**EUWA**”) (as set out in Annex 1 to this memorandum) amend ‘ambulatory’ references to EU legislation in in-scope instruments and documents so as to refer to:
 - 1.1.1 in the case of paragraph 1, which applies to references to retained direct EU legislation², the version of such EU legislation as it applies in the UK at exit day by virtue of the EUWA and, unless the contrary intention appears, as modified by domestic law from time to time; or
 - 1.1.2 in the case of paragraph 2, which applies to references to EU Treaties, EU instruments or other documents of an EU entity³, the version which had effect immediately prior to exit day.
- 1.2 ‘Ambulatory’ references to EU legislation are, by virtue of paragraphs 1(1)(b) and 2(1)(b) of Schedule 8 to the EUWA, references to the relevant piece of EU legislation “as it has effect from time to time”.
- 1.3 The effect of these provisions is to ensure that existing references to specific pieces of EU legislation as amended from time to time, will be to the relevant EU legislation ‘frozen’ as at the date the UK leaves the EU, except to the extent that the relevant EU legislation is incorporated into domestic law and is then or subsequently amended by domestic law.
- 1.4 For example, where these provisions apply:
 - 1.4.1 an ambulatory reference to an EU regulation becomes a reference to that regulation as ‘on-shored’ in the UK under the EUWA at exit day and, unless the context otherwise requires, as subsequently amended by UK domestic law; and
 - 1.4.2 an ambulatory reference to an EU directive becomes a reference to that directive as it was in effect immediately prior to exit day, irrespective of subsequent changes to that directive in the EU.
- 1.5 This memorandum focuses on the question of whether English law governed private contracts are within the scope of paragraphs 1(1)(a)(iii) and 2(1)(a)(iii) of Schedule 8 to the EUWA (the “**Related Documents Provisions**”), with the result that ambulatory references to EU legislation in such contracts would be amended in accordance with those provisions.
- 1.6 For the avoidance of doubt, references to ‘private contracts’ in this memorandum also include deeds and other private instruments and documents.

2 Executive Summary

- 2.1 In our view, private contracts are not within the scope of the Related Documents Provisions. This is based on the following:

¹ Allen & Overy LLP, Clifford Chance LLP, Freshfields Bruckhaus Deringer LLP, Linklaters LLP and Slaughter and May.

² See Section 20 of the EUWA for the definitions of *inter alia* “retained EU law”, “retained direct EU legislation”, “exit day” and “domestic law”.

³ See Section 21(1) of the EUWA and Schedule 1 to the Interpretation Act 1978 for the definitions of *inter alia* “EU Treaties”, “EU instrument” and “EU entity”.

- 2.1.1 the application of English law principles of statutory interpretation support a narrow construction of the Related Documents Provisions, such that private contracts do not fall within their scope; and
- 2.1.2 the consequences of applying the Related Documents Provisions to private contracts would be significant and inappropriate in many circumstances, conflicting with the parties' intentions and interfering with freedom of contract.

3 Statutory Interpretation of the Related Documents Provisions

There are a number of reasons why, in our view, the Related Documents Provisions do not apply to private contracts on the basis of existing English law principles of statutory interpretation, as set out below.

3.1 Plain meaning of the text

First, the drafting of the EUWA itself. The Related Documents Provisions are drafted to capture "*any document relating to anything falling within sub-paragraph (i) or (ii)*". If the intention was to capture private contracts, simply stating "*any other document of whatever nature*" would have been sufficient, and far clearer on this point. The addition of "*relating to anything falling within sub-paragraph (i) or (ii)*" suggests that the legislature must have intended some additional characteristic to be present before a document falls within the scope of this provision i.e. it is not enough that there is a document which simply refers to a piece of EU legislation ('relating to' is a narrower concept than 'referencing'⁴). Examples of documents which could be said to 'relate to' an enactment or a piece of EU legislation would be official documents such as green papers, white papers and explanatory memoranda (which accompany a piece of legislation), or waivers and other permissions made or granted by an official body in connection with a relevant piece of legislation. These are in nature quite different to private contracts and are very closely linked to legislation. In the same way that it makes sense for the EUWA to amend cross-references to EU legislation in UK legislation (whether existing or on-shored pursuant to the EUWA – this is the impact of sub-paragraphs (i) and (ii)), it makes sense for the EUWA to amend official documents that are closely connected to the relevant UK enactment or on-shored EU legislation.

Furthermore, Schedule 8 to the EUWA has effect by virtue of Sections 23(5) and (7) of the EUWA. Those sub-sections refer, respectively, to Parts 1 and 2 of Schedule 8 containing 'consequential provision' and to Parts 3 and 4 of Schedule 8 containing 'transitional, transitory and saving provision'. These expressions are, by convention, used in UK legislation to describe provision made in relation to legislation, or instruments or actions giving effect to legislation, rather than private contracts.

3.2 *Ejusdem generis* principle

The analysis set out in paragraph 3.1 is supported by the application of the *ejusdem generis* principle of statutory interpretation. This provides that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. For example, in relation to a provision which makes it unlawful for a person concerned with the provision of "goods, facilities or services" to discriminate on racial grounds, the word "facilities" was taken to not have a wholly unrestricted meaning but was instead construed to be limited to facilities that are akin to goods or services.⁵

A genus can be identified as a result of sub-paragraphs (i) and (ii) in each of paragraphs 1 and 2 of Schedule 8 to the EUWA – these have a common scope of UK legislation (whether directly enacted or on-shored via the EUWA). To interpret the Related Documents Provisions as capturing *any* private law contract would therefore go beyond this genus (unlike the interpretation set out in paragraph 3.1,

⁴ This wording is also narrower than the wording used in paragraph 45(2)(b)(ii) of Schedule 8 EUWA, which applies to documents issued "under or in connection with" retained EU law.

⁵ *Kassam v Immigration Appeal Tribunal* [1980] 1 WLR 1037

which would be more consistent). The application of this principle therefore supports a narrow construction of the Related Documents Provisions.

This is supported by the contrast with Section 23(3) of the Interpretation Act 1978 which is clearly intended to apply certain provisions of that Act to private law instruments, including written contracts, as it refers to "deeds and other instruments and documents". In that context, the reference to "documents" forms part of a phrase which includes private law instruments and therefore can be construed to cover written contracts.

It is also supported by the other contexts in which the EUWA uses the term "document". For example, paragraph 2(1)(c) of Schedule 8 itself refers to the "EU Treaties, any instrument or any other document of an EU entity", which suggests that the term "document" is used to refer to official documents rather than private law instruments.⁶

3.3 Detriment to property rights and economic interests

When construing Acts of Parliament, a principle which the English courts have applied is that the property and other economic interests of a person should be respected. This has been applied in caselaw to avoid construction of an Act of Parliament in way that would interfere with or prejudice established private rights under contracts, unless the statute is clearly intended to do so.⁷ It has previously been held that "*in the case of ambiguity, it is resolved in such a way as to...cause less interference...with such rights and liberties as existing contractual obligations*".⁸

As discussed in more detail in paragraph 4, the impact of construing the Related Documents Provisions widely would be to potentially materially alter the rights and liabilities of parties under a large number of existing contracts.

If the provision were capable of more than one construction, proper principles of construction require an interpretation to be taken which has the lesser effect on existing contractual rights, unless there is a clear intention otherwise. Applying this principle to this case would clearly support a narrow construction of the Related Documents Provisions.

Consideration could also be given to the implications that extending the Related Documents Provisions to private contracts would have from a human rights perspective. However, this is outside the scope of this memorandum.

3.4 Construction against 'absurdity'

It is also a principle of statutory construction that an interpretation should be avoided that produces an absurd result. 'Absurdity' in this context has been given a wide meaning, including any result which is illogical or impracticable.⁹ Paragraph 4 goes into further detail on the impact of applying the Related Documents Provisions to private contracts, and in particular the discrepancies and uncertainty which would arise – such consequences would be 'absurd' (in light of the scope noted above). This includes the fact that the application of the Related Documents Provisions to private contracts would have the result of statutorily amending contracts with no UK nexus to refer to UK legislation. This is further supported by the fact that, were the Related Documents Provisions to apply to private contracts, only written private contracts are amended (as 'documents'), whereas oral contracts would not be. This would create an unwarranted distinction between types of private contract and, again, support a narrow construction.

⁶ See also Sections 13(15) and (16), paragraphs 1(3)(b) and 4(1)(b)(ii) and (2) of Schedule 5 and paragraph 45(1), (2)(a) and (b)(ii) and (3) of Schedule 8 to the EUWA.

⁷ *Allen v Thorn Electrical Industries Ltd* [1968] 1 QB 487

⁸ Winn L.J., *Allen v Thorn Electrical Industries Ltd*

⁹ *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20

3.5 Legislative history of the EUWA

Finally, it is also a principle of interpretation of UK legislation that attention may be paid to the enacting history of the relevant Act of Parliament, including certain statements set out in the Official Report of Debates ('Hansard') on the Bill for the Act¹⁰ under specified conditions (i.e. a statement by a Minister), to the extent relevant for understanding the statement and its effect. There are a number of sources that are relevant.

First, the UK government white paper¹¹ in relation to the European Union (Withdrawal) Bill (the "**Bill**") did not make reference to any impact of the proposed legislation on private contracts. The white paper does, however, provide guidance as to the overall objectives of the EUWA, which is a relevant factor in its construction.¹² The white paper makes clear that the focus of the Bill is to "*convert the body of existing EU law into domestic law*", as well as to make changes to "*ensure that the domestic statute book continues to function once we have left the EU*", including by creating powers to make secondary legislation. Applying the Related Documents Provisions to private contracts would go beyond this objective – it is neither converting EU law into English domestic law nor ensuring the UK statute book functions effectively upon exit. There is also some expectation that, if the intention was to amend private contracts in such a broad manner (with potentially significant and adverse effects on private contracting parties), this would have been very clearly identified as an outcome as part of information made available with the Bill.

Secondly, it is worth noting two references made to the Related Documents Provisions during the Bill's passage through the UK parliament:

- (i) Steve Baker MP (at the time, Parliamentary Under Secretary of State at the Department for Exiting the European Union) referred to these provisions during the House of Commons debate on 20 December 2017¹³ and stated that "*I understand that this last provision—the reference to documents and whether or not that includes contracts—has concerned my hon. Friend Robert Neill. The Government are alive to concerns that we should not unduly disturb the operation of private contracts, or prevent parties to a contract from being able to give effect to their intentions.*"
- (ii) Lord Callanan (Minister of State at the Department for Exiting the European Union) stated during the House of Lords debate on 8 May 2018¹⁴ that "*the Government intend to consult further on ambulatory references—about which I am sure noble Lords are concerned—particularly in relation to contracts. Subject to the outcome of that consultation, further legislation might be brought forward under the consequential powers in the Bill*".

Each of these statements adds weight to the argument that the Related Documents Provisions should not be construed to capture private contracts. In particular, taking the wider interpretation would surely 'unduly disturb' the operation of private contracts. This would be inconsistent with the first statement. Furthermore, Lord Callanan's statement implies that something additional (e.g. further legislation) would be required before the Related Documents Provisions could be applied to private contracts. This suggests, in the absence of such additional action, that it should be construed narrowly.

¹⁰ *Pepper (Inspector of Taxes) v Hart* [1990] 1 WLR 204

¹¹ *Legislating for the United Kingdom's withdrawal from the European Union* – Department for Exiting the European Union, March 2017, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf

¹² *NWL Ltd v Nelson and Laughton, The Nawala* [1979] 1 WLR 1294 – Lord Scarman stated: "*It is wrong to attempt to construe any section of subsection of these Acts without reference to their legislative purpose.*"

¹³ [https://hansard.parliament.uk/commons/2017-12-20/debates/EDBDFC17-C424-4348-A515-78BD8203367E/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/commons/2017-12-20/debates/EDBDFC17-C424-4348-A515-78BD8203367E/EuropeanUnion(Withdrawal)Bill)

¹⁴ [https://hansard.parliament.uk/lords/2018-05-08/debates/A8AB0BD8-E2C2-499D-AE7B-B3A5B7B09D35/EuropeanUnion\(Withdrawal\)Bill](https://hansard.parliament.uk/lords/2018-05-08/debates/A8AB0BD8-E2C2-499D-AE7B-B3A5B7B09D35/EuropeanUnion(Withdrawal)Bill)

Finally, the Explanatory Notes¹⁵ which accompany the EUWA contain an explanation of the objective and effect of paragraphs 1 and 2 of Schedule 8 (as set out in Annex 2 to this memorandum). The objective is to ensure that modifications of EU law made by the EU on or after exit day do not form part of UK domestic law. No mention is made of private contracts and it would not be necessary to extend the Related Documents Provisions to private contracts in order to achieve the stated objective.

4 The potential impact of the Related Documents Provisions on private contracts

If the Related Documents Provisions were construed as applying to private contracts, the consequences would be significant and wide-ranging. For the purposes of this memorandum, we assume that documents could only be caught where governed by the laws of England and Wales, Scotland or Northern Ireland. The remainder of this paragraph focuses on English law contracts because of the prevalence of the choice of English law for international private contracts.

4.1 Use of English law internationally

English law is widely used as the governing law for international contracts, including in contracts with little or no UK nexus.¹⁶ This would include, for example, contracts entered into between two EU27 entities or an EU27 entity and a party located outside the EU (e.g. in Asia or the US), where references to EU legislation would be common, and also contracts entered into between parties located outside the UK and EU27. It is also the case that English law contracts are used across a wide variety of industries (including agriculture, financial services, shipping, intellectual property and tax (amongst many others)). English law is popular on this scale in large part because of its predictability and its willingness to give effect to the commercial bargain reached between the parties.

It is clear that to construe the Related Documents Provisions as applying to private contracts could adversely affect parties who have chosen to have their arrangements governed by English law. First, the impact of making this change to a private contract will depend on the terms of the contract in question – it is, however, conceivable that parties could be put into default or face other adverse consequences under such terms as a result of this change. For example, a party may have represented as to its authorisation under, or compliance with, a piece of EU legislation, which would no longer be accurate if amended to refer to the UK on-shored version. Even without such consequences arising, there is a material risk that such a change would significantly change the meaning and, consequently, the risks, rights and obligations of the parties to the contract in question. This has serious implications for the predictability of English law.

Secondly, it will be inappropriate in many circumstances for references to EU legislation to be amended to refer to the UK domestic equivalent (as amended from time to time), or the version that was incorporated into domestic English law immediately prior to exit day. As noted above, English law is often chosen as the governing law for contracts where there is no UK nexus, raising the possibility that entities will suddenly find themselves bound to meet English law requirements which have no relevance to their arrangement. This could apply, for example, to contracts between EU27 entities and Asian/US entities. These parties may find that on exit day the terms of their contract are mandatorily amended without their knowledge or consent and in a way that is simply not appropriate for their relationship. Such an amendment could put a party in breach of the law that applies to it, particularly if that party is established in an EU member state.

Even for private contracts entered into between two UK entities, the amendment of references to EU legislation in the way contemplated by the Related Documents Provisions (if construed to apply to private contracts) may not be appropriate. The geographical scope of the contract and location of the parties is not itself definitive, given the variety of situations in which a contract may be entered into. For example, a contract entered into between two UK entities may form part of a supply chain that

¹⁵ http://www.legislation.gov.uk/ukpga/2018/16/pdfs/ukpgaen_20180016_en.pdf

¹⁶ Statistics made available by the Ministry of Justice show that for the financial year 2012-13 81% of claims issued in the Admiralty, Commercial and Technology Commercial Court involved a foreign (non-UK) party and 49% involved only foreign parties - <https://www.gov.uk/government/publications/foi-releases-for-january-2014> (Commercial court cases)

ultimately exports the relevant item into the EU, with the result that references to EU legal requirements may be necessary and entirely appropriate even post-Brexit.

Finally, such an approach would undermine the principle of freedom of contract. Parties are given no ability to override the effect of the Related Documents Provisions, to the extent they are construed to capture private contracts.¹⁷ As a result, there is no way to give effect to the parties' intentions no matter how clearly expressed in the contract that they intend the "EU" version of legislation to apply rather than the version which applied immediately before exit day and is on-shored into English domestic law. In particular, this would mean that the parties to an existing English law contract affected by the Related Documents Provisions could not, in advance of exit day, remediate any adverse impact of the Related Documents Provisions by amending their contract explicitly to refer to the "EU" version of legislation because that amendment would itself be overridden by the Related Documents Provisions. The only way to avoid this result would be to change the governing law of the contract to a law other than the law of part of the UK.

The continued choice of English law as the governing law for contracts internationally will remain important to the UK post-Brexit.

4.2 Scope of the Related Documents Provisions and application to private contracts

'Ambulatory' references

The concept of an 'ambulatory' reference is difficult to apply to private contracts, which use a wide variety of drafting depending on the context, the sophistication of the parties and the overall purpose of the contract. Numerous uncertainties and conflicting approaches could arise if the Related Documents Provisions were applied to private contracts. For example, even where the reference does capture some changes to the piece of EU legislation over time, it may not be clear whether the reference is 'ambulatory' for the purposes of the Related Documents Provisions (e.g. a reference to EU legislation 'as amended from time to time' would seem to be caught, but the application of this concept to a reference to EU legislation 'as amended' up to a particular date or as 'modified' or 're-enacted' is less clear).

Similarly, even where a reference to EU legislation in a private contract is not expressly 'ambulatory', questions may arise as to whether that reference could be ambulatory by implication. This will depend on English common law rules of construction and implied terms and their application to the specific contract, and would be highly fact-specific.

The result would be inconsistency between contracts and increased uncertainty. This would arise not as a result of the parties' intentions (identified through established principles of contractual construction) but in many cases as a result of how the contract happened to be drafted. This could create absurd results and, as noted above, suggests that the intention cannot have been to apply the Related Documents Provisions to private contracts.

EU regulations and directives

The difference in treatment of references to different types of EU legislation under paragraphs 1 and 2 of Schedule 8 to the EUWA also leads to odd results when applied to private contracts. References to "direct EU legislation" retained in English law pursuant to section 3 of the EUWA (the key example for these purposes being EU regulations) are caught by paragraph 1 and are therefore amended to refer to the on-shored UK equivalent, as amended by the UK from time to time. In contrast, references to EU directives would be caught by paragraph 2 and amended to refer to the version of the EU directive as it had effect immediately before exit day.

Such a distinction creates additional inconsistency when applied to private contracts, which may reference EU directives and EU regulations (for example, certain industry standard derivatives documents refer to the Bank Recovery and Resolution Directive (2014/59/EU)). This creates the

¹⁷ Paragraph 1(1) of Schedule 8 allows a contrary intention to prevail only for the purposes of displacing the application of modifications made by domestic law after exit day to retained direct EU legislation as it applies in the UK on exit day.

possibility of discrepancies even within the same contract, where one reference moves with the UK on-shored version and another remains frozen as a reference to that EU legislation as it had effect on exit day when it may have been intended that both references should continue to ambulate. This again suggests that private contracts were not intended to be captured by the Related Documents Provisions.

Other inconsistencies would also arise from the difference between how Related Documents Provisions address references to EU regulations and directives. Paragraphs 1 and 2 both only apply to an ambulatory reference if that document "relates to" any enactment or any retained direct EU legislation. Therefore, paragraph 1 applies to a document if it both refers to and relates to retained direct EU legislation (or if it refers to retained direct EU legislation and relates to an enactment). However, paragraph 2 only applies to a document referring to the EU Treaties, EU instrument or other document of an EU entity if it also relates to retained direct legislation or an enactment; that is to say, it is not enough that the document relates to the EU Treaty or EU instrument or document to which it refers. If the Related Document Provisions did apply to private contracts, this might have the result that they would vary the effect of a contract which refers to an EU regulation, on the basis that the contract "relates to" the EU regulation to which it refers, whereas the Related Document Provisions would not vary the effect of a contract which refers to an EU directive unless it somehow otherwise were shown to "relate to" retained direct EU legislation or an enactment.

5 Contractual Construction

For the reasons outlined in this memorandum, the adverse consequences of the Related Documents Provisions applying to private contracts are significant. However, in our view the application of UK rules of statutory interpretation mean that such provisions would not capture private contracts.

English common law principles of contractual construction would remain available to construe any English law contracts which refer to EU legislation. These principles are well-established and are supported by a long history of caselaw which provides a flexible and practical approach. It is clear that this is an area where no 'one-size-fits-all' approach, or even a more detailed set of default rules, can possibly cater for the infinite variety of private contracts and underlying contexts which may be relevant. Depending on the exact circumstances, a reference to EU legislation in a private contract may need to be construed as a reference to the EU version, the UK on-shored version or both – the construction may also need to be different when applied to each party or in different parts of the same contract. There would also be some types of contract, in particular those between UK and EU27 entities, where it is impossible to simply amend a reference to EU legislation one way or the other in a way which is appropriate for both parties. Reaching this level of subtlety through a default rule would be impossible.

It has been suggested that it is impossible for contracts to have referred to the UK ambulated version of EU legislation since it would not have existed at the time of the contract (and that therefore legislative provision should be made for it). In our view this is not a valid contention. It is perfectly conceivable that a reference to EU legislation in a private contract should be capable of being construed as a reference to the provision as it has effect in a particular part of the EU (e.g. with the meaning it has from time to time in, say, the UK or in Germany, particularly bearing in mind that the legislation may have been implemented with subtle differences in different EU member states) or that it should be to the legislation as it has effect from time to time in the whole of the EU (as that territory is defined from time to time), or indeed both. This will depend on the context and the facts of the particular contract and the particular reference, as illustrated in this memorandum. The distinction matters little where the EU legislation in question has the same meaning in all parts of the EU (i.e. pre-Brexit), but once there is divergence, even if only in the source of the legislation's authority, this distinction will become more important.

6 Reliance

This memorandum is not intended to constitute, and should not be interpreted as constituting, legal advice. No liability, duty or responsibility whatsoever is accepted by those involved in the preparation or approval of this memorandum to any person who relies on or otherwise uses it in whole or in part in any way.

Annex 1

Paragraphs 1 and 2 of Schedule 8 to the EUWA (emphasis added)

Existing ambulatory references to retained direct EU legislation

1 (1) Any reference which, immediately before exit day—

(a) exists in—

(i) any enactment,

(ii) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of domestic law by virtue of section 3, or

(iii) any document relating to anything falling within sub-paragraph (i) or (ii), and

(b) is a reference to (as it has effect from time to time) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of domestic law by virtue of section 3,

is to be read, on or after exit day, as a reference to the EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement as it forms part of domestic law by virtue of section 3 and, unless the contrary intention appears, as modified by domestic law from time to time.

(2) Sub-paragraph (1) does not apply to any reference which forms part of a power to make, confirm or approve subordinate legislation so far as the power to make the subordinate legislation—

(a) continues to be part of domestic law by virtue of section 2, and

(b) is subject to a procedure before Parliament, the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

(3) Sub-paragraphs (1) and (2) are subject to any other provision made by or under this Act or any other enactment.

Other existing ambulatory references

2 (1) Any reference which—

(a) exists, immediately before exit day, in—

(i) any enactment,

(ii) any EU regulation, EU decision, EU tertiary legislation or provision of the EEA agreement which is to form part of domestic law by virtue of section 3, or

(iii) any document relating to anything falling within sub-paragraph (i) or (ii),

(b) is not a reference to which paragraph 1(1) applies, and

(c) is, immediately before exit day, a reference to (as it has effect from time to time) any of the EU Treaties, any EU instrument or any other document of an EU entity,

is to be read, on or after exit day, as a reference to the EU Treaty, instrument or document as it has effect immediately before exit day.

(2) Sub-paragraph (1) does not apply to any reference which forms part of a power to make, confirm or approve subordinate legislation so far as the power to make the subordinate legislation—

(a) continues to be part of domestic law by virtue of section 2, and

(b) is subject to a procedure before Parliament, the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly.

(3) Sub-paragraphs (1) and (2) are subject to any other provision made by or under this Act or any other enactment.

Annex 2

Paragraphs 350 to 354 of the Explanatory Memorandum to the EUWA

Existing ambulatory references to retained direct EU legislation

350 Paragraphs 1 and 2 of Schedule 8 set out what happens with existing ambulatory references after exit. As described above, these are cross-references to EU instruments as they may be amended from time to time in the future. Paragraph 1A of Schedule 2 to the ECA provided a power to make such references, and some have also been made in primary legislation and using other powers.

351 The effect of paragraph 1(1) is that existing ambulatory references to EU regulations, decisions, tertiary legislation or provisions of the EEA agreement which are to be incorporated into domestic law under section 3 will, on exit day, become references to the retained versions of those instruments as they are modified from time to time by domestic law (unless the contrary intention appears). This approach ensures that modifications of EU law made by the EU on or after exit day do not form part of UK domestic law. The provision applies to ambulatory references which exist immediately before exit day, within (i) any enactment; (ii) any direct EU legislation retained by section 3 of the Act; and (iii) any document relating to anything falling within the former categories.

352 As set out in paragraph 1(2), however, this does not affect ambulatory references contained in powers in other domestic legislation (i.e. other than the power contained in the ECA) which will be preserved under section 2 of the Act and are subject to a procedure before Parliament or in the devolved legislatures. Paragraph 1(3) provides that paragraph 1(1) is also subject to other provision made by or under this Act, including the powers in sections 8 and 9.

Other existing ambulatory references

353 Paragraph 2 provides that any other existing ambulatory references (which are not dealt with by paragraph 1) to any of the EU treaties, other EU instruments (such as directives) or any other document of an EU entity do not continue to update after exit day. So, for example, where there is a reference in domestic legislation to an 'EU Directive as amended from time to time', this paragraph ensures that the reference to the directive should be read as a reference to the version that had effect immediately before exit day. Any updates to that directive which occur after exit day would not be brought into domestic law. Regulations made under section 7 will be capable of correcting any deficiencies which arise as a result. The provision applies to ambulatory references which exist immediately before exit day, within (i) any enactment; (ii) any direct EU legislation retained by section 3 of the Act; and (iii) any document relating to anything falling within the former categories.

354 As set out in paragraph 2(2), however, paragraph 2(1) does not affect ambulatory references contained in powers in other domestic legislation (i.e. other than the power contained in the ECA) which will be preserved under section 2 of the Act and which are subject to a procedure before Parliament or in the devolved legislatures. Paragraph 2(3) provides that paragraph 2(1) is also subject to other provision made by or under this Act, including the powers in sections 8 and 9.

**THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Karen Anderson (Chair, Herbert Smith Freehills LLP)
Matthew Baker (Bryan Cave Leighton Paisner LLP)
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Ben Kingsley (Slaughter and May)
Anthony Ma (Grant Thornton UK LLP)
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Rob Moulton (Latham & Watkins LLP)
James Perry (Ashurst LLP)
Stuart Willey (White & Case LLP)