

Dods Summary: Legislating for the UK's withdrawal from the EU





White Paper - Overview

On March 30 2017, the Department for Exiting the EU published a white paper entitled <u>Legislating for the UK's withdrawal from the EU</u>, which explained how the UK would legislate for exiting the EU by introducing a Great Repeal Bill at the start of the next parliamentary session.

This Bill will, wherever practical and appropriate, convert EU law into UK law from the day the UK leaves the EU.

Dods has produced a summary of the main proposals in the paper along with further detail on the potential timings, key people and role of the House of Lords as Parliament and its staff look ahead at potentially one of the largest legislative projects ever undertaken in the UK

- How is EU law implemented in the UK currently?
- Converting EU law into UK law
- Delegated powers in the Great Repeal Bill
- Devolved settlements
- Role of the House of Lords
- Secondary legislation: navigating the process
- Potential Timeline: Great Repeal Bill
- Key People: Great Repeal Bill
- Stakeholder reaction to Great Repeal Bill white paper

How is EU law implemented in the UK currently?

"Our approach of converting EU law into domestic law maximises certainty and stability while ensuring Parliament is sovereign"

- Some EU law applies directly without the need for specific domestic implementing legislation.
- Other parts of EU law needs to be implemented in the UK through domestic legislation.
- Domestic legislation other than the European Communities Act also gives effect to some of the UK's obligations under EU law.

In this white paper, the Government considers that, unless and until domestic law was changed by legislators in the UK, legal rights and obligations in the UK should where possible be the same after the country has left the EU.

EU regulations will not be 'copied out' into UK law regulation by regulation. Instead the Great Repeal Bill will make clear that EU regulations – as they apply the moment before the UK leaves the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise.

Repeal of the European Communities Act 1972

The Bill will repeal the European Communities Act on the day the UK leaves the EU.

- The <u>European Communities Act 1972</u> gave effect in UK law to the EU treaties.
- It incorporates EU law into the UK domestic legal order and provides for the supremacy of EU law.
- It also requires UK courts to follow the rulings of the Court of Justice of the European Union (CJEU).

The white paper states it's key to repeal the ECA to ensure there is maximum clarity as to the law that applies in the UK, and to reflect the fact that following the UK's exit from the EU, it will be UK law, not EU law, that is supreme.





Converting EU law into UK law

If the Great Repeal Bill did not convert existing EU law into domestic law at the same time as repealing the ECA, the UK's statute book would contain significant gaps once the UK had exited the EU.

Therefore:

- The Bill will convert directly-applicable EU laws into UK law.
- It will preserve the laws the UK has made (through secondary legislation) to implement EU obligations.
- New primary legislation is also needed to ensure that the domestic statute book reflects the UK's withdrawal from the EU, and to ensure an orderly transition.

The Bill will therefore convert EU law as it stands at the moment of exit into UK law before the UK leaves the EU. However, EU regulations will not be 'copied out' into UK law regulation by regulation.

Instead, the Bill will make clear that EU regulations – as they applied in the UK the moment before we left the EU – will be converted into domestic law by the Bill and will continue to apply until legislators in the UK decide otherwise.

- ⇒ This means it will be up to the UK Parliament (and, where appropriate, the devolved legislatures) to **amend, repeal or improve** any piece of EU law (once it has been brought into UK law) at the appropriate time once the UK has left the EU.
- ⇒ The Great Repeal Bill will also **create a power to correct the statute book** where necessary, to rectify problems occurring as a consequence of leaving the EU.

The timing of the Great Repeal Bill and associated secondary legislation will run in parallel to the negotiation process under Article 50.

The paper outlines some key sources of EU law:

<u>EU Treaties</u> – whilst much of the content of the treaties will become irrelevant once the UK leaves the EU, the paper notes the treaties (as they exist at the moment we leave the EU) may assist in the interpretation of the EU laws we preserve in UK law. *Example: The Working Time Directive*.

There are rights in the EU treaties that can be relied on directly in court by an individual, and the Great Repeal Bill will incorporate those rights into UK law.

<u>Court of Justice of the EU</u> – Leaving the EU ends the jurisdiction of the CJEU in the UK. The Great Repeal Bill will not provide any role for the CJEU in the interpretation of future laws and the Bill will not require the domestic courts to consider the CJEU's jurisprudence.

For as long as EU-derived law remains on the UK statute book, and to maximize certainty, the Great Repeal Bill will provide that any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law, as it exists on the day we leave the EU. Examples: calculation of holiday pay or application of VAT.

Supremacy of EU law

The paper notes that where a conflict arises between EU-derived law and new primary legislation passed by Parliament after the UK's exit from the EU, then newer legislation will take precedence over the EU-derived law the country had preserved. In this way, the Great Repeal Bill will end the general supremacy of EU law.

Charter of fundamental rights

The paper confirms the Charter of Fundamental Rights, that has the same legal status as an EU treaty, will not be converted into UK law by the Great Repeal Bill.

However, the UK's withdrawal will not change the UK's participation in the European Convention on Human Rights and there are no plans to withdraw from the ECHR.

Other legislation

The Great Repeal Bill will not aim to make major changes to policy or establish new legal frameworks in the UK beyond those which were necessary to ensure the law continues to function properly from day one.

Therefore, the Government will also **introduce a number of further bills** during the course of the next two years to ensure the UK is prepared for withdrawal such as a Customs Bill and an Immigration Bill.

New legislation will be required to implement new policies or institutional arrangements that go beyond replicating current EU arrangements in UK law.



Delegated powers in the Great Repeal Bill

"Given the scale of the changes that will be necessary and the finite amount of time available to make them, there is a balance that will have to be struck between the importance of scrutiny and the speed of this process"

The Bill will create powers to make secondary legislation. This will enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU.

It will also enable domestic law once we have left the EU to reflect the content of any withdrawal agreement under Article 50.

In the context of the Great Repeal Bill, relevant reasons for using secondary legislation include:

- matters which cannot be known or may be liable to change at the point when the primary legislation is being passed because the Government needs to allow for progress of negotiations;
- adjustments to policy that are directly consequential on our exiting the EU;
- to provide a level of detail not thought appropriate for primary legislation.

The paper maintains without these powers, it would require a prohibitively large amount of primary legislation to correct these problems.

Process

The Government proposes using existing types of statutory instrument procedure and the Bill will therefore provide for the negative and affirmative procedures to be used.

Constraints

The paper sets out expected constraints on the use of delegated powers:

- ⇒ Will ensure that the power will not be available where Government wishes to make a policy change which was not designed to deal with deficiencies in preserved EU derived law;
- ⇒ They will consider the constraints placed on the delegated power in section 2 of the ECA already being used;
- ⇒ The Government intends that the power in the Bill will come into force as soon as the Bill gains Royal Assent to ensure corrections can be made from day one;
- ⇒ Government will also ensure that the power is appropriately time-limited to enact the required changes.

Devolved settlements

The devolved settlements were, therefore, premised on EU membership. In areas where the devolved administrations and legislatures have competence, they are responsible for implementing the common policy frameworks set by the EU.

At EU level, the UK Government represents the whole of the UK's interests in the process for setting those common frameworks.

As powers are repatriated from the EU, it will be important to ensure that stability and certainty is not compromised, and that the effective functioning of the UK single market is maintained.

Government intends to replicate the current frameworks provided by EU rules through UK legislation. In parallel the UK will begin discussions with the devolved administrations to identify:

- where common frameworks need to be retained in the future;
- what these should be;
- where common frameworks covering the UK are not necessary.

The Bill will also give the devolved ministers a power to amend devolved legislation to correct law that will no longer operate appropriately, in line with the power the UK Government propose should be held by UK ministers.





Role of the House of Lords

The Great Repeal Bill will 'take back control' by repealing the European Communities Act and giving the UK full power over its regulatory and legislative programme. However, it has been noted that 'taking back control' in this instance appears to mean a "massive transfer of legislative competence from Parliament to Government", limiting Parliament's role in shaping the post-Brexit legislative landscape.

The House of Lords may not always be the most obvious ally of the man (and woman) on the street, but the unelected second chamber could have a pivotal role in limiting the powers of the executive: retaining the "appropriate balance of power" between government and parliament and between legal certainty and a blank cheque to adapt and change rights and obligations subject to political preferences.

Scrutiny

The House of Lords spends approximately 60 per cent of its time scrutinising legislation, and much of the heavy lifting in the Great Repeal Bill will take place in the Second chamber.

Whilst the House spends approximately five per cent of this time on secondary legislation, this looks set to change once the Great Repeal Bill is introduced, and will drastically change once it becomes an Act. However, the sheer volume of delegated legislation and the current process by which this is scrutinised will pose significant challenges.

Therefore, during this most comprehensive and complex legislative process, the Lords will scrutinise every line of the Bill, looking not only at the conversion process but the future changes the Government may wish to make to former EU law.

Primary vs secondary legislation

Of central importance will be assessing situations where the degree of change justifies primary rather than secondary legislation, which — whilst both Houses will be keen to ensure the Great Repeal Bill passes relatively quickly in order to get started on the real policy work of the forthcoming policy bills — could prove contentious. It is not yet clear whether the Lords may seek to insert 'sunset clauses' to limit the executive's future power, or perhaps insert provisions requiring it to report back within a certain timescale on certain areas.

By convention, the Lords will not reject a Bill proposed as part of a Government's election manifesto, however as we saw with the passage of the EU Withdrawal Bill, they have the power to amend the legislation, and highlight areas where the proposed legislation is lacking or cause for concern.

As the parliamentary timetable in the Lords is much less regimented than in the Commons, with debating time generally not capped and the number of amendments not limited, this could cause significant delays to the legislative timetable. However, the Government is more likely to be worried about the passage of the forthcoming 'Brexit Bills' dealing with setting out new UK laws covering immigration, tax, agriculture, trade and customs regimes, fisheries, data protection and sanctions amongst others.





Secondary legislation: Navigating the process

There has been much talk about the Great Repeal Bill conferring considerable powers to ministers to make significant policy and legislative changes through 'secondary legislation' and the impacts this could have on parliamentary scrutiny.

What is Secondary Legislation?

Whether it's called delegated legislation, statutory instruments (SI) or secondary legislation, the term refers to any legislative power conferred upon a person or body through an Act of Parliament.

Most government Acts will outline the principles of the law and then provide for ministers to fill out all the necessary detail at a later date through secondary legislation.

Some Acts allow ministers to amend primary legislation without Parliament having to pass a new Act, so called 'Henry VII powers'. Because secondary legislation receives far less parliamentary scrutiny than primary legislation these powers are often criticised for handing power from Parliament to the Government.

Parliamentary Scrutiny

The Government have estimated that 1000 pieces of secondary legislation will be needed to make the necessary corrections. This raises significant questions over how much parliamentary oversight they will receive as in the previous parliament (2010-2015) day to day Government business resulted in an average of 1071 statutory instruments per year alone – and most of them would not have received any parliamentary debate.

Affirmative v Negative Procedure

In the White Paper the Government have said they will use existing mechanisms for statutory instruments in the Bill. The most common procedures are the negative and affirmative procedures. The affirmative procedure is usually used for more substantive policy changes, and historically the negative procedure has been much more common. The Government have indicated that they envision the negative procedure being used for the majority of regulations in the Bill.

The rest of this section sets out the parliamentary procedure for both mechanisms.

Negative procedure

Step 1: Secondary Legislation is laid in Parliament

This is recorded and published in Votes and Proceedings

Step 2: Consideration by the Parliamentary Committee

There are two parliamentary committees that look at every SI.

The **Joint Committee on Statutory Instruments** examine the scope of the powers and whether they fall within the remit of the parent act.

The **Secondary Legislation Committee** have a wider remit and examine the policy implications of the regulations.

 Both committees publish weekly reports on the regulations they have examined to inform Parliament on whether it needs to pay considerable consideration to particular regulations.

Step 3: Each House has 40 sitting days to table an annulment

Commons: MPs can put down a motion to annul negative secondary legislation through an Early Day Motion "praying that the regulations be annulled".

EDM's tabled by the Official Opposition are more likely to get a debate, however even these are not guaranteed.

Lords: Peers can table a "motion to annul" secondary legislation. This will then be debated alongside the Government's own "motion to approve"

Step 4: Approval or Rejection

If after 40 sitting days neither House has either successfully annulled the regulations then they became law.

Analysis

The lack of opportunity and no guarantee of debate makes it very difficult for Parliament to effectively scrutinise and if desired, reject negative secondary legislation. The House of Lords last annulled a negative procedure in 2000 whilst the Commons last did in 1979.



Affirmative procedure

Step 1: Secondary Legislation is laid in Parliament

This is recorded and published in Votes and Proceedings

Step 2: Consideration by the Parliamentary Committee

 As with negative instruments both the Joint Committee on statutory Instruments and Secondary Legislation Committee examine the regulations.

Step 3: Debate in Parliament

Unlike under the negative procedure every instrument subject to the affirmative procedure receives some form of parliamentary debate.

Commons: All affirmative instruments get debated in a **Delegated Legislation Committee**. These are ad-hoc committees comprised of 16-18 MPs mirroring the make-up of the House. Debates in DLC's happen on "motions to consider" and not on whether to approve or reject the regulations.

Lords: Affirmative instruments are debated on a "motion to consider" either in **Grand Committee** or on the floor of the House depending on parliamentary time.

Step 4: Approval or Rejection

 Once the regulations have been debated they are moved on the floor of each chamber under a "motion to approve"

Commons: At some point in the day's business the speaker will ask the House if they agree regulations should be approved. Most of the time they are approved without any vote. However, an MP can force a vote by indicating dissent. The regulations will then de put to a balloted vote on the next sitting Wednesday.

Lords: Peers can table a motion to "decline to approve" the regulations. This motion can then be put to a vote by the Peer who tabled it.

Analysis

The affirmative procedure offers considerably more opportunity for parliament to reject secondary legislation. However, in practice it is still very rare. The Commons last did so in 1978 whereas the Lords last did in 2015 over the proposed changes to tax credits.

In reality the potential threat of defeat on affirmative procedures means parliament could force the Government to withdraw regulations and come back with alternative proposals rather than risk suffering a defeat.

Potential Timeline: Great Repeal Bill

Please read below a provisional timetable for the Bill's scrutiny through Parliament.

- White paper published 30 March 2017
- Bill introduced early in the 2017/18 session following its announcement in the Queen's
 Speech (due May 17 Whitsun recess from 25 May)
- Second reading and submitted to Bill Committee before the summer recess
- Committee stages in September 2017 and possibly following the conference recess
- Lords stages during the remainder of 2017 subject to ping pong
- Royal Assent in early 2018

The Government intends powers in the Great Repeal Bill to come into force as soon as the Bill gains Royal Assent, so that the process of correcting the statute book can begin. There will be just over a year for Parliament to pass any secondary legislation required before the UK plans to leave the EU, due in March 2019.

There has been suggestion that timing of legislation will depend on the extent to which these issues are covered in Article 50 negotiations allowing the Government to already make proposals for legislation in areas of of domestic policy, such as immigration.

Potential challenges ahead

There are several stages, where the parliamentary process may be delayed, as "the Great Repeal Act will convert existing EU law into domestic law, wherever practical", which may not always be the case such as for:

- Regulations that cannot be transposed through technical changes, but require primary legislation
- European law which requires amendments or adaptations before it can be transposed
- Secondary legislation giving effect to EU law but which may need to be amended due to the outcome of the negotiations
- Legal frameworks which require time to legislate for; a interim arrangement may need to be agreed
- Provisions giving ministers powers to make subordinate legislation where necessary based on the negotiations – this may be challenged by parliament where MPs want to ensure parliamentary sovereignty



Key People: Great Repeal Bill

Rt Hon David Davis- Secretary of State for Exiting the European Union

Responsibilities:



- Policy work to support the UK's negotiations to leave the European Union and to establish the future relationship between the EU and the UK; conducting the negotiations in support of the Prime Minister.
- supporting bilateral discussions on EU exit with other European countries; working very closely with the UK's devolved administrations, Parliament and a wide range of other interested parties on what the approach to those negotiations should be; leading and coordinating cross-Government work to seize the opportunities and ensure a smooth process of exit on the best possible terms.

Staff:

- Special Adviser James Chapman
- Special Adviser Raoul Ruparel
- Principle Private Secretary Jane Walker (<u>psdaviddavis@dexeu.gov.uk</u>)
- Parliamentary Private Secretary- Stewart Jackson MP (stewart.jackson.mp@parliament.uk)

Rt Hon David Jones MP- Minister of State for Exiting the European Union

Responsibilities:

- Co-ordinating work to make sure the UK is prepared for exit;
- Co-ordinating the development of a negotiation position on migration, security and justice issues; co-ordinating cross-Government work to ensure the views of stakeholders in the agriculture, fisheries, manufacturing, engineering and goods sectors are fed into the negotiation strategy.

Staff:

- Private Secretary- Danyal Suleman (<u>psdavidjones@dexeu.gov.uk</u>)
- Parliamentary Private Secretary- Jeremy Quinn MP(<u>jeremy.quin.mp@parliament.uk</u>)



Robin Walker MP- Parliamentary Under-Secretary of State, Department for Exiting the European Union

Responsibilities:

- Co-ordinating work to shape the UK's future relationship with the EU Institutions; co-ordinating the development of a negotiation position on market access and trade;
- co-ordinating cross-Government work to ensure the views of the Overseas Territories and Crown Dependencies, as well as those of stakeholders in network industries, charities and the environmental and services, including Financial Services, sectors are fed into the negotiation strategy.

Staff:

Private Secretary- Kirsty McVicar (<u>psrobinwalker@dexeu.gov.uk</u>)

Lord Bridges of Headley MBE- Parliamentary Under-Secretary of State, Department for Exiting the European Union

Responsibilities:

All Department responsibility in the House of Lords

Staff:

Private Secretary- Tim Cork-(<u>psgeorgebridges@dexeu.gov.uk</u>)





Opposition: Great Repeal Bill

Sir Keir Starmer KCB QC MP- Shadow Secretary of State for Exiting the European Union

Staff:

Parliamentary Email- <u>keir.starmer.mp@parliament.uk</u>

Jenny Chapman MP- Shadow Minister for Exiting the European Union

Staff:

- Parliamentary Email- <u>jenny.chapman.mp@parliament.uk</u>
- Secretary- Grace Wright- gracef.wright@parliament.uk
- Research Assistant- Elaine Hope- <u>elaine.hope@parliament.uk</u>

Matthew Pennycook- Shadow Minister for Exiting the European Union

• Employment and workers' rights; environment and climate change; financial services and accounting; tax; EU Budget; health; disability; transport; Wales.

Staff:

Parliamentary Email- <u>matthew.pennycook.mp@parliament.uk</u>

Paul Blomfield MP- Shadow Minister for Exiting the European Union

 Scotland; free movement; structural funds; business and trade; education; consumers.

Staff:

- Parliamentary Email- <u>paul.blomfield.mp@parliament.uk</u>
- Parliamentary Assistant Andrea Nichols- andrea.nichols@parliament.uk
- Parliamentary Researcher Tom Hunt-- <u>thomas.hunt@parliament.uk</u>

Baroness Hayter of Kentish Town- Shadow Minister for Exiting the European Union

Staff:

Parliamentary Email- <u>hayterd@parliament.uk</u>











Select Committees

Rt Hon Hilary Benn MP- Chair of Exiting the European Union Select Committee Staff:

- Parliamentary Email- <u>hilary.benn.mp@parliament.uk</u>
- Parliamentary Assistant- Sally Clark- <u>clarks@parliament.uk</u>
- Committee email- exeucom@parliament.uk
- Committee Media Officer Nick Davies- daviesnick@parliament.uk



Angus MacNeil MP- Chair of International Trade Committee

Staff:

- Parliamentary Email- <u>macneila@parliament.uk</u>
- Committee Clerk Lydia Menzies- menziesl@parliament.uk
- Committee Media Officer George Perry- perryg@parliament.uk







Stakeholder reaction to the white paper

Business and industry

EEF commented that the Great Repeal Bill went some way to achieving the certainty and clarity needed by businesses. The priority for business would be knowing that the regulatory framework with the EU would allow effortless trade as was currently the case, their chief executive said.



The **Federation of Small Businesses (FSB)** welcomed the stability and certainty brought by the white paper on the Great repeal Bill, saying it meant no sudden big changes in regulation over the next two years. http://bit.ly/2njrro5

The **British Chambers of Commerce (BCC)** were wary of unintended consequences for individual firms, sectors or business communities during the legislative transition, but welcomed the premise of stability and continuity at the heart of the Great Repeal Bill. http://bit.ly/2nPbmdC

Deputy Director General of the **CBI** Josh Hardie welcomed the Government's aim to give businesses certainty as the UK leaves the EU, stressing it was vital for companies to continue creating jobs and prosperity across all UK regions and nations. http://bit.ly/2nz5nYf

The group **Retail NI** has welcomed the EU Repeal Bill white paper as "an opportunity to remove and amend EU regulations and directives that restrict the business growth of independent retailers and small businesses owners". http://bit.ly/2oC1bXl

Political parties

Liberal Democrat Chief Whip Tom Brake commented upon the publication stating that the Bill represented a "shameless power grab under the cloak of secondary legislation would have made Henry VIII blush." He declared that his party would "grind the government's agenda to a standstill" if proper safeguards were not put in place.

Plaid Cymru has described the Great Repeal Bill as 'the biggest Westminster power grab since our annexation in 1536'. Plaid Cymru 's Brexit spokesperson, Jonathan Edwards said: "The people of Wales voted to leave the European Union and to take back control – they did not vote to allow unelected Whitehall Britocrats to grab power for themselves."

The **Scottish National Party (SNP)** stressed the Great Repeal Bill must not become a "great power grab" from the devolved administrations, and asked for further detail about what Legislative Consent Motions would be required from the Scottish Parliament.

Speaking on behalf of the **Welsh Liberal Democrats**, Mark Williams MP said he doubted the Government's commitment to Wales. "As Wales loses access to the world's biggest single market, decisions about our economy, our industries, and our environment must be made in Wales for the benefit of the people of Wales" he added.

Devolved governments

Responding to the publication of the Bill, the **Scottish Government** has emphasised that Brexit must not see any existing competences or powers removed from the Scottish Parliament. Michael Russell, Minister for UK Negotiations on Scotland's Place in Europe, said the Great Repeal Bill risks undermining the devolution settlement. http://bit.ly/2nD7kVn

Upon publication of the Bill, the **Welsh Government** called on the UK government to not lose sight of the needs of businesses, workers and potential investors in order to protect the Welsh economy. First Minister Carwyn Jones said "We stand ready to work with the UK government to help make the Great Repeal Bill succeed and ensure it provides the clarity and reassurance the Welsh economy urgently needs." http://bit.ly/2oc7p3f

Environment

Responding to the publication of the Great Repeal Bill, **Friends of the Earth** warned that both the European laws and principles protecting the environment must be brought over upon the UK leaving the EU. Samuel Lowe, Friends of the Earth campaigner, said "The Great Repeal Bill is necessary but on its own, it isn't enough to protect nature and our environment. We must commit to bringing over the precautionary principles which underpin our high environmental and wildlife standards."

Technology

techUK have stated that the Great Repeal Bill will be vital in giving the tech businesses the clarity and certainty they need to keep innovating, trading and growing as the UK leaves the European Union. techUK's Deputy CEO, Antony Walker also emphasised that maintaining a stable and predictable legal framework must be a fundamental objective of the Brexit process. http://bit.ly/2ocdJb6

Local government

Commenting on its publication, Lord Porter, Chairman of the **Local Government Association** warned that Brexit would have a significant impact on local councils, with EU laws impacting on many local government services. He called for local government to be included in decisions on how EU laws would be converted to domestic law and suggested Brexit should allow new legislative freedoms and flexibilities for councils. http://bit.ly/2okYI4f



Home affairs and justice

Neil Dearden, director of **Global Justice** Now, responding to the publication of the White Paper, said the use of Henry VIII powers on such a scale "should send a chill down the spine of anyone who genuinely believes in parliamentary sovereignty". He called it a "frightening challenge to our rights" and raised concerns over the lack of mechanisms for scrutiny and accountability.

Trade Unions

Responding for **Unite the Union**, Len McCluskey the union's general secretary, called on the Government to bring forward proposals to honour the pledge to protect workers' rights once the UK leaves the EU. http://bit.ly/2okHWlw

The **Trade Union Congress (TUC)** general secretary, Frances O'Grady, said the Prime Minister should make good on her promise and put a clause in the Bill to protect workers' rights. http://bit.ly/2oC3NV8

The Government has said it welcomes feedback on the White Paper. Comments can be sent to repeal-bill@dexeu.gov.uk

Key documents:

- ◆ The Great Repeal Bill: White Paper
- David Davis' Commons statement on the Great Repeal Bill White Paper
- Certainty and stability for UK businesses as negotiations begin on new relationship with Europe
- Guidance for businesses on the Great Repeal Bill

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