These notes refer to the European Union Act 2011 (c.12) which received Royal Assent on 19 July 2011

EUROPEAN UNION ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 3: General

Status of EU law

Section 18: Status of EU law dependent on continuing statutory basis

118. *Section 18* is a declaratory provision which confirms that directly applicable or directly effective EU law falls to be recognised and available in law in the United Kingdom only by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act of Parliament. The words 'by virtue of any other Act' cover other Acts of Parliament, UK subordinate legislation made under Acts and, because of the particular context of this clause, also cover Acts and measures of the devolved legislatures in exercise of the powers conferred on them by the relevant UK primary legislation.

119. This reflects the dualist nature of the UK's constitutional model under which no special status is accorded to treaties; the rights and obligations created by them take effect in domestic law through the legislation enacted to give effect to them. Although EU Treaties and judgments of the EU Courts provide that certain provisions of the Treaties, legal instruments made under them, and judgments of the EU Courts have direct application or effect in the domestic law of all of the Member States, such EU law is enforceable in the UK only because domestic legislation, and in particular the European Communities Act 1972, makes express provision for this. This has been clearly recognised by the Courts of the UK. As Lord Denning noted in the case of *Macarthys Ltd v. Smith* ([1979] 1 WLR 1189): "Community law is part of our law by our own statute, the European Communities Act 1972. Community law is now part of our law: and whenever there is any inconsistency, Community law has priority. It is not supplanting English law. It is part of our law which overrides any other part which is inconsistent with it."

120. This declaratory provision was included in the Act in order to address concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts. By providing in statute that directly effective and directly applicable EU law only takes effect in the UK legal order through the will of Parliament and by virtue of the European Communities Act 1972 or where it is required to be recognised and available in law by virtue of any other Act, this will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU Treaties or international law and principles which has become an integral part of the UK's legal system independent of statute.

121. In the 'Metric Martyrs' case (*Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin)), attempts were made, but rejected, to run the proposition that the legislative and judicial institutions of the EU may set limits to the power of Parliament to make laws which regulate the legal relationship between the EU and the UK. It was argued

that, in effect, the law of the EU includes the entrenchment of its own supremacy as an autonomous legal order, and the prohibition of its abrogation by the Member States. This argument was rebutted by the High Court, who noted that Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the European Communities Act 1972.

122. Paragraph 59 of the judgment in the 'Metric Martyrs' case illustrates this point. Lord Justice Laws stated:

> "**59** Whatever may be the position elsewhere, the law of England disallows any such assumption. Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the ECA. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal. Thus there is nothing in the ECA which allows the Court of Justice, or any other institutions of the EU, to touch or qualify the conditions of Parliament's legislative supremacy in the United Kingdom. Not because the legislature chose not to allow it; because by our law it could not allow it. That being so, the legislative and judicial institutions of the EU cannot intrude upon those conditions. The British Parliament has not the authority to authorise any such thing. Being sovereign, it cannot abandon its sovereignty. Accordingly there are no circumstances in which the jurisprudence of the Court of Justice can elevate Community law to a status within the corpus of English domestic law to which it could not aspire by any route of English law itself. This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the United Kingdom's hands. But the traditional doctrine has in my judgement been modified. It has been done by the common law, wholly consistently with constitutional principle.

123. This section does not alter the existing relationship between EU law and UK domestic law; in particular, the principle of the primacy of EU law. The principle of the primacy of EU law was established in the jurisprudence of the European Court of Justice before the accession of the United Kingdom to the European Communities. This is made clear, for example, in the judgment of the European Court of Justice in *Costa v ENEL* [1964] ECR 585 (6/64), and Parliament accepted this principle in approving the European Communities Act 1972. As Lord Bridge noted in his judgment in *R v. Secretary of State for Transport, ex p. Factortame (No. 2)* [1991] 1 All ER 70:

> "Under the terms of the Act of 1972 it has always been clear that it was the duty of the United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that, in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy.

124. Thus this section is declaratory of the existing legal position. The rights and obligations assumed by the UK on becoming a member of the EU remain intact. Similarly, it does not alter the competences of the devolved legislatures or the functions of the Ministers in the devolved administrations as conferred by the relevant UK Act of Parliament.