



BRIEFING PAPER

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The European Union (Withdrawal) Bill: exit day

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Summary

This briefing paper addresses the domestic legal concept of exit day, as defined by the provisions of the *European Union (Withdrawal) Bill* (EUW Bill) as introduced. The paper also addresses some of the amendments tabled relating to exit day, including those tabled by the Government and Sir Oliver Letwin. The paper has been prepared for day 8 of the Committee Stage of the EUW Bill in the House of Commons, scheduled to take place on 20 December.

The Commons Library Briefing, [European Union \(Withdrawal\) Bill \(CBP8079\)](#), covers all of the provisions in the Bill.

Exit day and the EUW Bill as introduced

The UK Government triggered Article 50 on 29 March 2017, beginning the formal process of negotiating the UK's withdrawal from the European Union (EU). The EUW Bill was published on 13 July 2017 and is designed to prepare the UK's statute book for the day that the UK leaves the EU.

The EUW Bill specifies that there will be an exit day: **clause 1** of the EUW Bill states that "the European Communities Act 1972 is repealed on exit day". The European Communities Act 1972 (ECA) gives effect to the UK's membership of the EU.

Clause 14(1) defines "exit day" as: "such day as a Minister of the Crown may by regulations appoint". The regulations made under this power will not be subject to any parliamentary procedure.¹ In the Delegated Powers Memorandum, the Government justifies this power, on the basis that the date of exit day is "dependent on the withdrawal negotiations with the EU".²

Schedule 7 Part 3 paragraph 13 (b)(ii) prescribes that all powers in the EUW Bill, including the power to appoint exit day, could be used "to make different provision for different cases or descriptions of case, different circumstances, different purposes or different areas". This could enable the Government to decide that exit day is one particular day for some parts of the Bill, but another day for others.

Exit day appears as a reference point in a number of places in the EUW Bill. For example: exit day is the cut off point for the conversion of direct EU legislation under **clause 3**; and the sunset clause on the power in **clause 9** (under which the Government may use secondary legislation to implement the Withdrawal Agreement) means that the power cannot be used after exit day.

The domestic legal concept of exit day, as defined by the EUW Bill as introduced, is distinct from the time when the UK will leave the EU. Exit day is defined in a way that grants some flexibility which could be used to adapt to: a) any shifts in the timing as to when the UK formally leaves the EU; and b) any commitments in the withdrawal agreement that might require adaptation to the way in which the provisions of the EUW Bill operate.

¹ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 73.

² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 72.

Government amendments 381, 382 and 383

On Friday 10 November, the Government tabled amendments 381, 382 and 383 in order to enshrine in law the commitment that exit day will be 11pm GMT, 29 March 2019 (midnight Brussels time). The Secretary of State for Exiting the EU, David Davis stated: "We've listened to members of the public and Parliament and have made this change to remove any confusion or concern about what 'exit day' means".

The amendments reflects the UK Government and the EU's stated intention, confirmed in the Joint Report on Phase 1 of the negotiations, that the UK will leave the EU on 29 March 2019.³

Amendments 399-405

On 15 December, Sir Oliver Letwin tabled a package of amendments that would enable the definition of exit day in clause 14 to be altered, after the EUW Bill receives Royal Assent, by secondary legislation "if the day or time on or at which the United Kingdom ceases to be a member of the EU is different from that specified in the definition".

Exit day, Article 50 and the withdrawal agreement

Domestic legislation will not determine when the UK will leave the EU. The day that the UK will leave the EU is determined by Article 50(3) of the Treaty on European Union (TEU), which sets three possibilities for when the EU Treaties will cease to apply:

- the date of entry into force of the withdrawal agreement, or
- "failing that", two years after the notification of withdrawal, unless
- the European Council (EU27) and the UK unanimously decide to extend the two-year period.

Both sides are aiming for 29 March 2019, two years after the UK's [notification](#) of intention to withdraw. Article 50(3) of the TEU enables the UK and EU27 to agree that the withdrawal agreement to enter into force on *any date* before or after 29 March 2019. If there is no agreement and no extension, the EU Treaties will automatically cease to apply to the UK.

How could the EUW Bill be amended after it is enacted?

The exit day provisions could be amended after the EUW Bill is enacted. Clause 9 contains a power to change the provisions in the EUW Bill by secondary legislation in order to implement the withdrawal agreement. If the withdrawal agreement provided a different date from 29 March 2019, this power could be used to amend the relevant provisions.⁴ Alternatively, primary legislation could also be used to amend the EUW Bill and provide for a different exit day. On 13 November 2017, the Government announced it would bring forward a Withdrawal Agreement and Implementation Bill in order to give legal effect to the withdrawal agreement.

³ [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p15

⁴ The amendment made to clause 9 on 13 December would mean that clause 9 could only be used to amend the definition of exit day if Parliament has already enacted "a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union" HC Deb 13 December 2017 Division 68

How would a transitional period affect exit day?

The Government has indicated that it intends to secure a transitional period as part of the withdrawal agreement. The transitional period (or implementation period) would apply immediately after exit day until any future relations agreement came into force. The EU and UK have said that any transitional period would see the existing EU rules, regulations and institutional structures continue to apply in the UK for a time-limited period.

The Government has not yet set out how the transitional period would be implemented in domestic law. The Government has said that the EUW Bill is not designed to provide for transitional arrangements.⁵ As a consequence, the provisions and concepts within the EUW Bill, including exit day, may have to be adapted in order to give effect to transitional arrangements.

⁵ House of Commons Exiting the EU Committee, [Oral evidence: The European Union \(Withdrawal\) Bill, HC 373, Thursday 26 October 2017](#), qq184 and 187 (Steve Baker MP Parliamentary Under Secretary of State, Department for Exiting the European Union)

1. Introduction

The *European Union (Withdrawal) Bill* (the EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the *European Communities Act 1972* and removing the competence of European Union institutions to legislate for the UK.

The Bill had its [Second Reading debate](#) in the House of Commons on 7 and 11 September 2017. The [Programme Motion](#) passed at the end of the Second Reading debate provides for eight days in Committee of the Whole House.

The Department for Exiting the European Union (DEXEU) has published [Explanatory Notes](#) to the Bill, a series of [factsheets](#) on the Bill's provisions and a [Delegated Powers Memorandum](#) (DPM) addressed to the House of Lords Delegated Powers and Regulatory Reform Committee.

A large number of amendments have been tabled for the Committee stage. An up to date list of amendments can be found on Parliament's [bill pages](#) online.

The Commons Library produced a [briefing paper](#) to inform the Second Reading debate which sets out full details of the provisions of the Bill and extensive commentary on them.

This briefing paper has been produced to inform the Committee of the Whole House debate on clause 14, which refers to exit day, and is scheduled to take place on day eight (20 December 2017).

The House of Lords Constitution Committee has published an [Interim Report](#) on the Bill which includes conclusions and recommendations relevant to the debate on clause 14. The House of Lords Delegated Powers and Regulatory Reform Committee's [report on the Bill](#), published on 28 September 2017, contains detailed analysis of clause 7. Both are expected to issue further reports on the EUW Bill when it is being debated in the House of Lords. The House of Commons Exiting the European Union Committee published a [report on the EUW Bill](#) on 15 November 2017.

2. Exit day: the main provisions in the EUW Bill

2.1 Introduction

The EUW Bill provides the domestic legal framework for the UK to leave the European Union. The EUW Bill creates the domestic legal concept of “exit day”:

- **Clause 1** repeals the ECA 1972 on exit day; and
- **Clause 14(1)** defines exit day as “such day as a Minister of the Crown may by regulations appoint”.

Thus, the EUW Bill does not at present contain a prescribed exit date. Instead it allows Ministers to define exit day(s). In particular, it does not define exit day with reference to Article 50 or the withdrawal agreement. Exit day could be defined as the day on which the EU Treaties cease to apply, but clause 14 does not require this to be the case. This highlights the fact that in strict legal terms the domestic legal concept of “exit day”, as contained in Clause 14(1), does not necessarily have to be the same day that the UK leaves the EU. The domestic concept of “exit day”, as created by the EUW Bill, serves a distinct, but connected, purpose from the date specified by the withdrawal agreement as to when the UK ceases to be a member of the EU.

By not expressly linking the date set by the withdrawal agreement with the date by the EUW Bill, the EUW Bill grants a discretion to the Government to decide when the provisions of the EUW Bill would take effect. The distinct domestic concept of exit day, and the ability to set different exit days for different purposes, could be used for example to extend or delay when provisions of the EUW Bill come into force,⁶ or adapt the operation of particular provisions, these actions might be desirable for a variety of reasons: for example, should any transitional arrangements be agreed.

Exit day also serves to determine:

- the point at which a snapshot of EU law is taken and transposed into UK law as “retained EU law”(clauses 2-4), and
- when the Henry VIII powers granted to Ministers in the Bill will expire (clauses 7-9).

⁶ For example, exit day for the purposes of clauses 5(1) and 6(1), on the status of the principle of supremacy of EU law and the role of CJEU after exit day respectively, could be defined differently from exit day for the purpose of clause 1, which repeals the ECA on exit day.

The concept of exit day runs throughout the EUW Bill, and how it is defined will have important implications for how the provisions in the EUW Bill will operate in practice.

The Lords Constitution Committee described this concept as “pivotal to the operation of the Bill”, because many parts of the Bill cannot be operationally effective until exit day arrives.⁷

This section examines the provisions in the EUW Bill relating to exit day, and examines some of the main implications of the domestic legal concept of “exit day”.

Clause 19

Exit day is not the only legal mechanism in the EUW Bill that will determine when its provisions come into force. **Clause 19** of the EUW Bill provides that a number of provisions, including the main delegated powers, will come into force on the day that the EUW Bill is enacted. These provisions are designed to be used before exit day in order to prepare for when the UK leaves the EU.

Clause 19 also provides that the other provisions of the EUW Bill will come into force “on such day as a Minister of the Crown may by regulations appoint; and different days may be appointed for different purposes”. This grants the Government some discretion to decide when particular provisions will come into force.

2.2 The ECA 1972 to be repealed on exit day (clause 1)

Clause 1 of the EUW Bill repeals the *European Communities Act 1972* (ECA) on exit day. Clause 1 makes the domestic legal concept of exit day central to the process of legislating for Brexit.

The ECA is one of the most significant statutes ever passed by Parliament.⁸ The EUW Bill’s provisions all follow directly from the need to replace the legal and constitutional framework provided by the ECA at the very moment the ECA is repealed.

The European Communities Act 1972

Over the past 40 years, EU law has flowed into the UK’s legal systems through the ECA, acting as a “conduit pipe”,⁹ with the result that presently EU law is deeply embedded in our domestic legal system, as well our governance arrangements, in a number of policy areas.

⁷ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#), HL19 2017-19, 7 September 2017, paras 18-21

⁸ In the High Court case of *Thoburn*, which concerned the role of EU law in the UK constitution, Lord Justice Laws said of the ECA: “It may be there has never been a statute having such profound effects on so many dimensions of our daily lives”. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin).

⁹ [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5, para 65.

Once the ECA is repealed on exit day, and without the legislative measures proposed in the EUW Bill, huge holes would open in the statute book. The EUW Bill is intended to remove and replace the pillars that underpinned the integration of EU law in the UK, while at the same time minimising changes to the substance of the statute book.

When the ECA is repealed, all the directly applicable EU law (Treaties, EU Regulations and Decisions), enforceable in the UK through section 2(1) of the ECA, would cease to have effect. Directly applicable EU law made after exit day would no longer take effect in the UK.

Any existing secondary legislation made under section 2(2) to implement EU Directives would also cease to have effect if the ECA were simply repealed.¹⁰

Clauses 2, 3 and 4 respond to the legal effect of repealing the ECA on exit day, by preserving and converting all of the law in force “immediately before exit day” in the UK through the ECA.¹¹ This body of law is described as “retained EU law”.

One of the primary functions of the domestic concept of exit day, under the terms of the EUW Bill, is that it determines when the ECA stops acting as a “conduit pipe” for EU law, and retained EU law takes over.

2.3 Defining exit day (clause 14(1))

As we have already seen, in its current form, the EUW Bill does not specify a date for exit day; instead **clause 14(1)** specifies that exit day means “such day as a Minister of the Crown may by regulations appoint”.

Further, Schedule 7 paragraph 13 provides that regulations made by powers in the EUW Bill can be used to make “different provision for different cases”.

The Government has stated that its intention is that the domestic legal concept of exit day will align with the day that the UK leaves the EU under Article 50, and as such the power in clause 14(1) “is limited to only specifying a date and time which will itself be subject to negotiations between the UK and the EU”.¹²

The House of Lords Constitution Committee’s report on the Bill drew attention to the flexibility of the EUW Bill’s definition of exit day:

The Bill leaves open the possibility that Ministers may provide through regulations that “exit day” is to be taken to mean one thing for one purpose and something else for another purpose. For instance, it may be possible for Ministers to provide that for the purpose of clause 1 (repeal of the ECA) “exit day” is to be

¹⁰ The effect of a repeal is to render the law as if the repealed Act had never existed Tindal CJ in *Kay v Goodwin* (1830) 6 Bing. 576, 582.

¹¹ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 81

¹² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 73

taken to be 29 March 2019, but that for the purpose of the clause 7 amendment powers (which lapse, through a sunset clause, two years after “exit day”) “exit day” is to be taken to be some later date. This might be intended to facilitate a transitional period, between the formal disapplication of the EU Treaties to the UK and the establishment of a new, permanent relationship with the EU, necessitating phased domestic legal reforms over a longer period of time.¹³

The UK Government and the EU have both said that any transitional period would see EU laws and structures, on current terms, continue to apply for a time-limited period after the day that the UK leaves the EU. The flexibility of the definition of exit day could be designed to enable the Government to adjust the provisions of the EUW Bill should a transitional period be agreed. Clause 19 could also be used to delay the implementation of particular provisions in order to enable a transitional period to be implemented domestically.

The Constitution Committee’s report on the EUW Bill noted that the power to define exit day was “unduly broad in its scope and flexibility”, and not subject to any parliamentary scrutiny procedure.¹⁴

The Delegated Powers and Regulatory Reform Committee recommended that “regulations stipulating exit day(s) should be subject to the affirmative procedure”.¹⁵

2.4 Exit day and retained EU law (clauses 2, 3, 4, 5 and 6)

Exit day will define at which point EU laws will be copied over into domestic law, and therefore will also determine which laws will form part of ‘retained EU law’, the new category of domestic law created by the EUW Bill. Exit day will also serve to determine how retained EU law will be interpreted. It sets the point at which EU law will be copied across into retained EU law and releases UK courts from the requirement to follow judgments of the CJEU.

Clause 2

Clause 2 states that EU-derived domestic legislation “as it has effect immediately before exit day, continues to have effect in domestic law on and after exit day”. EU directives made by the EU after exit day, and which would have been implemented in the UK through section 2(2) of the ECA will not be implemented in this way as the ECA will have been repealed on exit day. All domestic legislation made to give effect to EU law obligations before exit day will be preserved by clause 2. The

¹³ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#), HL19 2017-19, 7 September 2017, para 20

¹⁴ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#), HL19 2017-19, 7 September 2017, para 21

¹⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, para 65

reference to exit day in clause 2 means that any EU laws made after exit day which could affect how domestic law implementing EU law obligations operate, would not automatically do so. The words “as it has effect in domestic law immediately before exit day” mean that the laws will continue to have effect in the form that they operated before exit day, even if the relevant underlying EU law is amended or changed after exit day.

Clause 3

Clause 3(1) domesticates, or converts, “direct EU legislation” which is “operative” immediately before exit day into domestic law post-exit day.

Clause 3(2) makes clear that “direct EU legislation” does not refer to all the directly applicable EU legislation currently enforced in the UK. Direct EU legislation includes:

- EU regulations
- EU decisions
- EU tertiary legislation (EU delegated and implementing measures)
- Annexes to the EEA agreement
- Protocol 1 to the EEA agreement

This Bill does not allow EU law made after exit day to be converted into domestic law. Clause 3(1) explains that *only* the direct EU legislation, as defined in clause 3(2), which is “operative” immediately before exit day will be converted.

The concept of a law being “operative” is novel. Clause 3(3) defines “operative” as:

- any provision which, if it is stated to come into force at a particular time and then apply from a later date, is both in force and actually being applied on exit day;
- a decision to which the person to whom it is addressed has been notified, or
- any provision in force before exit day.

EU regulations, which are addressed to all Member States, enter into force on the date specified in them, or if no date is specified, on the 20th day after their publication in the Official Journal of the EU (OJEU). But their effects, or some of them, may be operative from a later time. The Explanatory Notes to the Bill refer to this as “staggered application”.¹⁶

This approach gives legal force to the agreement to bring something into force later on, leaving actual application of the regulation until later.¹⁷ In the EUW Bill an EU regulation or part of one which applies after exit day will not be converted.

¹⁶ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN), para 49

¹⁷ For example, Council and EP [Regulation \(EU\) 2016/794](#) of 11 May 2016 ‘on the European Union Agency for Law Enforcement Cooperation (Europol)’ states in

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There were **12,484 regulations** (in early October 2017), sub-divided as follows:

- [Regulation \(8667\)](#)
- [Implementing regulation \(3374\)](#)
- [Delegated regulation \(438\)](#)
- [Financial regulation \(5\)](#)

While the EUW Bill will formally incorporate over 12,000 EU regulations (see Government's [Factsheet](#) on the Bill), the intention is that the amended legislation is considered as one with the legislation amending it - so approximately **7,000 pieces of EU legislation** (comprising the body of EU regulations as amended prior to exit day – the consolidated version) will be incorporated.

Clause 4

Clause 4(1) preserves any rights, powers, liabilities, obligations and restrictions currently "recognised and available" through section 2(1) of the ECA immediately before exit day, that are not also caught by **clause 3**. By contrast with **clauses 2 and 3**, **clause 4** is cast in general terms ("any rights...") and does not attempt to define in precise terms which provisions of EU law are to be continued after exit. The Government has described clause 4 as a "broad 'sweeper' provision".¹⁸

Clause 4(1) means that the default position is that on exit day directly enforceable provisions of the EU Treaties will become part of domestic law. Any new rights created under EU law after exit day will not be converted by clause 4.

Clause 5

Clause 5(1) of the EUW Bill provides that the principle of supremacy of EU law does not apply to any legislation "or rule of law" passed or made after exit day. The reference to a "rule of law" in 5(1) means that the exclusion applies to both legislation and common law rules.

Clause 5(2) makes provision for a new legal hierarchy to be introduced into the UK's constitutional system. The subsection ensures that the supremacy of EU law remains part of domestic law, but can only apply "so far as relevant" to enactments passed or rules of law made *before* exit day, but not over those passed or made after exit day. The provision does not define "relevance", but the Explanatory Notes suggest that the principle would not apply to legislation "which is made in preparation for the UK's exit from the EU".¹⁹

Article 77 that the regulation "shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*", that it "shall apply from 1 May 2017", but that "Articles 71, 72 and 73 shall apply from 13 June 2016".

¹⁸ [Department for Exiting the European Union—Written evidence to the HL Constitution Committee \(EUW0036\)](#)

¹⁹ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 96

This would imply that the effect of **clause 5(2)** is to ensure that retained EU law has priority over all law enacted before exit, *including* that enacted between this Bill being enacted and exit day, but *excluding* that made in order to prepare for Brexit.

Clause 6

Exit day is central to the way in which clause 6 approaches the role of CJEU judgments in the interpretation of retained EU law.

Clause 6(1)(a) provides that domestic courts are not bound to follow judgments of the CJEU handed down after exit day. It does not prevent domestic courts from treating them as persuasive authority, as they may currently treat judgments given by courts in other jurisdictions.²⁰

Clause 6(2) expressly permits a domestic court to refer to a post-exit CJEU judgment “if it considers it appropriate to do so”. The Bill does not offer any guidance as to the meaning of “appropriate” in this context.

Clause 6(3)(a) requires that UK courts post-exit will decide questions on the meaning of retained EU law “so far as it is unmodified” and “so far as... relevant” in accordance with any retained case law (which includes pre-exit CJEU judgments). The provision also requires UK courts to decide such questions by reference to retained domestic case law that is relevant to retained EU law, and retained general principles of EU law. The fact that retained case law does not include judgments of the CJEU given after exit means that there is the possibility of divergence in interpretation between EU law as it applies in the EU and retained EU law applicable in the UK.

Retained EU law and transitional arrangements

It is not yet clear how transitional arrangements will be implemented in the United Kingdom. If as expected, transitional arrangements require EU law, for example regulations, made after exit day to take effect in the UK as they do now, then this could have implications for how retained EU law is defined and interpreted. For example, will EU laws made during transition form part of retained EU law? And will CJEU cases decided during transition bind domestic courts’ interpretation of retained EU law? If the answer to either is yes then the meaning of exit day, as it relates to the way retained EU law is defined and interpreted, might have to be changed.

2.5 The sunset clauses and the powers in the EUW Bill

[Sunset clauses](#) are provisions that mean that an Act, or particular provisions of an Act, lapse on a certain date or after a specified period

²⁰ A study of the Supreme Court’s case law 2009-2013 found that 31.3% of human rights cases in that period cited foreign jurisprudence (77 out of 246 cases): Hélène Tyrrell, [The Use of Foreign Jurisprudence in Human Rights Cases before the UK Supreme Court](#) (2014) p143.

of time.²¹ Legislation without a sunset clause has a presumption of permanence. Sunset clauses are often used to enhance parliamentary supervision of a particular power. They are added to emergency legislation or Bills that are considered to include extraordinary legislative instruments. The powers in clauses 7, 8 and 9 of the EUW Bill are each subject to a sunset clause.

Clause 7(7) provides a “sunset clause”, providing that no regulations may be made under the clause two years after exit day. As the body of retained EU law is fixed on exit day, this provides two years for this body of law to be modified under this clause. If transitional arrangements are agreed, it is not yet clear whether the power could also be used to correct EU legislation made after exit day during the transitional period.

Clause 8 (4) provides a ‘sunset clause’ which states that no regulations may be made under clause 8 two years or more after exit day.

Clause 9 is limited by a sunset clause in **9(4)** which provides that the power expires on exit day.

Clause 9(2) could theoretically enable the Government to change the terms of the sunset clause, for example should the withdrawal agreement require it. But Parliament would have to approve such a measure under the affirmative resolution procedure (**Schedule 7 part 2 paragraph 6**).²²

²¹ For a detailed history and analysis the use of sunset clauses in the UK and elsewhere – see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (2017)

²² See Commons Library Briefing Paper 8172, [The European Union \(Withdrawal\) Bill: scrutiny of secondary legislation \(Schedule 7\)](#), 7 December 2017

3. Government amendments

381, 382 and 383

3.1 Introduction

On 9 November 2017, Theresa May announced that the Government would table amendments to the EUW Bill to fix ‘exit day’ for all purposes of the Bill at 11:00 pm GMT on 29 March 2019.²³ In a *Daily Telegraph* article David Davis added:

Our amendment makes it crystal clear that the UK is leaving the EU at 11pm on 29 March 2019. We’ve listened to members of the public and Parliament and have made this change to remove any confusion or concern about what ‘exit day’ means.²⁴

These amendments are due to be debated on the last day of the Commons Committee stage (20 December 2017).²⁵

The amendments would have a knock-on effect on the provisions in the EUW Bill outlined in Section 2 of this briefing. In practical terms, if the withdrawal agreement sets exit day at 11pm GMT, 29 March 2019, the amendment may not change the way the EUW Bill operates, as the Government would have been able to use the power in clause 14 to set that as the relevant date for all the provisions in the EUW Bill.

If the amendments were passed clause 14 would no longer grant the Government a power to define exit day through secondary legislation.²⁶

The EU has called for the UK-EU withdrawal agreement to come into force no later than midnight Brussels time on 30 March 2019 (11pm GMT on 29 March).²⁷

Article 50(3) of the TEU enables the UK and EU27 to agree that the withdrawal agreement to enter into force on *any date* before or after 29 March 2019. The Government’s proposal to define exit day as 11pm GMT, 29 March 2019, in the EUW Bill has been criticised on the basis that it is an unnecessary restriction which does not reflect the flexibility within Article 50(3) (**See Section 4 of this Briefing**).

3.2 Amendments 381, 382 and 383

Amendment 381, tabled by Secretary David Davis provides:

²³ Midnight in Brussels/Central European Time, including Gibraltar

²⁴ Telegraph, 10 November 2017

²⁵ See amendments 381, 382 and 383, available on the [‘Bill documents’](#) webpage

²⁶ As a result Schedule 7 para 13 which enables regulations made under powers in the EUW Bill to be exercised so as to “make different provision for... different purposes” would no longer apply.

²⁷ European Commission Brexit negotiating directives, 22 May 2017, para 8

Clause 14, page 10, line 25, leave out from “means” to “(and” in line 26 and insert

“29 March 2019 at 11.00 p.m.”

Member’s explanatory statement

This amendment removes the power for a Minister of the Crown to appoint exit day by regulations and ensures that exit day is fixed at 29 March 2019 at 11.00 p.m. for all purposes.

Amendment 382 states:

Clause 14, page 11, line 24, leave out from “Act” to end of line 32 and insert

“references to before, after or on exit day, or to beginning with exit day, are to be read as references to before, after or at 11.00 p.m. on 29 March 2019 or (as the case may be) to beginning with 11.00 p.m. on that day.”

Member’s explanatory statement

This amendment is consequential on amendment 381 and ensures that references to exit day in the Bill and other legislation operate correctly in relation to the time as well as the date of the United Kingdom’s withdrawal from the EU.

Amendment 383 sets out:

Clause 17, page 14, line 8, leave out “or the appointment of” and insert “(including its operation in connection with”

Member’s explanatory statement

This amendment is consequential on amendment 381 and highlights that transitional, transitory or saving provision under the Bill may relate to exit day.

3.3 Increasing certainty or removing useful flexibility?

On 14 November, on the first day of the Committee Stage debate on the EUW Bill in the House of Commons, the Parliamentary Under-Secretary of State for Exiting the European Union, Steve Baker, introduced the Government amendments:

The Government have, however, listened carefully to the debate about the setting of exit day for the statutory purposes of the Bill. There has been some uncertainty about whether the exit day appointed in the Bill would correspond to the day the UK leaves the EU at the end of the article 50 process. The Government sympathise with this uncertainty. ...

...

We would like to put this issue to rest. We recognise the importance of being crystal clear on the setting of exit day and are keen to provide the certainty that the right hon. Member for Birkenhead and others are seeking. In light of this, the

Government have tabled amendment 381 to clause 14, along with the consequential amendments 382 and 383, which will set exit day at 11pm on 29 March 2019.²⁸

Dominic Grieve (Con) noted that he found the Government's amendment "strange":

It seems to me to fetter the Government, to add nothing to the strength of their negotiating position, and, in fact, potentially to create a very great problem that could be visited on us at a later stage.²⁹

The Commons Exiting the EU Committee's report on the EUW Bill said the following on the Government's amendments:

The flexibility to set multiple exit days was described to us as a tool for setting different commencement dates for different provisions and providing for possible transitional arrangements. The Government's latest amendments will however, if agreed by the House, remove this flexibility by setting the exit day in the Bill as 29 March 2019 at 11.00 pm. This would create significant difficulties if, as the Secretary of State suggested to us in evidence, the negotiations went down to the 59th minute of the 11th hour.³⁰

Catherine Barnard, Professor of EU Law at the University of Cambridge, has criticised the amendment in terms of both its potential impact on the negotiations and for its effect on the domestic legislative framework:

The introduction of the Davis amendment therefore creates an artificial straightjacket. It will tie the negotiators' hands because it will mean that the UK might have to take any deal on offer in September 2018 (to provide the necessary six months before 29 March 2019 for the UK parliament and the European parliament to have a vote) rather than having the longer and probably necessary period (September 2018 to March 2019) in which to negotiate further, and to draft and pass the statutory instruments necessary to deliver on what has been agreed.

In other words, the Davis amendment creates a rod for the UK negotiators' backs, weakens any UK negotiating position and adds unnecessary pressure to those in the executive trying to deliver Brexit in a coherent, measured fashion.³¹

²⁸ HC Deb 14 November c204

²⁹ HC Deb 14 November c205

³⁰ Commons Exiting the EU Committee, European Union (Withdrawal) Bill (2017-2019 HC 373) para 101

³¹ Catherine Barnard, [Exit day: when is it?](#) UK in a Changing Europe (11 December 2017)

3.4 What if the UK leaves the EU on a different date?

If the Government amendments are passed and the EUW Bill is enacted, but it appeared that the UK would in fact be leaving the UK on a date other than 29 March 2019, the EUW Bill might have to be amended.

In such circumstances, the Government would have a number of legislative options, including amending clause 14 and changing the definition of exit day if the withdrawal agreement set a date other than 29 March 2019.

Clause 9

Clause 9 allows the provisions of the EUW Bill to be amended after it is enacted. This power could be used if, for example, the contents of the withdrawal agreement are not compatible with the final version of the EUW Bill as enacted.

Clause 9(2) states that secondary legislation made under clause 9 could also modify the provisions of the EUW Bill once enacted. The Government's Delegated Powers Memorandum (DPM) indicates that this power to change the provisions of the Bill, as enacted, might be needed "in order to reflect the outcome of negotiations".³²

Any changes to the EUW Act itself would be subject to the affirmative procedure.³³

The amendment made to clause 9 on 13 December would mean that clause 9 could only be used to amend the definition of exit day if Parliament has already enacted "a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union".³⁴

The Withdrawal Agreement and Implementation Bill

Since the EUW Bill was introduced, the UK Government [announced](#) (on 13 November 2017) that it will bring forward primary legislation, the Withdrawal Agreement and Implementation Bill (WAI Bill), to implement the withdrawal agreement and any 'implementation' (transition) period.³⁵ The WAI Bill could provide another opportunity for the EUW Bill to be amended.

³² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#) para 61

³³ Schedule 7 Part 2 Paragraph 6(2)(g)

³⁴ HC Deb 13 December 2017 Division 68

³⁵ Department for Exiting the European Union, [Press Release: New Bill to implement Withdrawal Agreement](#) (13 November 2017)

The Government has said that the EUW Bill is not designed to provide for transition.³⁶ It is not yet clear how the domestic implementation of any transitional period will impact upon the provisions in the EUW Bill.

Professor Kenneth Armstrong, University of Cambridge, has argued that the amendments offer a significant insight into the Government's legislative strategy:

The Withdrawal Bill will domesticate EU law up until 29 March 2019, whereas a new Bill will allow for the continued application of certain 'saved' provisions of EU law for the period of transition. The new Bill might look and feel much like the European Communities Act 1972 which is set to be repealed. Indeed, keeping the same sort of constitutional architecture in place may be key to the EU's willingness to accept any sort of transition on these terms.³⁷

If the UK leaves the EU on 29 March 2019, and a transitional period comes into force immediately afterwards, the WAI Bill may have to provide the domestic legal basis for the continuation of the EU law. As Armstrong suggests, this could require the WAI to provide similar constitutional architecture to the ECA 1972, albeit on a time-limited basis.

3.5 Amendments 399–405

On 15 December 2017, Sir Oliver Letwin tabled a package of amendments which would enable the Government to use secondary legislation to alter the definition of exit day "if the day or time on or at which the United Kingdom ceases to be a member of the EU is different from that specified in the definition".

The main amendment of the package is amendment 400, which would amend clause 14 to insert:

(2A) Subsection (2B) applies if the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with Article 50(3) of the Treaty on European Union is different from that specified in the definition of "exit day" in subsection (1).

(2B) A Minister of the Crown may by regulations—

(a) amend the definition of "exit day" in subsection (1) to ensure that the day and time specified in the definition are the day and time that the Treaties are to cease to apply to the United Kingdom, and

(b) amend subsection (2) in consequence of any such amendment.

³⁶ House of Commons Exiting the EU Committee, [Oral evidence: The European Union \(Withdrawal\) Bill, HC 373, Thursday 26 October 2017](#), qq184 and 187 (Steve Baker MP Parliamentary Under Secretary of State, Department for Exiting the European Union)

³⁷ Kenneth Armstrong, [Exit Day! What Does it Mean for a 'Transitional' Deal?](#), Brexit Time (10 November 2017)

(2C) In subsections (2A) and (2B) “the Treaties” means the Treaty on European Union and the Treaty on the Functioning of the European Union.

This amendment effectively would re-introduce some of the flexibility that would be lost if Government amendments 381-383 are made to specify the definition of exit day in clause 14 as 11pm GMT, 29 March 2019. The principal difference is that amendment 400 has a more specific purpose than the power in clause 14 (as introduced).

If the Government amendments 381-382 and amendments 399-405 are passed, the Government could use clause 14 to change the date *only* if the withdrawal agreement specifies a date other than 11pm GMT, 29 March 2019.³⁸

Clause 9 and the WAI Bill could still be used to alter the definition of exit day even the date that the UK leaves the EU is 11pm GMT, 29 March 2019.

3.6 Amendment 6

Amendment 6 tabled by Dominic Grieve would amend clause 14 so that however exit day is defined it “must be the same day for the purposes of every provision of this Act”. This would prevent the power in clause 14, as currently drafted, being used to define exit day “to be taken to mean one thing for one purpose and something else for another purpose”.³⁹

³⁸ As amendment 400 would create a power to make secondary legislation, Schedule 7 para 13 which enables regulations made under powers in the EUW Bill to be exercised so as to “make different provision for... different purposes” would apply.

³⁹ Schedule 7 para 13 enables regulations made under powers in the EUW Bill to be exercised so as to “make different provision for... different purposes”; House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#), HL19 2017-19, 7 September 2017, para 20

4. Article 50 of TEU

The day that the UK will leave the EU is determined by Article 50(3) of the Treaty on European Union (TEU), which sets three possibilities for when the EU Treaties will cease to apply:

- the date of entry into force of the withdrawal agreement or,
- “failing that”, two years after the notification of withdrawal, unless
- the European Council (EU27) and the UK unanimously decide to extend the two-year period.

Both sides are aiming for 29 March 2019, two years after the UK’s [notification](#) of intention to withdraw. If there is no withdrawal agreement and no extension, the EU Treaties will automatically cease to apply to the UK.

The [Joint Report](#) on phase 1 of the negotiations suggests the Withdrawal Agreement will include transitional arrangements. This could mean a continuing role for EU institutions and rules in the UK beyond exit day.

4.1 The end date: 29 March 2019?

The end of the two-year period triggered by the UK’s notification of withdrawal is 29 March 2019. But this is not the only option for Exit Day:

When a withdrawal agreement enters into force

Article 50 stipulates that the EU Treaties will cease to apply to a withdrawing State on the date a withdrawal agreement comes into force.

The EU has called for the UK-EU withdrawal agreement to come into force no later than midnight Brussels time on 30 March 2019 (11pm GMT on 29 March).⁴⁰ But the UK and EU27 could in theory agree for the withdrawal agreement to enter into force on any date before or after that.

Agreement to extend the two-year period

Article 50 allows for unanimous agreement of the UK and all other EU Member States to extend the two-year period.

No further detail is specified in Article 50 about what sort of circumstances might trigger an extension, but it could for example be to wait for any pending decision of the Court of Justice of the EU about interpreting Article 50 or because more time is needed to complete the negotiation and ratification of the Article 50 agreement. Nor is there any guidance on when an extension must be agreed, or how long it can last.

⁴⁰ European Commission Brexit negotiating directives, 22 May 2017, para 8

No withdrawal agreement

If there is no withdrawal agreement by 29 March 2019, and no unanimous agreement to extend the two-year period, the EU Treaties will automatically cease to apply to the UK.

Revoking the notification of withdrawal?

The UK Government has said that “regardless of the legal position, we do not intend to revoke our notice to withdraw”.⁴¹

Article 50 does not say anything about revoking a withdrawal notification, and the UK Supreme Court did not decide whether Article 50 could be revoked in the *Miller* case.⁴²

⁴¹ Lord Bridges of Headley, then Minister in the Department for Exiting the EU, [HL Deb 20 March 2017 c9](#)

⁴² [R \(on the application of Miller and another\) v Secretary of State for Exiting the European Union](#), 24 January 2017.

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