



European Union (Withdrawal) Bill HL Bill 79 of 2017–19

Summary

The European Union (Withdrawal) Bill completed its passage through the House of Commons on 17 January 2018 and is scheduled to have its second reading in the House of Lords over two days on 30 and 31 January 2018.

Clause 1 of the Bill seeks to repeal the European Communities Act 1972, which would cut off the ‘conduit pipe’ through which EU law flows into domestic law. This would take effect from exit day, which is defined in the Bill as 11pm on 29 March 2019. After exit day, EU law would no longer have supremacy over domestic law. Domestic courts would no longer be bound to follow the post-exit case law of the Court of Justice of the European Union (clause 6). To provide legal certainty and prevent gaps in the statute book, clauses 2 to 4 of the Bill would preserve EU-derived domestic legislation, direct EU legislation and certain directly effective EU rights and obligations in domestic law after exit day (subject to some exceptions set out in clause 5 and schedule 1). Critics of the Bill argue that some existing rights under EU law would not be preserved.

Ministers would be given time-limited delegated powers to modify retained EU law in order to: ‘correct’ provisions that would not function effectively or would be deficient after the UK leaves the EU (clause 7); to prevent or remedy breaches of the UK’s international obligations that might otherwise result from leaving the EU (clause 8); and to implement any withdrawal agreement made with the EU under Article 50 (clause 9). The Bill has been criticised for granting wide delegated powers, including the power to amend primary legislation through delegated legislation (so-called Henry VIII powers), without requiring sufficient parliamentary scrutiny.

The Bill also grants devolved authorities similar powers to the UK Government to amend retained EU law in devolved areas (clause 10). The devolution Acts currently prevent the devolved institutions from acting in a way that would be incompatible with EU law. The Bill would prevent them from acting in a way that would be incompatible with retained EU law (clause 11), but it also provides for the UK Government to ‘release’ policy areas from this restriction. The Government stated it intends to do so once agreement is reached with the devolved authorities regarding common UK frameworks in which the powers could operate. Clause 11 has proved highly contentious, with the Scottish and Welsh Governments stating they cannot recommend legislative consent be granted to the Bill in its current form. The UK Government committed to bringing amendments to clause 11 at report in the Commons. This did not happen but the UK Government has said that it will do so in the House of Lords.

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I. Introduction

The [European Union \(Withdrawal\) Bill](#) (HL Bill 79 of session 2017–19) was introduced in the House of Lords on 18 January 2018 and is scheduled to have its second reading over two days on 30 and 31 January 2018. The Government has produced [explanatory notes](#), an [impact assessment](#), a [delegated powers memorandum](#), an [equality analysis](#), a [European Convention on Human Rights memorandum](#) and a series of [factsheets](#) to accompany the Bill.

In her speech to the Conservative Party conference in October 2016, Theresa May announced that she planned to put before Parliament a ‘Great Repeal Bill’ to “remove from the statute book—once and for all—the European Communities Act”.¹ She said its effect would be clear: “Our laws will be made not in Brussels, but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in this country. The authority of EU law in Britain will end”.

In March 2017, the Government published a white paper on *Legislating for the United Kingdom’s Withdrawal from the United Kingdom*. It promised that the Great Repeal Bill would deliver on the referendum result in favour of leaving the EU by “put[ting] the UK back in control of its laws; maximis[ing] certainty for businesses, workers, investors and consumers across the whole of the UK as we leave the EU; and ensur[ing] accountability for the powers contained in the Bill”.² The white paper said the Bill would do three main things:

- First, it will **repeal the ECA** [European Communities Act 1972] and return power to UK institutions.
- Second, subject to the detail of the proposals set out in this white paper, the Bill will **convert EU law** as it stands at the moment of exit into UK law before we leave the EU. This allows businesses to continue operating knowing the rules have not changed significantly overnight, and provides fairness to individuals, whose rights and obligations will not be subject to sudden change. It also ensures that 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 we have left the EU.
- Finally, the Bill will **create powers to make secondary legislation**. This will enable corrections to be made to the laws

¹ Conservative Party, ‘[Prime Minister: Britain After Brexit: A Vision of a Global Britain](#)’, 2 October 2016.

² Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 12.

that would otherwise no longer operate appropriately once we have left the EU, so that our legal system continues to function correctly outside the EU, and will also enable domestic law once we have left the EU to reflect the content of any withdrawal agreement under Article 50.³

A ‘Repeal Bill’ was included in the Queen’s Speech on 21 June 2017.⁴ The Bill was published under the title of the European Union (Withdrawal) Bill, and received its first reading in the House of Commons on 13 July 2017. It had its second reading in the House of Commons over two days on 7 and 11 September 2017. A Labour amendment to decline to give the Bill its second reading (on the grounds of failure to protect parliamentary sovereignty, the devolution settlement and existing rights, and of preventing “strong transitional arrangements” through remaining in a customs union and the single market) was defeated by 318 votes to 296.⁵ The Bill received its second reading by 326 votes to 290.⁶

Committee stage took place in committee of the whole House over eight sittings between 14 November and 20 December 2017. The Government suffered one defeat at committee stage, on an amendment tabled by the former Attorney General Dominic Grieve (Conservative MP for Beaconsfield) that prevents the Government from using delegated powers under the Bill to implement any withdrawal agreement made with the EU until the agreement has been approved in separate primary legislation.⁷ The Bill completed its remaining stages in the Commons on 16 and 17 January 2018. A Scottish National Party (SNP) amendment to decline to give the Bill its third reading on the grounds that it undermined the devolution settlement in the Scotland Act 1998 was defeated by 322 votes to 295.⁸ The Bill was passed at third reading by 324 votes to 295.⁹

This Briefing provides a summary of the main features of the Bill, and describes the changes that were made to it at committee and report stage in the House of Commons. It also provides details of non-government amendments that were voted on during the Commons report stage (none of which were successful). A summary of the divisions that took place at the Commons committee stage is given in the House of Commons Library briefing [European Union Withdrawal Bill 2017–19: Summary of Commons Committee Stage](#), 9 January 2018.

³ Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 12. Emphasis in original.

⁴ Cabinet Office, [Queen’s Speech 2017: Background Briefing Note](#), 21 June 2017, p 17.

⁵ [HC Hansard, 11 September 2017, cols 589–92](#).

⁶ *ibid*, cols 593–7.

⁷ [HC Hansard, 13 December 2017, cols 521–5](#).

⁸ [HC Hansard, 17 January 2018, cols 1012–16](#).

⁹ *ibid*, cols 1017–20.

2. Repealing of the European Communities Act 1972

2.1 Repeal of the European Communities Act 1972 (Clause 1)

Clause 1 repeals the European Communities Act 1972 (ECA) on ‘exit day’. The ECA was passed at the time of the UK’s accession to the European Communities (now the European Union). It is the ECA that “defines the legal relationship between the two otherwise separate spheres” of domestic and EU law.¹⁰ The ECA has been described as “the ‘conduit pipe’ through which EU law flows into UK domestic law”.¹¹ Its effects are as follows:

[...] section 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically and “without further enactment” incorporated and binding in national law without the need for a further Act of Parliament.

[...] Section 2(2), by contrast, applies to measures of EU law that are neither directly applicable nor have direct effect. This provision makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as statutory instruments; importantly, such secondary legislation can amend an Act of Parliament (section 2(4)) since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.

[...] section 2(4) and 3(1) give effect to the doctrine of the supremacy of EU law, as interpreted by the Court of Justice, over national law; and where EU law is in doubt, requires UK courts to refer the question to the Court of Justice.¹²

Some EU law measures have been given effect in domestic law through statutory instruments made under section 2(2) of the ECA; other measures have been transposed into domestic law through other legislation, for example through secondary legislation made under parent Acts other than the ECA. Repealing the ECA would mean that all directly applicable and directly effective provisions of EU law would automatically cease to apply, as would all secondary legislation implementing EU law via section 2(2). A further effect of repealing the ECA would be that directly effective EU law would no longer have primacy over UK law.¹³

¹⁰ House of Commons European Scrutiny Committee, [The EU Bill and Parliamentary Sovereignty](#), 7 December 2010, HC 633-I of session 2010–12, para 11.

¹¹ [Explanatory Notes](#), p 9.

¹² *ibid*, paras 12–16.

¹³ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 6.

There is widespread agreement that repealing the ECA, thereby cutting off the conduit pipe through which EU law flows into domestic law, would leave significant gaps in the statute book. Clauses 2 to 4 of the Bill seek to prevent this, by, in the Government's words:

[...] convert[ing] the body the body of existing EU law into domestic law and preserv[ing] the laws we have made in the UK to implement our obligations. After this, because the supremacy of EU law will have ended, Parliament (and where appropriate, the devolved legislatures) will be able to decide which elements of that law to keep, amend or repeal once the UK has left the EU.¹⁴

2.2 Exit Day (Clause 14)

Clause 1 provides that repeal of the ECA would take effect from 'exit day'. 'Exit day' is defined in clause 14 as 29 March 2019 at 11pm, which will be midnight Brussels time. This marks the time at which, under the terms of Article 50 of the Treaty on European Union (TEU), the UK will cease to be an EU member state, unless the UK and EU have already concluded a withdrawal agreement which specifies a different departure date, or unless both sides agree to extend the Article 50 negotiation period. It is Article 50 which governs when the UK's membership of the EU will cease in EU law terms. 'Exit day' as specified in the Bill can only have an effect in domestic law.

As originally drafted, the Bill did not give a date for exit day, but gave ministers the power to specify it later in regulations. It also originally left open the possibility that a different date for exit day could be appointed for different purposes within the Bill. The Government tabled amendments at committee stage in the Commons to put on the face of the Bill that exit day would be 11pm GMT, 29 March 2019. David Davis, Secretary of State for Exiting the European Union, said that the Government was making this change "to remove any confusion or concern about what 'exit day' means".¹⁵

However, concerns were then raised that if agreement was reached with the EU to extend the Article 50 negotiating period beyond 29 March 2019, having that date specified in the Bill as the 'exit day' on which the ECA would cease to apply would cause difficulties. To resolve this issue without the need for subsequent primary legislation to amend the date, Sir Oliver Letwin (Conservative MP for West Dorset) tabled a package of amendments at committee stage to confer on ministers the power to amend the date of exit day specified in the Bill "if the day or time on or at which the United

¹⁴ [Explanatory Notes](#), p 10.

¹⁵ Jasper Jolly, '[The Government Just Revealed It Will Put the Official Brexit Time into Law](#)', *City AM*, 9 November 2017.

Kingdom ceases to be a member of the EU is different from that specified in the definition”.¹⁶

Theresa May said that the Government had decided to accept Oliver Letwin’s amendments because: “It is important we have the same position legally as the European Union”.¹⁷ But she assured the House of Commons that “we would use that power only in exceptional circumstances for the shortest possible time, and that an affirmative motion would be brought to the House”. The Commons voted by 319 to 294 in favour of the Government’s and Oliver Letwin’s amendments as a package.¹⁸ The power to amend the date of exit day is now in clause 14. A requirement for this to be exercisable by affirmative instrument was added at report stage and is now found in paragraph 10 of schedule 7.

3. Retaining Existing EU Law

Clauses 2 to 6 deal with how EU law would be preserved in, or converted into, domestic law at the point of exit day, and what status this new category of ‘retained EU law’ would have after exit day.

3.1 EU-derived Domestic Legislation (Clause 2)

Clause 2 provides that “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day”. This would save secondary legislation made under clause 2(2) of the ECA that would otherwise automatically lapse when the ECA was repealed. The Government has explained that it would also save:¹⁹

- Legislation that was not passed under section 2(2) of the ECA, but which was specifically passed for the purpose of implementing an EU obligation (both primary and secondary legislation).
- Legislation that was not specifically passed or made to implement EU obligations, but which has subsequently become part of the way the UK demonstrates compliance with EU requirements.
- Domestic law provisions that are tied to EU law or which implement EU law but go beyond the minimum required to comply with EU law (so-called ‘gold-plating’).

¹⁶ Member’s Explanatory Statement to Amendment 400 in House of Commons, [Committee of the Whole House Amendments as at 20 December 2017](#), 20 December 2017, p 10.

¹⁷ [HC Hansard, 20 December 2017, col 1065](#).

¹⁸ *ibid*, cols 1218–22.

¹⁹ [Explanatory Notes](#), p 25.

- Other provisions that relate in some way to the EU or the European Economic Area (EEA), for example an Act of Parliament that contains a cross-reference to a definition contained in an EU instrument.

While it has been said that primary legislation transposing EU law into domestic law would remain unaffected by the simple repeal of the ECA²⁰, the Government argues that there would be doubt as to whether legislation which presupposes EU membership would work if the UK was not a member of the EU. By including such legislation in the category of retained EU law, the Government states that “the powers in the Bill can be used to ensure they still function properly after exit from the EU”.²¹ Clause 14(6) provides that references in the Bill to things which continue to be domestic law include things which would have continued to exist regardless of the saving in clause 2. The Government states that this is to make clear that it is not necessary to consider whether an enactment might have been subject to implied repeal as a result of repealing the ECA in order to bring it within the ambit of clause 2 and therefore the definition of “retained EU law”.²²

3.2 Direct EU Legislation (Clause 3) and Exempt EU Instruments (Schedule 6)

Clause 3 provides that: “Direct EU legislation, so far as operative immediately before exit day, forms part of domestic law on and after exit day”. Some forms of EU legislation are directly applicable and binding on member states without needing to be transposed into domestic law. But without the conduit pipe of the ECA (which provides that such EU legislation is to have effect “in accordance with the EU Treaties”), these categories of EU legislation would cease to apply in the UK when the ECA was repealed. The purpose of clause 3 is therefore to convert these provisions of EU legislation into domestic law from exit day.

Clause 3 defines the following as types of ‘direct EU legislation’ which would be converted:

- **EU Regulations.** However, schedule 6 provides that any EU regulation which did not apply to the UK under relevant Protocols immediately before exit day would be an ‘exempt EU instrument’ and would not be converted. The ‘relevant Protocols’ are listed in paragraph 4 of schedule 6.

²⁰ Richard Gordon and Rowena Moffatt, [Brexite: The Immediate Legal Consequences](#), Constitution Society, May 2016, p 23.

²¹ [Explanatory Notes](#), p 25.

²² *ibid*, p 38.

- **EU Decisions.** Decisions are a category of EU laws alongside directives and regulations. They are binding, but only on the party or parties to whom they are addressed, which could be one or more member states, companies or individuals. Some categories of EU decision would not be incorporated into domestic law:
 - Decisions addressed only to a member state other than the UK (clause 3)
 - Decisions which do not apply to the UK under the relevant Protocols (schedule 6—exempt EU instrument)
 - Decisions relating to Common Foreign and Security Policy under Title V of the pre-Lisbon Treaty on European Union (TEU) and under the current Title V of the TEU (post-Lisbon) (schedule 6—exempt EU instrument)

Further background information about EU decisions is available in the House of Commons Library briefing [Legislating for Brexit: EU Decisions](#). This briefing suggests that the Bill's definition of which decisions to convert to domestic law may leave some gaps:

[...] EU foreign policy decisions are the basis for many important UK obligations, in sanctions against third states and individuals, and arms export controls, for example. While some of these obligations will be upheld under clause 8 of the EUW Bill, it is possible that there will be gaps.²³

- **EU Tertiary Legislation:** Under EU law, primary law includes the two main EU Treaties (the TEU and the Treaty on the Functioning of the European Union (TFEU)); secondary law includes regulations, directives and decisions; and tertiary law, which is largely the responsibility of the European Commission, provides further detail of secondary law.²⁴ Tertiary legislation is also known as 'delegated and implementing acts'. Schedule 6 provides that EU tertiary legislation would be an 'exempt EU instrument' and would not be converted into domestic law if it was made under:
 - an EU decision or EU regulation which is an exempt EU instrument

²³ House of Commons Library, [Legislating for Brexit: EU Decisions](#), 18 January 2018, p 4.

²⁴ UK in a Changing Europe, [Factsheet: The EU Withdrawal Bill](#), 19 September 2017.

- an EU directive that does not apply to the UK under the relevant Protocols.
- **EU regulations, decisions and tertiary regulation as they apply, and are adapted for, the EEA context.** Pages 27–8 of the Explanatory Notes to the Bill provide further information about how this adaptation flows through the ECA into UK domestic law.

Clause 3 provides that if EU derived domestic legislation saved under clause 2 reproduces the effect of an EU regulation, decision or tertiary legislation, then these instruments would not be converted into domestic law by clause 3. The Government has explained that this is to avoid duplication on the statute book after exit.²⁵

Direct EU legislation would be converted into domestic law “so far as operative immediately before exit day”. The definition of ‘operative’ is given in clause 3(3). The Government has explained this would work as follows:

[...] some EU legislation applies in a staggered way over time, and the Bill ensures that, so far as a relevant instrument has entered into force and applies before exit day, it will be converted into domestic legislation. Where there is a stated date of application, and this date falls after exit day, the provision is not converted. This means that, provided it is not expressly stated to apply from a date falling after exit day, EU legislation which is in force before exit day will be converted even if it has some effect which crystallises after exit day. For example the EU fluorinated greenhouse gases regulation (No 517/2014), the whole of which is stated to apply from 1 January 2015, prohibits the supply of equipment containing certain substances from certain specified dates, several of which fall after exit day. These future prohibitions apply now, even though they do not take effect until after exit day. They are therefore converted under the Bill and will take effect on the specified dates.²⁶

3.3 Saving for Rights etc (Clause 4)

Clause 4 would save other EU rights and obligations not covered by clause 3 if they are “recognised and available in domestic law” immediately before exit day. The Government intends that clause 4 would capture, for example, directly effective rights contained within EU treaties.²⁷ It defines “directly effective rights” as “those provisions of EU treaties which are sufficiently clear, precise and unconditional to confer rights directly on individuals which

²⁵ [Explanatory Notes](#), p 27.

²⁶ *ibid*, p 28.

²⁷ *ibid*.

can be relied on in national law without the need for implementing measures”.²⁸ An illustrative (not exhaustive) list of such provisions is given on pages 29–30 of the Explanatory Notes to the Bill. In the white paper that preceded the Bill, the Government used the example of workers’ rights: “Where protections are provided by the EU treaties as a final ‘backstop’—such as the right to rely on Article 157 of TFEU (equal pay) directly in court—they will also be preserved”.²⁹ The Explanatory Notes emphasise that it is the *right* that would be converted into domestic law, not the text of treaty articles themselves.³⁰

Directly effective rights arising under an EU directive would not be preserved unless they are of a kind recognised:

- by the European Court or a UK court before exit day (clause 4(20(b))); or
- by a UK court after exit day in a case begun before exit day (schedule 8, paragraph 26).

3.4 Exceptions (Clause 5 and Schedule 1)

Clauses 2, 3 and 4 are all subject to clause 5 and schedule 1, which set out some further exceptions to what will be preserved as retained EU law.

Supremacy of EU Law (Clause 5)

It is a fundamental principle of EU law that EU law has precedence over national law. This principle has been developed in European case law, going back to before the UK joined the European Communities:

According to the precedence principle, European law is superior to the national laws of member states. The precedence principle applies to all European acts with a binding force. Therefore, member states may not apply a national rule which contradicts to European law.

The precedence principle guarantees the superiority of European laws over national laws. It is a fundamental principle of European law [...] it is not inscribed in the Treaties, but has been enshrined by the Court of Justice of the European Union (CJEU).

The CJEU enshrined the precedence principles in the *Costa versus Enel* case of 15 July 1964. In this case, the Court decided that the laws

²⁸ [Explanatory Notes](#), p 28.

²⁹ Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 16.

³⁰ [Explanatory Notes](#), p 28.

issued by European institutions are to be integrated into the legal systems of member states, who are obliged to comply with them. European law therefore has precedence over national laws. Therefore, if a national rule is contrary to a European provision, member states' authorities must apply the European provision. National law is neither rescinded nor repealed, but its binding force is suspended.

The Court later clarified that the precedence of European law is to be applied to all national acts, whether they were adopted before or after the European act in question.³¹

Clause 5(1) provides that: “The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day”. However, clause 5(2) would ensure the principle of the supremacy of EU law continued to apply on or after exit day to interpreting, disapplying or quashing any enactment or rule of law passed or made before exit day. The Explanatory Notes explain how this is intended to operate in practice:

[...] for example, if an Act of Parliament is passed on or after exit day which is inconsistent with EU law which is preserved or converted by the Bill (for example, a retained EU regulation), that new Act of Parliament will take precedence. Where, however, a conflict arises between pre-exit domestic legislation and retained EU law, subsection (2) provides that the principle of the supremacy of EU law will, where relevant, continue to apply as it did before exit. So, for example, a retained EU regulation would take precedence over pre-exit domestic legislation that is inconsistent with it. The principle would not, however, be relevant to provisions made by or under this Bill or to other legislation which is made in preparation for the UK's exit from the EU.³²

The House of Lords Constitution Committee has expressed concerns that this provision is “ambiguous and risks creating considerable uncertainty”, for the following reasons:

It is unclear how and in what way “the principle of the supremacy of EU law” can continue to apply in the UK at a point in time—ie post-exit—when “EU law” does not apply. It is true that “retained EU law”, as defined by the Bill, will continue to apply, but that category is all-embracing, and not all of those laws would, in their pre-exit incarnations, have benefitted from the supremacy principle. For instance, while, pre-exit, directly effective treaty provisions and regulations benefit from the supremacy principle, thereby enjoying priority over incompatible domestic law, the same is not true of

³¹ EUR-Lex, [‘Precedence of European Law’](#), 1 October 2010.

³² [Explanatory Notes](#), p 31.

domestic secondary legislation that gives effect in national law to directives.³³

Sir William Cash, chair of the House of Commons European Scrutiny Committee, wrote to the Prime Minister in December 2017 outlining the Committee's concerns that, as drafted, the Bill would give the UK courts a power to disapply pre-exit UK primary legislation that was "not strictly circumscribed in the Bill".³⁴ He noted that the courts' current ability to disapply primary legislation was only found as a consequence of the UK's EU membership. He has argued in the House of Commons that clause 5 would "empower the courts, for the first time in our Westminster-based legislative history, to disapply Acts of Parliament".³⁵ The letter contrasted this with what happens if the courts find an Act of Parliament is incompatible with the Human Rights Act 1998.³⁶ In that case, the higher courts can make a declaration of incompatibility, but they have no power to disapply the primary legislation.³⁷

In response, Theresa May maintained that "simply removing" the principle of the supremacy of EU law at the point of exit would have "significant and unintended consequences", and would be likely to "result in a confused and incoherent statute book and create uncertainty as to the law's meaning and effect".³⁸ A similar approach to that in the Human Rights Act 1998 would not be suitable because it would "retrospectively change the way in which the principle of supremacy exists in UK law at the moment". She said that the reference in clause 5 was to the existing principle "in its well understood constitutional context", and that under clause 5(2), "the concept does not apply more widely after exit day than it did before".

Speaking at the Bill's report stage in the Commons, Sir William Cash reported that the unanimous view of the European Scrutiny Committee was that "Parliament as a whole needs a solution that confirms the principle of parliamentary sovereignty along the lines of declarations of incompatibility under the Human Rights Act 1998".³⁹ He noted that former Law Lords and members of the Supreme Court had expressed concerns about this issue.

³³ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 10.

³⁴ House of Commons European Scrutiny Committee, [Sir William Cash Letter to Prime Minister, Theresa May: European Union \(Withdrawal\) Bill: Disapplication of Primary Legislation](#), 19 December 2017.

³⁵ [HC Hansard, 17 January 2018, col 933](#).

³⁶ House of Commons European Scrutiny Committee, [Sir William Cash Letter to Prime Minister, Theresa May: European Union \(Withdrawal\) Bill: Disapplication of Primary Legislation](#), 19 December 2017.

³⁷ Human Rights Act 1998, s 4.

³⁸ House of Commons European Scrutiny Committee, [Prime Minister Letter to Sir William Cash: European Union \(Withdrawal\) Bill: Disapplication of Primary Legislation](#), 9 January 2018.

³⁹ [HC Hansard, 17 January 2018, col 934](#).

He asked the Government to give an assurance that they would engage with his and other committees whilst the Bill was in the Lords to “find a proper solution to the constitutional issues”. Steve Baker, Parliamentary Under Secretary at the Department for Exiting the European Union, said that the Government was “well apprised of the issue” and would “listen carefully” as the Bill continued its passage.⁴⁰

Charter of Fundamental Rights (Clause 5)

The Government stated in its white paper preceding the Bill that the EU Charter of Fundamental Rights would not be converted into UK law.⁴¹ The Charter of Fundamental Rights brings together in a single document the fundamental rights protected in the EU, under the headings of: dignity; freedoms; equality; solidarity; citizens’ rights; and justice.⁴² The Charter was proclaimed in 2000. When the Treaty of Lisbon entered into force in 2009, the Charter became legally binding on the EU institutions all the time, and on member states when they are acting within the scope of EU law.

Clause 5(4) provides that: “The Charter of Fundamental Rights is not part of domestic law on or after exit day”. Clause 5(5) states that this provision “does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter”. It also provides that “references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles”.

The Government’s position, as stated in the Explanatory Notes to the Bill, is that: the Charter codified rights and principles that already existed in EU law; as the EU *acquis* (body of law) is converted into UK law by the Bill, those underlying rights and principles will also be converted into UK law; and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.⁴³ The Government has explained its reasons behind not converting the Charter into domestic law:

The Charter did not create any new rights. Instead it was intended to catalogue the rights that already existed in EU law, including case law of the CJEU [Court of Justice of the European Union].

⁴⁰ [HC Hansard, 17 January 2018, cols 934–5.](#)

⁴¹ Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), Cm 9446, March 2017, p 18.

⁴² European Commission, ‘[EU Charter of Fundamental Rights](#)’, accessed 22 January 2018.

⁴³ [Explanatory Notes](#), p 32.

The substantive law and the principles which underpin the Charter will be converted into domestic law. As such, they will continue to be enshrined in UK domestic law, through domestic legislation or retained EU law.

The Charter only applies to member states acting within the scope of EU law. As such, when we leave the EU it will cease to have any real relevance for the UK.

The Government's intention is that **the removal of the Charter from domestic law will not affect the substantive rights that individuals already benefit from in the UK.** The Charter was never in itself the source of those rights.

The Charter of Fundamental Rights is only one element of the UK's human rights architecture. The Bill makes no changes to the UK's substantive obligations under the ECHR [European Convention on Human Rights], nor under the Human Rights Act 1998 that gives effect to the ECHR. This Government has been clear that it has no plans to withdraw from the ECHR. Individuals will still be able to bring a claim under the Human Rights Act 1998 as they can now.

It does not make sense for the UK to continue to be subject to EU judicial processes and remedies that do not exist in our legal system once the UK has left the EU. It is the Government's position that it cannot be right that the Charter could be used in its own right, post-exit, to bring challenges against the Government to strike down UK legislation after the UK's withdrawal from the EU.⁴⁴

However, the Government's stance that removing the Charter from UK law would not affect individuals' rights has been disputed. During the Commons committee stage of the Bill, Paul Blomfield, Shadow Minister for Exiting the European Union, spoke to a Labour amendment which would have retained the Charter post-exit. He maintained that removing the Charter would leave a gap in the statute book, and would diminish rights—both things that the Government had said it would not do.⁴⁵

Firstly, he argued that by codifying existing rights, the Charter had effectively created new rights that could not be relied upon without the Charter.⁴⁶ Secondly, he argued that in comparison with the Human Rights Act 1998, the Charter applied to a wider class of applicants: "Anyone with a sufficient interest can apply for a judicial review based on the Charter, and it can also

⁴⁴ Department for Exiting the European Union, [The Repeal Bill—Factsheet 6: Charter of Fundamental Rights](#), 7 September 2017. Emphasis as in original.

⁴⁵ [HC Hansard, 21 November 2017, cols 887–8.](#)

⁴⁶ *ibid*, col 889.

be relied on in other types of case—for example employment tribunal claims—that are within the scope of EU law. By contrast claims under the Human Rights Act can only be made when an individual is a victim of a rights violation”.⁴⁷ Thirdly, he argued that the Charter allowed for “stronger remedies” as national courts had to disapply primary legislation or quash secondary legislation that they found to be incompatible with a directly effective provision of the Charter, whereas under the Human Rights Act, the courts could only make a declaration of incompatibility.⁴⁸ He therefore concluded that “we should be in no doubt that losing the Charter means losing rights”, and that it was “not acceptable” to “pretend that the Bill provides for the transfer of rights and protections when it clearly does not”.⁴⁹ Labour’s amendment was defeated by 311 to 301.⁵⁰

Responding to Mr Blomfield and others who supported retaining the Charter, Dominic Raab, then Minister of State at the Ministry for Justice, confirmed the Government’s commitment to publish a detailed memorandum setting out how each article of the Charter would be reflected in UK law after Brexit.⁵¹ The Government first made a commitment to publish this memorandum to the House of Commons Exiting the European Union Committee.⁵² During its inquiry into the European Union (Withdrawal) Bill, that Committee heard evidence both for and against the Bill’s removal of the Charter from domestic law. The Committee did not draw any conclusions as to the relative strength of the arguments on either side, but it said it would be “helpful” if the Government published the memorandum before clause 5 was considered at committee stage.⁵³

The Government published its memorandum, *Charter of Fundamental Rights of the EU: Right by Right Analysis*, on 5 December 2017. The Government summarised the key findings of its analysis of each article in the Charter as follows:

The Government has been clear that it does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened. Those rights will continue to be protected in a number of ways. First [...] rights will continue to be protected through the EU law that is preserved and converted by the Bill. Second, eighteen of the articles correspond, entirely or largely, to articles of the European Convention on Human Rights and are, as a result, protected both internationally and, through the Human Rights Act 1998 and the

⁴⁷ [HC Hansard, 21 November 2017, col 891.](#)

⁴⁸ *ibid*, col 892.

⁴⁹ *ibid*, cols 892 and 893.

⁵⁰ *ibid*, cols 997–1000.

⁵¹ *ibid*, col 899.

⁵² House of Commons Exiting the European Union Committee, [European Union \(Withdrawal\) Bill](#), 17 November 2017, HC 373 of session 2017–19, p 16.

⁵³ *ibid*, p 17.

devolution statutes, domestically. Finally, the substantive rights protected in many articles of the Charter are also protected in domestic law via the common law or domestic legislation.

Many articles of the Charter set out principles, which are different from rights. Principles cannot be relied on directly by individuals, in the way that rights can.

Eight articles constitute rights which are intrinsically linked to EU citizenship, and make sense only in the context of the relationship between a member state and the Union.

The remaining articles include rights which will continue to be reflected in UK law in a range of ways—including through clause 4 of the EU (Withdrawal) Bill which will preserve Treaty rights which are directly effective, through the retention in UK law of general principles of EU law for interpretative purposes and case law of the CJEU, and through other domestic legislation, such as the Equality Act 2010 in England, Scotland and Wales, and equality legislation and regulations in Northern Ireland.⁵⁴

A further attempt by Labour at the Bill's report stage in the Commons to ensure the Charter would continue to apply to retained EU law was defeated (see section 9.2 of this Briefing).

A group of more than 20 human rights organisations and legal experts, including the Equality and Human Rights Commission, signed an open letter published in the *Observer* on 14 January 2018 arguing that losing the Charter “creates a human rights hole”.⁵⁵ They maintained that: “For the Government to honour its promise of preserving existing rights it must retain the protections in the Charter”.

Challenges to Validity of Retained EU Law (Schedule 1)

The Court of Justice of the European Union (CJEU) has jurisdiction to rule on challenges to the validity of EU law in infraction proceedings brought by the European Commission against member states and on references from national courts concerning the interpretation of EU acts.⁵⁶ Paragraph 1 of schedule 1 would prevent retained EU law being challenged in the UK courts after exit day on the grounds that an EU instrument (eg a regulation or decision) was invalid immediately before exit day. The Government has

⁵⁴ Department for Exiting the European Union, [Charter of Fundamental Rights of the EU: Right by Right Analysis](#), 5 December 2017.

⁵⁵ Equality and Human Rights Commission, [‘EU Withdrawal Bill Will Not Protect UK Rights: Open Letter’](#), 14 January 2018.

⁵⁶ GOV.UK, [‘EU Law and the Balance of Competences’](#), updated 21 March 2013.

stated that this would maintain the current position that domestic courts and tribunals cannot declare EU legislation to be invalid.⁵⁷ However, paragraph 1 of schedule 1 would make some exceptions, so that the validity of an EU instrument in retained EU law could be challenged in the UK courts after exit day if:

- The CJEU had already ruled before exit day that the instrument was invalid; or
- The challenge is of a kind provided for in regulations. These regulations could allow for a challenge that would previously have been brought against an EU institution to be brought against a UK public authority. These regulations would have to be made by the draft affirmative or made affirmative procedure (paragraph 5 of schedule 7).

As explained above, some retained EU law would be domestic secondary legislation, made either under the ECA or another parent Act. The Government has stated that paragraph 1 of schedule 1 would still allow for existing domestic secondary legislation to be challenged by way of judicial review, as long as it was on grounds other than the validity of the EU instrument it related to.⁵⁸

For categories of retained EU law other than domestic secondary legislation, questions have been raised about how it could be challenged in the courts—see section 3.5 of this Briefing.

General Principles of EU Law (Schedule 1)

The general principles of EU law are unwritten sources of law developed by the case law of the CJEU, which it uses to “bridge the gaps left by primary and/or secondary [EU] legislation”.⁵⁹ The Explanatory Notes to the Bill describe the general principles of EU law as follows:

The general principles are the fundamental legal principles governing the way in which the EU operates. They are part of the EU law with which the EU institutions and member states are bound to comply. The general principles are applied by the CJEU and domestic courts when determining the lawfulness of legislative and administrative measures within the scope of EU law, and they are also an aid to interpretation of EU law. Examples of the general principles include proportionality, non-retroactivity (ie that the retroactive effect of EU

⁵⁷ Department for Exiting the European Union, [Written Evidence \(EUW0036\)](#), 25 October 2017, p 10.

⁵⁸ *ibid.*

⁵⁹ EUR-Lex, [‘The Non-written Sources of European Law: Supplementary Law’](#), 20 August 2010.

law is, in principle, prohibited), fundamental rights and equivalence and effectiveness.

UK laws that are within the scope of EU law and EU legislation (such as directives) that do not comply with the general principles can be challenged and disapplied. Administrative actions taken under EU law must also comply with the general principles.⁶⁰

Paragraph 2 of schedule 1 provides that only general principles of EU law that had been recognised by the CJEU in a case decided before exit day would remain part of domestic law after exit day.

Paragraph 3 of schedule 1 provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. It further provides that post-exit, courts cannot:

- disapply domestic laws;
- rule that a particular act was unlawful; or
- quash any action taken on the grounds of incompatibility with the general principles of EU law.

However, paragraph 27(5) of schedule 8 would allow a legal challenge to be brought on or after exit day based on the general principles of EU law if it:

- related to something that happened before exit day;
- was brought within three months of exit day; and
- did not seek to disapply or quash an Act of Parliament or the common law or anything related to them (ie it could be made against either administrative action or domestic legislation other than Acts of Parliament or rules of law).⁶¹

This three-month window to bring a legal challenge was added as a government amendment at report stage. It is discussed further in section 9.1 of this Briefing.

Francovich Rule (Schedule 1)

As a result of the *Francovich* case in 1991—brought because the Italian Government failed to implement an EU directive on time—the *Francovich*

⁶⁰ [Explanatory Notes](#), pp 18–19.

⁶¹ *ibid*, p 65.

rule is a principle of EU law which requires damages to be available where a member state breaches a rule of EU law and three conditions are met:

1. The rule infringed was intended to confer rights on individuals.
2. The breach was sufficiently serious.
3. There was a direct causal link between the breach of the obligation resting on the member state and the damage sustained by the injured party.⁶²

Paragraph 4 of schedule 1 provides that there would be no right in domestic law post-exit to damages in accordance with the *Francovich* rule. The Explanatory Notes state that this would not affect any specific statutory rights to claim damages in respect of breaches of retained EU law.⁶³

An amendment to retain the *Francovich* rule in respect of government failures to comply with EU obligations before exit day was defeated at committee stage in the Commons.⁶⁴ Robert Buckland, the Solicitor General, said that the Government would “consider further whether any additional specific and more detailed transitional arrangements should be set out in regulations”.⁶⁵

3.5 Status of Retained EU Law

The House of Lords Constitution Committee noted in its interim report on the Bill that there was a lack of clarity about the status of retained EU law post-exit and how it would fit with the usual hierarchy of primary and secondary legislation:

It is also unclear as to the status of retained EU law post-exit, whether it is primary legislation, secondary legislation, or some new taxonomical form. Clause 2 suggests that primary legislation that implements EU obligations will remain primary legislation, while secondary legislation that implements such obligations will remain secondary legislation. However, the direct EU legislation and directly effective EU law domesticated by clauses 3 and 4 effectively have no equivalent status in UK law and the Bill makes no provision for them. The Bill requires that retained EU law be considered primary legislation for the purposes of the Human Rights Act 1998 [schedule 8 para 19], but does not set out how it should be considered otherwise.

⁶² James Segan, ‘[The Great Repeal Bill: What Will Happen to Accrued Rights to Claim Francovich Damages?](#)’, Blackstone Chambers, 3 October 2017.

⁶³ [Explanatory Notes](#), p 41.

⁶⁴ [HC Hansard](#), 21 November 2017, col 1006–10.

⁶⁵ *ibid*, col 979.

Professor Paul Craig concluded there was “an important ambiguity that lies at the heart of the present schema, which will render the law post Brexit difficult to understand, even for the trained lawyer” not least because “the legal status of retained law is not entirely clear”. **We recommend that this matter should be addressed on the face of the Bill to avoid uncertainty.**⁶⁶

This point was echoed by the House of Commons Exiting the European Union Committee, which said the Government needed to “[make] clear whether it is to be treated by the courts as primary legislation, so that they cannot rule it to be invalid, or secondary”.⁶⁷ The difference between primary and secondary legislation is significant in terms of the way that legal challenge can be brought:

As a general rule, primary legislation can be challenged in the courts only on very narrow grounds; in particular the doctrine of parliamentary supremacy means that Acts of Parliament can be challenged only by reference to legislative presumptions of compliance with the European Convention on Human Rights established by the Human Rights Act 1998 and [currently] with the UK’s European Union obligations established by the European Communities Act 1972.

Secondary legislation can be challenged in the courts on a wide variety of grounds, in common with other forms of executive action.

In particular, gross unreasonableness or irrationality will support a challenge to the lawfulness and effect of subordinate legislation; as will procedural defects in the preparation and making of the legislation, which the courts are prevented from examining in the case of Acts of Parliament [...]⁶⁸

The Government explained in evidence to the Constitution Committee how it envisaged the status of retained EU law:

Domestic legislation which is preserved under clause 2 will continue to hold whatever status it holds now, ie either primary or secondary legislation.

Legislation which is converted into domestic law by clause 3 will however form part of a unique and new category of domestic law. The

⁶⁶ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, paras 28–9. Emphasis in original.

⁶⁷ House of Commons Exiting the European Union Committee, [European Union \(Withdrawal\) Bill](#), 17 November 2017, HC 373 of session 2017–19, p 3.

⁶⁸ Daniel Greenberg, ‘Legislation’, *Westlaw Insight*, August 2017, paras 16–19.

Government considered carefully whether it would be appropriate to provide within the Bill a general or ‘default’ status for this legislation for all purposes. We have concluded that this would not be the right approach. Retained EU direct legislation will operate in a different way to both primary and secondary legislation, was not made by UK legislators, and will have a unique status within the domestic hierarchy. It was not considered appropriate, therefore, to assign a single status to retained EU direct legislation for all purposes.⁶⁹

The Government intends that, if it is necessary to specify post-exit whether for a particular purpose a retained EU law should have the status of primary or secondary legislation, ministers could do so using delegated powers under clause 17, using the negative procedure.⁷⁰ When Government ministers appeared before the House of Lords Constitution Committee to give evidence on the Bill, Lord Pannick (Crossbench) questioned whether it was “appropriate” for a minister to be able to determine “something as fundamental as whether a part of our law should be treated as primary or secondary legislation”.⁷¹

An alternative approach was suggested by the former Attorney General Dominic Grieve (Conservative MP for Beaconsfield). At report stage in the House of Commons, he tabled new clause 13 which proposed a classification scheme for retained EU law under which it would be treated as primary or secondary legislation depending on which EU procedure it had originally been made under. It would also have given ministers the ability to change the classification of a piece of retained EU law by affirmative instrument. He said that the Government’s proposal to deal with each measure on a case-by-case basis seemed “a rather extraordinary way in which to proceed”.⁷² He explained that he did not wish to press the new clause to a vote, but had tabled it to show both Houses “how one might go about making that separation”, which would “then provide a sensible measure of greater certainty”. Paul Blomfield, Shadow Minister for Exiting the European Union, said that Labour supported new clause 13.⁷³ However, Robert Buckland, the Solicitor General, maintained that a case-by-case approach was “far wiser”.⁷⁴

3.6 Court of Justice of the European Union (Clause 6)

The Court of Justice of the European Union (CJEU) is the judicial institution

⁶⁹ Department for Exiting the European Union, [Written Evidence \(EUW0036\)](#), 25 October 2017, pp 9–10.

⁷⁰ House of Lords Constitution Committee, [Uncorrected Oral Evidence: European Union \(Withdrawal\) Bill](#), 13 December 2017, Q47.

⁷¹ *ibid.*

⁷² [HC Hansard, 16 January 2018, col 741.](#)

⁷³ *ibid* col 742.

⁷⁴ *ibid*, col 781.

of the EU. It has jurisdiction to hear:

- i. Infringement actions against member states for non-compliance with EU law potentially leading to fines, brought by either the Commission or other member states.
- ii. Preliminary references—providing interpretative judgments at the request of national courts in order to help them decide a case with an EU law dimension.
- iii. Actions for annulment of EU legislation or to require an institution to act, brought by a member state or by one of the institutions, similar to judicial review proceedings in the UK.⁷⁵

In cases of doubt regarding the interpretation of a European provision, national courts must refer a matter to the CJEU.⁷⁶ Section 3(1) of the ECA requires UK courts to follow the CJEU interpretation of EU law.

Theresa May stated in her Lancaster House speech in January 2017 that one of her guiding principles for Brexit would be to “bring an end to the jurisdiction of the European Court of Justice in Britain” and ensure that “our laws [...] will be interpreted by judges not in Luxembourg but in courts across this country”.⁷⁷ However, the Government acknowledged in the white paper that there would be an ongoing role for existing CJEU case law post-Brexit:

[...] for as long as EU-derived law remains on the UK statute book, it is essential that there is a common understanding of what that law means. The Government believes that this is best achieved by providing for continuity in how that law is interpreted before and after exit day. To maximise certainty therefore, the 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. Everyone will have been operating on the basis that the law means what the CJEU has already determined it does, and any other starting point would be to change the law. Insofar as case law concerns an aspect of EU law that is not being converted into UK law, that element of case law will not need to be applied by the UK courts.⁷⁸

⁷⁵ House of Lords European Union Committee, [The Workload of the Court of Justice of the European Union](#), 6 April 2011, HL Paper 128 of session 2010–12, p 11.

⁷⁶ EUR-Lex, [‘The Reference for a Preliminary Ruling’](#), 15 January 2014.

⁷⁷ Prime Minister’s Office, [‘The Government’s Negotiating Objectives for Exiting the EU: PM Speech’](#), 17 January 2017.

⁷⁸ Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 15.

The Government's approach would include giving the UK Supreme Court latitude to depart from CJEU case law:

[...] the intention is not to fossilise the past decisions of the CJEU forever. As such, we propose that the Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of the Supreme Court. It is very rare for the Supreme Court to depart from one of its own decisions or that of its predecessor, the House of Lords. The circumstances in which it will, exceptionally, do so, derive from a Practice Statement made by the House of Lords in 1996, and adopted by the Supreme Court in 2010. That Statement set out, among other things, that while treating its former decisions as normally binding, it will depart from its previous decisions "when it appears the right thing to do so".

We would expect the Supreme Court to take a similar, sparing approach to departing from CJEU case law.⁷⁹

Clause 6 of the Bill sets out the post-exit relationship of the UK to the CJEU and its case law. Clause 6(1) provides that courts and tribunals would not be bound by the principles or decisions of the CJEU on or after exit day. It also stipulates that UK courts cannot refer matters to the CJEU on or after exit day. Clause 6(2) states that the UK courts need not have regard to anything done on or after exit day by the European Court, but "may do so" if they consider it "appropriate" to do so. This would allow the UK courts to have regard to post-exit CJEU case law, but would not oblige them to do so.

Clause 6(3) provides that, post-exit, retained EU law (that has not subsequently been modified) should be interpreted in accordance with retained case law and retained general principles of EU law, having regard to the limits of EU competences immediately before exit day. Paragraph 3 of schedule 5 provides that where determining the meaning or effect of EU law is necessary for a court to interpret retained EU law, judges would continue to determine it as a question of law, rather than treat it as a question of fact.

The Supreme Court, and the Scottish High Court of Justiciary in cases with no further right of appeal to the Supreme Court, would not be bound by retained EU case law (clause 6(3)). In deciding whether to depart from retained EU case law, the Supreme Court and the High Court of Justiciary would have to apply the same test as when deciding whether to depart from their own case law (clause 6(4)).

There has been some criticism that the Bill as drafted does not give enough guidance to the courts on applying CJEU case law made after exit day. Lord

⁷⁹ Department for Exiting the European Union, [Legislating for the United Kingdom's Withdrawal from the European Union](#), March 2017, Cm 9446, p 16.

Neuberger of Abbotsbury, speaking when he was still President of the Supreme Court, said that Parliament must be “very clear” on this matter; if not, then “to blame the judges for making the law when Parliament has failed to do so would be unfair”.⁸⁰ Judges would, he said, “hope and expect” that Parliament would “spell it out in a statute”. In her first press conference as President of the Supreme Court, Baroness Hale of Richmond also said she hoped the Bill would give “as much clarity as possible” on how much the Supreme Court should be taking into account future CJEU judgments.⁸¹

The House of Commons Exiting the European Union Committee also called for “greater clarity” to assist judges on how they are to apply CJEU case law decisions issued after exit day.⁸² The House of Lords Constitution Committee said it was “at least arguable that the Bill should provide more guidance to the courts”.⁸³ It particularly highlighted issues such as:

- Whether post-exit CJEU judgments rendered in cases that were referred to it by UK courts pre-exit should be treated differently from other CJEU case law.
- The status of post-exit judgments by the CJEU on any pre-exit laws that still apply in the UK
- Whether UK courts post-Brexit are likely to take into account CJEU case law which overturns or clarifies pre-exit law.

4. Delegated Powers

4.1 Deficiencies: the ‘Correcting’ Power (Clause 7)

The purpose of clauses 2 to 4 is to convert and preserve EU law as it stands at the moment of exit into domestic law. But the Government argues that “a significant proportion” of retained EU law contains “some provisions that will not function effectively or be otherwise deficient once the UK leaves the EU”.⁸⁴ Examples of the sorts of scenarios the Government has in mind include:⁸⁵

- References which will no longer be accurate once the UK leaves the EU, such as references to “member states other than the

⁸⁰ Clive Coleman, ‘[UK Judges Need Clarity after Brexit—Lord Neuberger](#)’, BBC News, 8 August 2017.

⁸¹ Owen Bowcott, ‘[UK’s New Supreme Court Chief Calls for Clarity on ECJ After Brexit](#)’, *Guardian*, 5 October 2017.

⁸² House of Commons Exiting the European Union Committee, [European Union \(Withdrawal\) Bill](#), 17 November 2017, HC 373 of session 2017–19, p 3.

⁸³ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 20.

⁸⁴ [Explanatory Notes](#), p 11.

⁸⁵ *ibid*, pp 11–12.

United Kingdom”, to “EU law”, or to providing for the UK’s “EU obligations”.

- Law which will no longer work properly once the UK has left the EU, for example where law requires the UK to obtain an opinion from the European Commission on a given issue. The Commission will no longer provide such an opinion to the UK post-exit.
- Depending on what is agreed with the EU, functions currently carried out at EU level (eg evaluation and authorisation of chemicals; air safety regulation) may need to be transferred to appropriate bodies in the UK.
- Areas of law where policy no longer operates as intended, for example the reciprocal arrangements between states, including the reciprocal rights of citizens.

Clause 7(1) would therefore enable ministers to make regulations to make such provision as the minister considers “appropriate” to prevent, remedy or mitigate “any failure of EU law to operative effectively” or “any other deficiency in retained EU law”, but only where the failure or deficiency arises from the UK’s withdrawal from the EU. The Explanatory Notes state that “the law is not deficient merely because a minister considers that EU law was flawed prior to exit”.⁸⁶ This power in clause 7 has been dubbed the ‘correcting power’.

Clause 7(2) specifies that deficiencies in retained EU law are where the minister considers that retained EU law:

- Contains anything which no longer has practical application in the UK or is redundant.
- Confers functions on EU entities that would no longer have any function in relation to the UK.
- Makes provision for reciprocal arrangements between the UK and the EU, an EU body or EU member state which no longer exist or are no longer appropriate.
- Makes provision for other arrangements with the EU, an EU body or EU member state, or which depend on the UK’s EU membership, which no longer exist or are no longer appropriate.
- Makes provision for any other reciprocal or other arrangements which no longer exist or which are no longer appropriate as a result of the UK ceasing to be a party to any of the EU Treaties.
- Does not transpose functions or restrictions which were in an EU directive and in force immediately before exit and which it is appropriate to retain.

⁸⁶ [Explanatory Notes](#), p 34.

In the Bill as originally drafted, this list was illustrative rather than exhaustive. However, at report stage, a government amendment was agreed to that made the list exhaustive, subject to subclause (3) (also added at report stage). This states that retained EU law is deficient where the minister considers that it contains anything “which is of a similar kind to any deficiency that falls within subsection 2”. It would also give ministers the power to make regulations setting out further categories of deficiency. The background to these amendments to clause 7 is discussed further in section 9.1 of this Briefing. Retained EU law would not be deficient simply for failing to reflect changes in EU law made after exit day (clause 7(4)).

Regulations made under clause 7(1) would be able to make any provision that could be made by an Act of Parliament (clause 7(5)). This would include amending or repealing primary legislation, a so-called Henry VIII power. The regulations could also transfer functions currently carried out by EU bodies to a UK public authority (either an existing one, or a new one established under the regulations) (clause 7(6)). This would include enabling a UK public authority to make an instrument of a legislative character (tertiary legislation).

Clauses 7(7) and (8) set out some restrictions on the delegated power in clause 7(1). Regulations could not be used to impose or increase taxation; make retrospective provision; create a relevant criminal offence;⁸⁷ implement the withdrawal agreement; amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it; or amend or repeal the Northern Ireland Act 1988 (with some limited exceptions). The regulation-making power would be time-limited, so it would expire two years after exit day. Paragraph 28 of schedule 8 makes clear that it is the power to make new regulations that expires at this point, not any regulations that have already been made.

4.2 Complying with International Obligations (Clause 8)

Clause 8 would give ministers the power to make regulations to enable continued compliance with the UK’s international obligations by preventing or remedying any breaches that might otherwise result from the UK’s departure from the EU. Ministers could use this power when they considered it “appropriate” (clause 8(1)), but they could not use it to: make retrospective provision; create a relevant criminal offence; implement the withdrawal agreement; or amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.

⁸⁷ A ‘relevant criminal offence’ is defined in clause 14 as an offence for which an individual who has reached the age of 18 (or, in Scotland and Northern Ireland, 21) is capable of being sentenced to imprisonment for a term of more than 2 years (ignoring any enactment prohibiting or restricting the imprisonment of individuals who have no previous convictions).

Like the correcting power, the power in clause 8 is a Henry VIII power, as it could be used to make any provision that could be made by an Act of Parliament, which includes the ability to amend or repeal previous primary legislation. Also like the correcting power, the power in clause 8 is time limited, so it would expire two years after exit day. It would be the power to make new regulations that would expire at this point, not any regulations already made (paragraph 28 of schedule 8).

The House of Lords Delegated Powers and Regulatory Reform Committee has criticised the Government for not being explicit about the sort of international obligation they have in mind under clause 8, save for one example about trans-frontier television, given in the delegated powers memorandum.⁸⁸

4.3 Implementing the Withdrawal Agreement (Clause 9)

The Government anticipates there will be at least two agreements resulting from the UK's departure from the EU: a withdrawal agreement negotiated under Article 50 covering the terms of the UK's departure from the EU (including citizens' rights, Northern Ireland and any financial settlement) and any implementation period; and one or more agreements covering different aspects of the future relationship (eg trade).⁸⁹

Clause 9 of the Bill would give ministers powers to make delegated legislation for the purposes of implementing the withdrawal agreement. As with the powers in clauses 7 and 8, ministers could use this power when they considered it "appropriate" (clause 9(1)). And as with the powers in clauses 7 and 8, the power in clause 9 is a Henry VIII power (clause 9(2)), as it could be used to make any provision that could be made by an Act of Parliament, which includes the ability to amend or repeal previous primary legislation.

Some restrictions are set out on the way the power in clause 9 could be used. It could not be used:

- To impose or increase taxation; to make retrospective provision; to create a relevant criminal offence; or to amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it (clause 9(3)).

⁸⁸ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 12. The Committee report refers to paragraph 52 of the delegated powers memorandum, but a new version of the memorandum has subsequently been published in which the relevant paragraph is paragraph 72.

⁸⁹ House of Commons, [Written Statement: Procedures for the Approval and Implementation of EU Exit Agreements](#), 13 December 2017, WS342.

- After exit day (clause 9(4)).
- Without the prior enactment of a statute by Parliament approving the final terms of withdrawal of the UK from the EU (clause 9(1)).

This last condition was added as the result of an amendment tabled at the Bill's committee stage in the Commons by Dominic Grieve (Conservative MP for Beaconsfield), on which the Government was defeated by 309 votes to 305 (the only Government defeat on the Bill in the Commons).⁹⁰

During the debate on his amendment (amendment 7), Dominic Grieve described clause 9 as a “blank cheque to draft statutory instruments to achieve something when at the moment we do not know what that is”.⁹¹ Given that the Government had already stated there would be a Withdrawal Agreement and Implementation Bill, Mr Grieve said he was “none the wiser” about why the Government needed the powers in clause 9.⁹²

David Davis had announced in November 2017 that the Government would bring forward a separate bill, the EU Withdrawal Agreement and Implementation Bill, to implement the withdrawal agreement, and that “major policies in the withdrawal agreement will be directly implemented into UK law by primary legislation, and not by secondary legislation under the Withdrawal Bill”.⁹³ In a ministerial statement in December 2017, Mr Davis clarified how the withdrawal agreement would be approved and brought into force:

The Withdrawal Agreement will need to be signed by both parties and concluded by the EU and ratified by the UK before it can enter into force. The UK approval and EU approval processes can operate in parallel.

The EU's Chief Negotiator, Michel Barnier, has said he wants to have finalised the Withdrawal Agreement by October 2018. In Europe, the Agreement will then require the consent of the European Parliament and final sign off by the Council acting by a qualified majority. It will not require separate approval or ratification by the individual member states.

In the UK, the Government has committed to hold a vote on the final deal in Parliament as soon as possible after the negotiations have concluded. This vote will take the form of a resolution in both Houses

⁹⁰ [HC Hansard, 13 December 2017, cols 521–5.](#)

⁹¹ *ibid*, col 443.

⁹² *ibid*, col 445.

⁹³ [HC Hansard, 13 November 2017, col 37.](#)

of Parliament and will cover both the Withdrawal Agreement and the terms for our future relationship. The Government will not implement any part of the Withdrawal Agreement—for example by using clause 9 of the European Union (Withdrawal) Bill—until after this vote has taken place.

In addition to this vote, the Constitutional Reform and Governance Act 2010 (CRAG) normally requires the Government to place a copy of any treaty subject to ratification before both Houses of Parliament for a period of at least 21 sitting days, after which the treaty may be ratified unless there is a resolution against this. If the House of Commons resolves against ratification the Government can lay a statement explaining why it considers the treaty should still be ratified and there is then a further 21 sitting days during which the House of Commons may decide whether to resolve again against ratification. The Government is only able to ratify the agreement if the House of Commons does not resolve against the agreement.

If Parliament supports the resolution to proceed with the Withdrawal Agreement and the terms for our future relationship, the Government will bring forward a Withdrawal Agreement and Implementation Bill to give the Withdrawal Agreement domestic legal effect. The Bill will implement the terms of the Withdrawal Agreement in UK law as well as providing a further opportunity for parliamentary scrutiny. This legislation will be introduced before the UK exits the EU and the substantive provisions will only take effect from the moment of exit. Similarly, we expect any steps taken through secondary legislation to implement any part of the Withdrawal Agreement will only be operational from the moment of exit, though preparatory provisions may be necessary in certain cases.⁹⁴

Speaking to his amendment, Dominic Grieve argued that this statement did not make the case for why the clause 9 powers were necessary.⁹⁵ He said he had drafted his amendment to ensure they “could not be used to pre-empt a statute that we should probably be considering this time next year”.⁹⁶

Dominic Raab, then Minister of State at the Ministry for Justice, said that clause 9 was “a supplementary provision to give us agility in the negotiations and the flexibility of legislative procedure to deliver the best deal under time pressure”.⁹⁷ He explained that some of the legislative changes needed to implement the withdrawal agreement would be “better suited” to secondary

⁹⁴ House of Commons, ‘[Written Statement: Procedures for the Approval and Implementation of EU Exit Agreements](#)’, 13 December 2017, WS342.

⁹⁵ [HC Hansard, 13 December 2017, col 443.](#)

⁹⁶ *ibid*, col 446.

⁹⁷ *ibid*, col 475.

legislation than primary legislation, and doing this through clause 9 (rather than secondary legislation made under the EU Withdrawal Agreement and Implementation Bill) “offers a material benefit in terms of timing” as “we would be able to start—not complete—laying some of the statutory instruments soon after reaching agreement with our EU friends alongside the passage of new primary legislation”. He gave examples of the way the Government might use clause 9 (mostly technical matters, such as ensuring the EU had diplomatic privileges and immunities in the UK post-Brexit) but argued that the powers in clause 9 needed to be drafted to retain “agility” as the final “contours” of the deal were not yet known.⁹⁸

Following the Government’s defeat on the amendment, David Davis said that deferring the clause 9 powers until after the EU Withdrawal and Implementation Bill received royal assent would result in a “very compressed” timetable.⁹⁹

4.4 Power to Make Consequential Provision (Clause 17)

Clause 17 would allow a minister to make regulations “as the minister considers appropriate in consequence” of the Bill. As this power could include amending, repealing or revoking primary and secondary legislation (clause 17(2)), it is another Henry VIII power. However, this power could not be used to modify primary legislation passed after the end of the parliamentary session in which this Bill is passed. Statutory instruments made under this power would be subject to the negative procedure (paragraph 11 of schedule 7).

The Government has acknowledged that “the powers conferred by this clause are wide”.¹⁰⁰ But it argues that this provision is necessary because it is “unable to identify, at this early stage, all the possible consequential provisions required”, so it is “prudent for the Bill to contain a power to deal with consequential provisions by secondary legislation”. It says that the power is limited to making amendments consequential to the contents of the Bill itself, and not to the consequences of withdrawal from the EU which are addressed by other powers in the Bill. As an example of the way this power might be used, the Government says that it could, for example, make provision on whether retained direct EU legislation should be treated as primary or subordinate legislation for the purposes of another enactment.

⁹⁸ [HC Hansard, 13 December 2017, col 477.](#)

⁹⁹ [HC Hansard, 14 December 2017, col 586.](#)

¹⁰⁰ Department for Exiting the European Union, [Delegated Powers Memorandum](#), January 2018, p 42.

4.5 Parliamentary Scrutiny (Clause 16 and Schedule 7)

Clause 16 introduces schedule 7, which sets out the parliamentary scrutiny procedures for statutory instruments made under the Bill.

Scrutiny of the Correcting Power (Schedule 7)

Part I of schedule 7 sets out the scrutiny procedures which apply to regulations made under clause 7(1) (the correcting power). The affirmative procedure¹⁰¹ would apply to delegated legislation that:

- Establishes a new public authority.
- Transfers EU functions to a newly established public authority.
- Transfers an EU legislative function (the power to make delegated or implementing acts) to a UK authority.
- Relates to fees.
- Creates or widens the scope of a criminal offence.
- Creates or amends a power to legislate.

The affirmative procedure would also apply to regulations made under clause 7(3)(b) that contained new definitions or provisions about what qualifies as a ‘deficiency’ in retained EU law.

Regulations under clause 7(1) that did not do any of the above could be made under the negative procedure.¹⁰² However, paragraph 3 of schedule 7 requires that before making a negative instrument, a minister must lay the instrument before a Commons committee in draft, along with an explanatory statement setting out why s/he considers the negative procedure appropriate. The committee would have ten sitting days to make a recommendation about whether it agreed this was the appropriate procedure. The minister would not be bound by this recommendation, and could still proceed with making a negative instrument even if the committee recommended against it. The minister could also proceed with making a negative instrument if the committee failed to produce a recommendation within ten sitting days.

Paragraph 4 of schedule 7 would allow the made affirmative procedure to be used if the minister considered it “necessary” “by reason of urgency”. Under the made affirmative procedure, the instrument may be made without first being approved by both Houses, but it will lapse after a month unless it is approved by both Houses during that time. Subparagraphs 7 and 8 would

¹⁰¹ Under the affirmative procedure, regulations are laid before Parliament in draft and cannot come into force until they have been approved by both Houses.

¹⁰² Under the negative procedure, regulations are made by the minister without any need for prior debate. They can subsequently be annulled by a resolution of either House.

allow the minister to make a negative instrument without referring it to be considered by a Commons committee if the minister considered it “necessary” “by reason of urgency”.

Scrutiny of Other Powers (Schedule 7)

Part 2 of schedule 7 sets out the scrutiny procedures for regulations made under powers other than clause 7(1).

The scrutiny procedures for secondary instruments made under clause 8 (power to comply with international agreements) and clause 9 (power to implement withdrawal agreement) mirror those that apply to the correcting power. For clause 9, there is the additional requirement that if the power is used to amend the European Union (Withdrawal) Act itself, then this must be done by the affirmative or made affirmative procedure.

The sifting committee procedure would apply to instruments made under clauses 8 and 9 as well as clause 7, but not to instruments made under other clauses in the Bill.

Commons Sifting Committee (Schedule 7)

When the Bill was first introduced to the House of Commons, it did not include requirement for ministers to submit draft negative instruments to a Commons committee. There were a number of calls in autumn 2017 for the Bill to introduce enhanced scrutiny procedures for delegated legislation:

- The House of Lords Constitution Committee suggested that enhanced scrutiny procedures might be required for the Bill, and undertook to investigate this further.¹⁰³
- The House of Lords Delegated Powers and Regulatory Reform Committee proposed a new sifting mechanism for regulations made under clauses 7 to 9 and 17.¹⁰⁴
- The House of Commons Procedure Committee argued that the Government’s proposals for scrutiny in the Bill gave MPs “insufficient control over the means by which adequate scrutiny and consequential changes are to be achieved”.¹⁰⁵ It recommended that a new committee should be established along

¹⁰³ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 2.

¹⁰⁴ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, pp 28–9.

¹⁰⁵ House of Commons Procedure Committee, [Scrutiny of Delegated Legislation under the European Union \(Withdrawal\) Bill: Interim Report](#), 6 November 2017, HC 386 of session 2017–19, p 10.

the lines of the European Scrutiny Committee to provide a scrutiny system “adequate for the purpose” of the “unique and unprecedented” task of scrutinising secondary legislation under the powers in the Bill.¹⁰⁶

- The Hansard Society also published a report in September 2017 calling for a new strengthened scrutiny procedure to be introduced for the exercise of the widest delegated powers in the Bill, and for the House of Commons to establish a new ‘sift and scrutiny’ system for delegated legislation in general.¹⁰⁷

Charles Walker, chair of the House of Commons Procedure Committee, tabled amendments at committee stage to establish a new Commons sifting procedure for secondary legislation made under the Bill. Steve Baker said that the Government would accept these amendments.¹⁰⁸ They were agreed to without division.¹⁰⁹ Mr Walker acknowledged that ministers could “in theory ignore the recommendation of the new committee”, but he said if they did so, they could be summoned to the committee to explain why.¹¹⁰

Andrea Leadsom, Leader of the House of Commons, has published a draft amendment to the Commons Standing Orders to establish a European Statutory Instruments Committee to carry out this role.¹¹¹ The draft standing orders require the new committee to have regard to any relevant report of the Joint Committee on Statutory Instruments (JCSI), and would enable it to request an opinion from the JCSI or the Joint Committee on Human Rights (as well as from other Commons select committees).

The Hansard Society has argued that this “simply bolts a new sifting committee on to existing, wholly inadequate, procedures for scrutinising negative and affirmative instruments in the Commons”.¹¹² It recommended further changes to the Bill:¹¹³

- The Government should be obliged to accept the sifting committee’s recommendation to upgrade the scrutiny procedure

¹⁰⁶ House of Commons Procedure Committee, [Scrutiny of Delegated Legislation under the European Union \(Withdrawal\) Bill: Interim Report](#), 6 November 2017, HC 386 of session 2017–19, p 3.

¹⁰⁷ Hansard Society, [Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union \(Withdrawal\) Bill](#), September 2017.

¹⁰⁸ [HC Hansard, 12 December 2017, col 280](#).

¹⁰⁹ [HC Hansard, 13 December 2017, col 536](#).

¹¹⁰ House of Commons Procedure Committee, [‘Chair Tables Amendments to EU \(Withdrawal\) Bill on Scrutiny Powers’](#), 7 December 2017.

¹¹¹ The draft amendment to Standing Orders currently appears each day on the Commons Order Paper; see: House of Commons, [Order Paper](#), 23 January 2018, pp 54–5.

¹¹² Hansard Society, [‘Scrutiny of SIs: Further Amendments are Needed to EU \(Withdrawal\) Bill’](#), 15 January 2018.

¹¹³ *ibid.*

for an SI.

- A ‘conditional amendment’ power should be added.
- Clause 17(1): The sifting committee’s remit should extend to SIs produced under this power.
- Urgent cases: Some constraints should be introduced.
- The House of Lords: Its role in the scrutiny process should be confirmed.

On this last point, the Hansard Society argued that:

The Walker amendments were deliberately framed to refer only to the House of Commons rather than Parliament, to avoid trespassing on the Upper House’s procedures. However, this has given rise to concerns that the Government might utilise this situation to further its desire to limit the role of the House of Lords in the scrutiny of SIs, as set out in the Strathclyde Report.¹¹⁴

Baroness Evans of Bowes Park, Leader of the House of Lords, told the House of Lords Constitution Committee in December that she wanted to “to make sure that the Lords has a comparable role in relation to SIs under this Bill”.¹¹⁵ She said at that stage she was, pending consultation with the usual channels, “minded to look at building on the work of the Secondary Legislation Scrutiny Committee, enhancing its resources so that, hopefully, it can play a comparable role in dealing with the SIs”.

Under the proposed mechanism that was put forward by the House of Lords Delegated Powers and Regulatory Reform Committee last year, the sifting would be done by a committee of each House, or by a joint committee of both Houses.¹¹⁶ If a committee in either House, or a joint committee, recommended the affirmative procedure, that level of scrutiny would apply unless the relevant House resolved to reject the committee’s recommendation within a further period of five sitting days.

Explanatory Statements (Schedule 7)

When laying an instrument before Parliament under the correcting power, or under clause 8 (complying with international obligations) or clause 9

¹¹⁴ Hansard Society, [‘Scrutiny of SIs: Further Amendments are Needed to EU \(Withdrawal\) Bill’](#), 15 January 2018.

¹¹⁵ House of Lords Constitution Committee, [Uncorrected Oral Evidence: European Union \(Withdrawal\) Bill](#), 13 December 2017, Q54.

¹¹⁶ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 28.

(implementing the withdrawal agreement), paragraph 22 of schedule 7 would require the minister to have produced an explanatory statement:

- indicating whether the draft legislation amends/repeals/revokes equalities legislation (the Equality Act 2010, the Equality Act 2006 or any secondary legislation made under either of those Acts)—and if so, what the effect is;
- indicating that the minister has had due regard under equalities legislation to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010, so far as required by equalities legislation;
- explaining the instrument or draft and the reasons for it;
- explaining what any relevant law did before exit day and how the retained EU law is being changed; and
- that the minister considers that the instrument does no more than is appropriate.¹¹⁷

This requirement was added by a government amendment agreed at committee stage without division.¹¹⁸ The Government tabled the amendment in response to concerns raised by Maria Miller and the Committee she chairs, the House of Commons Women and Equalities Committee, about the equalities impacts of the Bill.¹¹⁹

4.6 Criticism of Delegated Powers in the Bill

The House of Lords Delegated Powers and Regulatory Reform Committee has been critical about the scope of the delegated powers granted in the Bill, including those in clauses 7 to 9. It said that the Bill had “failed” to meet any of the expectations to do with delegated powers the Committee had set out ahead of the Bill’s publication.¹²⁰

The Committee found that the powers given to ministers to “correct” EU law were “too wide”.¹²¹ It said that the test in clauses 7 to 9 and 17 should be “whether remedial action is objectively necessary rather than whether

¹¹⁷ [Explanatory Notes](#), p 59.

¹¹⁸ [HC Hansard, 13 December 2017, col 541](#).

¹¹⁹ [HC Hansard, 14 November 2017, cols 277–8](#).

¹²⁰ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, pp 4–5. The Committee set out its expectations before the Bill’s publication in its reports [Special Report: Submission to the House of Commons Procedure Committee Inquiry on the Delegated Powers in the ‘Great Repeal Bill’](#), 16 March 2017, HL Paper 143 of session 2016–17 and [Special Report: Second Submission to the House of Commons Procedure Committee Inquiry on the Delegated Powers in the ‘Great Repeal Bill’](#), 27 April 2017, HL Paper 164 of session 2016–7.

¹²¹ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 30.

the minister thinks it appropriate”. It suggested that if the powers were framed that way, then once the necessity threshold was met, ministers could choose whichever solution most commended itself, even if it was one of several possible solutions.¹²²

Clauses 7 to 9 enable the making of tertiary legislation, ie regulations which may allow people or bodies, including ministers themselves, to make further subordinate legislation without there necessarily being any parliamentary procedure or requirement for the tertiary legislation to be made by statutory instrument.¹²³ The Delegated Powers and Regulatory Reform Committee expressed concerns that the tertiary legislation-making powers in clauses 7 to 9 would not be subject to the same time limits as the secondary legislation-making powers (two years from exit day for clauses 7 and 8; exit day for clause 9).¹²⁴ The Committee called for tertiary legislation to be subject to the same parliamentary control and time limits applicable to secondary legislation.¹²⁵

The Delegated Powers and Regulatory Reform Committee said that the Bill conferred “wider Henry VIII powers than we have ever seen”.¹²⁶ The widest Henry VIII power is in clause 9, which would allow an affirmative instrument to repeal the European Union (Withdrawal) Act itself. The Committee described this as “wholly unacceptable”, and took the view that ministers should not be able to amend or repeal the European Union (Withdrawal) Act by statutory instrument.¹²⁷ It also recommended that “in the absence of a convincing explanation to the contrary”, the affirmative procedure should apply to Henry VIII powers under clauses 7 to 9 and 17 that allow Acts of Parliament to be amended or repealed.¹²⁸

The House of Lords Constitution Committee has expressed a similar range of concerns. It said the Bill “weaves a tapestry of delegated powers that are breath-taking in terms of both their scope and potency”.¹²⁹ It said clauses 7 to 9 “as drafted, leave open the possibility that the power they contain could be used to make changes in significant policy areas” and called for the Government to place on the face of the Bill restrictions on the power “to limit their use to purely technical changes; given the broad scope of the

¹²² House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 10.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*, p 30.

¹²⁶ *ibid.*, p 5.

¹²⁷ *ibid.*, pp 14 and 30.

¹²⁸ *ibid.*, p 30.

¹²⁹ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 2.

power, ministerial assurances are not sufficient”.¹³⁰ The Committee concluded that:

The number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited power upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.¹³¹

On the use of Henry VIII powers, the Constitution Committee did not believe that the Government had “sufficiently engaged with the need for [...] safeguards”.¹³² It said that the fact only a narrow range of matters would require the affirmative procedure was “not constitutionally acceptable for Henry VIII powers of this significance”.¹³³ Nor was it convinced that the urgent procedures for making delegated legislation were “acceptable”.¹³⁴

5. Devolution

The current devolution settlements were agreed in the context of the UK as a member of the EU. As such, the competence of the devolved administrations and legislatures is partly defined by provisions which prevent them making changes that would be incompatible with EU law, and therefore potentially put the UK in breach of EU legislation. The Bill makes provisions which would remove references to ‘EU law’ in the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998, and replace them with references to ‘retained EU law’. The effect of this would be to give the devolved authorities and legislatures the same powers as regards retained EU law as they had before exit day in relation to EU law. In other words, they would not be able to make changes that would be incompatible with retained EU law.

The Government has stated that it intends the restriction to be a “transitional arrangement while decisions are taken on where common policy approaches are or are not needed” and the Bill provides the UK Government with the power to ‘release’ areas from this restriction by

¹³⁰ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 12.

¹³¹ *ibid*, pp 13–14.

¹³² *ibid*, p 15.

¹³³ *ibid*, p 17.

¹³⁴ *ibid*, p 18.

Order in Council.¹³⁵ A list of 111 powers that would be returned from the EU—and that intersect with the devolution settlement in Scotland—was prepared by the UK Government.¹³⁶ This list was created to inform discussion between the UK and Scottish Governments on areas where ‘common frameworks’ would be needed or not.¹³⁷ Policy areas could then be released from clause 11 in those cases where it was decided that a common framework was not necessary.

The Bill also provides for the devolved administrations to be given similar powers to the UK Government as regards correcting retained EU law. The Bill’s provisions on devolution are contained in clause 10 (and schedule 2) and clause 11 (and schedule 3).

5.1 Delegated Powers for Devolved Authorities (Clause 10 and Schedule 2)

Clause 10 would give effect to schedule 2. Schedule 2 grants devolved authorities similar powers to those conferred on the UK Government by clauses 7, 8 and 9. Schedule 2 is divided into the following three parts:

- Part 1: Dealing with deficiencies arising from withdrawal
- Part 2: Complying with international obligations
- Part 3: Implementing the withdrawal agreement

Powers contained in part 1 are analogous to the ‘correcting’ power contained in clause 7. That is, it enables devolved authorities, by regulation, to prevent, remedy or mitigate:

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law, arising from the withdrawal of the United Kingdom from the EU.¹³⁸

The power may also be used by Ministers of the Crown acting jointly with devolved authorities.¹³⁹ Paragraph 1(3) provides that clause 7(2) to (9) applies for the purposes of part 1 of schedule 2:

Section 7(2) to (9) apply for the purposes of this Part as they apply for the purposes of section 7 (including the references to the Minister in

¹³⁵ [Explanatory Notes](#), p 14.

¹³⁶ Scottish Government, [Letter from Michael Russell, Scottish Minister for UK Negotiations on Scotland’s Place in Europe to Bruce Crawford, Convener of the Scottish Finance and Constitution Committee](#), 19 September 2017.

¹³⁷ *ibid.*

¹³⁸ Schedule 2, part 1, paragraph 1(1).

¹³⁹ Schedule 2, part 1, paragraph 1(2).

section 7(2) and (3) (but not the reference to a Minister of the Crown in section 7(3)(b)) being read as references to the devolved authority or (as the case may be) the Minister acting jointly with the devolved authority and the references to section 7(1) being read as references to sub-paragraph (1) or (2) above).¹⁴⁰

The effect of this is that devolved authorities are subject to the same definitions of deficiencies, and restrictions on use, as provided for under clause 7 for Ministers of the Crown. This includes the two-year sunset provision in clause 7(8) and the fact that regulations “may make any provision that could be made by an Act of Parliament”, under clause 7(5) (a so-called ‘Henry VIII power’).

However, there are some additional restrictions that apply to the use of the correcting power by devolved authorities. These include the following:

- Paragraph 2 restricts devolved authorities to using the power only to address deficiencies arising from those areas within the devolved competence of the authority (as defined by paragraphs 9 to 12 of schedule 2).
- Paragraph 3 provides that devolved authorities can only use the power to address deficiencies arising from retained EU-derived domestic legislation. It cannot ordinarily be used to amend direct retained EU law or EU laws retained through clause 4. However, government amendments passed at report stage in the House of Commons lifted this latter restriction provided that the area had been released by an Order in Council under clause 11. This is discussed in further detail in section 9.1 of this Briefing.
- Paragraph 5 requires devolved authorities, when acting alone, to consult with the Secretary of State if they wish to make regulations that:
 - (a) are to come into force before exit day, or
 - (b) remove (whether wholly or partly) reciprocal arrangements of the kind mentioned in section 7(2)(c) or (e)¹⁴¹
- As the Bill was considered at report stage in the House of Commons, paragraph 5 of schedule 2 required devolved administrations to obtain the consent of a Minister of the Crown in such circumstances. This was altered by a government

¹⁴⁰ Schedule 2, part 1, paragraph 1(3).

¹⁴¹ Schedule 2, part 1, paragraph 5.

amendment which replaced the requirement for the consent of a Minister of the Crown with the requirement to consult with the Secretary of State. This is discussed in further detail in section 9.1 of this Briefing.

Paragraph 6 provides that before making any provision in regulations under part 1 of schedule 2, devolved authorities must gain the consent of a Minister of the Crown if it would require that consent were the provision contained in an act of that devolved legislature. This would not apply if the devolved authority already has power to make such provision using secondary legislation without needing the consent of the Minister of the Crown.¹⁴² Paragraph 7 provides that if a devolved authority would only normally be able to make legislation jointly with the UK Government, it would still have to do so when exercising the power to deal with deficiencies. Similarly, if required to consult with the UK Government on legislation when making certain changes in legislation, the devolved authority would have to consult when using the correcting power to make the same changes.¹⁴³

Analogous to powers given to the UK Government in clause 8, paragraph 13 in part 2 of schedule 2 would grant devolved authorities the power by regulation to “make such provision as the devolved authority considers appropriate to prevent or remedy any breach, arising from the withdrawal of the United Kingdom from the EU, of the international obligations of the United Kingdom”.¹⁴⁴

Paragraph 13(2) provides that these powers may be used jointly by a Minister of the Crown and a devolved authority. It also:

Sets out that the same restrictions on the use of the power that apply to UK ministers also apply to devolved ministers, along with an additional restriction preventing the power from being used to sub-delegate law-making powers.¹⁴⁵

As with part 1, part 2 places certain requirements on devolved authorities. For example, paragraph 14(1) requires that “no regulations may be made under this Part by a devolved authority unless every provision of them is within the devolved competence of the devolved authority”. Devolved competence for the purposes of part 2 is defined in paragraphs 18 to 20.

Analogous to powers given to the UK Government in clause 9, part 3 relates to powers granted to devolved authorities in order to implement the

¹⁴² [Explanatory Notes](#), p 43.

¹⁴³ *ibid.*

¹⁴⁴ Schedule 2, part 2, paragraph 13(1).

¹⁴⁵ [Explanatory Notes](#), p 45.

withdrawal agreement. It provides broadly similar powers to those under part 2, and would grant devolved authorities the power to “make such provision as the devolved authority considers appropriate for the purposes of implementing the withdrawal agreement if the devolved authority considers that such provision should be in force on or before exit day”.¹⁴⁶

Paragraph 21(2) provides that these powers may be used jointly by a Minister of the Crown and a devolved authority. It also:

[S]ets out that the same restrictions on the use of the power that apply to UK ministers also apply to devolved ministers, along with additional restrictions preventing the power from being used to sub-delegate any law-making powers, from modifying secondary legislation made under the Bill (except where that legislation was made by the devolved authority or the power is being exercised jointly with a minister of the Crown), or from modifying the Bill.¹⁴⁷

As with parts 1 and 2, part 3 places certain requirements on devolved authorities. For example, paragraph 22(1) requires that “no regulations may be made under this Part by a devolved authority unless every provision of them is within the devolved competence of the devolved authority”.¹⁴⁸ Devolved competence for the purposes of part 3 is the same as that defined in part 2, paragraphs 18 to 20.

5.2 Retaining EU Restrictions in Devolution Legislation etc (Clause 11 and Schedule 3)

In areas where powers have been devolved, the devolved institutions are prevented from legislating or otherwise acting in a way that is incompatible with EU law.¹⁴⁹ This is achieved by provisions in the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998 (the devolution acts). For example, section 29 of the Scotland Act 1998 sets out the legislative competence of the Scottish Parliament. This states that an Act of the Scottish Parliament is “not law” in so far as any provision of the Act is outside the competence of the Parliament.¹⁵⁰ In regard to EU law, section 29(2)(d) provides that a provision is outside competence in so far as it is incompatible with EU law.

Clause 11 of the Bill makes amendments to the devolution acts to replace references to ‘EU law’ with references to ‘retained EU law’ in relation to the legislative competence of the Scottish Parliament, the National Assembly for

¹⁴⁶ Schedule 2, part 2, paragraph 21(1).

¹⁴⁷ [Explanatory Notes](#), p 47.

¹⁴⁸ Schedule 2, part 2, paragraph 22(1).

¹⁴⁹ [Explanatory Notes](#), p 14.

¹⁵⁰ Scotland Act 1998, s 29(1).

Wales and the Northern Ireland Assembly. This would have the effect of preventing the devolved legislatures from passing law which would be incompatible with retained EU law. In the case of each legislature, clause 11 makes provision to allow modification of retained EU law “so far as the modification would, immediately before exit day, have been within the legislative competence” of the devolved legislature.¹⁵¹

The Government has explained that the intention of this is to maintain the current parameters of devolved competence as regards EU law:

This means that devolved institutions will still be able to act after exit as they could prior to exit in relation to retained EU law. For example, where they currently have discretion over how to implement an EU directive, after exit they will have the ability to modify retained EU law in ways that remain consistent with the underlying directive, rather than being constrained by their existing implementing legislation. By contrast, for example, devolved legislation which would amend or otherwise be incompatible with retained direct EU legislation (such as EU regulations) would, as now, remain outside competence.¹⁵²

Whilst the specific amendments made to the devolution acts vary, in each case clause 11 provides the UK Government with the power to make Orders in Council which would “release” areas from the limit placed on the devolved legislatures on modifying retained EU law.¹⁵³ Such Orders in Council would need to be approved by both Houses of Parliament and the relevant devolved legislature.¹⁵⁴ The Government has explained that the procedure for releasing the restriction on legislating on retained EU law:

[A]dopts broadly the same approach taken by the powers for devolving responsibilities in the devolution statutes, for example, the power in section 30 of the Scotland Act 1998 to modify the schedules of that Act that define what is and is not within devolved competence. Although the power in this Bill operates in areas that are otherwise devolved, it achieves a similar effect to the powers in those acts.¹⁵⁵

Part 1 of schedule 3 makes corresponding provision in relation to the executive competence of the devolved authorities. Currently, similar restrictions are placed on them as regards doing anything incompatible with EU law. Part 1 of schedule 3 amends these references to refer to retained EU law. This restriction does not apply so far as the modification would have

¹⁵¹ See for example clause 11(1)(b) for the Scottish Parliament, clause 11(2)(b) for the National Assembly for Wales, or clause 11(3)(b) for the Northern Ireland Assembly.

¹⁵² [Explanatory Notes](#), p 14.

¹⁵³ [Explanatory Notes](#), p 15.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

been within the legislative competence of the relevant devolved legislature or where the modification is being made under schedule 2 or 4 of the Bill. As with the restriction placed on the devolved legislatures, the UK Government may lift this restriction using an Order in Council.

Part 2 of schedule 3 makes a number of changes to the devolution acts resulting from the UK's withdrawal from the EU, for example, as a result of the repeal of the ECA by clause 1 of the Bill and the cessation of European Parliamentary elections in the UK.¹⁵⁶ However, in the Bill's Explanatory Notes the Government explains that not all of the required amendments are currently in the Bill:

For example, changes to the list of reserved matters in part 2 of schedule 5 to the Scotland Act 1998 and in schedule 7A to the Government of Wales Act 2006 are not included. Similarly, paragraph 38 of schedule 3 to the Northern Ireland Act 1998 is not amended by the Bill (this is the only remaining correction to that Act not addressed on the face of the Bill). This is because the UK Government intends to discuss these changes with the devolved administrations before finalising the amendments.¹⁵⁷

5.3 Common Frameworks

Whilst areas such as agriculture are devolved they are currently subject to common policy frameworks set by the EU, with the devolved authorities and legislatures responsible for implementing them.¹⁵⁸ The UK Government set out its approach to the issue of common frameworks in the white paper that preceded the Bill. It explained that:

At EU level, the UK Government represents the whole of the UK's interests in the process for setting those common frameworks and these also then provide common UK frameworks, including safeguarding the harmonious functioning of the UK's own single market.¹⁵⁹

After the UK withdraws from the EU the power which the EU exercises in relation to common frameworks will return to the UK.¹⁶⁰ However, the UK Government has argued that once the UK is no longer bound by common EU frameworks it may still be necessary to operate UK-wide frameworks, for example, in order "to protect the freedom of businesses to operate

¹⁵⁶ [Explanatory Notes](#), p 49.

¹⁵⁷ *ibid.*

¹⁵⁸ Department for Exiting the European Union, [Legislating for the United Kingdom's Withdrawal from the European Union](#), March 2017, Cm 9446, p 27.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

across the UK single market and to enable the UK to strike free trade deals with third countries”.¹⁶¹ The Government’s “guiding principle” in this will be to ensure that “no new barriers to living and doing business” within the UK are created as a consequence of withdrawing from the EU.¹⁶²

As a consequence, the UK Government has argued that it is necessary to implement the current frameworks provided by the EU in UK legislation.¹⁶³ This would be achieved through the Bill. In its white paper, the UK Government stated its intention to work with the devolved authorities to identify where common frameworks need to be maintained, and where common UK frameworks would not be necessary. Its expectation is that that this process will lead to a significant increase in the decision-making powers of the devolved administrations.

The Government has argued that the restrictions placed on the devolved authorities and legislatures by the Bill are necessary to prevent divergence in areas where common UK frameworks are required. During the Bill’s report stage, the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, David Lidington, explained that:

While we work with the devolved administrations on where frameworks are or are not needed, we are maintaining existing common approaches to provide much welcomed certainty. To aid that, direct EU legislation that currently applies uniformly across the UK will be corrected at UK level in the first instance to avoid the risk of early, unhelpful divergence in areas where it may ultimately be determined that a common approach should apply.¹⁶⁴

Mr Lidington also stated that the Government would “shortly publish” its analysis of areas in which common UK frameworks would and would not be required.¹⁶⁵ The Government would seek to agree as many areas as possible where frameworks were needed in advance of exit day. The effect of this would be to transfer these powers directly to the devolved administrations “without the need for an intervening period in which to operate the holding pattern described in the clauses”.¹⁶⁶

Joint Ministerial Committee on EU Negotiations

The primary means of engaging with the devolved administrations has been

¹⁶¹ Department for Exiting the European Union, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 27.

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ [HC Hansard, 16 January 2018, col 836.](#)

¹⁶⁵ *ibid.*, col 837.

¹⁶⁶ *ibid.*, col 836.

through meetings of the Joint Ministerial Committee (JMC), which brings together the leaders of the devolved administrations of Scotland, Wales and Northern Ireland. In the first meeting after the referendum it was agreed to set up a Joint Ministerial Committee on EU Negotiations (JMC (EN)), so ministers from each of the devolved administrations could contribute to the process of planning for the UK's withdrawal from the EU. In the absence of ministers from the Northern Ireland Executive, a senior civil servant from the Northern Ireland Civil Service has attended meetings.¹⁶⁷

The JMC (EN) was established in October 2016. The terms of reference for the committee were as follows:

Through the JMC (EN) the governments will work collaboratively to:

- discuss each government's requirements of the future relationship with the EU;
- seek to agree a UK approach to, and objectives for, Article 50 negotiations;
- provide oversight of negotiations with the EU, to ensure, as far as possible, that outcomes agreed by all four governments are secured from these negotiations; and
- discuss issues stemming from the negotiation process which may impact upon or have consequences for the UK Government, the Scottish Government, the Welsh Government or the Northern Ireland Executive.¹⁶⁸

At its meeting in October 2017, agreement was reached on principles for common frameworks between the UK and devolved governments in areas currently governed by EU law.¹⁶⁹ To prevent or limit divergence the JMC (EN) has agreed the need for common frameworks in certain policy areas. A communique set out three principles for the common frameworks:

- Common frameworks will be established where they are necessary to:
 - Enable the functioning of the UK internal market, while acknowledging policy divergence.
 - Ensure compliance with international obligations.
 - Ensure the UK can negotiate, enter into and implement new trade agreements and international treaties.

¹⁶⁷ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017.

¹⁶⁸ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee Communique](#), 24 October 2016.

¹⁶⁹ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017.

- Enable the management of common resources.
 - Administer and provide access to justice in cases with a cross-border element.
 - Safeguard the security of the UK.
- Frameworks will respect the devolution settlements and the democratic accountability of the devolved legislatures, and will therefore:
 - Be based on established conventions and practices, including that the competence of the devolved institutions will not normally be adjusted without their consent.
 - Maintain, as a minimum, equivalent flexibility for tailoring policies to the specific needs of each territory as is afforded by current EU rules.
 - Lead to a significant increase in decision-making powers for the devolved administrations.
 - Frameworks will ensure recognition of the economic and social linkages between Northern Ireland and Ireland and that Northern Ireland will be the only part of the UK that shares a land frontier with the EU. They will also adhere to the Belfast Agreement.¹⁷⁰

Representatives from the devolved administrations have also been critical of the JMC (EN), both for the lack of meetings¹⁷¹ but also for the level of engagement in the meetings. Speaking in the House of Commons in June 2017, Peter Grant, Shadow SNP Spokesperson (Europe), stated, “the governments of the devolved nations have attended a JMC that was a total and utter waste of time, for they went and spent 45 minutes being told what the UK Government had decided”.¹⁷² In March 2017, Hywel Williams, Shadow Plaid Cymru Spokesperson (Brexit), criticised the JMC (EN) quoting a participant who stated the “Joint Ministerial Committee on Exiting the EU is less organised than a community council”.¹⁷³

5.4 Devolved Governments’ Positions

The Bill has faced strong criticism from both the Scottish and Welsh governments. This has focused principally on the functioning of clause 11 and the restrictions placed on the devolved authorities and legislatures to amend retained EU law and how these restrictions interact with the devolution

¹⁷⁰ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017.

¹⁷¹ Scottish Government, ‘[Clarity Needed on Withdrawal from EU](#)’, 10 November 2017.

¹⁷² [HC Hansard, 26 June 2017, col 417.](#)

¹⁷³ [HC Hansard, 14 March 2017, col 192.](#)

settlements. While accepting that common frameworks to replace certain EU laws may be needed, the First Minister of Wales, Carwyn Jones, and First Minister of Scotland, Nicola Sturgeon, released a joint statement after the publication of the Bill on 13 July 2017, describing it as a “naked power grab, an attack on the founding principles of devolution [that] could destabilise our economies”.¹⁷⁴ They continued:

The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions on the Scottish Parliament and National Assembly for Wales. On that basis, the Scottish and Welsh Governments cannot recommend that legislative consent is given to the bill as it currently stands.¹⁷⁵

The Secretary of State for Scotland, David Mundell, told the House of Commons Scottish Affairs Committee in its inquiry on the Bill, that the Government did not accept the suggestion that the Bill represented a power grab. He stated that he was “disappointed by the repeated power grab suggestion” and that the Bill would “maintain the scope of devolved decision making powers immediately after Exit” and that “the Scottish Parliament and Scottish Government will not lose any of their current decision-making powers”.¹⁷⁶ The House of Commons Public Administration and Constitutional Affairs Committee considered the contention that clause 11 represented ‘a power grab’ in its report on the clause.¹⁷⁷ Whilst the Committee did not make any recommendations in its report, it heard evidence from a number of academics on this issue. As part of its wider inquiry ‘Brexit: Agriculture, Trade and the Repatriation of Powers’,¹⁷⁸ the House of Commons Welsh Affairs Committee held an oral evidence session on the Bill on 17 October 2017, in which the subject was also discussed.¹⁷⁹

Legislative Consent

The Explanatory Notes to the Bill explain that several of the provisions of the Bill fall within the legislative competence of the devolved legislatures.¹⁸⁰

¹⁷⁴ Welsh Government, ‘[Joint statement from First Ministers of Wales and Scotland in Reaction to the EU \(Withdrawal\) Bill](#)’, 13 July 2017.

¹⁷⁵ *ibid.*

¹⁷⁶ House of Commons Scottish Affairs Committee, [European Union \(Withdrawal\) Bill: Implications for Devolution](#), 19 November 2017, HC 375 of session 2017–19, p 5.

¹⁷⁷ House of Commons Public Administration and Constitutional Affairs Committee, [Devolution and Exiting the EU and Clause 11 of the European Union \(Withdrawal\) Bill: Issues for Consideration](#), 29 November 2017, HC 484 of session 2017–19.

¹⁷⁸ House of Commons Welsh Affairs Committee, ‘[Brexit: Agriculture, Trade and the Repatriation of Powers Inquiry](#)’, accessed 25 January 2018.

¹⁷⁹ House of Commons Welsh Affairs Committee, [Oral evidence: Brexit: Agriculture, Trade and the Repatriation of Powers](#), 17 October 2017, HC 402 of session 2017–19.

¹⁸⁰ [Explanatory Notes](#), p 23.

Therefore, under the Sewel Convention there is a requirement for the Government to seek a legislative consent motion (LCM) from each of the devolved legislatures for the Bill.¹⁸¹ The Sewel Convention states that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved parliaments.¹⁸² Whilst the Convention can be found within the Scotland Act 2016 and the Wales Act 2017, the Supreme Court has concluded that the Sewel Convention does not give rise to a legally enforceable obligation.¹⁸³ In reaching this conclusion, it said that:

[...] we do not underestimate the importance of constitutional conventions, some of which play a fundamental role in the operation of our constitution. The Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures. But the policing of its scope and the manner of its operation does not lie within the constitutional remit of the judiciary, which is to protect the rule of law.¹⁸⁴

The Scottish and Welsh Governments have made it clear that they would not present legislative consent motions (LCMs) for the Bill in the form in which it was introduced.¹⁸⁵

The Scottish Government has stated that whilst it opposes the UK's withdrawal from the EU it accepts that preparations should be made on this basis, including preserving a functioning legal system.¹⁸⁶ It has explained that its principal objections to the Bill are related to clause 11 (and schedule 3) on the competence of the devolved authorities and legislatures, and clauses 7 to 9, clause 10 and schedule 2, relating to the powers to amend retained EU law. The Scottish Government has argued that the Bill:

[C]uts across the well-established and understood scheme of legislative competence, based on reserved areas, set out in the Scotland Act. It would give the UK Parliament and the UK Government power to legislate in relation to policy areas which are the responsibility of the Scottish Parliament and the Scottish

¹⁸¹ House of Commons Public Administration Committee, [Devolution and Exiting the EU and Clause 11 of the European Union \(Withdrawal\) Bill: Issues for Consideration](#), 29 November 2017, HC 484 of session 2017–19.

¹⁸² Institute for Government, ['Brexit and the Sewel \(Legislative Consent\) Convention'](#), 16 January 2018.

¹⁸³ Supreme Court, [Press Summary—R \(On the Application of Miller and Another\)\(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\)](#), 24 January 2017.

¹⁸⁴ Supreme Court, [R \(on the Application of Miller and Another\) \(Respondents\) v Secretary of State for Exiting the European Union \(Appellant\) \[2017\] UKSC 5](#), para 151.

¹⁸⁵ Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017; and Welsh Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017.

¹⁸⁶ Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, p 1.

Government. It is a constraint which is no longer based (as the current limit by reference to EU law is based) on the need to respect international obligations or the status of the UK as a member of the EU and is therefore entirely a matter of internal domestic law.¹⁸⁷

The Scottish Government argues that on the UK's withdrawal from the EU the Scottish Parliament should be in "exactly the same position" as the UK Parliament—that is "able to act within its area of competence in the way it sees fit".¹⁸⁸ It disagrees that following exit day its competence should be defined as it was the day before the UK withdrew from the EU. The Scottish Government also argued that the way clause 11 operates would cut across devolved matters in a way that was contrary to the structure of the Scotland Act 1998 in identifying specific reserved areas.¹⁸⁹ The Scottish Government has also expressed concern that whilst the UK Government has said the provisions in clause 11 are transitional, there is no time limit set on the provision in the Bill itself.

It should be noted that the Scottish Government and UK Government take differing views on which clauses require legislative consent. The UK Government believes that LCMs are required for clauses 1 to 4, 8, 10 to 12 and 16 (and schedules 1 to 4 and 7).¹⁹⁰ The Scottish Government believes that notably clauses 5, 6, 7 and 9 also require LCMs.¹⁹¹ The Welsh Government takes a similar view to the Scottish Government.¹⁹²

The Welsh Government's consent memorandum outlined similar objections to the Bill:

The Welsh Government's principal objections relate to clauses 7–9 (which give Ministers of the Crown unacceptably wide regulation-making powers, including the ability to amend devolved law and the devolution settlement without consent), clause 10 (which gives effect to schedule 2 and unreasonably restricts Welsh Ministers' correcting powers to domestic EU law) and clause 11 which introduces a new constraint on legislative competence.¹⁹³

¹⁸⁷ Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, p 5.

¹⁸⁸ *ibid.*

¹⁸⁹ *ibid.*, p 6.

¹⁹⁰ [Explanatory Notes](#), p 71.

¹⁹¹ Scottish Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, p 3. See Annex B for the Scottish Government's full assessment of which clauses require a legislative consent motion.

¹⁹² Welsh Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#), 12 September 2017, p 2.

¹⁹³ *ibid.*, p 6.

In their memoranda, the Scottish and Welsh Governments wrote that they would publish amendments that, if made, would address their concerns. On 19 September 2017, the Welsh and Scottish Governments jointly published a set of amendments they wished to see made to the Bill, which “seek to correct the deficiencies in the Bill as they relate to devolution”.¹⁹⁴ The governments have stated that these amendments would enable them to consider recommending consent be given to the Bill by the Scottish Parliament and Welsh Assembly.¹⁹⁵

The Institute for Government argues that it would be possible for the UK Parliament to pass the Bill without the consent of the devolved authorities as the Sewel Convention does not formally limit the power of the UK Parliament.¹⁹⁶ However, it argues that to do so would be “hugely contentious”.¹⁹⁷ In its interim report on the Bill, the House of Lords Constitution Committee wrote that:

While the legislative consent of the devolved institutions may not be legally required, as the UK Parliament remains sovereign, the political and constitutional consequences of proceeding with the Bill without consent would be significant and potentially damaging.¹⁹⁸

The Scottish Parliament’s Finance and Constitution Committee has been designated as the Scottish Parliament’s lead committee scrutinising the Bill with regard to legislative consent. It published its interim report on 9 January 2018.¹⁹⁹ The report was wide-ranging and looked at issues including common frameworks, the UK’s internal market, issues related to trade agreements and international treaties, and the Charter of Fundamental Rights. It also looked at clause 11 in detail describing it as a “fundamental shift in the structure of devolution in Scotland”.²⁰⁰ The Committee concluded that it was unable to recommend legislative consent be given to the Bill (as it was introduced).²⁰¹ The Committee’s interim report was debated in the Scottish Parliament on 23 January 2018.²⁰²

¹⁹⁴ Welsh Government, ‘[Written Statement: European Union \(Withdrawal\) Bill](#)’, 19 September 2017.

¹⁹⁵ Nicola Sturgeon and Carwyn Jones, [EU \(Withdrawal\) Bill: Joint Letter to Prime Minister](#), 19 September 2017.

¹⁹⁶ Institute for Government, ‘[Brexit and the Sewel \(Legislative Consent\) Convention](#)’, 16 January 2018.

¹⁹⁷ *ibid.*

¹⁹⁸ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 22.

¹⁹⁹ Scottish Parliament Finance and Constitution Committee, [European Union \(Withdrawal\) Bill LCM: Interim Report](#), 9 January 2018, SP Paper 255 of session 5.

²⁰⁰ *ibid.*, p 9.

²⁰¹ *ibid.*, p 37.

²⁰² [Scottish Parliament, Official Report, 23 January 2018, cols 27–77.](#)

The National Assembly for Wales' External Affairs and Additional Legislation Committee has also published its interim report on the Bill.²⁰³ The Committee discussed six objectives it had for amending the Bill, including the removal of clause 11, concluding that “we recommend that the Assembly withhold its consent for the Bill in its current form [as considered by the Committee at the time of its report]”.²⁰⁴

Continuity Bills

Both Scottish and Welsh governments have stated that they have been working on so-called ‘continuity bills’ should they be unable to reach agreement with the UK Government. The National Assembly for Wales’ research service has explained that a Welsh continuity bill:

[W]ould transpose EU law that falls within the Assembly’s competence into Welsh law. It would safeguard the Welsh Government’s power over the areas where EU law and devolved competence intersect and seek to retain EU legislation in devolved policy areas.²⁰⁵

The Scottish Parliament’s Finance and Constitution Committee took evidence from the Scottish Government where it spoke about introducing a continuity bill.²⁰⁶ The Committee stated that:

In the event that the Scottish Government is unable to recommend legislative consent and decides to introduce a continuity bill then it is highly likely that there would be a reduced timetable for parliamentary scrutiny of such legislation. In such a situation the Committee recommends that the Scottish Government engages in early discussions with the Scottish Parliament regarding what mechanisms can be used to maximise the scope and time available for scrutiny of such legislation.²⁰⁷

On 10 January 2018, Scotland’s Minister for Scotland’s Place in Europe, Michael Russell, and Minister for Parliamentary Business, Joe Fitzpatrick, wrote to the Presiding Officer of the Scottish Parliament, Ken Macintosh.²⁰⁸

²⁰³ National Assembly for Wales External Affairs and Additional Legislation Committee, [European Union \(Withdrawal\) Bill: Interim report on the Legislative Consent Memorandum](#), 15 December 2017.

²⁰⁴ *ibid*, p 1.

²⁰⁵ Senedd Research, National Assembly for Wales, ‘[A Continuity Bill: Why and When?](#)’, In Brief Blog, 5 January 2018.

²⁰⁶ Scottish Parliament Finance and Constitution Committee, [European Union \(Withdrawal\) Bill LCM: Interim Report](#), 9 January 2018, SP Paper 255 of session 5, p 8.

²⁰⁷ *ibid*, p 10.

²⁰⁸ Scottish Government, ‘[Scottish EU Bill Likely to be Introduced in February](#)’, 10 January 2018.

In this letter they stated that the Scottish Government had begun preparations to introduce an EU Continuity Bill and, if necessary, would introduce it in February 2018.²⁰⁹ They wrote that whilst they continued to work with the UK Government they were preparing for a situation where consent was withheld:

The Scottish Government's preference is to work collaboratively with the UK government on the legislative consequences of EU withdrawal, including through the EU (Withdrawal) Bill. Discussions continue on the potential for amendments to be made, but as things stand we need to prepare responsibly for the possibility of consent being withheld. To that end, our officials are developing a Continuity Bill for Scotland.²¹⁰

The ministers state that the purpose of the continuity bill would be to "ensure that Scotland's laws can be prepared for the effects of EU withdrawal even if it does not prove possible to rely on the UK Bill".²¹¹

Similarly, Wales' First Minister, Carwyn Jones, has stated that the Welsh Government has been developing a continuity bill which he would present to the National Assembly for Wales' Presiding Officer should an agreement not be reached by the end of January 2018. Such a continuity bill would seek to transpose EU law that falls within the Assembly's competence into Welsh law.²¹²

On 17 January 2018, the Assembly agreed a motion to note the proposal for a continuity bill.²¹³ On 23 January 2018, the Scottish Parliament considered the Scottish Parliament's Finance and Constitution Committee's interim report.²¹⁴

5.5 Recent Developments Relating to Clause 11

In the context of the Scottish and Welsh Governments recommending the withholding of legislative consent, the Secretary of State for Scotland, David Mundell, stated that the Government would bring amendments to clause 11 at the Bill's report stage in the House of Commons.²¹⁵ However, on 9 January 2018, BBC News reported Mr Mundell as saying that amendments to clause 11 would instead be brought forward in the House of Lords

²⁰⁹ Scottish Government, '[Scottish EU Bill Likely to be Introduced in February](#)', 10 January 2018.

²¹⁰ *ibid.*

²¹¹ *ibid.*

²¹² Senedd Research, National Assembly for Wales, '[A Continuity Bill: Why and When?](#)', In Brief Blog, 5 January 2018.

²¹³ National Assembly for Wales, '[Debate on a Member's Legislative Proposal](#)', 17 January 2018.

²¹⁴ [Scottish Parliament, Official Report, 23 January 2018, cols 27–77.](#)

²¹⁵ [HC Hansard, 6 December 2017, col 1021.](#)

“allowing for further discussions to take place between the UK Government and the Scottish Government”.²¹⁶ He stated that he regretted the delay, but said that the Government’s “commitment to improve the Bill remains absolute”.²¹⁷

In a written statement, the Welsh First Minister, Carwyn Jones, described the Government’s failure to bring forward amendments to clause 11 as “unacceptable”.²¹⁸ Mr Jones said that the Welsh Government would continue to discuss with the UK Government ways in which the Bill might be amended as it moves to the House of Lords (with a particular reference to clause 11). The Scottish First Minister, Nicola Sturgeon, also expressed disappointment that amendments to clause 11 were not tabled by the UK Government, and argued that tabling such amendments during the Bill’s House of Lords stages raised “its own democratic issues”.²¹⁹

On 18 January 2018, MSPs from the Scottish Parliament’s Finance and Constitution Committee, Delegated Powers and Law Reform Committee, and Culture, Tourism, Europe and External Relations Committee attended an Inter-Parliamentary Forum on Brexit meeting at the House of Lords, chaired by the Senior Deputy Speaker, Lord McFall of Alcluith, to discuss amendments to clause 11.²²⁰ Reports of the meeting emerged later, with Bruce Crawford, the Scottish Parliament Constitution Committee convener, apparently stating that MSPs would “unanimously reject” consent for the Bill unless agreement was reached with the Scottish Government on “wholesale changes to clause 11”.²²¹ The *Scotsman* noted that this warning “was heard by Chloe Smith, the new Minister for the Constitution”.²²²

A statement was issued through the House of Lords European Union Committee at the conclusion of the meeting. It said:

As the European Union (Withdrawal) Bill completes its House of Commons stages, today’s meeting provided a timely opportunity for us to share information on the work that each of our Committees and legislatures is undertaking. We have focused in particular on the implications of Clause 11 of the Bill for the devolution settlements, and discussions on potential future UK-wide frameworks, and we recognise the strong views of members of the Scottish Parliament and National Assembly for Wales on these issues. We met Chloe Smith MP, Minister for the Constitution, Cabinet Office, and have made clear

²¹⁶ BBC News, [‘Delay to Brexit Bill Amendments Confirmed’](#), 9 January 2018.

²¹⁷ *ibid.*

²¹⁸ Welsh Government, [‘Written Statement: EU \(Withdrawal\) Bill’](#), 16 January 2018.

²¹⁹ Scottish Government, [‘Scotland After Brexit’](#), 16 January 2018.

²²⁰ Scottish Parliament, [‘Senior MSPs to set out concerns at House of Lords talks on EU Withdrawal Bill’](#), 18 January 2018.

²²¹ *Scotsman*, [‘Brexit Powers Row: Theresa May Can’t Overrule House of Lords’](#), 18 January 2018.

²²² *ibid.*

to her our various perspectives on these important questions. We urge the Government to take all of these points of view into account as the House of Lords begins its scrutiny of the legislation in the coming weeks.

The Forum will meet again in March 2018, when we will again review the progress of the Brexit negotiations and the parallel domestic legislation.²²³

In answer to oral questions in the House of Commons on 24 January 2018, the Secretary of State for Scotland, David Mundell, explained that the UK Government could not “meet the timescale that we had aspired to” over bringing amendments to clause 11 at report.²²⁴ However, he reiterated the UK Government’s intention to work with the Scottish and Welsh governments and “with the Scottish Parliament, whose Finance and Constitution Committee has set out its views on clauses 10 and 11 of the Bill”.²²⁵ Mr Mundell restated the UK Government’s objective was to ensure that any amendments would secure the recommendation of the devolved governments that a legislative consent motion should be passed.²²⁶ The Secretary of State said that he was intending to meet the Scottish Government next week on amending clause 11.²²⁷

6. Financial and Other Matters

6.1 Financial Provision (Clause 12)

Clause 12 relates to financial provisions made under the Bill. Clause 12(1) gives effect to schedule 4.

Clause 12(2) would provide for a Minister of the Crown, government department or a devolved authority to incur expenditure in preparation for the making of statutory instruments under the Bill.²²⁸ Such expenditure may be incurred before any such provision is made.²²⁹ Under clause 12(3)(a), any expenditure incurred by a Minister of the Crown, government department or other public authority under the Bill may be met with money provided by Parliament. The same applies, under clause 12(3)(b) for “any increase attributable to this Act in the sums payable by virtue of any other Act out of

²²³ House of Lords European Union Committee, ‘[Interparliamentary Forum on Brexit Holds Second Meeting](#)’, accessed 19 January 2018.

²²⁴ [HC Hansard, 24 January 2018, col 246.](#)

²²⁵ [HC Hansard, 24 January 2018, col 246.](#)

²²⁶ *ibid.*

²²⁷ *ibid.*, col 248.

²²⁸ [Explanatory Notes](#), p 37.

²²⁹ Clause 12(2).

money so provided”. Clause 12(4) states that sub-clause (3) “is subject to any other provision made by or under this Act or any other enactment”.

Amongst its provisions, part 1 of schedule 4 provides for Ministers of the Crown and devolved authorities to make secondary legislation to enable public authorities to charge fees and other charges, such as levies. This relates to instances where an existing public authority is given additional functions under clauses 7, 8, or 9 (or the equivalent powers in schedule 2).²³⁰ Powers under paragraph 1 of schedule 4 would enable an ‘appropriate authority’ to make regulations enabling the public authority to charge fees or other charges, such as levies in connection with the carrying out of the function.²³¹ Appropriate authorities may make regulations jointly under paragraph 1 where there is more than one such authority in relation to the relevant function.²³² Sub-paragraph 3 gives examples of what regulations under paragraph 1 could do. Among other things they could:

- (a) prescribe the fees or charges or make provision as to how they are to be determined;
- (b) provide for the recovery or disposal of any sums payable under the regulations;
- (c) confer power on the public authority to make, by subordinate legislation, any provision that the appropriate authority may make under this paragraph in relation to the relevant function.²³³

An appropriate authority is defined under paragraph 2 as a Minister of the Crown or any devolved authority “[i]n circumstances where the function has been conferred by them, the function has been conferred on them, or the provision to confer the function would have been within the competence of the relevant devolved legislature (ignoring the requirements not to act incompatibly with EU law or modify retained EU law)”.²³⁴

Paragraph 3 requires that a Minister of the Crown gain the consent of the Treasury before making regulations under paragraph 1. A devolved authority can only make regulations under paragraph 1 with the consent of a Minister of the Crown if the relevant function is a function of a Minister of the Crown²³⁵ or “a body with cross-border functions with the consent of a minister of the Crown”.²³⁶

²³⁰ [Explanatory Notes](#), p 49.

²³¹ *ibid.*

²³² Schedule 4, part 1, paragraph 1(2).

²³³ Schedule 4, part 1, paragraph 1(3).

²³⁴ [Explanatory Notes](#), p 49.

²³⁵ Schedule 4, part 1, paragraph 3(2)(a).

²³⁶ [Explanatory Notes](#), p 50.

Part 2 relates to the modification of existing fees and charges made before the UK's withdrawal from the EU in subordinate legislation under section 2(2) of the ECA or section 56 of the Finance Act 1973, and which form part of retained EU law.²³⁷ Paragraph 6(2) would enable an appropriate authority²³⁸, by regulations, to make provision modifying subordinate legislation for the purposes of:

- (a) revoking the charging provision,
- (b) altering the amount of any of the fees or charges that are to be charged,
- (c) altering how any of the fees or charges are to be determined, or
- (d) otherwise altering the fees or charges that may be charged in relation to anything in respect of which fees or charges may be charged under the charging provision.²³⁹

Paragraph 8 restricts the use of this power, such that:

[W]here it is used to modify legislation created through the ECA, it cannot impose or increase taxation, in line with the constraint at paragraph 1(1)(a) of Schedule 2 to the ECA. And a minister of the Crown needs Treasury consent to make certain kinds of provision, in line with section 56 of the Finance Act.²⁴⁰

Paragraph 8 of schedule 7 sets out the scrutiny procedures that would apply to secondary legislation made under paragraph 1 of schedule 4.²⁴¹ The explanatory notes explain that:

The draft affirmative procedure (or the made affirmative, see paragraph 14 of Schedule 7) must be used for regulations made under paragraph 1 of Schedule 4 which sub-delegate the power or which impose a fee or charge, except for re-exercising the power to make modifications, for example for changing the amount of the fee or charge, which can be done under the negative procedure. The negative procedure can be used for regulations made under paragraph 4 or 7 of Schedule 4.²⁴²

The Government's delegated powers memorandum for the Bill provides

²³⁷ Schedule 4, part 2, paragraph 6(1).

²³⁸ As defined under schedule 4, part 2, paragraph 7.

²³⁹ Schedule 4, part 2, paragraph 6(2).

²⁴⁰ [Explanatory Notes](#), p 51.

²⁴¹ *ibid*, p 56.

²⁴² *ibid*.

further detail on the operation of the powers under schedule 4.²⁴³ This includes the explanation that powers under part 1 of schedule 4:

[C]ould include the creation of tax-like charges, which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body, or to lower regulatory costs for small or medium sized enterprises.²⁴⁴

The House of Lords Delegated Powers and Regulatory Reform Committee has expressed concern that the powers in schedule 4 are “very wide” and argued that a tax-like charge means a tax.²⁴⁵ The Committee also concluded that:

Taxation, including “tax-like charges”, should not be permissible at all in regulations made under schedule 4. Fees and charges for services or functions should operate on a cost-recovery basis, leaving taxation for a Finance Bill—a principle enshrined in Article 4 of the Bill of Rights 1688.²⁴⁶

6.2 Publication of Retained EU Direct Legislation etc (Clause 13 and Schedule 5)

Clause 13(1) gives effect to part 1 of schedule 5. This provides for the publication of, amongst other things, retained direct EU law; this is to ensure that retained EU law is accessible after exit day.²⁴⁷ It makes provision for the Queen’s Printer (within the National Archives) to make arrangements for the publication of:

- (a) each relevant instrument that has been published before exit day by an EU entity, and
- (b) the relevant international agreements.²⁴⁸

Relevant instruments would mean an EU regulation, an EU decision and EU tertiary legislation.²⁴⁹ A relevant international agreement would mean the

²⁴³ Department for Exiting the European Union, [European Union \(Withdrawal\) Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 18 January 2018.

²⁴⁴ *ibid*, p 49.

²⁴⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 23.

²⁴⁶ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 24.

²⁴⁷ [Explanatory Notes](#), p 51.

²⁴⁸ Schedule 5, part 1, paragraph 1.

²⁴⁹ Schedule 5, part 1, paragraph 2.

Treaty on European Union, the Treaty on the Functioning of the European Union, the Euratom Treaty and the EEA agreement.²⁵⁰ Paragraph 3 would allow the Queen’s Printer also to make arrangements for the publication of any decision of, or expression of opinion by, the European Court or any other document published by an EU entity. However, it does not require it to do so.²⁵¹ Paragraph 4 similarly would give the Queen’s Printer power to make arrangement for the publication of anything else which it thinks may be useful in connection with anything published under paragraph 1. The Explanatory Notes to the Bill give the example of ‘as amended’ versions of retained direct EU legislation which reflect changes made using the correcting powers in the Bill.²⁵² The Queen’s Printer would not be required to publish anything which was repealed before exit day or any modifications made on or after exit day.²⁵³

Paragraph 2 gives Ministers of the Crown the power to create an exception to the duty placed on the Queen’s Printer under paragraph 1(1), should they believe that a relevant instrument has not, or will not, become on exit day, retained direct EU legislation. They may do this by direction.

The issue of clause 13 and schedule 5 were raised in the House of Lords Constitution Committee’s interim report on the Bill. The Committee expressed concern that the amount of retained EU law will be “considerable and its contents will be changing up until exit day”. The Committee said it was imperative in the interests of legal certainty that there is clarity as to what counts as retained EU law and that this clarity must be available immediately upon exit. The Committee said it would be looking at the practicalities of publishing a copy of retained EU law in its inquiry.

The House of Lords Delegated Powers and Regulatory Reform Committee described the direction-making power in paragraph 2 as highly unusual, comparing the power to proclamations made under Henry VIII:

The delegated powers memorandum justifies this on the ground that it is a “limited administrative power”. Even so, to allow ministers to amend the law by a mere direction, with no associated parliamentary procedure, sets an ominous precedent. Such a direction is what Henry VIII might have called a proclamation. The Statute of Proclamations 1539, which gave proclamations the force of statute law and later gave rise to the term “Henry VIII power”, was repealed in 1547 (after the King’s death earlier that year).²⁵⁴

²⁵⁰ [Explanatory Notes](#), p 51.

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ Schedule 5, part 1, paragraph 1(5)(a) and (b).

²⁵⁴ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 28 September 2017, HL Paper 22 of session 2017–19, p 25.

7. General and Final Provision

7.1 Interpretation and Index of Defined Expressions (Clauses 14 and 15)

Clause 14 contains the definition of a number of terms used in the Bill. Clause 15 is an index, showing in which provision of the Bill the definitions or interpretations of certain terms and expressions are to be found—many are in clause 14, but some are in other clauses of the Bill, or are already defined in existing legislation.

7.2 Consequential and Transitional Provision (Clause 17)

Subclauses (1) to (3) of clause 17 contain a power to create consequential regulations; this power is dealt with in the section 4.4 of this Briefing.

Clause 17 also introduces schedule 8, which contains consequential, transitional, transitory and saving provision, and schedule 9, which lists further legislation which is wholly or partly repealed by the Bill.

7.3 Extent (Clause 18)

Clause 18 of the Bill relates to extent, and provides for the Bill to extend to the legal jurisdictions of England and Wales, Scotland and Northern Ireland.²⁵⁵ Sub-clause 2 also provides that where a provision of the Bill amends or repeals an enactment it has the same extent as the enactment amended or repealed.

As the ECA has a limited application to Gibraltar and the Crown Dependencies, its repeal by clause 1 of the Bill will also extend to them. Additionally, the European Union Act 2011, the European Parliamentary Elections Act 2002 and the European Parliament (Representation) Act 2003 also extend to Gibraltar.²⁵⁶ Clause 18(3) would provide that regulations under section 7(1) or 17 make provision which extends to Gibraltar in relation to European Parliamentary Elections and connected matters.²⁵⁷

7.4 Commencement and Short Title (Clause 19)

Clause 19 of the Bill provides for the Bill's commencement and short title. 19(1) provides that sections 7 to 10, schedule 2, section 12, schedule 4, sections 14 to 16, schedules 6 and 7, section 17(1) to (3) and (5), section 18

²⁵⁵ [Explanatory Notes](#), p 39.

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

and section 19 come into force on the day on which the Bill is passed. The remaining provisions of the Bill would come into force on a day stipulated in regulations, with different days appointed for different purposes. Once passed, the Bill may be cited as the European Union (Withdrawal) Act 2018.

8. Commons Committee Stage

Committee stage in the House of Commons took place over eight sittings of the whole House between 14 November and 20 December 2017. Four substantive changes were made to the Bill:

- Amendments tabled by Charles Walker, chair of the House of Commons Procedure Committee, to create a sifting committee to examine the SIs made under the Bill, and report on the procedure they should be subject to, were agreed without division. This is covered in section 4.5 of this Briefing.
- A government amendment which would require statements to be published in relation to regulations or draft regulations made under the Bill to deal with the appropriateness and with their relationship to equalities legislation, was agreed without division. This is covered in section 4.5 of this Briefing.
- The Government was defeated by 309 to 305 on an amendment which would require a statute to be passed on the withdrawal agreement before the powers to implement the agreement under clause 9 are used. The amendment, tabled by Dominic Grieve (Conservative Member for Beaconsfield), was passed despite the Government offering the concession that they would amend the Bill so that the powers would not be used until a resolution had been passed by both Houses agreeing the withdrawal agreement. This is covered in section 4.3 of this Briefing.
- The Government amended the Bill to set 'exit day' as 29 March 2019 at 11pm, and accepted an amendment tabled by Sir Oliver Letwin (Conservative Member for West Dorset) to allow the date specified to be changed by order. This is covered in section 2.2 of this Briefing.

The House of Commons Library has published a full summary of the Bill's committee stage in the House of Commons: [The European Union \(Withdrawal\) Bill 2017–19: Summary of Commons Committee Stage](#), 9 January 2018.

9. Commons Report Stage

A number of government amendments were made at report stage, as detailed in section 9.1 below. Divisions took place on a number of non-government amendments and new clauses, all of which were defeated. These

are detailed in section 9.2 below, and are covered in the order in which the divisions took place. Although the Government had given a commitment at committee stage that it would table amendments to clause 11 on devolution at report stage, it did not do so; this was a subject of significant comment during report stage. Recent developments relating to clause 11 and the devolved authorities are discussed in section 5.5 of this Briefing.

9.1 Government Amendments

Scope of the Correcting Power (Government amendments 14 and 15 and Amendment 49)

The Scottish National Party (SNP) Spokesperson on Justice and Home Affairs, Joanna Cherry, tabled a series of amendments to the powers of both Ministers of the Crown and the devolved authorities to make changes by regulation to correct failures or deficiencies in retained EU law. These powers (contained both in clause 7, as they relate to Ministers of the Crown, and in schedule 2, as they relate to the devolved authorities) would enable changes that were considered ‘appropriate’ to be made in order to prevent, remedy or mitigate such issues in retained EU law. Ms Cherry’s amendments would have changed the word appropriate to ‘necessary’.

On moving the amendments, Joanna Cherry said that the word ‘appropriate’ was too wide.²⁵⁸ She argued that when governments are “afforded too much executive power [they] will seek to abuse it—that is the nature of the executive”.²⁵⁹ Ms Cherry also expressed concern that the courts would not know how to interpret the word appropriate and referenced comments made by the Scottish Parliament’s Delegated Powers Committee and Law Reform Committee that “the powers should only be available where ministers can show that it is necessary to make a change to the statute book”.²⁶⁰ These comments were made in the Committee’s Legislative Consent Memorandum on the Bill, in which it also stated that it believed it should be possible to find a solution whereby the powers were limited without impacting their efficacy:

[I]t should be possible to find some wording which would restrict Ministers to using the power only where necessary, while still enabling a choice to be made between competing solutions depending on which is most appropriate.²⁶¹

²⁵⁸ [HC Hansard, 16 January 2018, col 801.](#)

²⁵⁹ *ibid.*

²⁶⁰ Scottish Parliament Delegated Powers Committee and Law Reform Committee, [Legislative Consent Memorandum on the European Union \(Withdrawal\) Bill](#), 17 November 2017, SP Paper 231, p 8.

²⁶¹ *ibid.*, p 9.

Joanna Cherry said that she “had no doubt” that an amendment on this issue would be forthcoming in the House of Lords.²⁶² She also stressed that arguments for curtailing executive power applied to “all governments in these islands, not just [the UK] Government”.²⁶³

Responding to Joanna Cherry’s amendments, David Lidington, Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, described ‘necessary’ as a “very strict legal test”.²⁶⁴ He expressed concern that:

It could be interpreted by a court as “logically essential”, and where two or more choices of law to correct EU law are available to ministers, arguably neither one is strictly necessary because there is an alternative.²⁶⁵

Mr Lidington argued that ministers needed to be able exercise discretion to choose the “most appropriate course”.²⁶⁶ Whilst he disagreed with Joanna Cherry’s amendments, Mr Lidington said that the Government had listened to concerns about the scope of the power in clause 7(1) and introduced government amendments 14 and 15, building on an amendment by Dominic Grieve (Conservative MP for Beaconsfield). David Lidington explained that amendments 14 and 15 would “put beyond doubt some of the wilder speculation” as to how these powers would be used by providing an “exhaustive” list of the types of deficiency that can be corrected.²⁶⁷

As considered at report stage in the House of Commons, clause 7(2) listed the deficiencies in retained EU law to which the power in clause 7(1) applied, but deficiencies were “not limited to” this list. Government amendment 14 replaced the words “not limited to” in clause 7(2) with the word “are”, therefore restricting deficiencies to those solely within 7(2). However, government amendment 15 inserted a new sub-clause (2A) [sub-clause 3 as introduced in the Lords] into clause 7 which provided that there was also a deficiency in retained EU law where the Minister considers that there is:

- (a) anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2), or
- (b) a deficiency in retained EU law of a kind described, or provided for, in regulations made by a Minister of the Crown.²⁶⁸

²⁶² [HC Hansard, 16 January 2018, col 802.](#)

²⁶³ *ibid.*

²⁶⁴ *ibid.*, col 837.

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*

²⁶⁷ *ibid.*, col 838.

²⁶⁸ House of Commons, [Consideration of Bill \(Report Stage\): European Union \(Withdrawal\) Bill, as Amended](#), 16 January 2018, p 31.

Speaking on the issue of ‘appropriate’ versus ‘necessary’, the Parliamentary Under Secretary of State for Exiting the European Union, Steve Baker, referred to Mr Lidington’s comments on government amendments 14 and 15, saying that the word ‘appropriate’ had been chosen specifically in order to give governments the discretion required for this “unique situation”²⁶⁹:

The constraints that a test of necessity would impose would prevent the Government and the devolved Administrations from making the best corrections to ensure that the statute book continues to function properly. A provision of necessity would risk limiting the Government and the devolved administrations to only the most minimal changes, regardless of whether that would leave the law deficient, create absurd outcomes, or change the outcomes that the legislation was intended to deliver.²⁷⁰

Government amendments 14 and 15 (and their consequential amendments, 16 to 19) were agreed without division.²⁷¹ Joanna Cherry’s amendment 49 was negated without division.²⁷²

Power of Devolved Authorities to Amend Retained EU Law (Government Amendments 25, 28 and 29)

As the Bill was considered at report stage, paragraph 3(1) of part 1 of schedule 2 restricted the power of devolved authorities to make regulations to modify retained EU law such that they could only modify retained EU law as defined under clause 2 of the Bill (that is EU-derived UK domestic legislation such as that transposed by UK secondary legislation). It would also restrict the devolved administrations from making amendments to anything which was retained EU law by virtue of clause 4 under the Bill. Paragraph 3(2) would prevent regulations being made which would be inconsistent with any modification (whether in force or not) made by the Bill or a Minister of the Crown to any retained direct EU legislation or anything retained by virtue of clause 4. Similar restrictions were provided for by paragraph 15 of part 2 (relating to changes made to ensuring compliance with international obligations and paragraph 23 of part 3 of schedule 3 (relating to powers to implement the withdrawal agreement).

Government amendments 25, 28 and 29 added new paragraphs to parts 1, 2 and 3 of schedule 2 respectively. These would provide that for each of the devolved authorities the restrictions would not apply to retained EU law under clauses 3 and 4 where the Government had released the issue from clause 11 through an Order in Council. The Government’s explanatory

²⁶⁹ [HC Hansard, 17 January 2018, col 959.](#)

²⁷⁰ *ibid.*

²⁷¹ House of Commons, [Votes and Proceedings: Number 80](#), 17 January 2018, p 2.

²⁷² House of Commons, [Votes and Proceedings: Number 79](#), 16 January 2018, p 3.

statements for amendments 25, 28 and 29 state that they “would also allow regulations to be made, in equivalent circumstances, that are inconsistent with modifications of retained direct EU legislation etc made by a Minister of the Crown or the Bill”.²⁷³

David Lidington explained that government amendments 25, 28 and 29 would allow the devolved administrations to use the powers conferred on them by schedule 2 to modify directly retained EU legislation in areas where a common framework is not needed.²⁷⁴ Where direct EU law currently applies uniformly across the UK, the Government would correct this legislation “in the first instance to avoid the risk of early, unhelpful divergence in areas where it may ultimately be determined that a common approach should apply”.²⁷⁵ Mr Lidington said however, that where an issue had been released from clause 11 by the Government, the devolved administrations should be able to modify retained direct EU legislation.²⁷⁶ He said that the Government intended that this would be in the majority of areas.²⁷⁷ The Government would seek to agree as many areas as possible where frameworks were not needed in advance of exit day, the effect of which would be to transfer these powers directly to the devolved administrations “without the need for an intervening period in which to operate the holding pattern described in the clauses”.²⁷⁸

Requirement for Devolved Authorities to Consult (Government Amendments 26 and 27)

As the Bill was considered at report stage in the House of Commons, paragraph 5 of schedule 2 required devolved authorities to obtain the consent of a Minister of the Crown before making regulations under part 1. This applied when a devolved authority was acting alone so far as the regulations would come into force before exit day, or remove (whether wholly or partly) reciprocal arrangements of the kind mentioned in clause 7(2)(c) or (e).

Government amendment 26 removed the requirement to obtain the consent of a Minister of the Crown, but amendment 27 added a requirement for devolved authorities to consult with the Secretary of State.

Speaking to the amendments at report, David Lidington explained that they were being made in response to a similar amendment proposed at

²⁷³ House of Commons, [Consideration of Bill \(Report Stage\): European Union \(Withdrawal\) Bill, as Amended](#), 16 January 2018, p 9.

²⁷⁴ [HC Hansard, 16 January 2018, col 836](#).

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

committee. He stated that the amendments achieved:

[T]he same effect as committee amendment 169, which was proposed by the Scottish and Welsh governments and tabled in the name of the hon. Member for Cardiff South and Penarth [Stephen Doughty, Labour]. Having discussed the matter with those administrations and having listened to the debate in committee, we have agreed to accept that proposal, with the addition of extending the change to the power by conferring it on the Northern Ireland Executive.²⁷⁹

Mr Lidington explained that whilst using the conferred power, it was important that no action was taken that would inadvertently place the UK in breach of EU law whilst it was still a member state, or that would prejudice or pre-empt withdrawal negotiations.²⁸⁰ However, the Government believed the requirement to consult with the Secretary of State was a sufficient safeguard against these issues.²⁸¹

Government amendments 21, 22, 23, 24 were consequential on government amendment 15.²⁸² Government amendments 21 to 29 were considered and voted on as a group, being agreed to on division by 317 votes to 297.²⁸³

Procedure for Amending Date of Exit Day (Government Amendment 33)

Government amendment 33, agreed to without division, provides that changes to the definition of exit day could only be made by using the affirmative procedure to ensure that Parliament had “appropriate scrutiny”.²⁸⁴

Explanatory Statements and Sifting Committee Procedure (Government Amendments 35 and 36)

Government amendments to streamline how the new sifting committee and explanatory statements procedures would work alongside each other were agreed to without division. Steve Baker explained they would:

[...] ensure that the requirement for a Minister of the Crown to make an explanatory statement applies before a draft instrument is laid

²⁷⁹ [HC Hansard, 16 January 2018, cols 835–6.](#)

²⁸⁰ [ibid col 836.](#)

²⁸¹ [ibid.](#)

²⁸² House of Commons, [Consideration of Bill \(Report Stage\): European Union \(Withdrawal\) Bill, as Amended](#), 16 January 2018, p 8.

²⁸³ [HC Hansard, 16 January 2018, cols 842–5.](#)

²⁸⁴ [HC Hansard, 17 January 2018, col 955.](#)

before the House for the purposes of sifting, as well as in other cases. They will also ensure that, where an explanatory statement has been made before the House of Commons for the purposes of sifting, there is no need to make a further statement after sifting when an equivalent instrument is laid before both Houses of Parliament after being made or as a draft affirmative instrument. That will ensure that the committee has all the necessary information at its disposal and will avoid confusing double statements when nothing has changed.²⁸⁵

Legal Challenge on the Basis of General Principles of EU Law (Government Amendments 37 and 38)

Amendments 37 and 38 amended paragraph 27(5) of schedule 8 to create a time-limited exception to the restrictions on bringing a legal challenge on the basis of general principles of EU law (paragraphs 2 and 3 of schedule 1). The effect would be to allow a legal challenge on or after exit day based on the general principles of EU law if it:

- relates to something that happened before exit day;
- is brought within three months of exit day; and
- does not seek to disapply or quash an Act of Parliament or the common law or anything related to them (ie it could be made against either administrative action or domestic legislation other than Acts of Parliament or rules of law).²⁸⁶

Robert Buckland, the Solicitor General, explained that the Government had applied a time limit to this exception because “retaining an open-ended right of action would create more uncertainty for businesses and individuals about rights and obligations”.²⁸⁷ A three-month time limit was “analogous to that which exists in domestic judicial review”. He said it would not be right to allow ‘general principles’ challenges to Acts of Parliament to continue after the UK was no longer a member of the EU as it was “not consistent with the way in which our domestic legal system functions” and “not in line with the purposes of Brexit”.

Dominic Grieve (Conservative MP for Beaconsfield) reminded the House that at committee stage, he had suggested that rather than trying to maintain the Charter of Fundamental Rights in domestic law, a stopgap arrangement could be to continue to allow the general principles of EU law to be invoked in respect of retained EU law.²⁸⁸ He said the government amendments were a consequence of this discussion. Although Mr Grieve said he was

²⁸⁵ [HC Hansard, 17 January 2018, col 956.](#)

²⁸⁶ [Explanatory Notes](#), p 65.

²⁸⁷ [HC Hansard, 16 January 2018, col 781.](#)

²⁸⁸ *ibid*, col 739.

“delighted” to welcome the amendments to the extent they represented “quite a major surrender or change of principle on the part of the Government”, he also described them as “quite a paltry response”, and “a minuscule change” which “does not go anything like far enough”. He said he had decided not to table a further amendment at report stage as he expected the House of Lords would consider this issue and decide that the Government’s amendment “might be capable of a little bit of development”.²⁸⁹

Similarly, Paul Blomfield, Shadow Minister for Exiting the European Union, agreed the government amendments improved the Bill, but “fear[ed] that they do not go anywhere near far enough”.²⁹⁰ Kenneth Clarke (Conservative MP for Rushcliffe) described the amendments as “a strange concession” and “utterly ludicrous” to give people the right of action for three months, which they would risk losing if “their solicitors do not act quickly enough or they do not realise in time that they might have an action”.²⁹¹

9.2 Divisions on Non-Government Amendments

Saving Environmental Rights and Obligations (Amendment 57)

Kerry McCarthy, Shadow Secretary of State for Environment, Food and Rural Affairs, moved amendment 57, which would have removed clause 4 from the Bill. She intended that clause 4 would be replaced by her new clause 19, which contained a broader definition of EU rights to be saved.²⁹² She argued that the restrictions in clause 4, which would mean that rights that had not been recognised by a court before exit day would not be saved, were “inexplicable and unnecessary” and could mean that some EU environmental law would not be saved.²⁹³ She gave some examples of EU law provisions that might be lost as they had not been transposed into UK law, such as the requirement for water pricing policies to incentivise efficient water use and energy performance requirements for publicly owned buildings.²⁹⁴ She argued that the Bill needed to be amended to match the Government’s stated intentions for a “green Brexit”.²⁹⁵

In response, Robert Buckland, the Solicitor General, stated that clause 4 was important as a “sweeper clause”, the function of which was “curing any loopholes that might exist in European law when we leave the EU”.²⁹⁶

²⁸⁹ [HC Hansard, 16 January 2018, cols 739–40.](#)

²⁹⁰ *ibid*, col 742.

²⁹¹ *ibid*, cols 758 and 760.

²⁹² *ibid*, col 734.

²⁹³ *ibid*, cols 734–5.

²⁹⁴ *ibid*, col 735.

²⁹⁵ *ibid*, cols 735–6.

²⁹⁶ *ibid*, col 780.

Amendment 57 was defeated by 319 votes to 299.²⁹⁷

Charter of Fundamental Rights (Amendment 4)

Paul Blomfield spoke to Labour's amendment 4 which sought to ensure that the Charter would continue to apply to retained EU law, and sought to give the Charter rights the same level of protection as the rights in the Human Rights Act 1998. He said the Government's memorandum on the Charter rights "acknowledged that the Government envisaged all these rights being scattered back to their original sources".²⁹⁸ He argued that by "removing the material source of the rights, in the form of the Charter, and leaving citizens with the formal source", it would "become more difficult for any UK citizen to assert their rights post-Brexit". He repeated the argument he had made at committee stage that the Charter had created new rights, and said that retained EU law would be "incoherent" without it.²⁹⁹

Kenneth Clarke questioned why the Government had singled out the Charter, "uniquely amongst all other EU law", not to be saved in domestic law, and asked the Government to explain "what evil it has done, what danger they think we are being protected from by its repeal".³⁰⁰

Responding for the Government, Robert Buckland said seeking to maintain the Charter in domestic law after exit was to "fundamentally misunderstand what the Charter means in the first place".³⁰¹ He explained this was firstly because it was "never intended to create new rights in the first place". Secondly, because the Charter "binds member states only in so far as they are acting within the scope of EU law", in his view it was a "regrettable misunderstanding" to talk about the Charter in a domestic context. He believed importing the Charter into domestic law would "sow confusion".

Amendment 4 was defeated by 317 votes to 299.³⁰²

Animal Sentience (NCT)

Article 13 of the Treaty on the Functioning of the European Union (TFEU) states that, "since animals are sentient beings", the EU and member states must "pay full regard to the welfare requirements of animals" when "formulating and developing the Union's agriculture, fisheries, transport, internal market, research and technological development and space

²⁹⁷ [HC Hansard, 16 January 2018, cols 784–8.](#)

²⁹⁸ *ibid*, col 743.

²⁹⁹ *ibid*, cols 743–4.

³⁰⁰ *ibid*, col 759.

³⁰¹ *ibid*, cols 777–8.

³⁰² *ibid*, cols 790–3.

policies”.³⁰³ This Treaty provision would not be carried into domestic law by the Bill. Existing domestic legislation on animal welfare does not explicitly recognise that animals are sentient.³⁰⁴

In his Conservative Party conference speech in October 2017, Michael Gove, Secretary of State for Environment, Food and Rural Affairs, said: “Animals are sentient beings, they are in our care, they deserve our protection”.³⁰⁵ He announced his intention to legislate to increase the punishment for animal cruelty. The Department for Environment, Food and Rural Affairs published a Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill in December 2017.³⁰⁶ Clause 1(1) of the draft Bill provides that ministers “must have regard to the welfare needs of animals as sentient beings in formulating and implementing government policy”.³⁰⁷ A consultation on the draft Bill runs until the end of January.³⁰⁸

Caroline Lucas (Green MP for Brighton, Pavilion) spoke to new clause 7 at report stage, which would have transferred Article 13 TFEU on animal sentience into domestic law after exit day. She said she wanted to ensure there was no legislative gap, as she was not assured that the Government’s draft Bill would reach the statute book before Brexit.³⁰⁹ She explained that her new clause was intended to transfer the existing EU provision without gold-plating it, but she would support the Government in seeking to address “any real or perceived weakness in the wording of Article 13” when it introduced its own Bill.³¹⁰

Robert Buckland argued that because Article 13 explicitly referred to taking animal sentience into account when developing EU policies, transferring it into UK law would create confusion.³¹¹ He said the present Bill would convert the existing body of EU animal welfare law into domestic law (ie regulations and directives, rather than Treaty provisions). He also

³⁰³ European Union, [Treaty on the Functioning of the European Union \(Consolidated version 2016\)](#).

³⁰⁴ See House of Commons Library, [Animal Sentience and Brexit](#), 14 December 2017 for further details about existing domestic legislation on animal welfare and question of sentience.

³⁰⁵ Conservative Party, [‘Gove: Cleaner, Greener, Stronger—Britain After Brexit’](#), 2 October 2017.

³⁰⁶ Department for Environment, Food and Rural Affairs, [‘Environment Secretary Publishes Bill to Strengthen Animal Welfare’](#), 12 December 2017.

³⁰⁷ Department for Environment, Food and Rural Affairs, [Animal Welfare \(Sentencing and Recognition of Sentience\) Draft Bill](#), 12 December 2017, Cm 9554.

³⁰⁸ Department for Environment, Food and Rural Affairs, [‘Consultation: Draft Animal Welfare \(Sentencing and Recognition of Sentience\) Bill 2017’](#), 12 December 2017.

³⁰⁹ [HC Hansard, 16 January 2018, col 772](#).

³¹⁰ *ibid*, cols 772–3.

³¹¹ *ibid*, col 782.

believed that the Government's new bill on animal sentience would be a "significant improvement" on Article 13 as it would apply to all policy areas.

New clause 7 was defeated by 320 votes to 297.³¹²

Competence of Devolved Legislatures and Agreement on Frameworks (Amendment 3)

The Labour Party's amendment 3 sought to amend clause 11 of the Bill. It would have removed subclauses (1) to (3). These would have been replaced with new subclauses (1) to (6). The first three of these would have removed the restriction from the devolved legislatures on legislating in a way that was incompatible with EU law. However, unlike with the existing clause 11 subclauses (1) to (3), these would not have been replaced with new restrictions relating to retained EU law.

Instead, amendment 3's new subclauses (4) to (6) would have provided for the creation of new UK frameworks to replace existing EU ones. Subclause (4) would have required the Secretary of State to lay proposals for new UK frameworks before Parliament. Subclause (5) would have restricted the purpose of such frameworks to:

- (a) enable the functioning of the UK internal market,
- (b) ensure compliance with international obligations,
- (c) ensure the UK can negotiate, enter into and implement new trade agreements and international treaties,
- (d) enable the management of common resources,
- (e) administer and provide access to justice in cases with a cross-border element, or
- (f) safeguard the security of the UK.³¹³

Subclause 6 would have required Ministers of the Crown to consult with, and secure the agreement of, the affected devolved administrations, before creating any such frameworks.

Speaking to amendment 3, Jenny Chapman, Shadow Minister for Exiting the European Union, referred to the Government's statement that it would bring forward amendments to clause 11 at report:

It was disappointing to have to table this amendment. It should not be necessary, because the Government, with the support of the devolved

³¹² [HC Hansard, 16 January 2018, col 793–8.](#)

³¹³ House of Commons, [Consideration of Bill \(Report Stage\): European Union \(Withdrawal\) Bill, as Amended](#), 16 January 2018, p 12.

authorities, should have tabled their own amendment, but they have not done so, so here we are.³¹⁴

The Shadow Minister expressed concern that the Bill would fail to receive legislative consent from the Scottish and Welsh devolved administrations because of clause 11. She argued that the problem was a lack of a time limit on the restrictions placed on devolved administrations to legislate on retained EU law and the lack of a collaborative mechanism in the Bill for the creation of UK-wide frameworks and devolution of power.³¹⁵ Jenny Chapman called on Scottish Conservative Members to support amendment 3. At the end of her speech she said that Conservative Scottish and Welsh Members, who had also expressed concern over the clause, had “been reasonable and given the Government a chance”. However, she argued that now it was necessary to “force the Government’s hand” with amendment 3 because the “devolution settlements are more important than any party interest”.³¹⁶

The SNP’s Shadow Spokesperson on International Affairs and Europe, Stephen Gethins, said that his Party did not think Labour’s amendment 3 was perfect but that they would support it.³¹⁷ Mr Gethins also called on Scottish Conservative Members to support the amendment.³¹⁸

Stephen Kerr (Conservative MP for Stirling) had said earlier in the debate that whilst he did not disagree fundamentally with the wording of amendment 3 it was not adequate for its purpose in terms of the Bill.³¹⁹ He argued that clause 11 had to be amended with the explicit agreement of the devolved administrations to allow for the passage of a legislative consent motion.³²⁰

Responding for the Government, the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster, David Lidington, argued that there was common ground on the need for common UK frameworks. However, he said that the Government did not believe that amendment 3 would achieve the goal of protecting the “internal UK market, managing common resources and meeting international obligations”.³²¹ He argued that amendment 3 would risk “unchecked divergence” when the UK left the EU and could create new barriers to living and working across the UK. However, Mr Lidington said he was confident that through working with the

³¹⁴ [HC Hansard, 16 January 2018, col 822.](#)

³¹⁵ *ibid.*

³¹⁶ *ibid*, col 823.

³¹⁷ *ibid*, col 832.

³¹⁸ *ibid*, col 823.

³¹⁹ *ibid*, col 817.

³²⁰ *ibid*, cols 816–7.

³²¹ *ibid*, col 837.

devolved administrations the UK Government could achieve legislative consent:

I [...] wish to acknowledge the cooperative approach of both the Scottish and Welsh Governments and their officials in working with us towards the right outcome. I have full confidence that we will deliver this Bill with the legislative consent of both the Scottish Parliament and the National Assembly for Wales.³²²

He also stated that the Government would publish its analysis of where frameworks would and would not be needed.³²³

Amendment 3 was defeated on division by 297 votes to 321.³²⁴

Retaining Enhanced Protection for Rights in Retained EU Law (NCI)

Labour's new clause 1 sought to place restrictions on how ministers could make changes to retained EU law using regulation-making powers contained in other Acts (ie, these restrictions would not have applied to the regulation-making powers contained in this Bill). Firstly, retained EU law could be amended, repealed or modified using delegated powers under other Acts only if it was necessary to maintain or enhance rights and protections. Secondly, if the power was being used to make changes to retained EU law in specified policy areas—employment entitlement, rights and protection; equality entitlements, rights and protection; health and safety entitlement, rights and protection; consumer standards; or environmental standards and protection—then a special procedure would have applied. This would have required an explanatory statement from the Minister as to why the regulation was necessary; a statutory consultation period; and the use of the affirmative procedure in Parliament.

Matthew Pennycook, Shadow Minister for Exiting the European Union, said that “the wide range of rights and protections that flow from” retained EU law could become “vulnerable” to amendment, modification or repeal by subordinate legislation contained in numerous other Acts of Parliament once retained EU law was “wrenched away from the enhanced protection enjoyed as a result of our retained EU membership”.³²⁵ He said it was “absolutely true” that the Government could, for example, use subordinate legislation to prevent workers from receiving holiday pay or to cap awards for discrimination. He reminded the House that the Opposition had “repeatedly emphasised” that Brexit must not lead to “any watering down or weakening of EU-derived rights”. While he accepted the Government had also said it

³²² [HC Hansard, 16 January 2018, col 837.](#)

³²³ *ibid.*

³²⁴ *ibid.*, cols 847–50.

³²⁵

did not wish to see rights and protections diminished as a result of leaving the EU, in his view, the Bill did not currently provide that level of protection.³²⁶ He explained that new clause 1 was drafted to take account of there being “many instances” where using subordinate legislation contained in other Acts “might be necessary”, but in a way that maintained “a presumption of enhanced protection”.

In response, Steve Baker, Parliamentary Under Secretary at the Department for Exiting the European Union, argued it was “right and necessary” for delegated powers in existing and future Acts of Parliament to be able to “operate effectively and without inappropriate fetter within UK domestic law” after Brexit.³²⁷ He said a test of necessity on using these powers to modify retained EU law would “impose a high burden” that might prevent the powers being used “in the most appropriate and relevant way” if the new regulations were “not deemed truly necessary for the protection of rights”. This could prevent changes being made to irrelevant or unsuitable pieces of retained EU law in future, leading to “ossification”, “confusion” and “uncertainty” in the statute book. The procedure set out in new clause 1 was “excessively and needlessly onerous” and risked delaying the implementation of important changes.³²⁸ He pointed out that the use of these powers would be governed by the rules and procedures set out in the parent Act and by Parliament’s accepted statutory instrument processes.

New clause 1 was defeated by 318 votes to 305.³²⁹

Legal Advice on Altering Article 50 Notification (NC6)

Chris Leslie (Labour MP for Nottingham East) tabled new clause 6, which would have required the Government to publish a summary of the legal advice it had received about whether the withdrawal notification made under Article 50 could be extended, altered or revoked. The Government’s consistent position on the question of revocability, and whether they have received legal advice about it, is that:

[...] there is a constitutional convention set out in the Ministerial Code that the Government do not comment on the fact of, or content of, advice that may or may not have been given by the law officers. The Government have been clear that as a matter of firm policy our notification to leave the European Union will not be withdrawn.³³⁰

³²⁶ [HC Hansard, 17 January 2018, col 908.](#)

³²⁷ *ibid*, col 958.

³²⁸ *ibid*, col 959.

³²⁹ *ibid*, cols 962–5.

³³⁰ [HL Hansard, 20 December 2017, col 2114.](#)

Article 50 itself is silent on the question of whether a member state can revoke notification to withdraw once it has been given, and there has not been a legal ruling on whether Article 50 is revocable. As both the Government and the claimants argued in the *Miller* case that Article 50 cannot be revoked once triggered, the Supreme Court accepted this was common ground between the parties and did not rule on this point. Lord Kerr of Kinlochard, who was involved in the drafting of Article 50, is of the view that the UK could change its mind about leaving and unilaterally revoke its notification of intent to withdraw.³³¹ Others have concluded that “a hypothetical right of revocation could only be examined and confirmed or infirmed by the EU institution competent to this purpose, namely the CJEU”.³³²

Chris Leslie argued that Parliament needed to know what the options were should the Government return with “an unacceptable deal”, and that the public also had a right to know.³³³ He also suggested there was “ample precedent” for the Government publishing summaries of legal advice.

Dominic Grieve argued that the issue of whether Article 50 could be revoked was “not an easy one for the Government to answer, in fairness”, as “ultimately it could probably be determined only by the European Court of Justice”.³³⁴ Arguing in support of new clause 6, Chuka Umunna (Labour MP for Streatham) accused the Government of seeking “deliberately to pull the wool over the eyes not just of this House but of the people” by giving “the misleading impression” that Article 50 could not be revoked.³³⁵

New clause 6 was defeated by 322 votes to 298.³³⁶

‘Meaningful Vote on Deal or No Deal’ (NC11)

Tom Brake, the Liberal Democrat Spokesperson for Foreign Affairs, spoke to new clause 11 which would have required the Government to publish an economic impact assessment for any deal reached under Article 50, or—if no deal was reached—on the economic impact of leaving the EU without a deal. If by the end of January 2019, the House of Commons had neither approved a deal, nor approved the UK leaving without a deal, then new clause 11 would have required the Government to continue trying to negotiate a deal in the remaining time; to request an extension of the Article 50 negotiating period; or to rescind the notification of the UK’s intention to

³³¹ BBC News, ‘[Article 50 Author Lord Kerr Says Brexit Not Inevitable](#)’, 3 November 2016.

³³² Ioannis Papageorgiou, [The \(Ir-\)revocability of the Withdrawal Notification Under Article 50 TEU](#), European Parliament, January 2018, p 28.

³³³ [HC Hansard, 17 January 2018, cols 925–6](#).

³³⁴ *ibid*, col 939.

³³⁵ *ibid*, col 946.

³³⁶ *ibid*, cols 967–70.

leave the EU. Mr Brake argued that an impact assessment was necessary for Parliament to have a “meaningful vote”, and that the sectoral analyses already produced by the Government were not sufficient as they contained “nothing of any great substance”.³³⁷

New clause 11 was defeated by 320 votes to 301.³³⁸

Environmental Protection (NC12)

Mary Creagh (Labour MP for Wakefield), chair of the House of Commons Environmental Audit Committee, spoke to new clause 12, which would have required the Government to publish a report detailing any loss of environmental protection, or monitoring or enforcement of environmental protections, as a result of Brexit. The Government would also have been required to publish a draft Environmental Protection Bill before exit day and to establish a new Environmental Protection Agency to monitor environmental targets. Ms Creagh argued that if EU-derived environmental protections were simply “cut and pasted” into domestic law, there was a risk they would become “zombie legislation”, not updated or enforced in future.³³⁹ She made the case that new legislation was needed to set up a “strong environmental protection agency” to take over the role of the European Commission in monitoring and enforcing standards.

New clause 12 was defeated by 318 votes to 301.³⁴⁰

Effect of Losing Access to Single Market and Customs Union (NC17)

Ian Murray (Labour MP for Edinburgh South) proposed new clause 17 which would have required the Government to publish an economic impact assessment comparing any agreement reached with the EU under Article 50 with the UK’s continued participation in the EU single market and customs union. No statute approving a withdrawal deal could have come into force until the economic assessment had been approved by the House of Commons. Mr Murray said that his new clause was intended to “inject some clarity, transparency and honesty” into the debate, by offering “a straightforward way of comparing what we have now” with what the Government “put on the table before the House votes on the legislation to invoke our leaving the European Union”.³⁴¹ He argued that the Government

³³⁷ [HC Hansard, 17 January 2018, col 936.](#)

³³⁸ *ibid*, cols 972–6.

³³⁹ *ibid*, col 947.

³⁴⁰ *ibid*, cols 978–81.

³⁴¹ *ibid*, col 945.

had made “a wrong decision” in taking membership of the customs union and single market off the table “so early”.

New clause 17 was defeated by 320 votes to 301.³⁴²

Restricting the Correcting Power (Amendment 2)

Labour’s amendment 2 sought to place further restrictions on the way the ‘correcting’ power could be used, by:

- Allowing the power to be used only when the Minister considered it “necessary” (clause 7 specifies that the Minister can use the powers when s/he considers it “appropriate”).
- Making the list of ‘deficiencies’ in subclause 7(2) an exhaustive list rather than an illustrative list.
- Requiring that if regulations were used to transfer functions from an EU body to a UK one, those functions would have to be exercised with “equivalent scope, purpose and effect” by the UK body.
- Preventing regulations from being used to:
 - remove or make less favourable any rights conferred by retained EU law;
 - lower standards set in retained EU law;
 - make any remedy, procedure or enforcement of rights or standards in retained EU law less effective;
 - modify the Equality Act 2010 or subordinate legislation made under it.

Matthew Pennycook welcomed the fact that government amendments 14 and 15 made one of the changes sought by Labour—making the list of ‘deficiencies’ in subclause 7(2) exhaustive rather than illustrative, albeit the government amendments would allow further deficiencies to be added to the list subsequently.³⁴³ The government amendments were “not perfect”, he said, but did “represent some progress”. However, he argued that the correcting power in clause 7 was still “too potent and too widely drawn”. He said that amendment 2 “addresses comprehensively the range of flaws contained in clause 7 so that the correcting power is reasonably and proportionately circumscribed”.³⁴⁴

Steve Baker responded that restricting the correcting power as Labour proposed “would risk compromising our ability to ensure that the statute

[HC Hansard, 17 January 2018, cols 983–6.](#)

³⁴³ *ibid*, col 908.

³⁴⁴ *ibid*, col 909.

book continues to function”, thereby “leaving gaps in our law” and “creating uncertainty and confusion”.³⁴⁵ He recognised that amendment 2 sought to protect rights and equalities, but maintained that the Government was “committed to protecting equalities legislation as we leave the EU”.³⁴⁶

Amendment 2 was defeated by 318 votes to 302.³⁴⁷

Permanent Membership of Single Market and Customs Union (Amendment 59)

Peter Grant, Shadow SNP Spokesperson for Europe, spoke to amendment 59, which would have prevented the Government making regulations under clause 9 to implement a withdrawal agreement unless it had signed an agreement with the EU guaranteeing the UK would remain a permanent member of the single market and the customs union. He described the decision to leave the single market as a “unilateral political decision taken by the Prime Minister without any prior consultation”, but not “under any circumstances [...] an inevitable consequence of the vote to leave”.³⁴⁸

Amendment 59 was supported by the Liberal Democrats, Plaid Cymru and the Green Party.³⁴⁹ However, it was defeated on division by 322 votes to 99.³⁵⁰

Exit Day and Transition (Amendment 1)

Labour’s amendment 1 would have given ministers the power to amend the date of exit day after the Bill had received royal assent “to ensure that the day and time specified are in accordance with any transitional arrangements agreed under Article 50”.

Under the terms of Article 50, the UK will leave the EU on 29 March 2019, unless a withdrawal agreement specifies a different date, or both sides agree to extend the two-year negotiating period. Matthew Pennycook acknowledged that the amendments made to the Bill at committee stage would allow the date of exit day specified in the Bill to be changed from 29 March 2019 if this was not the date on which the EU Treaties cease to apply to the UK.³⁵¹ But in his view, this provided only “a limited form of

[HC Hansard, 17 January 2018, col 959.](#)

³⁴⁶ *ibid*, col 960.

³⁴⁷ *ibid*, cols 989–92.

³⁴⁸ *ibid*, col 929.

³⁴⁹ *ibid*.

³⁵⁰ *ibid*, cols 994–6.

³⁵¹ *ibid*, col 911.

flexibility”, which “might not be sufficient to facilitate transitional arrangements after 29 March 2019 on the same basic terms as now”.

Mr Pennycook implied it might be problematic when it came to implementing transitional arrangements that the Bill does not provide for developments in EU law after exit day to be reflected in domestic law. In his view, a transitional period should include the UK being in the single market and a customs union with the EU, both of which would entail the continued jurisdiction of the Court of Justice of the European Union.³⁵² He pointed out that the Prime Minister had recognised that the framework for a transition or implementation period would be “the existing structure of EU rules and regulations” with the CJEU “still governing the rules we are part of for that period”.³⁵³ He asserted that amendment 2 would “restore some common sense to the question of exit day for the purposes of this Bill”.³⁵⁴ He said it would ensure the Bill could facilitate any transitional arrangements agreed in the Brexit negotiations, avoiding the “ludicrous situation” of having to amend it after royal assent.

Steve Baker said he understood the intention behind this amendment, but reminded the House that the amendments made at committee stage already allowed for exit day to be changed “to ensure that the domestic situation reflects the international position”.³⁵⁵ In evidence to the House of Lords Constitution Committee in December 2017, Robin Walker, Parliamentary Under Secretary of State at the Department for Exiting the European Union, said it was a “red herring” to think that specifying an exit day for domestic legal purposes in the Bill would preclude an implementation period.³⁵⁶ He said it was “very clear” that the Government could legislate for an implementation period through the Withdrawal Agreement and Implementation Bill. He said this legislation would specify the role the CJEU would have during the implementation period, as recognised under UK law.³⁵⁷

The House voted against amendment 1 by 321 votes to 302.³⁵⁸

10. Commons Third Reading

At the Bill’s third reading the Secretary of State for Exiting the European Union, David Davis, summarised the Bill’s purpose as ensuring that the UK

³⁵² [HC Hansard, 17 January 2018, col 909.](#)

³⁵³ [HC Hansard, 9 October 2017, cols 42 and 53.](#)

³⁵⁴ [HC Hansard, 17 January 2018, col 912.](#)

³⁵⁵ *ibid*, col 955.

³⁵⁶ House of Lords Constitution Committee, [Uncorrected Oral Evidence: European Union \(Withdrawal\) Bill](#), 13 December 2017, Q49.

³⁵⁷ *ibid*, Q50.

³⁵⁸ [HC Hansard, 17 January 2018, cols 997–1001.](#)

has a functioning statute book when the country withdraws from the EU:

The Bill is essential to preparing the country for the historic milestone of withdrawing from the European Union. It ensures that on day one we will have a statute book that works, with this Government delivering the smooth and orderly exit desired by people and businesses across the United Kingdom. It is a complex piece of legislation, which is unsurprising given that it seeks to put into British law the entire *acquis* of European law—established over 40 years or more of membership—and to do so in a few years while active negotiations are going on.³⁵⁹

He also reiterated the Government’s stated aim of working collaboratively on the Bill and that it would “listen carefully” to all suggestions that were put forward.³⁶⁰

Mr Davis also said that the Government would “respect the decision of this House to limit the power in clause 9” (referring to the amendment tabled in the name of Dominic Grieve (Conservative MP for Beaconsfield) (see section 4.3 of this Briefing)).³⁶¹ He also referred to the establishment of a sifting committee as an example of the Government working collaboratively to improve the Bill.³⁶² On the subject of clause 11, the Secretary of State said the Government had intensified its discussions with the devolved administrations and reiterated the Government’s intention to bring forward amendments in the House of Lords.³⁶³ Mr Davis said the Bill left the House of Commons in a “much improved form”.³⁶⁴

Responding for the Opposition, the Shadow Secretary of State for Exiting the European Union, Keir Starmer, took a different view of the Bill saying that it was “not fit for purpose”.³⁶⁵ He reiterated Labour’s argument that the Bill had “serious defects”.³⁶⁶ These included the wording of clause 6, which Mr Starmer argued was at odds with the agreement reached between the UK Government and the remaining 27 EU states in phase I of the withdrawal negotiations:

[C]lause 6(1), as amended, means that there cannot be any reference to the European Court of Justice after 29 March 2019. However, in December, the Government committed in phase I to allowing EU

³⁵⁹ [HC Hansard, 17 January 2018, cols 1002–3.](#)

³⁶⁰ *ibid*, cols 1003–4.

³⁶¹ *ibid*, col 1004.

³⁶² *ibid*.

³⁶³ *ibid*.

³⁶⁴ *ibid*, col 1005.

³⁶⁵ *ibid*.

³⁶⁶ *ibid*.

citizens to refer to that Court for another eight years after Article 50.³⁶⁷

He also reiterated Labour's criticism that the Government would not be making the Charter of Fundamental Rights part of EU retained law.

Mr Starmer argued that some rights within the Charter are covered in other elements of legislation but others are not and the Charter brought together these rights in one place. He argued that the Government's approach would disperse them:

The whole point of the Charter was to gather all the rights and protections that existed discretely in other places and put them into one document. The Government have now decided that the best strategy is to scatter them back to where they started.³⁶⁸

He expressed concerns over the breadth of the delegated powers contained within the Bill and reiterated Labour's concerns over clause 11. Mr Starmer also referred to the Government's promise of a meaningful vote on the withdrawal agreement:

This has been described as "a meaningful vote" and it must be meaningful. So let me be clear: if the Prime Minister thinks she can come to this House, put forward her proposed Article 50 deal, lose that vote and carry on regardless or walk the UK off a cliff with no deal, she has got another think coming.³⁶⁹

Keir Starmer said that Labour would be voting against giving the Bill a third reading because:

[The Government] have been unwilling to listen to reason, unwilling to reflect on the obvious defects in this legislation and unwilling to ensure this Bill is fit for the incredibly important purpose it seeks to achieve. The Government have simply ploughed on. They have side-lined Parliament and made a mockery of the phrase "Take back control".³⁷⁰

The chair of the House of Commons European Union Scrutiny Committee, Sir William Cash, argued that the result of the referendum in 2016 and the passage of the European Union (Notification of Withdrawal) Act 2017 meant that the Bill should not be opposed at third reading.³⁷¹

³⁶⁷ [HC Hansard, 17 January 2018, col 1005.](#)

³⁶⁸ *ibid*, col 1006.

³⁶⁹ *ibid*, col 1007.

³⁷⁰ *ibid*, col 1008.

³⁷¹ *ibid*.

The chair of the House of Commons Exiting the EU Committee, Hilary Benn, described the Bill as “necessary [but] deeply flawed”.³⁷² He argued that despite amendments that had been made it remained flawed. However, he welcomed that the withdrawal agreement would be put to the House in primary legislation but expressed concern that there was a lack of consensus within Government about what it was seeking in such an agreement:

Therefore, if I have one plea, as we see this Bill depart for now, it is that the Government will, very quickly, do their job and set out for this House and for the British people what it is that they are seeking, because when we come to that meaningful vote, believe you me, this House will ensure that it is meaningful when it comes to decisions about our future.³⁷³

The SNP tabled an amendment to the motion to give the Bill a third reading. This would have declined to pass the Bill, citing clause 11 and arguing that the Bill was not fit for purpose because:

[I]t undermines the fundamental principles of the Scotland Act 1998 by reserving to the UK Parliament powers that would otherwise be devolved to the Scottish Parliament on the UK leaving the European Union.³⁷⁴

Ian Blackford, the SNP’s Leader at Westminster, restated the SNP’s view that clause 11 represented a “power grab”.³⁷⁵ He was particularly critical of the absence of government amendments to clause 11 following statements by the Secretary of State for Scotland that these would be forthcoming at report:

Statements and promises made at the Dispatch Box cannot be sidestepped or ignored. The failure to deliver on commitments made at the Dispatch Box undermines the integrity of political office and undermines our democracy, never mind the democratic rights of the devolved institutions that we are seeking to protect. I am not talking about some abstract principle; I am talking about the rights hard won and delivered with, for example, the passing of the Scotland Act 1998, which brought in devolution.³⁷⁶

³⁷² [HC Hansard, 17 January 2018, col 1010.](#)

³⁷³ *ibid.*, col 1011.

³⁷⁴ *ibid.*, col 1008.

³⁷⁵ *ibid.*, col 1009.

³⁷⁶ *ibid.*

Mr Blackford also “echoed some of the fundamental concerns about other parts of the Bill that only compound [the SNP’s] opposition to it”.³⁷⁷

The SNP’s amendment was defeated on division by 295 votes to 322.³⁷⁸ The European Union (Withdrawal) Bill was passed at third reading by 324 votes to 295.³⁷⁹

³⁷⁷ [HC Hansard, 17 January 2018, col 1009.](#)

³⁷⁸ *ibid*, cols 1012–6.

³⁷⁹ *ibid*, cols 1017–20.