

HOUSE OF LORDS

Delegated Powers and Regulatory Reform
Committee

3rd Report of Session 2017–19

European Union (Withdrawal) Bill

Ordered to be printed 25 September 2017 and published 28 September 2017

Published by the Authority of the House of Lords

The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

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The members of the Delegated Powers and Regulatory Reform Committee are:

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Lord Flight

Lord Jones

Lord Lisvane

Lord Moynihan

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Historical Note

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

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SUMMARY

The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers, allowing them to make major changes beyond what is necessary to ensure UK law works properly when the UK leaves the EU.

The Bill contains unacceptably wide Henry VIII powers, including allowing Ministers to amend or repeal the European Union (Withdrawal) Bill by statutory instrument.

The Bill contains insufficient parliamentary scrutiny of many of the law-making powers given to Ministers, including the setting of exit day.

Parliament should be given a greater say on the procedure applicable to regulations made by Ministers under the Bill.

The Government should bring forward separate Bills to confer on the devolved institutions competencies repatriated from the EU. It is inappropriate for an issue of such constitutional importance to be left to secondary legislation.

Ministers should not have power to impose taxation by statutory instrument.

Many of the time-limits and other restrictions on Ministers can be circumvented by so-called tertiary legislation, which is law made by public bodies under powers conferred on them by Ministers.

Third Report

INTRODUCTION

1. On 11 September, the House of Commons gave a second reading to one of the most important Bills in the constitutional history of the United Kingdom. The Bill gives to Ministers a range of powers, unique in peace-time, to override Acts of Parliament by statutory instrument, without in most cases the need for any prior debate in either House of Parliament.

The heart of the Bill

2. The European Union (Withdrawal) Bill essentially does three things:
 - It repeals the European Communities Act 1972 Act (“the 1972 Act”), which is the legal underpinning of the UK’s membership of the EU.
 - It retains the large body of EU-derived law¹ that would otherwise disappear overnight once the 1972 Act is repealed.
 - It gives unprecedented powers to Ministers and other public bodies to make changes to the body of EU law preserved by the Bill and to Acts of Parliament.

Our remit

3. This Committee, which has no counterpart in the House of Commons, examines Bills to see:
 - (a) whether they grant to Ministers (and others) inappropriate powers to make law; and
 - (b) whether the powers are exercisable without appropriate parliamentary scrutiny.
4. To assist us in our consideration of the European Union (Withdrawal) Bill, the Department for Exiting the European Union has provided a delegated powers memorandum.²
5. Ministers already make considerably more law than Parliament. From 2014 to 2016, Parliament passed 92 public general Acts. During the same period, Ministers made 6,787 laws by statutory instrument under powers delegated to them by Parliament. This Bill is expected to generate another 800 to 1,000 statutory instruments in the near future, making it a Bill of the first importance in terms of law-making powers being granted to Ministers. We make no apology for the fact that this report is longer than usual. The importance of the Bill requires it.

1 We are talking about 60 years of EU-derived law: the 44 years since the UK joined the EEC on 1 January 1973 and the previous 16 years’ law, dating from the creation of the EEC in 1957, which the UK inherited when it joined.

2 Department for Exiting the European Union, *European Union (Withdrawal) Bill: Delegated Powers Memorandum*: [https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20\(Withdrawal\)%20Bill.pdf](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/delegated%20powers%20memorandum%20for%20European%20Union%20(Withdrawal)%20Bill.pdf) [accessed 27 September 2017].

Earlier involvement than usual

6. Normally we report on a Bill in sufficient time to allow Members of the House of Lords to consider it before the Bill's committee stage in the House of Lords. This Bill is of exceptional constitutional significance. Central to the Bill is the balance of power between Parliament and Government, including the propriety of giving Ministers such unprecedented powers to override Acts of Parliament subject, in the great majority of cases, to no scrutiny whatsoever on the floor of either House. Accordingly we have written this report in sufficient time for Members of the House of Commons to consider it at committee stage in their House. In due course, we will also report on the Bill in the form in which it comes to this House.

Preliminary point on terminology

7. People can be forgiven for not knowing what statutory instruments are or how they are made. They are important all the same. Before turning to the heart of this Bill, we set out the types of parliamentary procedure (where there is one) that apply when Ministers make regulations, which have the force of law, under powers delegated to them under this Bill.³ The Bill provides for two main types of procedure:

- (a) The negative procedure. Regulations are made by the Minister without a need for any prior debate at all. They can subsequently be annulled following an adverse vote in either House. The great majority of regulations are made under the negative procedure and the Government have indicated that this will be the case under this Bill.

Since 1950, negative procedure instruments have been annulled only six times as a result of action taken by the House of Commons. This happened on four occasions in 1951, and not at all since 1979. Since 1950, just one negative procedure instrument has been annulled as a result of action taken by the House of Lords.

- (b) The affirmative procedure. In the case of “draft affirmatives”, the regulations are laid before Parliament in draft and cannot be made into law by Ministers unless they are debated and approved by both Houses. In the case of “made affirmatives” (typically used for urgent cases), the regulations are made and come into force but cannot remain in force unless debated and approved by Parliament within one month of being made.⁴

Since 1950, affirmative procedure instruments have failed to secure approval on ten occasions only, five in each House, a rejection rate of one every six or seven years.

Our expectations

8. In our 23rd and 30th Reports from the last Session,⁵ we set out our expectations for the delegated powers in this Bill.
- Ministers must not have unfettered delegated powers. In particular, it would be **wholly unacceptable** for the Bill to replicate the European

3 After they are made by Ministers, the regulations are published as statutory instruments under the Statutory Instruments Act 1946.

4 Schedule 7, para. 11(4).

5 [23rd Report](#), Session 2016–17 (HL Paper 143) and [30th Report](#), Session 2016–17 (HL Paper 164).

Communities Act 1972 by giving the Government a choice to adopt whichever procedure they liked for statutory instruments made under the Bill.

- Significant Henry VIII powers (the power of Ministers to override Acts of Parliament by statutory instrument) must be fully explained and justified.
- The Bill must not enable major changes to policy or establish new frameworks beyond what is **necessary** to ensure that UK law continues to work properly on exit day.
- Any time-limited delegated powers would need careful examination to see that they worked properly.

Expectations not met

9. The Bill has failed to meet our expectations on all the above points.
 - The Bill subjects the law-making powers of Ministers to little parliamentary scrutiny. Apart from the small number of cases where statutory instruments must adopt the affirmative procedure, the Government have an unfettered choice as to which procedure to adopt. This is a radical departure from the norm and one that we regard as wholly unacceptable. We propose a sifting system that will give Parliament a say on the parliamentary procedure applicable to regulations made under the Bill.⁶
 - The Bill confers on Ministers wider Henry VIII powers than we have ever seen.
 - Ministers have powers to alter 60 years of EU law when they consider it **appropriate** to deal with deficiencies arising from the UK's withdrawal from the EU. This goes much wider than the Government's White Paper commitment not to make major changes to policy beyond those that are **necessary** to ensure UK law continues to function properly from day one.⁷
 - Although time-limits apply to secondary legislation made by Ministers under clauses 7 to 9, they do not apply to secondary legislation made under other powers contained in the Bill, or to tertiary legislation (legislation made pursuant to secondary legislation). We have more to say about this later.

Our detailed comments on particular clauses

10. Bearing in mind our remit, we confine ourselves to reporting on what we regard as an inappropriate delegation of power or an inappropriate parliamentary procedure attaching to the exercise of those powers. We do not comment on general political questions relating to our withdrawal from the EU, in particular the devolution settlement. Throughout the Report, we give hypothetical examples of what the powers in the Bill *could* enable

⁶ See para. 107 below.

⁷ Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, Cm 9446, March 2017: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604516/Great_repeal_bill_white_paper_accessible.pdf [accessed 26 September 2017].

Ministers to do. That should not be construed as implying that Ministers *will* do these things. But we do judge powers on how they might be used and not just on how the Government indicate that they intend to use them.

11. **We draw attention to clauses 7, 8, 9, 11, 14, 17, and Schedules 3 to 5 and 7. For each provision on which we report, we set out (i) its effect; (ii) our concerns; and (iii) our recommendations.**

CLAUSE 7: DEALING WITH DEFICIENCIES ARISING FROM WITHDRAWAL

(i) Effect

12. Clause 7 allows Ministers by regulations to make such provision as they consider **appropriate** to prevent, remedy or mitigate:
- (a) any **failure** of retained EU law⁸ to **operate effectively**, or
 - (b) any other **deficiency** in retained EU law,
- arising from withdrawal of the UK from the EU.⁹
13. Deficiencies in retained EU law include (but are not limited to) cases where Ministers¹⁰ consider that retained EU law:
- (a) is substantially redundant, for example, relating to European Parliamentary elections;
 - (b) confers functions on EU entities which need transferring to a national body, for example, from the European Air Safety Authority to the Civil Aviation Authority;
 - (c) makes provision for reciprocal arrangements between the UK and the EU that will no longer exist or no longer be appropriate;
 - (d) contains no functions or restrictions which were in an EU directive and in force immediately before exit day and which are appropriate to retain;
 - (e) contains EU references which are no longer appropriate.
14. Regulations made under clause 7 may do anything that an Act of Parliament can do.¹¹ This is a Henry VIII power as it allows for the repeal or amendment of primary legislation. However there are some things that cannot be done under clause 7, including taxation, retrospective legislation, criminal offences punishable by more than two years' imprisonment, changes to the Human Rights Act 1998 and certain changes to the Northern Ireland Act 1998.¹²

(ii) Concerns

15. Clause 7 is notable for its width, novelty and uncertainty.
16. Under clause 7(1)(a), Ministers can make regulations to prevent, remedy or mitigate “any failure of retained EU law to operate effectively” arising from the UK’s withdrawal from the EU. By what standards is the failure to operate effectively to be judged? In relation to whom or what is the ineffective

⁸ The body of EU law that continues to form part of domestic law by virtue of clauses 2 to 4 of the Bill.

⁹ Schedule 2 confers corresponding powers on Scottish Ministers, Welsh Ministers and Northern Ireland Departments to make regulations for the same purposes within their respective areas of legislative competence. In some cases, the regulations have to be made jointly with, or with the consent of, a UK Government Minister. This point also applies to clauses 8 and 9. In the case of clause 9 (where UK Government Ministers can amend the European Union (Withdrawal) Act itself), the same power does not apply to Ministers in the devolved administrations.

¹⁰ The references to “Ministers” include (where applicable) references to Ministers in devolved administrations exercising the delegated powers conferred by Schedule 2 to the Bill.

¹¹ Clause 7(4).

¹² Clause 7(6).

operation to be judged? Need it be a major failure? What if the failure is in relation to some sectors of the economy or society but not others? There is no obvious answer to these questions.

17. The uncertainty of the meaning of clause 7(1)(a) is exacerbated by the uncertainty of “retained EU law” as defined in clause 6(7), which in turn refers to the definition of “EU-derived domestic legislation” in clause 2(2). It is by no means clear precisely what clause 2(2)(b)–(d) is referring to, adding to the uncertainty of the scope of clause 7(1)(a).
18. Clause 7 also allows Ministers to legislate to prevent, remedy or mitigate “any other deficiency” in retained EU law arising from the UK’s withdrawal from the EU. This is a very wide power, given that the dictionary definition of “deficiency” includes a failure, want, lack or absence. Although clause 7(2) gives seven overlapping examples of deficiencies in retained EU law, there is no obvious rationale underlying them beyond the fact that they must arise from the UK’s withdrawal from the EU. In any event the definition in clause 7(2) is expressly stated to be non-exhaustive.
19. Paragraph 1.21 of the White Paper said that the Great Repeal Bill would not:

“aim to make major changes to policy or establish new legal frameworks in the UK beyond those which are **necessary** to ensure the law continues to function properly from day one”.
20. Likewise, paragraph 3.7 of the White Paper said that the Bill:

“will provide a power to correct the statute book, **where necessary**, to rectify problems occurring as a consequence of leaving the EU”.

The delegated powers memorandum refers to Ministers having the power by regulations to make “**necessary** corrections to the statute book”.¹³

21. However, clause 7 is drafted in much wider terms. Instead of a test based on necessity, the test is based on the subjective judgment of the Minister as to what he or she **considers to be appropriate**. There is nothing to suggest that the judgment of appropriateness is confined to technical matters or purely mechanistic changes. There is scope for Ministers to make regulations arising from EU withdrawal with an extensive policy content across the whole of retained EU law.

“Necessary” versus “appropriate”: some examples

22. One example concerns EU Regulation No. 883/2004 on the co-ordination of social security systems. As “direct EU legislation” under clause 3, the Regulation will become “retained EU law” under clause 6. It sets out rules designed to ensure that people receive the full benefit of the contributions they have made so that they are not disadvantaged by reason of having moved to live or work elsewhere in the EU. It also provides that some social security benefits have to be exported if the person claiming them moves to another Member State. Hence UK citizens who have retired to Spain are entitled to have their state retirement pension or invalidity benefits paid to them in Spain in full on the same basis as if they had stayed in the UK. The Regulation would appear to fall within clause 7(1)(b) and (2)(c) & (d) of the Bill — so that Ministers could legitimately form the view that there is

¹³ Para. 12(ii), page 11.

a deficiency in the Regulation arising from the withdrawal of the UK from the EU and it is, therefore, “appropriate” to repeal or substantially rewrite the Regulation as from exit day so as to end the obligation to export benefits, or to prevent EU citizens resident in the UK from claiming benefits here. Whether this would be “necessary” appears to be more doubtful.

23. Another example is in the new EU General Data Protection Regulation,¹⁴ which will also become “retained EU law”. Clause 7 allows Ministers to amend it if they think it “appropriate” to remedy any failure of the law to operate effectively arising from the UK’s withdrawal from the EU. Under the Regulation, individuals have rights of access to personal data subject to exceptions such as national security, defence and public security. Ministers might take the view that, once we no longer have to recognise the supremacy of EU law when we have left the EU, the exceptions to data access rights do not operate effectively as regards EU citizens resident in this country and should be widened under clause 7 to prevent them, say, from having a right of access to immigration information held about them by the Home Office. Using a test of necessity, it would not be necessary for the law to be changed to give the Government the benefit of a wider derogation than they currently possess under the Regulation. But it is arguably something that Ministers could decide was “appropriate” to do as it arises from the UK’s withdrawal from the EU.¹⁵
24. The Committee has previously drawn attention to loosely-drawn powers based on the subjective judgment of the Minister and has argued for their being restricted by an objective test of necessity.¹⁶
25. Drawing on Case Study 3 at page 21 of the White Paper, we take the hypothetical example of regulations under clause 7 altering a legal duty to send information to an EU body, because the EU body would no longer accept the information once the UK leaves the EU. The issue raises policy questions as to what is to become of this information requirement. Should the information go instead to an existing UK body? Should it go to a newly-created body? Should the requirement be scrapped altogether? Should more or less information be sent to some other body?
26. It might be argued that none of these solutions is strictly necessary and that, therefore, a wider test based on what Ministers regard as appropriate should be employed. We disagree. The Bill ought to be drafted so that Ministers may make remedial provision only where:
 - (a) there is a deficiency in retained EU law arising from the UK leaving the EU, and
 - (b) it is necessary to prevent, remedy or mitigate it.

14 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ([OJ L 119/89](#), 4 May 2016).

15 By contrast, the UK Information Commissioner will, after we have left the EU, no longer be obliged to co-operate with current EU counterparts in order to contribute to the consistent application of the EU Regulation throughout the EU (precisely because we will have left the EU). This would be an example where the “necessity” test would allow the Government to remove the legal duty to co-operate found in Article 63 of the Regulation.

16 [15th Report](#), Session 2016–17 (HL Paper 104), para. 55, in the context of the Neighbourhood Planning Bill.

Once this necessity threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions. In the information example, a requirement to collect and send information that will no longer be accepted by the EU institution is a deficiency that it is necessary to remove from the statute book on the ground that it cannot be right to retain a redundant legal duty that amounts to a waste of time, effort and public money. Having passed this hurdle, Ministers would not be stopped from acting merely because the proposed solution was one of several that might have been devised. In other words, the operative test in clause 7 would be whether it is necessary to deal with the problem, not whether only one solution follows inexorably.

27. The things that Ministers cannot do in regulations made under clause 7 bear some resemblance to the restrictions currently found in the European Communities Act 1972. However, there is something that regulations under clause 7 can do that regulations under the 1972 Act cannot. Regulations under clause 7 allow for “legislative sub-delegation”. That is to say, regulations under clause 7 may allow people or bodies, including Ministers themselves, to make further subordinate legislation (tertiary legislation) without there necessarily being any parliamentary procedure or even any requirement for the tertiary legislation to be made by statutory instrument. Paragraph 12 of Schedule 7 says that regulations made by Ministers must be made by statutory instrument. This would not catch other forms of subordinate legislation apart from regulations. It would not cover tertiary legislation made by non-Ministers. Arguably it does not catch tertiary regulations at all (on the basis that they are not made under the Act but are made under secondary legislation which is itself made under the Act). Where tertiary legislation is not made by statutory instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. Despite its greater inaccessibility, tertiary legislation is still the law.
28. The delegated powers memorandum suggests that the power to make tertiary legislation is intended to be used sparingly, where it is appropriate for powers to be conferred independently of political control, for example, conferring powers on a regulator to set standards. However, there is nothing in the Bill that limits the power in this way. It could be used for any purpose for which regulations may be made under clause 7. It could, for example, be used to create new bodies with wide powers to legislate in one of the many areas currently governed by EU law, including aviation, banking, investment services, chemicals and medicines. The regulations might also contain only skeleton provisions in relation to a particular activity, leaving the detailed regime to be set out in tertiary legislation made not by Parliament, or even by Ministers, but by one of the new bodies so created.
29. Although regulations made under clause 7 cannot be made after the period of two years following “exit day”,¹⁷ the ability to provide for sub-delegated powers in regulations under this clause (and under clauses 8 and 9) allows the Government to circumvent the two-year period. Paragraph 28 of Schedule 8 to the Bill states that the two-year restriction does not apply to such tertiary legislation, meaning that those powers could be exercised after the two-year period elapses.

¹⁷ “Exit day” is a day or days specified by regulations under clause 14, discussed later in this Report at page 19.

30. We also note that the prohibition in clause 7(6)(c) against certain criminal offences being created by regulations does not prevent the levying of substantial civil penalties. Indeed, the power for Ministers to create criminal offences attracting a sentence of up to two years' imprisonment is a significant one.

(iii) Recommendations

31. **Clause 7 involves an inappropriately wide delegation of power.**
- (a) **The “appropriateness” test in clause 7 should be circumscribed in favour of a test based on necessity. Currently, the Bill allows regulations to make substantial policy changes that ought to be made only in primary legislation.**
 - (b) **Tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.**

CLAUSE 8: COMPLYING WITH INTERNATIONAL OBLIGATIONS

(i) Effect

32. Clause 8 allows Ministers to make such regulations as they consider appropriate to prevent or remedy any breach of the UK's international obligations arising from the UK's withdrawal from the EU.
33. Clause 8 contains a Henry VIII power allowing the regulations to do anything that an Act of Parliament can do, including amending or repealing any Act of Parliament ever passed. This power is subject to several of the exceptions found in clause 7. However more can be done in regulations made under clause 8 than under clause 7. Under clause 8, the regulations can impose or increase taxation. Similarly the restriction on amending the Northern Ireland Act 1998 in clause 7 does not apply to clause 8.
34. Regulations made under clause 8 cannot be made after the period of two years following exit day.

(ii) Concerns

35. The appropriateness test in clause 8 gives Ministers greater scope to act than if the test were one based on necessity.
36. The Government have not been explicit about the sorts of international obligation they have in mind under clause 8, save for the example about trans-frontier television given at paragraph 52 of the delegated powers memorandum. It would be helpful if the Government would give more examples.
37. The Government have not explained why regulations under clause 8 (unlike regulations made under clauses 7 and 9) may impose or increase taxation, thus allowing the supremacy of the House of Commons in financial matters to give way to taxation by statutory instrument.
38. Unlike the corresponding test in clause 7, the power to make regulations in clause 8 relates to preventing or remedying breaches but does not extend to mitigating such breaches.
39. Tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit applicable to secondary legislation. Nothing is said in the delegated powers memorandum to explain why a power to make tertiary legislation is needed in the context of clause 8. This is surprising given the unusual nature of the power.

(iii) Recommendations

40. **Clause 8 involves an inappropriately wide delegation of power.**
 - (a) **The “appropriateness” test in clause 8 should be circumscribed in favour of a test based on necessity.**
 - (b) **The Government should demonstrate a convincing case before the supremacy of the House of Commons in financial matters gives way to taxation by statutory instrument.**

- (c) **The Government should demonstrate a convincing case for requiring the power to make tertiary legislation under clause 8. Even if the power is needed, it is unsatisfactory that tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit applicable to secondary legislation.**
41. **The Government should explain further how they propose to use this law-making power, including why the power to make regulations in clause 8 relates to preventing or remedying breaches but does not extend to mitigating such breaches.**

CLAUSE 9: IMPLEMENTING THE WITHDRAWAL AGREEMENT

(i) Effect

42. Clause 9 allows Ministers to make such regulations as they consider appropriate for the purposes of implementing the withdrawal agreement. There are limits to what regulations under clause 9 can do, broadly similar to those in clause 7. No regulations may be made under clause 9 after exit day.
43. Importantly, regulations under clause 9 can do anything that an Act of Parliament can do, including amending or repealing the European Union (Withdrawal) Act itself. Clause 9(2) reads:

“Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).”

Although clause 9(2) is expressed as a power to “modify” the Act, suggesting less substantial change, “modify” is defined in clause 14(1) to include amendment and repeal. The inclusion of this power to amend and repeal the Act itself does not appear in clauses 7 and 8 and is therefore implicitly excluded from those clauses.

(ii) Concerns

44. Clause 9 allows for important matters in the withdrawal agreement (for example, the rights of EU citizens resident in the UK) to be implemented in domestic law by negative procedure regulations, even if this requires extensive changes to primary legislation (for example, the Immigration Acts).
45. Although clauses 7 and 8 contain wide Henry VIII powers, clause 9 contains the widest Henry VIII power. Regulations under clause 9 may, in addition to amending or repealing any Act of Parliament whenever passed, also repeal the European Union (Withdrawal) Act itself. Such an instrument must adopt the affirmative procedure.¹⁸ Notwithstanding, this power is wholly unacceptable. By way of example, to implement the withdrawal agreement Ministers could by statutory instrument:
- (a) repeal the restrictions in clauses 7 to 9 that time-limit the making of regulations;
 - (b) amend clauses 3 and 4 to alter the scope of “retained EU law” so that in certain areas it includes EU legislation passed after exit day;
 - (c) amend clause 5 so that the supremacy of EU law is retained for certain purposes or for certain areas of law;
 - (d) amend clause 6 so that in certain areas the courts have to follow decisions of the Court of Justice of the EU made after exit day;
 - (e) widen the scope of clause 7 to allow regulations to make major policy changes, to the extent that they cannot already.
46. It is no answer for the Government to say that they would never use a statutory instrument for these purposes. Clause 9 is wide enough for Ministers to do so. We judge powers not on how the Government say that they will use them but on how any Government might use them.

¹⁸ Schedule 7, para. 6(1) and (2)(g).

47. The delegated powers memorandum justifies the extraordinary width of this Henry VIII power because the “exact use of the power will of course depend on the contents of the withdrawal agreement”¹⁹ and the “nature and scale of the legislative changes required are as yet unknown”.²⁰ The answer to this is as follows. The Government propose to take very wide-ranging secondary and tertiary legislative powers in the Bill, which would appear to cover every possible need to deal with failures and deficiencies in retained EU law as we leave the EU. Given the sheer width of these powers, it is difficult to conceive of areas where the proposed powers are not sufficient. However if the final withdrawal agreement includes something that is not capable of being legislated for under the regulation-making powers of the European Union (Withdrawal) Act, then Parliament should legislate rather than Ministers. Parliament is capable of passing urgent Bills with extraordinary expedition.

(iii) Recommendations

48. **Clause 9 involves an inappropriate delegation of power in allowing statutory instruments to amend or repeal the European Union (Withdrawal) Act.**
49. **If, before exit, amendments are needed to the European Union (Withdrawal) Act, it is for Parliament to make the changes through primary legislation rather than for Ministers to do so by statutory instrument, particularly where significant and contentious policy issues are at stake.**

19 Para. 62.

20 Para. 60.

CLAUSE 11 AND SCHEDULE 3: RETAINING EU RESTRICTIONS IN DEVOLUTION LEGISLATION ETC.

(i) Effect

50. The existing law prevents the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales and Scottish Ministers, Welsh Ministers and Northern Ireland Departments from making legislation that is incompatible with EU law.²¹
51. Clause 11 and Schedule 3 amend that law so that none of the devolved institutions can modify retained EU law unless the modification would have been within their legislative competence immediately before exit day. This means that EU withdrawal will not result in any new competencies being conferred on the devolved institutions, even in subject areas that are already devolved (for example, food, plant health, the environment). It will therefore, at least initially, be for the UK Government and Parliament to legislate on matters that fall within those areas but could not be changed by devolved institutions due to their incapacity to legislate incompatibly with EU law. This provision, which the Scottish and Welsh Governments have declared unacceptable,²² concerns the devolution settlements rather than delegated powers and is therefore outside this Committee's remit.
52. However clause 11 and Schedule 3 also contain delegated powers that do fall within our remit. These allow for an Order in Council (a type of secondary legislation) to confer on the devolved institutions the power to alter retained EU law. The affirmative procedure would apply in both Houses of Parliament and the relevant devolved legislature.

(ii) Concerns

53. The Government's delegated powers memorandum describes clause 11 as "a transitional arrangement to provide certainty after exit day and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are needed".²³ As regards the power to prescribe exceptions by Order in Council the memorandum asserts that:
- (a) its purpose is "to provide an appropriate mechanism to broaden the parameters of devolved competence in respect of retained EU law";
 - (b) "it adopts a similar approach to established procedure within the devolution legislation for devolving new powers (for example section 30 orders in the Scotland Act 1998)";
 - (c) "without the power it would be necessary for the UK Parliament to pass primary legislation (having sought Legislative Consent Motions from the relevant devolved legislatures) in order to release areas from the new competence limit".²⁴

21 Scotland Act 1998, sections 29 and 57; Northern Ireland Act 1998, sections 6 and 24, and the Government of Wales Act 2006, sections 80 and 108A (as amended by the Wales Act 2017).

22 See their Legislative Consent Memoranda: <http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf> and <http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf>

23 Para. 68.

24 Para. 69.

54. We doubt whether the powers in clause 11 and Schedule 3 are analogous to existing procedures in the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 (as amended in 2017). In the case of the Scotland Act, Schedule 5 sets out which matters Parliament considers should be reserved to Westminster (for example, defence, foreign affairs and company law).²⁵ This is supplemented by a power in section 30 to allow existing reservations, by Order in Council, to be removed from the list or new ones to be added.²⁶ In contrast, the effect of clause 11 and Schedule 3 is to reserve to Westminster all competences returning from the EU unless the position is changed by Order in Council.
55. Moreover the lists of reserved matters in the devolution enactments are, for the most part, relatively straightforward. This is not the case with the concept of “retained EU law” which is defined in clause 6 to mean:
- “anything which, on or after exit day, continues to be, or forms part of, domestic law, by virtue of section 2, 3 or 4 or subsection (3) or (6) [of clause 6] (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)”.
56. This is complex and obscure, and something of a moving target in view of the words in brackets at the end of the definition. There may be significant potential for disputes after exit day between the UK Government and the devolved administrations about what does or does not constitute “retained EU law”, which might ultimately require resolution by the Supreme Court.
57. We are also puzzled by the memorandum’s description of clause 11 as “a transitional provision”. It is not drafted in those terms and could remain indefinitely.
58. The Government appear to envisage that the Order in Council procedure will distribute competences returned from the EU to the devolved institutions, following negotiations with them. The memorandum gives no convincing explanation as to why it is considered appropriate to implement any agreement following those negotiations by delegated legislation, rather than by a Bill. Revisions to the three devolution settlements in light of EU withdrawal will be of considerable constitutional significance. We anticipate that both Houses of Parliament would wish closely to scrutinise proposed legislation amending the settlements, and to have the opportunity to amend it—as has happened with all major changes to devolution since 1998: see most recently the Scotland Act 2016 and the Wales Act 2017.
59. On an issue as important as this, we regard it as unacceptable for Parliament to be presented with a draft Order in Council and given a simple choice of “take it or leave it”. The Government should instead bring forward a separate Bill. It is, of course, not for us to express a view as to which competencies returned from the EU should be devolved to Belfast, Cardiff or Edinburgh. We are concerned only with the issue of whether it appropriate for this to be done by delegated powers. In our view, it is not.

25 See also Northern Ireland Act 1998, Schedules 2 and 3 and the Government of Wales Act 2006, Schedule 7A (inserted by the Wales Act 2017).

26 The power in section 30 of the Scotland Act was used in 2013 so as to confer competence on the Scottish Parliament to legislate for the Scottish independence referendum.

(iii) Recommendation

60. **The Order in Council powers in clause 11 and Schedule 3 are inappropriate and should be removed. Separate Bills should be introduced in Parliament to provide for the conferral on devolved institutions of competencies repatriated from the EU.**

CLAUSE 14: INTERPRETATION OF EXIT DAY

(i) Effect

61. Clause 1 of the Bill repeals the European Communities Act 1972 on exit day. Exit day is defined in clause 14(1) to mean any day appointed by Ministers in regulations. The regulations are subject to **no** parliamentary procedure. That is to say, Ministers can decide on exit day and set it out in law without recourse to Parliament. This becomes the day on which the 1972 Act is repealed and the supremacy of EU law ceases to apply in the UK.
62. Exit day may be one date for some purposes and a different date for other purposes.²⁷ Accordingly, some sectors might be governed by unchanged EU law for a longer period than others. One can therefore talk about exit **days**, given that there can be more than one.

(ii) Concerns

63. We are concerned that no parliamentary procedure attaches to the setting of exit day(s). There are good reasons why the setting of exit days should require the affirmative procedure, meaning that both Houses are able to debate the regulations before they are made. These reasons include:
- Political significance and public interest will attach to the setting of exit days.
 - Some sectors might be governed by unchanged EU law for longer than others.
 - The time-limits applying to the making of regulations under clauses 7 to 9 are dependent on exit day. If exit day is later rather than sooner, the period during which regulations under clauses 7 to 9 can be made will be longer.
 - Regulations setting exit days can also make transitional and consequential provision, which too may be of significance.
64. Paragraph 73 of the delegated powers memorandum justifies the lack of a parliamentary procedure because “the power is limited to only specifying a date and time which will itself be subject to negotiations between the UK and the EU”. However, considerable significance attaches to these dates.

(iii) Recommendation

65. **Regulations stipulating exit day(s) should be subject to the affirmative procedure.**

²⁷ Para. 13(a)(ii) of Schedule 7 to the Bill.

CLAUSE 17(1): POWER TO MAKE CONSEQUENTIAL PROVISION

(i) Effect

66. Clause 17(1) allows Ministers to make regulations containing such provision as they consider appropriate in consequence of the Bill.
67. The powers include a Henry VIII power to repeal or amend any Act of Parliament passed from earliest times until the end of the current Session.
68. We have already noted that, although the power is expressed as a power to modify primary legislation, and therefore may tend to suggest less substantial changes, “modify” is defined by clause 14(1) of the Bill to include amendment and repeal.
69. There is no time-limit on the making of regulations under clause 17, unlike the regulation-making powers in clauses 7 to 9.
70. Regulations under clause 17(1) are subject to the negative procedure, including where those regulations amend or repeal primary legislation.

(ii) Concerns

Scope of powers

71. In our 15th Report of the last Session on the Neighbourhood Planning Bill,²⁸ we considered a similar regulation-making power which allowed the Minister to make such provision as the Minister considered “appropriate”. In that case we expressed concern about such widely-drawn powers and recommended a restriction based on an objective test of necessity rather than leaving this to the subjective judgment of the Minister. We have similar concerns here. The delegated powers memorandum does not explain the need for such widely-drawn powers. It states that regulations under clause 17(1) are limited to making amendments consequential to the contents of the Bill and not to consequences of withdrawal from the EU that are addressed by other powers (for example, under clauses 7 to 9). We are not convinced, given that the substantive effect of the Bill is to provide for the repeal of the European Communities Act 1972, with all that this entails.
72. Paragraph 15(2) of Schedule 7 makes it clear that regulations under clause 17(1) can amend or repeal retained EU law where doing so is consequential on the repeal by the Bill of any enactment contained in the 1972 Act. One consequence of the repeal of the 1972 Act is to remove the requirement to comply with, and implement, EU law. A Minister might at some point in the future rely on this to make substantive policy changes to retained EU law, going beyond remedying a defect. For example, the powers could be used to amend the Working Time Regulations on the basis that the changes are “appropriate” in consequence of the repeal of the 1972 Act and the UK no longer being under a duty to implement the Working Time Directive.

Parliamentary scrutiny

73. Established practice in other legislation has been to require the affirmative procedure for consequential amendments to primary legislation. The

²⁸ 15th Report, Session 2016–17 (HL Paper 104), para. 55.

precedents given in paragraph 75 of the delegated powers memorandum are all ones which follow this practice. For Henry VIII powers to be routinely exercised by negative procedure instruments represents a significant departure from what Government and Parliament have hitherto regarded as acceptable. Paragraph 78 of the delegated powers memorandum justifies this on the ground that a large number of “fairly straightforward” changes, including to primary legislation, will be needed in consequence of this Bill. But that does not explain why it is appropriate for the negative procedure to apply in all cases including those which are not “fairly straightforward”.

(iii) Recommendations

Scope of powers

74. **The powers to make consequential provision conferred by clause 17(1) should be restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister.**
75. **The Government should be asked to explain why it is necessary to have powers that go beyond those conferred by clauses 7 to 9.**
76. **In the absence of a convincing explanation, clause 17(1) should not be capable of being used to amend retained EU law.**

Parliamentary scrutiny

77. **Where regulations under clause 17(1) amend or repeal primary legislation, the affirmative procedure should — in the absence of a convincing explanation to the contrary — apply in accordance with established practice.**
78. **Where a decision is to be made on the appropriate level of parliamentary scrutiny applying to the making of regulations by Ministers under this Bill, Parliament and not Ministers should decide. When we come to Schedule 7, we recommend a sifting mechanism. Ministers may propose the level of scrutiny which is to apply, but Parliament should have the opportunity to require a higher level of scrutiny. The details are set out at paragraph 107 below. Regulations under clause 17(1), other than those which amend or repeal primary legislation and which should be affirmative, should be subject to this sifting mechanism.**

CLAUSE 17(5): POWER TO MAKE TRANSITIONAL PROVISION

(i) Effect

79. Ministers may, by regulations under clause 17(5), make transitional, transitory or saving provision in connection with the coming into force of provisions of the Bill or the appointment of exit day.
80. The effect of paragraph 10 of Schedule 7 is that the Minister decides for each set of regulations made under clause 17(5) whether it is to be made without any parliamentary procedure (including without any requirement for laying before Parliament), or whether it should be subject to parliamentary scrutiny and, if so, whether the negative or affirmative procedure applies.

(ii) Concerns

81. The delegated powers memorandum explains that, while powers to make transitional provision in connection with commencement are commonly not subject to any parliamentary procedure, the unique circumstances of the Bill warrant a different approach which allows for a higher level of scrutiny. But the memorandum does not explain why Ministers rather than Parliament should decide the appropriate level of parliamentary scrutiny in each case.

(iii) Recommendation

82. **Regulations under clause 17(5) should be subject to the sifting mechanism set out at paragraph 107 below.**

SCHEDULE 4: FEES AND OTHER CHARGES

(i) Effect

83. Schedule 4 confers a power on UK Ministers or (within their areas of competence) Ministers in the devolved administrations to make regulations providing for a public authority to impose “fees or other charges” in respect of functions it is given by regulations under clauses 7 to 9.²⁹ For example, regulations under clause 7 may establish a new public body to assume the functions of the European Medicines Agency as regards the UK. Schedule 4 would then allow Ministers to make further regulations allowing the body to levy charges on UK pharmaceutical companies, or even on the general public, in connection with the cost of the new UK regulatory regime for medicines.
84. The delegated powers memorandum indicates that Schedule 4 is designed to allow “flexibility” in how new Government functions are funded and that “it enables the creation and modification of fees or other charges so the costs of Government services do not always fall on the taxpayer”.³⁰
85. Schedule 4 also contains a power for Ministers to confer on public authorities the same powers to make fee regulations as Ministers have, save that where the public authorities make the subordinate legislation it does not have to be subject to parliamentary scrutiny or be made by statutory instrument.³¹

(ii) Concerns

86. The powers in Schedule 4 are very wide. The delegated powers memorandum notes that they would enable:
- “the creation of **tax-like charges** [our emphasis], 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”.³²
87. Ensuring that the general taxpayer does not pay the cost of specialist services is a legitimate aim, although permitting organisations full cost recovery of their services without parliamentary scrutiny allows them to gold plate the services they offer. Parliamentary scrutiny is accordingly important, even where the fees do not overtly involve a tax or a tax-like charge.
88. A “tax-like charge” means a tax. Taxes and tax-like charges should not be allowed in subordinate legislation. They are matters for Parliament, a principle central to the Bill of Rights 1688. Regulations under clauses 7 and 9 cannot impose or increase taxation.³³ But regulations under Schedule 4 may. Not only can Ministers tax, Ministers can confer powers on public authorities to tax and they can do so in tertiary legislation that has no parliamentary scrutiny whatsoever.

29 The consent of the Treasury is needed where the power is to be exercised by a UK Government Minister. Treasury consent is not needed for exercise of the power by a devolved administration although, in certain limited circumstances, the administration will need to seek the consent of a UK Minister.

30 Para. 91.

31 Para. 1(3)(c) of Schedule 4 and para. 7 of Schedule 7.

32 Para. 89.

33 Clauses 7(6)(a) & 9(3)(a).

89. The affirmative procedure applies to secondary legislation under Schedule 4, made by UK Ministers or Ministers in devolved administrations, which imposes a new fee or charge. But only the negative procedure applies to subsequent regulations modifying those fees.³⁴ This is open to abuse, allowing an initially very small fee to be set by affirmative regulations, with a subsequent increase accomplished by negative regulations.
90. The delegated powers memorandum recognises that the decision to charge is a policy issue warranting affirmative scrutiny, but suggests that the negative procedure suffices where a department amends the amount.³⁵ In our view such an amendment equally involves a policy issue. Indeed the initial decision to charge (say) a £10 fee arguably involves less policy than trebling or quadrupling the fee, or increasing a fee by 13,000% — which the Government recently proposed for probate fees.³⁶

(iii) Recommendations

91. **Schedule 4 is unacceptably wide.**
- (a) **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.**
 - (b) **Schedule 4 should in no circumstances permit fees or charges to be levied by tertiary legislation.**
 - (c) **All regulations imposing a fee or charge under Schedule 4 should be made by statutory instrument either by UK Government Ministers or by Ministers in a devolved administration.**
 - (d) **The affirmative procedure should apply to all regulations made under Schedule 4 which introduce or increase fees, either in both Houses of Parliament or in the relevant devolved legislature.**

34 Para. 7 of Schedule 7 to the Bill.

35 Para. 96.

36 The draft Non-Contentious Probate Fees Order 2017 and the [26th Report](#) of the Joint Committee on Statutory Instruments, Session 2016–17.

SCHEDULE 5: PUBLICATION AND RULES OF EVIDENCE

(i) Effect

92. Paragraph 1 of Schedule 5 sets out the statutory duty of the Queen's Printer in relation to the publication of retained EU law. Paragraph 2 of Schedule 5 allows a Minister of the Crown to amend the scope of this duty, not by a statutory instrument but by a direction.

(ii) Concern

93. Amending the law by direction — with no statutory instrument and no parliamentary procedure — is highly unusual. 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).

(iii) Recommendation

94. **The direction-making power should be replaced by a requirement that any changes to the scope of the statutory duty of the Queen's Printer in Schedule 5 be made by statutory instrument.**

SCHEDULE 7: PARLIAMENTARY PROCEDURE FOR REGULATIONS UNDER CLAUSES 7–9 AND 17

(i) Effect

95. Schedule 7 sets out the parliamentary scrutiny procedures for regulations made under the Bill:
- (a) “draft affirmative” (the regulations are laid in draft and cannot be made unless the draft is approved following debates in both Houses);
 - (b) “negative” (the regulations are made without a need for any debates, but can subsequently be annulled following an adverse vote in either House);
 - (c) “made affirmative” (the regulations are made and come into force but cannot *remain* in force unless approved by both Houses within one month of being made).
96. The “made affirmatives” are for urgent cases.
97. The “draft affirmatives” under clauses 7 to 9 cover a variety of matters:
- establishing a new public authority;
 - transferring an EU function to a newly created public authority;
 - transferring an EU legislative function to a UK body;
 - imposing fees;
 - creating or widening the scope of certain criminal offences;
 - creating or amending a power to legislate; and
 - (in the case of clause 9) amending the European Union (Withdrawal) Act.
98. If an exercise of powers does not fall within one of these matters, Ministers have an unfettered discretion to decide whether the affirmative or negative procedure should apply.

(ii) Concerns

Extending the matters to which the affirmative procedure applies

99. There is no obvious rationale for the narrow range of matters which must be contained in affirmative regulations under clauses 7 to 9. In the context of regulations under clause 7, the delegated powers memorandum talks of the negative procedure being used for those areas that are “principally mechanistic”. This is vague, as was the same language in the White Paper,³⁷ and in our view raises the question whether the list of matters which automatically require the affirmative procedure has been appropriately drawn, or whether there are further matters which should be added to the list.

37 Para. 3.22.

100. Under Schedule 7, the affirmative procedure is required where the regulations provide for any function of an EU body to be exercisable by a newly-established body under clauses 7 to 9. However, where regulations transfer such functions to an existing body the negative procedure can apply. We are not convinced that there are sound reasons for this difference in approach. The issues of how transferred functions should be configured in a UK context, and which body is most appropriate to exercise particular functions, are of equal importance in both cases, and arguably justify the affirmative procedure in both cases.
101. It is suggested in paragraph 47(a) and (b) of the delegated powers memorandum that a higher level of scrutiny is appropriate where functions are transferred to a newly-established body because of the cost implications of setting up the new body. There will be cost implications arising from the transfer of functions (and how those functions are configured) whether it is a new or old body that is given the functions. And in any case that seems to us to be an unduly narrow basis for determining whether the affirmative procedure should apply.
102. The powers in clauses 7(4), 8(2) and 9(2) for regulations to do anything that an Act of Parliament can do involve a significant Henry VIII power. Except in the narrow cases where regulations must be affirmative, the Government are free to exercise these Henry VIII powers under the negative procedure. This is a significant departure from long-established practice whereby the Government have accepted the Committee's position that powers to amend primary legislation should be made in affirmative instruments save in exceptional cases for which a full justification must be provided.
103. To say that some of the changes will be "mechanistic and minor"³⁸ does not provide an adequate justification for applying the negative procedure in all cases particularly as these are exceptionally wide-ranging Henry VIII powers.

Deciding whether the affirmative or negative procedure applies

104. The delegated powers memorandum does not explain why it is Ministers rather than Parliament who should have the final say on the appropriate level of parliamentary scrutiny in those cases where either the affirmative or negative procedure is capable of applying. There are examples in existing legislation where the final decision on the level of scrutiny is given to Parliament: for example, the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011. A similar mechanism could be included in this Bill, albeit with shorter time-periods in view of the large amount of legislation that has to be in place before exit from the EU.

(iii) Recommendations

Extending the matters to which the affirmative procedure applies

105. **The affirmative procedure should apply to regulations which transfer EU functions to a UK body under clauses 7 to 9, irrespective of whether or not the body is newly established.**

³⁸ See para. 47 of the delegated powers memorandum.

106. **In the absence of a convincing explanation to the contrary, the affirmative procedure should apply to regulations under clauses 7 to 9 and 17 that amend or repeal primary legislation.**

Deciding whether the affirmative or negative procedure applies

107. **Where the Bill currently allows Ministers a choice as to whether the affirmative or negative procedure applies to regulations under clauses 7 to 9 and 17(5), we recommend the following sifting mechanism instead.³⁹ We also consider that this mechanism should apply to all regulations made under clause 17(1).**
- (a) **Each statutory instrument is laid in draft. The Minister proposes either the affirmative or the negative procedure. Where the Minister proposes the negative procedure, he or she must justify it in writing to Parliament.**
 - (b) **Where the Minister proposes the affirmative procedure, that procedure will apply.**
 - (c) **Where the Minister proposes the negative procedure, a committee of each House — or a joint committee of both Houses — has 10 sitting days in which to accept the Minister’s proposal or recommend the affirmative procedure. If no recommendation is made in the 10-day period, the statutory instrument will be subject to the negative procedure.**
 - (d) **If the responsible committee of either House (or a joint committee) recommends the affirmative procedure, that level of scrutiny applies unless the relevant House resolves to reject the committee’s recommendation within a further period of five sitting days.⁴⁰**
 - (e) **Once the relevant periods have expired:**
 - **Where the negative procedure applies, the Minister may make the statutory instrument although it could still be annulled if prayed against in either House within the usual 40-day period.**
 - **Where the affirmative procedure applies, the Minister may make the statutory instrument once the draft has been approved by both Houses.**
 - (f) **In urgent cases where the Minister considers it necessary for a proposed negative instrument to come into force immediately, the Minister makes the instrument before laying it. The relevant Committee(s) would still have 10 days in which to recommend that the affirmative procedure should apply instead. If it**

39 Others have also considered how the two Houses can play a role in determining the scrutiny procedures to be applied to instruments made under the Bill. See, for example, Hansard Society, *Taking Back Control for Brexit and Beyond* (September 2017).

40 As under the Legislative and Regulatory Reform Act 2006, there is no need for both Houses to agree on the necessary level of scrutiny. A recommendation or resolution from either House is sufficient to increase the level of parliamentary scrutiny. The position is analogous to that under the Statutory Instruments Act 1946, where a successful prayer in either House against a negative procedure statutory instrument is sufficient to lead to its annulment.

made such a recommendation, which was not rejected by the relevant House, the instrument would cease to remain in force unless approved by both Houses within 40 days of laying. If no recommendation is made, the instrument continues to have effect like any other negative instrument, subject to the usual 40-day praying period.

108. This sifting mechanism strikes a balance between the scrutiny requirements of Parliament and the business needs of Government. So far as the level of applicable scrutiny is concerned, our proposal would allow for every instrument to be judged rapidly on its merits. In our view, it incorporates realistic timeframes that will allow the Government to have a functioning statute book when the UK leaves the EU. Since many of the regulations to be made under the Bill may end up being laid before Parliament towards the end of the negotiation process, it is all the more important that Members of both Houses have an opportunity to sift the purely mechanistic ones from those which they consider deserve fuller scrutiny. The sifting process permits Parliament to make rapid decisions on those regulations which it wants to scrutinise more closely.

SUMMARY OF OUR MAIN RECOMMENDATIONS

1. **Powers given to Ministers to “correct” retained EU law are too wide.**
 - **The test in clauses 7 to 9 and 17 should be whether remedial action is objectively necessary rather than whether the Minister thinks it is appropriate.**
 - **Tertiary legislation should be subject to the same parliamentary control and time-limits applicable to secondary legislation.**
 - **Ministers should not be able to amend or repeal the European Union (Withdrawal) Act by statutory instrument.**
2. **The Order in Council powers in clause 11 (devolution) are inappropriate. Separate Bills should provide for the conferral on devolved institutions of competencies repatriated from the EU.**
3. **Regulations under clause 14 stipulating exit day(s) should be subject to the affirmative procedure.**
4. **Schedule 4 (fees and charges) is unacceptably wide. Taxation and “tax-like charges” are matters for Parliament, not for Ministers under secondary legislation or other bodies under tertiary legislation. All regulations made under Schedule 4 which introduce or increase fees should be subject to the affirmative procedure.**
5. **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.**
6. **Ministers should not have an unfettered choice to apply the negative or the affirmative procedure for statutory instruments under those clauses. We propose instead a sifting mechanism:⁴¹**
 - **Ministers lay all instruments in draft before Parliament, proposing either the affirmative or the negative procedure.**
 - **Where the Minister proposes the affirmative procedure, it applies.**
 - **Where the Minister proposes the negative procedure, a parliamentary committee has 10 sitting days in which to recommend the affirmative procedure instead. If no such recommendation is made, the negative procedure applies.**
 - **Where the committee recommends the affirmative procedure, it applies unless the relevant House rejects the committee’s recommendation within a further period of five sitting days.**

⁴¹ In urgent cases, the procedure in paragraph 107(f) applies.

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

The membership of the Committee is set out on the inside front cover of this Report.

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office.