



European Union (Withdrawal) Bill: Lords Report Stage HL Bills 79 and 102 of 2017–19

Summary

The [European Union \(Withdrawal\) Bill](#) was considered by the House of Lords at report stage over six days between 18 April and 8 May 2018. A total of 316 amendments were tabled for consideration and of these, a total of 192 amendments were made to the Bill. The version of the Bill before the House at report stage was [HL Bill 79](#). A new version of the Bill, [HL Bill 102](#), has now been issued, reflecting these amendments. Third reading of the Bill is due to take place on 16 May 2018.

The Government was defeated in 14 votes on the Bill covering: a requirement to report on negotiations to continue in a customs union with the EU; enhanced scrutiny procedures for future changes to retained EU law in certain policy areas; retention of the EU Charter of Fundamental Rights; ability to bring legal cases on the grounds of a failure to comply with the general principles of EU law; ministers' ability to specify when the validity of retained EU law could be challenged in court; the threshold for using certain delegated powers to be when it is "necessary" rather than when the minister considers it "appropriate"; giving Parliament a 'meaningful vote' on the outcome of negotiations with the EU; parliamentary approval of the mandate for negotiations on the UK's future relationship with the EU; maintaining rights to refugee family reunion; continuation of North-South cooperation and the prevention of new border arrangements in Northern Ireland; future relationship with EU agencies; removing the fixed date of exit day; continued participation in the European Economic Area; giving parliamentary sifting committees the ability to insist that certain statutory instruments are made using the affirmative procedure.

Government amendments were made to the Bill without division covering areas such as: how UK courts should treat the judgments of the Court of Justice of the European Union after exit day; domestic legal status of retained EU law; further restrictions on the use of delegated powers in the Bill; further requirements for ministers to make explanatory statements when exercising delegated powers; restructuring the Bill's provisions relating to the repatriation of powers returning from the EU in areas of devolved competence, so that powers would be returned to the relevant devolved institutions unless specific regulations were made to ring-fence them; creating a two-year window post-exit in which *Francovich* damages claims could be brought.

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I. Introduction

The [European Union \(Withdrawal\) Bill](#) was considered by the House of Lords at report stage over six days between 18 April and 8 May 2018. A total of 316 amendments were tabled for consideration at report stage and of these, a total of 192 amendments were made to the Bill.¹ The version of the Bill before the House at report stage was [HL Bill 79](#). A new version of the Bill, [HL Bill 102](#), has now been issued, reflecting the amendments made on report. Third reading of the Bill is due to take place on 16 May 2018.

Government Defeats

The Government was defeated in 14 votes on the Bill, as follows:

- Clause 1 was amended so the European Communities Act 1972 can be repealed only if the Government has laid a statement before both Houses of Parliament by 31 October 2018, outlining the steps taken in the Brexit talks to negotiate, as part of the framework for the future relationship, an arrangement which enables the UK to continue participating in a customs union with the EU (amendment 1, agreed on division by 348 to 225; amendment 4 agreed without division).
- A new clause (now clause 4) was inserted providing that retained EU law in the areas of employment rights, equality, consumer standards, health and safety standards and environmental standards can be amended, repealed or revoked only by primary legislation or, for “technical” changes only, by secondary legislation, subject to an enhanced scrutiny procedure (amendment 11 agreed on division by 314 to 217).
- Clause 5 (now clause 6) was amended so that the EU Charter of Fundamental Rights will be retained in domestic law after exit day (amendment 15, agreed on division by 316 to 245).
- Provisions were removed from schedule 1 of the Bill that would have prevented legal cases being brought after exit day on the grounds of a failure to comply with the general principles of EU law (amendment 19, agreed on division by 280 to 223).
- Ministers’ ability to specify in regulations when the validity of retained EU law could be challenged in court was removed from schedule 1 of the Bill (amendment 18, agreed on division by 285 to 235).
- Clauses 7 and 17 (now clauses 9 and 22) were amended so that ministers can make regulations to correct deficiencies in retained EU law and consequential regulations only when it is “necessary” (previously a minister could have used these powers when s/he

¹ House of Lords, [‘Lords Amendments—European Union \(Withdrawal\) Bill’](#), accessed 9 May 2018.

- considered it “appropriate”) (amendment 31 agreed by 349 to 221, and amendments 86 and 87 agreed without division).
- A new clause (now clause 10) was added to give Parliament a ‘meaningful vote’ on the outcome of negotiations with the EU (amendment 49, agreed on division by 335 to 244).
 - Clause 9 (now clause 11) was amended so that delegated powers to implement a withdrawal agreement cannot be used until both Houses have approved a mandate for negotiations on the UK’s future relationship with the EU (amendment 51, agreed on division by 270 to 233).
 - A new clause (now clause 12) was added which seeks to maintain rights to refugee family reunion currently provided under the EU’s Dublin III Regulation (amendment 59, agreed on division by 205 to 181).
 - A new clause (now clause 13) was added which provides for the continuation of North-South cooperation and the prevention of new border arrangements in Northern Ireland (amendment 88, agreed on division by 309 to 242).
 - A new clause (now clause 18) was added which provides that nothing in the Bill can prevent the UK from replicating EU law in domestic law made on or after exit day, or from continuing to participate in, or have a formal relationship with, EU agencies after exit day (amendment 93, agreed on division by 298 to 227).
 - The fixed date of exit day was removed from clause 14 (now clause 19) of the Bill (amendment 95, agreed on division by 311 to 233; consequential amendments 99 and 74 agreed without division).
 - Clause 19 (now clause 24) was amended so that provisions of the Act (other than those expressly specified in clause 19 [24]) cannot come into force until it is a negotiating objective for the Government to ensure an international agreement has been made which enables the UK to continue to participate in the European Economic Area after exit day (amendment 110A, agreed on division 247 to 218).
 - Schedule 7 was amended so that sifting committees in both Houses would have the power to insist that statutory instruments made under clause 7(1), 9 or 17(1) (now clauses 9(1), 11 and 22(1)) of the Bill should be made under the affirmative procedure (amendment 70 agreed on division 225 to 194; consequential amendment 77 agreed without division).

Government Amendments

A large number of government amendments were also made to the Bill without division. The main areas these covered were as follows:

- Clarifying how the UK courts should treat the judgments of the

- Court of Justice of the European Union after exit day;
- Setting out the status in domestic law of different categories of retained EU law for the purposes of making future amendments and when ruling on incompatibility with the Human Rights Act 1998;
 - Removing delegated powers which would have allowed ministers to create new public bodies by statutory instrument;
 - Placing further restrictions on the use of delegated powers to impose fees or charges;
 - Removing clause 8 from the Bill (this clause would have given ministers the power to make regulations to enable continued compliance with the UK's international obligations by preventing or remedying breaches that might otherwise result from the UK's departure from the EU);
 - Removing the power in clause 9 (now clause 11) which would have allowed ministers to modify the European Union (Withdrawal) Act itself through secondary legislation (this amendment was tabled by Lord Lisvane (Crossbench) and supported by the Government);
 - Putting a ten-year sunset on the delegated power to make consequential provisions;
 - Restructuring the provisions in clause 11 (now clause 15), and schedule 2, to a system where powers in devolved areas, returned to the UK from the EU, are returned to the relevant devolved institutions unless specific regulations are made to 'ring-fence' these areas. Sunset provisions, a new 'consent decision' mechanism, requirements for explanatory statements and a requirement for the UK Government to report on progress towards repealing the provisions were also added. The amendments would operate alongside an intergovernmental agreement and memorandum;
 - Explanatory statement requirements were expanded to include a requirement to state the minister's 'good reasons' for the regulation and its impact (if any) on equalities legislation, in certain circumstances. Specific requirements were also added when criminal offences were created under the Bill's provisions, when the urgent procedures were used and when sub-delegated powers were used;
 - And creating a two-year window after exit for *Francovich* claims to be brought, as long as the claim related to an alleged breach of EU law that occurred before exit day.

Structure of this Briefing

Section 2 of this Briefing provides more detail about the amendments made to the Bill at report stage. Amendments to do with the Bill provisions relating to devolution are covered in section 3. The Briefing does not

provide exhaustive coverage of all the consequential and drafting amendments made, although many of these are covered.

This Briefing largely deals with issues and amendments in the order in which debate occurred. However, where similar matters were discussed on more than one day of report, or where subsequent consequential amendments were made, they have been grouped together in this Briefing for ease of reference. For instance, devolution matters are grouped together in one section of this Briefing for convenience, as the issues raised are inter-related.

Two non-government amendments, on animal sentience and on a second referendum, were defeated on division. Section 4 of this Briefing provides further details.

During report stage, ministers suggested that public health protection and environmental protection could be revisited at the Bill's third reading. They also gave assurances that they would consider further legislation if necessary on the Clinical Trials Regulation and on the way ambulatory references to EU law interacted with private contracts. Section 5 of this Briefing provides further details.

Two previous Lords Library Briefings give further background on the Bill:

- [European Union \(Withdrawal\) Bill: Briefing for Lords Stages](#) (25 January 2018) gives a clause-by-clause analysis of the Bill as introduced in the Lords and summarises changes made to the Bill in the Commons.
- [European Union \(Withdrawal\) Bill: Lords Committee Stage](#) (12 April 2014) provides an overview of areas where the Government indicated at the Lords committee stage it would further consider issues raised in amendments tabled by Members.

Clause Numbering

Because one clause was removed and several new clauses were added to the Bill at report stage, the numbering of clauses has changed between HL Bill 79 (the Bill before the House at second reading, committee and report stage) and HL Bill 102 (the Bill that will be before the House at third reading). For ease of reference, Table I overleaf summarises these changes in clause numbering.

None of the schedule numbers were changed by amendments made at report stage, so the schedules are not listed in Table I. However, some of the paragraph numbers within individual schedules did change as a result of amendments made to the Bill at report.

Throughout this Briefing, where a clause or paragraph number changed as a result of amendments made at report stage, the new number as it appears in

HL Bill 102 is given in square brackets [] after the number as it appeared in HL Bill 79. For example:

- Clause 7 [9]
- Clause 7(2) [9(2)]
- Paragraph 27 [37] of schedule 8

Table 1: Clause Numbering in HL Bill 79 and HL Bill 102

Clause Number		Clause Title
As Introduced (HL Bill 79)	At Third Reading (HL Bill 102)	
1	1	Repeal of the European Communities Act 1972
2	2	Saving for EU-derived domestic legislation
3	3	Incorporation of direct EU legislation
new clause	4	Enhanced protection for certain areas of EU Law
4	5	Saving for rights etc under section 2(1) of the ECA
5	6	Exceptions to savings and incorporation
6	7	Interpretation of retained EU law
new clause	8	Status of retained EU law
7	9	Dealing with deficiencies arising from withdrawal
8	removed at report	Complying with international obligations
new clause	10	Parliamentary approval of the outcome of negotiations with the European Union
9	11	Implementing the withdrawal agreement
new clause	12	Maintenance of refugee family unity within Europe
new clause	13	Continuation of North-South co-operation and the prevention of new border arrangements
10	14	Corresponding powers involving devolved authorities
11	15	Retaining EU restrictions in devolution legislation etc
12	16	Financial provision
13	17	Publication and rules of evidence
new clause	18	Future interaction with the law and agencies of the EU
14	19	Interpretation
15	20	Index of defined expressions
16	21	Regulations

Clause Number		Clause Title
As Introduced (HL Bill 79)	At Third Reading (HL Bill 102)	
17	22	Consequential and transitional provision
18	23	Extent
19	24	Commencement and short title

2. Amendments Made to the Bill at Report Stage

2.1 Customs Union (Amendments 1 and 4)

On the first day of report, the House agreed to cross-party amendments 1 and 4 tabled by Lord Kerr of Kinlochard (Crossbench), Lord Patten of Barnes (Conservative), Baroness Hayter of Kentish Town (Labour) and Baroness Ludford (Liberal Democrat).² Taken together, amendments 1 and 4 amended clause 1 so that the European Communities Act 1972 can be repealed only if the Government has laid a statement before both Houses of Parliament by 31 October 2018, outlining the steps taken in the Brexit talks to negotiate, as part of the framework for the future relationship, an arrangement which enables the UK to continue participating in a customs union with the EU.

Lord Kerr described the amendments as “a call to the Government to explore a customs union”.³ He advanced five arguments in favour of the UK remaining in a customs union with the EU. Firstly, he argued that costs in the manufacturing industry would rise if goods and components in the supply chain had to cross a customs frontier.⁴ Secondly, he argued that it would be “hard not to see a fall in overall exports if our trade with the European Union became more complicated”, and said it would be “much more complicated if we do not have a customs union”.⁵ He described a customs frontier as an “inevitable friction”, and asserted that attempting to replace trade with the EU, the UK’s biggest export market, with trade further afield would “not be an easy task”. For example, he suggested that third countries would be less willing to replicate the existing preferential trade arrangements they have with the EU when negotiating new arrangements with the UK, which represents a smaller market.

Thirdly, Lord Kerr said that as customs unions are concerned with goods, not services, remaining in a customs union with the EU would still leave the UK “entirely free” to negotiate new arrangements for trade in services, investment protection, remittance of profits, intellectual property, data protection, access to government procurement—“all the new ideas and new issues which are now much more important in trade negotiation than

² [HL Hansard, 18 April 2018, cols 1197 and 1201.](#)

³ *ibid*, col 1173.

⁴ *ibid*, cols 1173–4.

⁵ *ibid*, col 1174.

tariffs”.⁶ In his view, there was “very little economic downside to customs union”.

Lord Kerr’s fourth point was to do with avoiding a hard border between Ireland and Northern Ireland. He said that a hard border was “inevitable” without a customs union, as even if trade across the border was tariff-free other checks would be required at the border to enforce rules of origin and phytosanitary measures.⁷ He said that a customs union was “not in itself a sufficient condition for an open or soft border”, but was “a necessary condition for an open border”, and was the “workable solution to the Irish border conundrum”.

Lord Kerr’s final argument centred on the UK’s negotiations with the EU. He suggested that leaving the customs union was a red line laid down by the Government, and that no-one could argue that the country had “voted knowingly to leave the customs union”.⁸ He noted that the European Council’s latest Brexit negotiating guidelines said that the UK’s intention to leave the customs union and the single market “limit the depth” of the UK-EU future relationship, but that if the UK’s positions “were to evolve”, the EU would be “prepared to reconsider its offer”.⁹ Lord Kerr took this to mean that the EU would improve its offer.¹⁰ He said that although it was not known “how far-reaching some improvements would be”, if the UK went on “refusing to allow our negotiators to explore the idea of a customs union, we will never find out”. In his view, that would be “irresponsible”.

Drawing on his negotiating experience whilst he was a European Commissioner, Lord Patten of Barnes called for “a little scepticism” towards the Government’s claims that it would be easy to negotiate new free trade agreements.¹¹ He said that when it came to renegotiating arrangements with countries with which the EU had existing trade agreements, it was “absurd” to think “you can simply Snopake the words ‘European Union’ and insert ‘United Kingdom’ and grandfather that trade agreement in nanoseconds”.¹²

He argued that in seeking new free trade agreements with countries with which the EU had not yet signed a deal, the UK would be likely to have to make significant concessions:

The deal between Switzerland and China is a very good example of how difficult it is to get into bed with an elephant. The Swiss have

⁶ [HL Hansard, 18 April 2018, cols 1174–5.](#)

⁷ *ibid*, col 1175.

⁸ *ibid*, col 1176.

⁹ European Council, [‘European Council \(Art 50\) \(23 March 2018\)—Guidelines’](#), 23 March 2018, paras 4 and 6.

¹⁰ [HL Hansard, 18 April 2018, col 1176.](#)

¹¹ *ibid*, col 1177.

¹² *ibid*, col 1178. ‘Snopake’ is a brand name for correction fluid that can be used when making changes to hard copy documents.

agreed hardly anything with the Chinese about services and nothing about cars, but they have accepted that China will have, for a number of goods, tariff-free access to Switzerland straightaway. In return, Switzerland gets tariff-free access to China after fifteen years. So sleeping with elephants is a bit of a problem.¹³

He suggested that in any negotiations with the UK, Australia would seek concessions on agriculture, India on visas for its nationals coming to the UK, and the US on opening up procurement in the NHS.¹⁴ Lord Patten argued that what British companies wanted was “the best access possible to the closest market”.¹⁵ He believed that “we will not do any better than we are doing within the customs union”, and that in supporting the amendment he was “trying to stand up for the national interest”.

Speaking against the amendments, Lord Lamont of Lerwick (Conservative), a former Chancellor of the Exchequer, argued that the pattern of UK trade had been changing, and Asian markets and other countries, while small markets at the moment, “have accumulatively been growing as a share of our trade”.¹⁶ He believed that it was important to consider “which is better for the future trend of our trade”, remaining in the customs union or the Government’s alternative of a free trade agreement with the EU.

Lord Lamont argued that Lord Kerr had not addressed the point that being in the customs union but not being an EU member was a “very different matter” from being in the customs union as an EU member state.¹⁷ He said that from the EU’s perspective, being in the customs union was “related to the whole issue of the rules and definitions that make up the single market”.¹⁸ To remain in the customs union, the UK would have to keep “a vast swathe of regulations” exactly the same as the EU rules, “however damaging that might be, or however inappropriate we thought it was”. Lord Lamont said that “no-one is arguing [...] that there cannot be alignment”, but that the decision on how closely to align “ought to remain in the control of the UK”—and likewise for the setting of external tariffs, where he said “EU tariffs can be extremely damaging to British consumers”. He identified the inability to conclude trade agreements as the third disadvantage of remaining in the customs union.¹⁹

Noting that the only country currently in a customs union with the EU but outside the single market was Turkey, he concluded that: “The Turks do not regard this as an entirely satisfactory arrangement, and nor should we”.²⁰

¹³ [HL Hansard, 18 April 2018, col 1179.](#)

¹⁴ *ibid*, cols 1179–80.

¹⁵ *ibid*, col 1180.

¹⁶ *ibid*, col 1181.

¹⁷ *ibid*, cols 1181–2.

¹⁸ *ibid*, col 1182.

¹⁹ *ibid*, col 1183.

²⁰ *ibid*, cols 1183–4.

Lord Howarth of Newport (Labour) objected to amendment 4 on the grounds it was “simply too vague for us to send to the other place”.²¹ His view was that supporters of the amendment needed to explain how a future customs union to be negotiated with the EU would differ from the existing EU customs union in areas such as a common external tariff, a dispute resolution mechanism and interactions between the rules of the existing EU customs union and a new UK-EU customs union.²² He also questioned how a new customs union would solve the problem of the Ireland-Northern Ireland border if it differed from the existing customs union.

Lord Lawson of Blaby (Conservative), another former Chancellor of the Exchequer, argued that both sides in the referendum campaign had made it “absolutely clear” that leaving the EU meant leaving the customs union and the single market.²³ He said it was “complete nonsense” to suggest otherwise. He also described as “absolute nonsense” the view that there was an economic case for remaining in a customs union with the EU. He said it would leave the UK with a “quasi-colonial status” which he did not think the British people could accept. He argued that the UK’s trade with the rest of the world was larger than its trade with the EU, and was growing faster, and he said it was “a fallacy to believe that bilateral agreements are as important as trade”.

Baroness Ludford, one of the signatories to the amendment, said that whether to stay in a customs union was not “some esoteric question”.²⁴ She argued that hard borders and regulatory divergence would “risk blocking trade, creating supply-chain logjams and causing our business to grind to a halt”. She recognised that staying in a customs union would “not solve all the problems”, but she said it was “a necessary part of preserving the simplicity and streamlined nature of the manufacturing industry”. While she characterised remaining in the EU as “the gold standard”, she said that the UK should “at least go for silver” by staying in the customs union.

Lord Forsyth of Drumlean (Conservative) claimed that the amendment was a “carefully orchestrated” attempt to “create division and confusion in the House of Commons” over the question of a customs union, “with a view to preventing Brexit going ahead”.²⁵ Baroness Hayter of Kentish Town, Shadow Spokesperson for the Exiting the European Union, countered that the amendment was not about “playing politics” or “unscrambling Brexit” but was concerned with “how we leave the EU” and “our future relationship once we are outside”.²⁶

Responding for the Government, Lord Callanan, Minister of State at the

²¹ [HL Hansard, 18 April 2018, col 1184.](#)

²² *ibid.*

²³ *ibid.*, col 1189.

²⁴ *ibid.*, col 1190.

²⁵ *ibid.*, col 1191.

²⁶ *ibid.*,

Department for Exiting the European Union, restated the Government’s policy that “the UK, in its entirety is leaving the customs union”.²⁷ He argued that remaining in a customs union with the EU would “leave us with less influence over our international trade policy than we have now”, and the Government did not believe that would be in the best interests of UK business. He said that the Government would be guided in negotiations with the EU by “what delivers the greatest economic advantage to the UK”, and by three strategic objectives:

First, we want to ensure UK-EU trade is as frictionless as possible. Secondly, we want to avoid a hard border between Ireland and Northern Ireland—a commitment that was solidified by last December’s joint report. Thirdly, we want to establish an independent international trade policy.²⁸

Lord Callanan said that the Government had not formed its policy “arbitrarily” but “because we do not believe a customs union is in the best interests of the UK and UK businesses”. He reminded the House that the Government had set out two potential options for a future customs relationship with the EU—a customs partnership and a highly streamlined customs arrangement.²⁹ He said that agreeing to the amendments would send a signal that the Government would not seek to negotiate these options and instead pursue an outcome it had already ruled out.³⁰

The House voted in favour of amendment 1 by 348 votes to 225, a majority of 123.³¹ Amendment 4 was consequently agreed to without division.³²

In response to the defeat, a Department for Exiting the European Union spokesperson said:

We are disappointed that Parliament has voted for this amendment. The fundamental purpose of this Bill is to prepare our statute book for exit day, it is not about the terms of our exit. This amendment does not commit the UK to remaining in a customs union with the EU, it requires us to make a statement in Parliament explaining the steps we’ve taken.³³

A senior Downing Street source told the BBC, “[w]e will not be staying in a

²⁷ [HL Hansard, 18 April 2018, col 1194.](#)

²⁸ [ibid, col 1195.](#)

²⁹ HM Government, [Future Customs Arrangements—A Future Partnership Paper](#), 15 August 2017.

³⁰ [HL Hansard, 18 April 2018, col 1196.](#)

³¹ [ibid, col 1197.](#) The tellers for the contents reported 348 votes, the clerks recorded 347 names.

³² [ibid, col 1201.](#)

³³ Heather Stewart, [‘Brexit Bill: May Under Pressure After Two Big Defeats in Lords’](#), *Guardian*, 18 April 2018.

customs union, or joining a customs union”.³⁴

For further background information on the customs union issue, see:

- House of Lords Library, [Leaving the European Union: Customs Union—An Introduction](#), 27 January 2017
- House of Commons Library, [A UK-EU Customs Union](#), 25 April 2018

2.2 Enhanced Protection for Certain Areas of EU Law (Amendment 11)

On day one of report, the House agreed to amendment 11, a cross-party amendment tabled by Baroness Hayter of Kentish Town (Labour), Lord Warner (Crossbench), Baroness Smith of Newnham (Liberal Democrat) and Lord Kirkhope of Harrogate (Conservative).³⁵ Amendment 11 inserted a new clause [4] into the Bill to provide enhanced protection for certain areas of retained EU law.

The new clause requires that retained EU law in the areas of employment rights, equality, consumer standards, health and safety standards and environmental standards can be amended, repealed or revoked only by primary legislation or, for “technical” changes only, by secondary legislation subject to an enhanced scrutiny procedure.³⁶

The enhanced scrutiny procedure would be established by regulations made by the Secretary of State subject to the affirmative procedure (ie the enhanced scrutiny procedure would have to be approved by both Houses before it could come into force). The enhanced scrutiny procedure would have to include a period of consultation with relevant stakeholders for any proposed changes to retained EU law in the specified policy areas. When making regulations subject to the enhanced security procedure, a Minister would be required to:

- Produce an explanatory statement under paragraph 22 of schedule 7 (as is already required by schedule 7 for regulations made under clause 7 for ‘correcting deficiencies’ in retained EU law). This explanatory statement must:
 - set out the Minister’s opinion that the statutory instrument (SI) does “no more than is appropriate”;
 - explain the SI’s impact on equalities legislation;

³⁴ BBC News, [‘Brexit: Government Insists UK Will Leave Customs Union’](#), 23 April 2018.

³⁵ [HL Hansard, 18 April 2018, col 1225](#).

³⁶ Lord Low of Dalston (Crossbench) tabled amendment 11A, which would have added human rights to the list of policy areas. He did not move his amendment. However, when moving amendment 11, Baroness Hayter agreed that human rights should have been included in the list (*ibid*, col 1218).

- confirm that the Minister has had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited under the Equalities Act 2010;
 - and explain the reasons for the SI, the law before exit day that is relevant to the SI, and the SI's effect on retained EU law.
- Include a certification that the regulation “does no more than make technical changes to retained EU law in order for it to work following exit”.

The effect of this certification requirement would be that any changes to retained EU law in these policy areas that went beyond a technical change could only be made by primary legislation.

Moving the amendment, Baroness Hayter, Shadow Spokesperson for Exiting the European Union, argued that the rights being brought into domestic law “should not then be vulnerable to subsequent change by secondary legislation”.³⁷ She said that the amendment would “basically ensure that there can be no reduction” in rights “without primary legislation”. She explained that the policy areas covered had until now been “ring-fenced” by the UK’s membership of the EU, and suggested that they now needed to be put in “bubble-wrap” to “safeguard them from meddling hands”.³⁸ She said there was a risk that they could be weakened by secondary legislation without stakeholder consultation and without giving Parliament the full scrutiny role that would come with primary legislation. She hoped that “no Government would ever want to sweep away such protections”.³⁹ She acknowledged that the Conservatives’ 2017 manifesto had promised not to change workers’ rights, but she said that some Cabinet members had spoken in favour of deregulation of employment protections.

Baroness Hayter argued that there was widespread public support for EU-derived consumer, employment and environmental protections, and that employers’ groups were content to keep existing employment regulations.⁴⁰ She suggested that maintaining the existing standards would minimise non-tariff barriers to future trade between the UK and the EU.⁴¹ She also pointed out that the UK’s EU partners “are already talking of a no-regression undertaking”.⁴²

³⁷ [HL Hansard, 18 April 2018, col 1218.](#)

³⁸ *ibid*, col 1219.

³⁹ *ibid*.

⁴⁰ *ibid*.

⁴¹ *ibid*, col 1220.

⁴² In a recent speech, Michel Barnier, the EU’s chief negotiator, said that an agreement between the UK and the EU on the future relationship should “commit to no lowering of the standards of environmental protection” and “should include a non-regression clause” (European Commission, [‘Remarks by Michel Barnier at Green 10: ‘Is Brexit a Threat to the Future of the EU’s Environment?’](#), 10 April 2018).

Lord Warner argued that the “hard won” rights covered were “particularly vulnerable to backsliding” and that was why they had been “singled out for enhanced protection in this amendment”.⁴³ A second aim of the amendment was, he said, “future-proofing”, to ensure that “these rights and protections cannot be tampered with by the casual use of statutory instruments”. Lord Kirkhope of Harrogate suggested that were these rights and protections “to be threatened or to look as if they were about to be threatened”, it could have a negative impact on negotiations with the EU about the future relationship.⁴⁴ Baroness Ludford sought to provide reassurance that the amendment was “not about saying EU legislation has to be enshrined in UK law in perpetuity entirely unchanged” but to ensure that Parliament could “take back control” in scrutinising any change.⁴⁵

In response, Lord Callanan, Minister of State at the Department for Exiting the European Union, reiterated that the Government was committed to both “effective parliamentary scrutiny” and “maintaining the UK’s long-standing tradition of upholding the rights and protections in these vital areas”.⁴⁶ He agreed it was “crucial that these rights and protection are not diluted or weakened as we withdraw from the EU”. However, he argued that the Government had already taken steps to address these concerns, “potentially in ways that are even stronger than the noble Baroness’s amendment”. For example, Lord Callanan said that the regulation-making powers in clauses 7, 8 and 9 to modify retained EU law in all policy areas—not just those listed in the amendment—would be subject to numerous scrutiny procedures, including the new sifting committees in both Houses, and the requirement to make explanatory statements alongside delegated legislation.

Furthermore, Lord Callanan said the Government had tabled further amendments to address the use of existing and future delegated powers to modify retained EU law beyond the expiration of the time-limited powers in clauses 7 [9], 8 and 9 [11].⁴⁷ He said these amendments would ensure that regulations and rights saved by clause 4 [5], which he said were “likely to contain more fundamental rights, rules and provisions” would come higher up the Government’s proposed new hierarchy of retained EU law and would therefore only be amendable in a way akin to primary legislation. Lord Callanan argued that the Government’s amendments represented a “more effective approach” as, unlike amendment 11, it would avoid “unclear or differing views about which provisions of retained EU law would actually be covered”.⁴⁸

⁴³ [HL Hansard, 18 April 2018, col 1221.](#)

⁴⁴ *ibid*, cols 1221–2.

⁴⁵ *ibid*, col 1222.

⁴⁶ *ibid*, col 1223.

⁴⁷ *ibid*, cols 1223–4.

⁴⁸ *ibid*, col 1224.

The House voted in favour of amendment 11 by 314 votes to 217, a majority of 97.⁴⁹

On day two of report stage, Lord Callanan returned to the subject of amendment 11 to outline why the Government believed it was “not the answer” to ensuring enhanced protection for existing rights in retained EU law.⁵⁰ He said that amendment 11 “prevents crucial corrections being made in time for exit day”. He asserted that it inserted into the Bill “arguably undefinable concepts such as ‘technical changes’”, which could introduce “a high level of risk to attempting to take forward even the most uncontentious of corrections by secondary legislation” because “most corrections, however innocuous and benign, require some limited policy choices”.⁵¹ The example that Lord Callanan gave at committee stage of a “limited policy choice” was where regulations were ‘correcting’ retained EU law by replacing references to an EU regulator, the Government might have to choose which of two existing UK regulators the relevant functions should be transferred to.⁵²

Lord Callanan said that the Government’s analysis so far indicated that “a very significant proportion” of the planned secondary legislation programme would be at “real risk of legal challenge” following amendment 11.⁵³ He argued that the result of the amendment could therefore be “an enormous increase in the volume of needless primary legislation” that would have to be passed before exit day. He believed there was a risk “we might be unable to achieve our core objective of ensuring a functioning statute book on exit day”. He warned that this problem could continue post-exit, if Parliament was “unable to make important updates or changes which would enhance existing protections”, such as regulating new hazardous chemicals or marine contaminants, in a timely manner because of a requirement for such changes to be made through primary legislation. He described putting such a system in place as “a dereliction of our duty”.

2.3 Charter of Fundamental Rights (Amendment 15)

On the second day of report, the House voted in favour of an amendment tabled by Lord Pannick (Crossbench) and others to retain the EU Charter of Fundamental Rights in domestic law after exit day.⁵⁴

The Charter 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.⁵⁵ The Charter was proclaimed in 2000.

⁴⁹ [HL Hansard, 18 April 2018, col 1225.](#)

⁵⁰ [HL Hansard, 23 April 2018, col 1411.](#)

⁵¹ *ibid*, col 1412.

⁵² [HL Hansard, 7 March 2018, col 1212.](#)

⁵³ [HL Hansard, 23 April 2018, col 1412.](#)

⁵⁴ *ibid*, col 1376.

⁵⁵ European Commission, [‘Why Do We Need the Charter?’](#), accessed 1 May 2018.

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.

In the Bill as introduced, clause 5(4) provided that “[t]he Charter of Fundamental Rights is not part of domestic law on or after exit day”. Clause 5(5) stated 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 provided 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”.

In a factsheet published at the time of the Bill’s second reading in the House of Commons in September 2017, the Government set out its reasons for 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].

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.⁵⁶

Throughout the Bill's passage through Parliament, the Labour Party and others have contested the Government's assertion that the Charter created no new rights.⁵⁷ In response to such concerns raised in the Commons, in December 2017 the Government published a memorandum, *Charter of Fundamental Rights of the EU: Right by Right Analysis*, which was intended to set out how each article in the Charter would be reflected in UK law after exit day.⁵⁸ In response, the Joint Committee on Human Rights published a commentary on the Government's analysis in January 2018, which concluded that:

[...] the exclusion of the Charter from domestic law results in a complex human rights landscape which is uncertain. Legal uncertainty is likely to undermine the protection of rights. There are various reasons why rights may be diminished owing to the exclusion of the Charter [...]⁵⁹

Lord Pannick's amendment 15 sought to delete clauses 5(4) and 5(5) from the Bill, and replace them with a provision [6(4)] that would retain the Charter in domestic law after exit except for its Preamble and Chapter V. Moving the amendment, Lord Pannick explained that his amendment excluded these sections because the Preamble "contains no substantive provisions" and Chapter V confers rights such as the rights to vote and stand in elections to the European Parliament which "plainly will have no application" once the UK leaves the EU.⁶⁰

Lord Pannick set out three reasons to support his amendment. Firstly, he said that the exclusion of the Charter "conflicts with the central purpose of this Bill: to read across EU law rights at exit date to ensure continuity and to avoid legal uncertainty".⁶¹ He argued that excluding the Charter ran counter to the position repeatedly stated by the Government since the publication of the white paper on the Bill, that "the same rules and laws will apply on the day after exit as on the day before".⁶²

⁵⁶ Department for Exiting the European Union, [The Repeal Bill—Factsheet 6: Charter of Fundamental Rights](#), 7 September 2017. Emphasis as in original.

⁵⁷ See House of Lords Library, [European Union \(Withdrawal\) Bill](#) (25 January 2018, pp 67–7) and [European Union \(Withdrawal\) Bill: Lords Committee Stage](#) (12 April 2018, pp 3–4) for a summary of the debate on this issue at report stage in the House of Commons, and committee stage in the House of Lords, respectively.

⁵⁸ HM Government, [Charter of Fundamental Rights of the EU: Right by Right Analysis](#), 5 December 2017.

⁵⁹ Joint Committee on Human Rights, [Legislative Scrutiny: The EU \(Withdrawal\) Bill: A Right by Right Analysis](#), 26 January 2018, HL Paper 70 of session 2017–19, p 24.

⁶⁰ [HL Hansard, 23 April 2018, col 1344](#).

⁶¹ *ibid*, col 1345.

⁶² *ibid*, col 1344.

Furthermore, he argued that clause 5(5) would cause additional uncertainty:

[...] it says that, although charter rights will not be part of retained EU law, fundamental rights and principles that exist in EU law irrespective of the Charter will be retained. This is, quite simply, a recipe for confusion, especially when European Court of Justice judgments, which will become part of retained EU law on or after exit date, themselves rely on charter rights.⁶³

Secondly, Lord Pannick argued that excluding the Charter rights from domestic law would “have a detrimental effect on the content of our law”.⁶⁴ He referred to a report by the Bingham Centre for the Rule of Law and a legal opinion prepared by Jason Coppel QC for the Equality and Human Rights Commission, both of which took the view that rights would be diminished if the Charter was not retained.⁶⁵ He said that it was “mutually inconsistent” for the Government to argue on the one hand that the Charter rights did not need to be retained because they could be found elsewhere in retained EU law, and on the other hand that they should not be retained because they would “do immense damage to our law”.⁶⁶

Lord Pannick then sought to counter arguments that retaining the Charter would be damaging. Although he recognised it had been argued that concepts in the Charter were “vague and would need judicial interpretation”, he said the same was “true of the vast majority of retained EU law”, so this was “no basis for distinguishing the Charter from all other retained EU law”.⁶⁷ He also addressed the concern that Charter rights could be used to overturn statutes enacted before exit day. Currently, if a court finds that a domestic law provision is incompatible with a directly effective provision of the Charter, the court must disapply the domestic law provision (if it is primary legislation) or quash it (if it is secondary legislation).⁶⁸ Lord Pannick argued that this was no different from the approach taken in the rest of the Bill to the relationship between retained EU law and domestic law passed before exit day, observing that clause 5(2) [6(2)] preserves the principle of the supremacy of EU law, so that retained EU law would take precedence over any incompatible provisions of domestic law that had been passed before exit day. Lord Pannick said that his amendment would “not confer on the Charter any greater legal effect than it already has—and has had for a decade”.⁶⁹

⁶³ [HL Hansard, 23 April 2018, col 1344.](#)

⁶⁴ *ibid.*

⁶⁵ Bingham Centre for the Rule of Law, [The EU \(Withdrawal\) Bill: A Rule of Law Analysis of Clauses 1–6](#), 21 February 2018; and Jason Coppel, [Equality and Human Rights Commission: European Union \(Withdrawal\) Bill—EU Charter of Fundamental Rights: Opinion](#), 5 January 2018.

⁶⁶ [HL Hansard, 23 April 2018, col 1345.](#)

⁶⁷ *ibid.*, cols 1345–6

⁶⁸ As happened in *Benkharbouche* in 2017, see: House of Commons Library, [EU \(Withdrawal\) Bill: The Charter, General Principles of EU Law and ‘Francovich’ Damages](#), 17 November 2017,

p 11.

⁶⁹ [HL Hansard, 23 April 2018, col 1346.](#)

The third reason Lord Pannick set out in support of his amendment was his concern ministers had made a “purely doctrinal” choice to exclude the Charter because “they are suspicious of the very concept of fundamental rights”.⁷⁰

Lord Pannick concluded by quoting from a report by the House of Lords Constitution Committee, of which he is a member.⁷¹ The report criticised the Government’s approach to the Charter, saying:

If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.⁷²

Lord Brown of Eaton-under-Heywood (Crossbench), a former President of the Supreme Court, stated his view that leaving the EU but retaining the Charter would be “the worst of all possible worlds”.⁷³ He questioned whether it made sense to “carry over into our own law an instrument designed specifically for use only in an EU context, which, on occasions, requires our judges to disapply our legislation”.⁷⁴ He said that the Charter applied only when implementing EU law, but this was “a notoriously uncertain concept”. He argued it would become increasingly difficult to distinguish between what the Charter did and did not apply to:

In response to another intervention of mine in committee at col 549, the noble Lord, Lord Pannick, suggested that the Charter would continue to apply just to EU law, which he identifies as all the law which is to be retained under this Bill. What if that law comes to be amended by Parliament or by secondary legislation, as some of it surely will? [...] it would be nothing short of absurd to perpetuate the distinction between EU law and domestic law, a distinction that will recede ever further into history, simply to continue to provide an area of law in which the Charter would operate.⁷⁵

Lord Mackay of Clashfern (Conservative) a former Lord Chancellor, made a similar point about the difficulty of identifying where the Charter would apply post-exit, noting in particular that while the UK was an EU member it was implementing EU law and the Charter applied, but “there is a serious

⁷⁰ [HL Hansard, 23 April 2018, col 1346.](#)

⁷¹ *ibid.*

⁷² House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 35.

⁷³ [HL Hansard, 23 April 2018, col 1348.](#)

⁷⁴ *ibid.*, col 1349.

⁷⁵ *ibid.*, col 1350.

question as to whether we will be implementing EU law at all after Brexit”.⁷⁶ In his view, once the UK left the EU, the “fundamental part of our constitution should be respected”, namely that “the courts of justice of our land have no jurisdiction to set aside Acts of Parliament”.

This belief was echoed by Lord Howarth of Newport (Labour) and Baroness Deech (Conservative). Lord Howarth argued that the Charter was an expression of “the judicial activism of a European Court of Justice that can fairly be characterised as imperialist”.⁷⁷ He argued that the supremacy of EU law and the requirement for judges to disapply legislation which they determine to be inconsistent with the Charter “explains the revulsion of so many in our country from the European Union”, so that it “seems to many Britons to have turned our constitution inside out and back to front”.⁷⁸ Baroness Deech declared that endowing judges with the power to set aside laws made by Parliament “offends against the rule of law and parliamentary sovereignty” and was “unacceptable”.⁷⁹ In her view, retaining the Charter would “give judges the very contentious interpretation powers that they have indicated they do not wish to have in relation to EU law”. She also believed that retaining it would be “a Trojan horse with a tapeworm in its intestines” as its interpretation “would depend on the ongoing, never-ending, twisting and turning judgments of the ECJ”.⁸⁰

Baroness Lister of Burtersett (Labour) raised several points relating to the removal of the Charter which she said ministers had failed to address adequately.⁸¹ Firstly, she said there was a “fundamental requirement” in the Good Friday Agreement for there to be “an equivalent level of human rights protection” in Ireland and Northern Ireland. She questioned how this could be maintained if the Charter were to apply on only one side of the border. She suggested that the reason she had “not received a convincing answer” from the Government was “because there is no convincing answer”. Secondly, she asked whether the Government rejected the analyses produced by the Joint Committee on Human Rights, the Equality and Human Rights Commission and the Bingham Centre for the Rule of Law identifying rights that would be lost in the absence of the Charter.⁸² Thirdly, she noted that the Conservative manifesto for the 2017 general election set out an intention to “consider our human rights legal framework when the process of leaving the EU concludes”.⁸³ She maintained that if the Government was planning such a review, that would be the time to consider whether the Charter should continue to apply in the UK, “so that Parliament [...] can look at the whole human rights landscape holistically”.

⁷⁶ [HL Hansard, 23 April 2018, col 1361](#).

⁷⁷ *ibid*, col 1352.

⁷⁸ *ibid*, cols 1351–2.

⁷⁹ *ibid*, col 1355.

⁸⁰ *ibid*.

⁸¹ *ibid*, col 1353.

⁸² *ibid*, col 1354.

⁸³ Conservative Party, [Manifesto 2017](#), April 2017, p 37.

Lord Cashman (Labour) argued that the Charter should be kept because it offered an additional layer of protection of rights:

[...] the Charter is a repetition of many rights that currently exist, but actually the formulation of some rights that hitherto were not listed and enumerated.

For me, the repetition of a right does not weaken that right, especially when we are seeking equality and equal protection. The repetition of a right reinforces it. I care not if it is repeated again and again—from convention to charter to charter—because ultimately, if we seek equality and equal citizenship, we should have as many legal instruments on which to argue as we can.⁸⁴

He argued that the Government had “no mandate” to “detach the Charter of Fundamental Rights from the rights that we have achieved in this country”. Conversely, Lord Shinkwin (Conservative) argued that Parliament was “well able to assert itself and to advance and protect rights after Brexit”.⁸⁵ He maintained that it was the UK Parliament which “set the benchmark” in advancing human rights, rather than the EU and the ECJ.

Baroness Ludford, Liberal Democrat Spokesperson for Exiting the European Union, was a signatory to the amendment. She questioned why the Charter should be treated differently from the rest of EU law being retained by the Bill.⁸⁶ She said the Charter was “the key to the rest of retained EU law” and leaving it out “runs counter to the claim of continuity and certainty that this Bill is meant to deliver”. She pointed out what she saw as anomalies within the Government’s position:

Frankly, the Government’s case as to why we do not need the Charter, and specifically why we need to get rid of it now, is full of holes. Why can we not deal with it in the same way as we will the rest of retained EU law? If we do not retain the Charter, we could find ourselves in the very odd position of applying retained EU law that the EU has found to be in breach of the Charter. We would keep the law but would have got rid of the protections which have already struck down the law according to the European Court of Justice. That would be a rather strange position to find ourselves in.⁸⁷

Responding for Labour, Lord Goldsmith, another signatory to the amendment, said he was not persuaded that the Government’s reasons for excluding the Charter were sufficient.⁸⁸ He said he was starting to detect

⁸⁴ [HL Hansard, 23 April 2018, cols 1357–8.](#)

⁸⁵ *ibid*, col 1363.

⁸⁶ *ibid*, col 1364.

⁸⁷ *ibid*, col 1366.

⁸⁸ *ibid*, col 1367.

that the Government “accepted that the Charter does something [...] but what it does is not liked”.⁸⁹ Like Baroness Ludford, he argued that the Charter should be treated in the same way as other retained EU law:

Even if the Charter does only a little, if it does something—then, in accordance with the Government’s promise, that should be incorporated into domestic law at this stage like every other provision of EU law. Its removal or modification, if desired, should be done through the process that this House and the other place decide is the right way for us to modify retained EU law [...] The key point is that if the Government want to modify how the protection of the rights of workers, citizens, the elderly and children appears in the Charter in any way, it should be through that process.⁹⁰

Lord Keen of Elie, Advocate-General for Scotland and Lords Spokesperson for the Ministry of Justice, argued against accepting the amendment. He pointed out that the Charter applies to EU member states only where they are implementing EU law, but after leaving the EU, the UK would not be implementing EU law.⁹¹ The UK would have a body of retained EU law but, said Lord Keen, this would “diminish over time and diverge from European Union law over time as the latter develops”. He noted that the Charter itself contained provisions requiring certain rights to be interpreted “within the scope of the application of” the EU Treaties, “under the conditions provided for by Union law” and so on.⁹² He argued that this would tie the UK to EU law in an unacceptable way:

When we leave the Union, Union law will be foreign law, just as much as the federal law of the United States of America. It will be a foreign body of law.

What are we to make of the suggestion that, going forward, Acts of our sovereign Parliament should be capable of being struck down by reference to a body of foreign law? That would, I respectfully suggest, be one of the greatest constitutional outrages since 1689.

[...] What happened to the mother of Parliaments? What happened to the concept of the sovereignty of this Parliament? We are apparently prepared to abandon it in favour of a body of foreign law because we no longer trust ourselves to protect our own fundamental human rights. Is that what we have really come to?⁹³

⁸⁹ [HL Hansard, 23 April 2018, col 1367.](#)

⁹⁰ *ibid*, col 1368.

⁹¹ *ibid*, col 1370.

⁹² *ibid*, col 1371.

⁹³ *ibid*, col 1372.

Lord Keen therefore opposed Lord Pannick’s amendment on the grounds that it would “bring into our domestic law a Charter that relies on Union law—a developing body of foreign law going forward”. He surmised that amendment 15 was intended so that the Charter would apply when the UK was implementing retained EU law, although this was not stated in the amendment itself.⁹⁴ Lord Keen argued that even so, this would not cut off the Charter as it would be applied in the UK from future developments in EU law:

[...] just because the Charter is made part of retained EU law in terms of the Bill does not mean that Union law, which is the linchpin and anchor of the entirety of the Charter, is then retained EU law. Union law remains Union law. Therefore the Charter will continue to develop. Even though it is ring-fenced within retained EU law, the body of the Charter will be subject to Union law. You cannot have it both ways.⁹⁵

Lord Keen repeated the Government’s commitment that if the Bill was passed without retaining the Charter in domestic law, and it later became “apparent that any substantive rights are lost”, the Government would address that.⁹⁶

Responding to criticisms of his amendment, Lord Pannick argued that “a concern about parliamentary sovereignty is no basis for excluding the EU Charter of Fundamental Rights”.⁹⁷ He suggested the Charter would not be a special case, because clause 5(2) [6(2)] of the Bill preserves the supremacy of all retained EU law over domestic statute enacted before exit day. However, he said the Bill also “maintains the sovereignty of Parliament” by providing that legislation enacted after exit day would take priority over all retained EU law, which would include the Charter. He also disputed the argument that keeping the Charter would mean the UK would be bound by future ECJ judgments, saying that clause 6 [7] ensured that only judgments handed down before exit day were binding, and only on courts below the Supreme Court, and that judgments given by the ECJ after exit would not be binding in the UK at all.

The House voted by 316 votes to 245 in favour of amendment 15, a majority of 71.⁹⁸

⁹⁴ [HL Hansard, 23 April 2018, col 1372.](#)

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*, col 1373.

⁹⁸ *ibid.*, col 1376.

2.4 Right of Action Based on General Principles of EU Law (Amendment 19)

The House also voted on day two in favour of another amendment tabled by Lord Pannick, supported by Lord Beith (Liberal Democrat). Amendment 19 removed provisions from the Bill that would have prevented legal cases being brought after exit day on the grounds of a failure to comply with the general principles of EU law.

In the Bill as introduced, clause 5(5) stated that, although the Charter would not form part of retained EU law, this would “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”. As mentioned above, Lord Pannick argued this was “a recipe for confusion”.⁹⁹ He then he went on to argue that the legal situation would be made even more complex by the provisions of paragraph 3 of schedule 1 relating to the general principles of EU law.¹⁰⁰

The general principles of EU law are unwritten sources of law developed by the case law of the Court of Justice of the European Union (CJEU), which it uses to “bridge the gaps left by primary and/or secondary [EU] legislation”.¹⁰¹ 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 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.¹⁰²

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

⁹⁹ [HL Hansard, 23 April 2018, col 1344](#).

¹⁰⁰ *ibid.*

¹⁰¹ EUR-Lex, ‘[The Non-Written Sources of European Law: Supplementary Law](#)’, 20 August 2010.

¹⁰² [Explanatory Notes to the Bill as Introduced in the Lords](#), pp 18–19.

part of domestic law after exit day. In the Bill as introduced, paragraph 3 of schedule 1 provided that there would be 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. However, following a government amendment made at report stage in the Commons, paragraph 27(5) [37(5)] of schedule 8 created a three-month window for a legal challenge based on the general principles of EU law to be brought after exit day, if it:

- related to something that happened before 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).¹⁰³

During its examination of the Bill, the House of Lords Constitution Committee took evidence from witnesses who said it was unclear:

- what was covered by the “fundamental rights and principles that exist irrespective of the Charter” that would have been preserved by clause 5(5); and
- whether or to what extent they were the same as the general principles of EU law referred to in paragraph 2 of schedule 1.¹⁰⁴

The Constitution Committee concluded that:

The effects of excluding the Charter rights, retaining the “general principles”, but excluding rights of action based on them, are unclear. This risks causing legal confusion in a context where clarity is needed.¹⁰⁵

Amendment 19, tabled by Lord Pannick and Lord Beith (Liberal Democrat) (both members of the Constitution Committee) removed paragraph 3 of schedule 1. Lord Pannick said it was “simply unacceptable and unprincipled to recognise rights but then to deny a remedy if the principles are breached”.¹⁰⁶

The House voted in favour of amendment 19 by 280 votes to 223, a majority of 57.¹⁰⁷ The effect of the amendment is to allow legal action to be brought after exit day on the grounds of a failure to comply with the general principles of EU law, but only where the principle had been recognised as a

¹⁰³ [Explanatory Notes to the Bill as Introduced in the Lords](#), p 65.

¹⁰⁴ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, pp 32–3.

¹⁰⁵ *ibid*, p 35.

¹⁰⁶ [HL Hansard, 23 April 2018, col 1345](#).

¹⁰⁷ *ibid*, col 1396. The tellers for the not-in-content reported 223 votes; the clerks recorded 222 names.

general principle of EU law by the CJEU in a case decided before exit day. The reference in paragraph 27(5) [37(5)] of schedule 8 of the Bill to paragraph 3 of schedule 1 (setting out the previously more limited circumstances in which action could be brought on the grounds of failure to comply with the general principles of EU law) is still in the Bill as it was not deleted by amendment 19.

2.5 Challenges to the Validity of Retained EU Law (Amendment 18)

The House voted in favour of a third amendment on day two of report, tabled by Lord Beith and supported by Lord Pannick. Amendment 18 removed the ability of ministers to specify when the validity of retained EU law could be challenged in court. Lord Beith said he regarded amendment 18 “in broad terms if not technically” as a consequential amendment following amendments 15 and 19.¹⁰⁸

Paragraph 1(1) of schedule 1 of the Bill provides that there is no right in domestic law on or after exit day to challenge retained EU law on the basis that, immediately before exit day, an EU instrument was invalid. In the Bill as introduced, paragraph 1(2) of schedule 1 created two exceptions to this, so that a challenge could be brought if:

- the European Court has decided before exit day that the instrument is invalid, or
- the challenge is of a kind described, or provided for, in regulations made by a Minister of the Crown.

Lord Beith argued that this would produce a situation where, “having snatched away a citizen’s right to seek redress through the courts [...] in some circumstances the Executive might allow you into the court with your challenge”.¹⁰⁹ He was concerned that in answer to a written question he had tabled, Lord Callanan, Minister of State at the Department for Exiting the European Union, had suggested ministers could use the power to enable a right of challenge in domestic law in circumstances where “individuals and business may be individually affected by an EU instrument”.¹¹⁰ Lord Beith declared it was “a quite extraordinary thought” that the Executive might “decide on a case-by-case basis which individual cases merit a judicial hearing and make regulations specific to individual cases”.¹¹¹ He questioned whether ministers should be able “to choose who is allowed the key to the courtroom”.

¹⁰⁸ [HL Hansard, 23 April 2018, col 1392.](#)

¹⁰⁹ [ibid, col 1347.](#)

¹¹⁰ House of Lords, ‘[Written Question: Brexit](#)’, 29 March 2018, HL6531.

¹¹¹ [HL Hansard, 23 April 2018, col 1347.](#)

In Lord Beith’s view, this would create legal uncertainty:

Companies and individuals claiming to be adversely affected by a retained EU law whose validity was open to challenge will not be able to take that challenge to court unless they are lucky enough to be covered by exempting regulations, but they cannot know that in advance because the regulations will not have been made or even published in draft [...] It is not even clear whether there will be any regulations, since the Government could decide not to use this purely permissive power at all.¹¹²

Lord Beith argued that if the House agreed to amendments 15 and 19, so that Charter rights and the right to bring a challenge on the grounds of incompatibility with the general principles of EU law were retained, then “the scope for appropriate legal challenge” would be “reinstated”.¹¹³ He said there would then be no need for the Government to have powers “to remove the prohibition [on bringing legal action] in selective circumstances of their own choosing”.

In response, Lord Keen of Elie, Advocate-General for Scotland and Lords Spokesperson for the Ministry of Justice, said he did not accept that amendment 18 was a “necessary consequence” of amendment 15.¹¹⁴ He sought to explain why the Government had drafted schedule 1 as it had. He said that after the UK leaves the EU, if the CJEU rules that an EU decision is invalid, that EU decision would be annulled and would no longer apply in the EU. However, the “converted form of the decision” would remain in force within the UK—in other words, the CJEU ruling would have no effect on retained EU law within UK domestic law. Lord Keen said that domestic courts currently have no jurisdiction to annul an EU measure or declare it invalid, and the Government did “not think it would be right to hand them a wide-ranging new jurisdiction which asks them effectively to assume the rule of the CJEU”. Paragraph 1 of schedule 1 therefore rules out the possibility of post-exit challenges in the domestic courts on the grounds that a retained EU law measure is invalid (unless the CJEU had declared it invalid before exit day). Lord Keen stated that Lord Beith’s amendment “does not alter that general exclusion”.

Lord Keen went on to explain that the power for ministers to specify when there could be an exception to this general exclusion was intended to address circumstances where individuals or companies would be affected by an EU measure being found invalid in the EU, but still applying in the UK:

[...] the Government recognise that, in some circumstances, individuals and business may be individually affected by an EU

¹¹² [HL Hansard, 23 April 2018, col 1347.](#)

¹¹³ *ibid*, col 1348.

¹¹⁴ *ibid*, col 1374.

instrument which has been converted and should have a right to challenge it. For example, it would be strange if after exit a UK business were able to challenge and have struck down an EU decision which prevents it carrying out certain trading activities within the EU but would not have any equivalent right of redress in relation to the form of that decision which has been retained as part of UK law. It is for that reason that provision is made for this power.¹¹⁵

Lord Keen said the provision was there “as a safety measure”, but it might never need to be used.

The House voted in favour of amendment 18 by 285 to 235, a majority of 50.¹¹⁶ The regulation-making powers were removed from paragraph 1 of schedule 1, but the exclusion on bringing post-exit challenges to retained EU law on the grounds of validity remains (unless the CJEU had declared it invalid before exit day).

2.6 Post-Exit Judgments of the Court of Justice of the European Union (Amendments 23, 24 and 25)

On day two of report, the House agreed without division to government amendments clarifying how the UK courts should treat the judgments of the Court of Justice of the European Union (CJEU) after exit day.¹¹⁷ Taken together, amendments 23, 24 and 25 amended clause 6(2) [7(2)] from its original wording:

A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so.

to:

Subject to this and to subsections (3) and (6), a court or tribunal may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal.

Lord Keen of Elie, Advocate-General for Scotland and Lords Spokesperson for the Ministry of Justice, said that these amendments directly addressed and responded to concerns raised about clause 6(2) [7(2)] at committee stage.¹¹⁸

¹¹⁵ [HL Hansard, 23 April 2018, col 1374.](#)

¹¹⁶ *ibid*, col 1392.

¹¹⁷ *ibid*, col 1410.

¹¹⁸ *ibid*, col 1401.

At committee stage, Lord Pannick (Crossbench) had argued there were defects in the original drafting of clause 6(2), such as:¹¹⁹

- The default position that UK courts “need not have regard” to judgments delivered by the CJEU after exit day was “unhelpful” because it could be understood to suggest that UK judges “should not normally” have such regard.
- The use of the word ‘appropriate’ “wrongly suggests that our court will be making a policy choice to have regard to a post-exit day judgment” from the CJEU, and “confidence in the rule of law is undermined if judges are seen to be taking sensitive policy decisions that are for Parliament to make”. He argued that the drafting needed to make clearer that “although our judges are certainly not going to be bound by Luxembourg judgments handed down after exit day”, Parliament does intend them to “have regard to judgments of that court given after exit day where they consider that those judgments are relevant to the issues before our courts”.

Also speaking at committee stage, Lord Neuberger of Abbotsbury (Crossbench), President of the Supreme Court from 2012 to 2017, concurred with Lord Pannick, and said that as drafted, clause 6(2) was “worse than nothing from the judicial perspective”.¹²⁰ He agreed it should be re-worded with a view to “clarifying the law and minimising the risk” of “ill-informed political and media attacks on the judges”.¹²¹ Lord Hope of Craighead, Deputy President of the Supreme Court from 2009 to 2013, also recognised the need for this clause to contain more guidance to the judiciary on when to refer to post-exit CJEU judgments.¹²²

Similarly, in her first press conference as President of the Supreme Court in October 2017, Baroness Hale of Richmond 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.¹²³ In its most recent report on the Bill, the House of Lords Constitution Committee recommended that the Bill should provide that a court or tribunal “shall have regard to judgments given by the CJEU on or after exit day which the court or tribunal considers relevant to the proper interpretation of retained EU law”.¹²⁴

Speaking at report stage, Lord Keen said there had never been any intention to “draw judges into making policy decisions”, but rather a recognition that

¹¹⁹ [HL Hansard, 7 March 2018, col 1091.](#)

¹²⁰ *ibid*, col 1094.

¹²¹ *ibid*, col 1092.

¹²² *ibid*, col 1096.

¹²³ Owen Bowcott, ‘[UK’s New Supreme Court Chief Calls for Clarity on ECJ After Brexit](#)’, *Guardian*, 5 October 2017.

¹²⁴ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 76.

as “our domestic courts are restored as the ultimate judicial authority on law in the United Kingdom”, it was “right and appropriate that they have the authority and discretion to decide and interpret all UK law themselves, including retained EU law”.¹²⁵ However, he recognised that “for some, the wording of clause 6(2) as originally tabled failed to convey this intention with what many would regard as sufficient clarity”.

Lord Keen explained that clause 6(2) [7(2)] did not seek to legislate to give effect to the content of a withdrawal agreement or implementation (transition) period.¹²⁶ He said if the withdrawal agreement included a role for the CJEU (for example, EU-UK joint report of December 2017 would give the CJEU oversight of citizens’ rights issues for eight years from the UK’s exit), this would be legislated for under the separate Withdrawal Agreement and Implementation Bill.

Lord Pannick (Crossbench) sought assurance on the following points:¹²⁷

- That the new opening words of subclause 2 (“subject to this and to subsections (3) to (6)”) were not intended to affect the power of the court to have regard to judgments and other decisions by the CJEU and the EU given after exit day when domestic courts interpret retained EU law.
- That subclause 2 was not intended to prevent a court having regard to decisions of the CJEU handed down, whether before or after exit day, in cases not concerned with the interpretation of retained EU law (just as the courts can, if they consider it relevant, have regard to the judgments of other foreign courts, such as the Supreme Court of Canada or the High Court of Australia).
- That there would be nothing to prevent courts taking into account the terms of any agreement between the UK and the EU if they consider it relevant to the matter before them.
- That if the Supreme Court were to be criticised when it decided to have regard to post-exit judgments of the European Court, or when it decided to depart from pre-exit judgment of the European, the Lord Chancellor would defend the independence of the judiciary.

On the first two points, Lord Keen said that Lord Pannick’s analysis was correct, and on the third point that he did “not take material issue” with Lord Pannick’s observations.¹²⁸ On the final point, Lord Keen said that the Lord Chancellor had been “absolutely clear in his commitment to steadfastly defend the independence of the judiciary”.

¹²⁵ [HL Hansard, 23 April 2018, col 1402.](#)

¹²⁶ *ibid.*

¹²⁷ *ibid*, cols 1400–1.

¹²⁸ *ibid*, col 1403.

Lord Thomas of Cwmgiedd (Crossbench), former Lord Chief Justice of England and Wales, described the drafting of the Government’s amendments as “elegant”.¹²⁹ He explained that the amended subclause would operate with the other parts of clause 6 [7] as follows:

[...] although under subsection (2) a court may have regard to decisions made by the European Court of Justice after exit so far as they are relevant to any matter before the court, making that provision subject to subsections (3) to (6) means that a court could only do so to clarify the meaning or effect of retained EU law as at the date of exit. It therefore has the effect of confirming what I describe as the ossification of retained EU law as at the date of exit. Only the Supreme Court is permitted to depart from any retained EU case law under the test set out in subsection (5).¹³⁰

However, Lord Thomas expressed some concerns about the results of this ‘ossification’ of the law, a principle he said was “alien to the common law”, which had “always allowed a significant degree of flexibility to enable the law to develop”.¹³¹ He warned that confining the power to depart from pre-exit CJEU decisions to the Supreme Court alone could result in a “significant increase” in its caseload. He asked if the Government would consider permitting the Courts of Appeal of England and Wales and Northern Ireland and the Inner House in Scotland to be given a similar power. Lord Hope of Craighead endorsed this suggestion, explaining that having a decision from a lower court was often helpful to the Supreme Court.¹³²

Responding for Labour, Lord Goldsmith welcomed the Government’s amendment as it clarified the “important point that it will not be perceived as a political decision” if a court decided to follow a post-exit decision of the CJEU.¹³³ He described Lord Thomas’s suggestion about extending the ability to depart from pre-exit CJEU case law to the courts of appeal as “a good one”.¹³⁴ He said there were concerns about the possibility that if EU law changed in future—for example in the area of workers’ rights—retained EU law in the UK would “lag behind” the rest of Europe until a case reached the Supreme Court.

Lord Keen said the Government had considered allowing the courts of appeal to depart from pre-exit CJEU case law, but had in the end decided this was not the right way forward:

[...] we have to remember that until exit only the Court of Justice of the European Union is in a position to see us depart from a previous

¹²⁹ [HL Hansard, 23 April 2018, col 1404.](#)

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*, cols 1405–6.

¹³³ *ibid.*, col 1407.

¹³⁴ *ibid.*, col 1408.

decision of that court. The timeline for taking a case through the CJEU does not bear scrutiny in comparison with the timeline for taking a case to the United Kingdom Supreme Court. The feeling of the Government is that if we are removing the Court of Justice of the European Union, it is appropriate to put in its place the United Kingdom Supreme Court in that context [...]¹³⁵

However, he noted that the Government would have to consider “in due course whether that gives rise to any difficulties with respect to the reference of cases to the Supreme Court”. He also noted that the Supreme Court had the option to “in effect, accelerate cases that it considers to be of particular materiality of importance”.¹³⁶

2.7 Status of Retained EU Law (Amendments 26, 82, 93A, 93B, 93C, 94, 98, 100, 101, 102, 111, 112, 112A, 112BA, 112BB, 113, 114 and 115)

The House agreed on the second and sixth days of report to government amendments which sought to clarify the status in domestic law of different categories of retained EU law.¹³⁷ Those amendments provided for retained EU law which had a status in domestic law before exit day to retain that status in domestic law after exit day. For the purposes of making amendments in future, and for the purposes of ruling on incompatibility with the Human Rights Act 1998, ‘retained direct principal EU legislation’ (EU Regulations retained under clause 3 of the Bill) would be treated like primary legislation and ‘retained direct minor EU legislation’, such as EU tertiary legislation, would be treated like subordinate legislation. EU rights etc retained in domestic law under clause 4 [5] could in future be amended only by primary legislation or other powers capable of amending primary legislation.

The Bill as introduced was criticised for creating a lack of clarity about the status of retained EU law post-exit, and how it would fit with the usual domestic law hierarchy of primary and secondary legislation. The House of Lords Constitution Committee noted that the Bill would create broadly two categories of retained EU law:¹³⁸

- ‘EU-derived domestic legislation’ under clause 2, which was originally made as domestic legislation and therefore already has the status of primary or secondary legislation; and

¹³⁵ [HL Hansard, 23 April 2018, col 1409](#).

¹³⁶ *ibid*.

¹³⁷ [HL Hansard, 23 April 2018, col 1419](#) (amendment 26); and [HL Hansard, 8 May 2018, col 112](#) (amendment 82); col 31 (amendments 93A, 93B, 93C and 94); col 44 (amendment 98); col 45 (amendments 100, 101 and 102); col 139 (amendments 111, 112, 112A, 112BA, 112BB, 113, 114 and 115).

¹³⁸ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 18.

- ‘Retained EU direct law’, that is direct EU legislation and other directly effective provisions of EU law which would be brought into domestic law by clauses 3 and 4 [5]. In the Bill as originally drafted, retained direct EU law was given no particular status in domestic law as either primary or secondary legislation, although paragraph 19 of schedule 8 of the Bill required that retained EU law be considered primary legislation for the purposes of the Human Rights Act 1998.

The Constitution Committee recommended that retained EU direct law should be treated as domestic primary legislation for all purposes:

As drafted, the Bill gives rise to profound ambiguities about the legal status of retained direct EU law by generally assigning it no particular status while attributing to it (either explicitly or obliquely) particular and different statuses for certain purposes. This is likely to cause confusion and legal uncertainty. In our view, it is essential that all retained direct EU law has the same legal status for all purposes.

We recommend that the legal status that should be accorded to all retained direct EU law for all purposes is that of domestic primary legislation, as directly effective EU law is closely analogous to domestic primary legislation. This will secure legal continuity and certainty post-exit”.¹³⁹

The House of Commons Exiting the European Union Committee also said the Government needed to “[make] clear whether it [retained EU law] is to be treated by the courts as primary legislation, so that they cannot rule it to be invalid, or secondary”.¹⁴⁰

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.

¹³⁹ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 20.

¹⁴⁰ House of Commons Exiting the European Union Committee, [European Union \(Withdrawal\) Bill](#), 17 November 2017, HC 373 of session 2017–19, p 3.

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 [...] ¹⁴¹

The distinction between primary and secondary legislation is also significant in terms of the way legislation can subsequently be amended. Generally, primary legislation can be amended only by a further Act of Parliament (except where there are Henry VIII powers allowing for secondary legislation to amend primary legislation).

Speaking at report stage, Lord Callanan, Minister of State at the Department for Exiting the European Union, said the status of retained EU law was “undeniably an important issue” which the Government recognised was important to get right, “above all in the context of amendability”. ¹⁴² He rejected the approach recommended by the Constitution Committee of deeming all retained EU law that was not already domestic legislation as primary legislation, because this would “leave the law so rigid and inflexible as to be virtually inoperable”. ¹⁴³ By way of example, he said that in 2017, the EU had adopted just under 500 pieces of amending tertiary legislation. He said that if Parliament took on the role of making similar updates to EU law when it became retained EU law—for example to keep regulatory regimes up to date, such as the Biocidal Products Regulation which maintains a list to restrict entry to market of active biocidal products—it would not be possible to make this volume of amendments through primary legislation. He said it would create “a serious risk of these regimes ceasing to function”.

He explained that instead of treating all direct EU legislation as domestic primary legislation for all purposes, the Government was proposing amendments to set out how retained EU law should be treated in a number of specific situations, such as for the purposes of the Human Rights Act. ¹⁴⁴ He said the Government was proposing broadly that EU Regulations and clause 4 [5] rights should be treated as primary legislation for the purposes of amendability, and that EU tertiary legislation should be treated as domestic subordinate legislation. ¹⁴⁵

¹⁴¹ Daniel Greenberg, ‘Legislation’, Westlaw Insight, August 2017, paras 16–19.

¹⁴² [HL Hansard, 23 April 2018, col 1411](#).

¹⁴³ *ibid*, col 1412.

¹⁴⁴ *ibid*, col 1413.

¹⁴⁵ *ibid*. EU tertiary legislation is the EU equivalent to domestic secondary legislation. EU primary law includes the two main EU Treaties (the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)); EU secondary law includes Regulations, Directives and Decisions; and EU tertiary law, which is largely the responsibility of the European Commission, provides further detail of secondary law. EU tertiary legislation is also known as ‘delegated and implementing acts’.

The Government's amendment 26 would insert a new clause [8] into the Bill to set out new rules on how different categories of retained EU law could be amended in future:

- Subclause (1) provides that any retained EU law that had a status in domestic law before exit day would retain that status in domestic law after exit day. This would apply to domestic provisions that become part of retained EU law by virtue of clause 2 of the Bill.
- Subclause (2) creates a new category of 'retained direct principal EU legislation'. This category would apply to any EU Regulation that:
 - became part of retained EU law by virtue of clause 3 of the Bill; and
 - was not EU tertiary legislation.
- 'Retained direct principal EU legislation' could be amended or revoked only by:¹⁴⁶
 - primary legislation;
 - powers that can amend primary legislation or principal EU Regulations;
 - powers being transferred from the EU to the UK which can amend principal EU Regulations; or
 - other powers but only to make supplemental etc provision.
- Subclause (3) creates a new category of 'retained direct minor EU legislation'. This category would apply to any retained direct EU legislation which is not 'retained direct principal EU legislation', ie retained EU tertiary legislation, EU Decisions and future domestic subordinate legislation made under retained direct EU legislation.¹⁴⁷
- 'Retained direct minor EU legislation' could be amended by powers that can amend subordinate legislation—both those made under existing UK delegated powers (context permitting) and by powers being transferred from the EU to the UK.¹⁴⁸
- Subclause (4) provides that anything which is retained EU law by virtue of clause 4 [5] of the Bill could be amended only by primary legislation or by other powers capable of amending primary legislation.

Government amendments 111 and 112 sought to amend paragraphs 3 and 5 of schedule 8 to make the necessary changes setting out when subordinate legislation could, or could not, be used to amend the different categories of retained EU law.

¹⁴⁶ Department for Exiting the European Union, [Government Response to the Lords Constitution Committee Report on the European Union \(Withdrawal\) Bill](#), 11 April 2018, pp 5–6.

¹⁴⁷ *ibid*, p 4.

¹⁴⁸ *ibid*, p 6.

Lord Callanan said the Government's amendments would both protect retained EU law and maintain appropriate flexibility to update it in future:

This will ensure that frameworks of retained EU legislation are maintained and can be adjusted only in the same way Acts of Parliament can, but that the technical matters underneath them can be adjusted by subordinate legislation to react quickly to the changing circumstances of the day, as now.

Our amendments provide that, in the future, Parliament will need to agree any new delegated powers to amend a specific regulation, or regulations. This House will be the gatekeeper that ensures there is no bonfire of EU Regulations.¹⁴⁹

The Government has explained that while the power in clause 7 [9] to 'correct' retained EU law would be "key to ensuring that the law is not deficient on day 1 after exit day", separate powers would be needed to be able to amend or update retained EU law thereafter to ensure that "regulatory regimes [...] also work on day 2, day 20 and day 200".¹⁵⁰

Lord Callanan said that beyond the question of amendability, there were "a limited number of other places where matters turn on whether a law is found in primary or secondary legislation".¹⁵¹ He said this was the case in relation to the Human Rights Act 1998. The Human Rights Act provides that if a higher court (eg the Supreme Court, the High Court or the Court of Appeal) finds that legislation is incompatible with the European Convention on Human Rights, the court can make a declaration of incompatibility. In some circumstances, the court can strike down secondary legislation, but not primary legislation:

If an Act of Parliament requires subordinate legislation to be made (such as orders or regulations) that is incompatible with human rights, that subordinate legislation will not be affected by section 3 [which requires that: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights"]. However, if the subordinate legislation could have been drafted differently and could have complied with human rights the courts can strike down the subordinate legislation.¹⁵²

¹⁴⁹ [HL Hansard, 23 April 2018, col 1413.](#)

¹⁵⁰ Department for Exiting the European Union, [Government Response to the Lords Constitution Committee Report on the European Union \(Withdrawal\) Bill](#), 11 April 2018, p 5.

¹⁵¹ [HL Hansard, 23 April 2018, col 1413.](#)

¹⁵² Liberty, [A Parliamentarian's Guide to the Human Rights Act](#), 2010, p 9.

Government amendments 113, 114 and 115 sought to amend paragraph 19 [28] of schedule 8 to provide that for the purposes of the Human Rights Act 1998:

- retained direct principal EU legislation would be treated as primary legislation; and
- retained direct minor EU legislation would be treated as primary legislation so far as it amended any primary legislation, but otherwise would be treated as secondary legislation.

Speaking at report stage, Lord Callanan said this would mean that, as with primary legislation, claimants could receive a declaration of incompatibility in the event of a successful challenge to an EU Regulation, and for challenges against amendments to EU tertiary legislation, the courts could, if appropriate, strike down the legislation.¹⁵³

Lord Callanan said that, having had discussions with academics and others, the Government had not identified any areas of importance in the Bill beyond amendability and the Human Rights Act “where matters turn on the distinction between primary and subordinate legislation”.¹⁵⁴ However, he said the Government was happy to return to this issue at third reading if other areas were raised in the debate.

Lord Callanan then sought to clarify what these amendments would mean in relation to EU Directives, which had already been transposed into domestic law:

Directives [...] have already, over the years of our EU membership, been implemented in primary legislation and under a range of delegated powers, but principally in regulations made under section 2(2) of the European Communities Act. The status of these regulations is clear. They are and should remain statutory instruments. I know that these regulations contain important protections which some noble Lords wish to ensure cannot be easily eroded, but it would be constitutionally deeply questionable and practically unnecessary to attempt simply to declare these instruments to be anything different.¹⁵⁵

He said that following the repeal of the European Communities Act 1972 (ECA), there would be “almost no powers on the statute book” capable of amending regulations that had been made under section 2(2) of that Act.¹⁵⁶ He said he could not be “absolutely definitive” on this point, but officials had found “only a handful, which within the scope of the policy area, might be able to amend regulations made under section 2(2)”. This therefore meant

¹⁵³ [HL Hansard, 23 April 2018, col 1413.](#)

¹⁵⁴ *ibid*, col 1414.

¹⁵⁵ *ibid*.

¹⁵⁶ *ibid*.

that “almost all of these regulations” could be amended in future only by primary legislation or by new delegated powers that Parliament would first have to approve before they could be created. He said government amendment 112A would require that any statutory instrument seeking to amend or revoke a regulation originally made under section 2(2) of the ECA would have to be accompanied by a statement explaining why there were “good reasons” for doing so and what the effect would be on retained EU law. Lord Callanan said this would ensure there was “no escaping the scrutiny of this House”.

Lord Pannick (Crossbench), a member of the Constitution Committee, said the Government’s amendments were “complex” but “necessarily so, given the inherent difficulty of the exercise”.¹⁵⁷ He had a “remaining concern” that by addressing the question of legal status by reference only to amendability and challenges under the Human Rights Act, “the Bill continues to provide less than adequate guidance on other issues which may arise in relation to retained EU law”. He wondered what the courts would do if asked to decide which rule takes priority in a conflict between different elements of retained EU law, or if the question arose as to the grounds on which retained EU law could be challenged in court as invalid, and what remedies would be available in the event of a successful challenge. He said Lord Callanan’s comment that he was happy to return to these issues at third reading was “helpful”.

Baroness Bowles of Berkhamsted (Liberal Democrat) expressed reservations at the prospect that existing domestic legislation could in future be used to amend retained EU legislation after it had been converted into domestic law.¹⁵⁸ She said that when the existing domestic legislation was made, there would have been no expectation that it could be used to cover future amendments to legislation in policy areas that were, before exit day, reserved to the EU. In her view, “[e]xtending the scope of that legislation so that policy-making legislation can be amended by secondary legislation is extending it further than was contemplated and it may go beyond the reasonable expectations of that legislation”. She suggested this was a constitutional problem and said she would like to discuss this further with the Minister, with a view to returning to it at third reading.¹⁵⁹

Responding for Labour, Lord Goldsmith said the Government’s approach was “a step in the right direction”, but he regretted that the Government had not tabled the amendments at an earlier stage so the Constitution Committee and Delegated Powers Committee could consider the proposal.¹⁶⁰ He said it was “perhaps difficult for us all to completely grasp the implications” of the amendments, but he expressed “qualified support” for them.¹⁶¹

¹⁵⁷ [HL Hansard, 23 April 2018, col 1415.](#)

¹⁵⁸ *ibid*, col 1416.

¹⁵⁹ *ibid* cols 1416–17.

¹⁶⁰ *ibid*, col 1417.

¹⁶¹ *ibid*, col 1418.

Lord Goldsmith believed that Lord Callanan had agreed to wait until third reading to move the amendments, to give Members more time to consider them.¹⁶² However, Lord Callanan said he wished to move the amendments at report stage, but would be prepared to return to the issue at third reading if Members still had concerns after reading his speech in *Hansard* and reflecting on it.¹⁶³

Amendment 26 was agreed without division on day two of report.¹⁶⁴ Amendments 94, 98, 100, 101 and 102, which made consequential amendments to the definitions set out in clause 14 and 15 [19 and 20] of the Bill, were agreed without division on day six.¹⁶⁵ Also agreed on day six were government amendments 111, 112, 112A, 113, 114 and 115.¹⁶⁶

Government amendment 82, also agreed without division on day six, inserted a new paragraph [23] into schedule 7 to provide that powers to make regulations under the Act to modify retained direct EU legislation, EU law retained under clause 4 [5] or any other retained EU law could be exercised before exit day so that regulations come into force on or after exit day.¹⁶⁷

Government amendments 93A, 93B and 93C, also agreed without division on day six of report, clarified that Church Measures, Orders in Council made in exercise of Her Majesty's prerogative and devolved enactments made in exercise of the prerogative would retain the same status in domestic law as they had before exit day.¹⁶⁸ Government amendments 112BA and 112BB, also agreed without division, inserted the new definitions of 'retained principal direct EU legislation' and 'retained minor direct EU legislation' into the Interpretation Act 1978.¹⁶⁹

2.8 Appropriate Versus Necessary (Amendments 31, 42, 86 and 87)

On day three of report the House agreed to amendment 31, moved by Lord Lisvane (Crossbench), which altered the wording in clause 7 [9] (related to the scope of the 'correcting power') to replace the text "the Minister considers appropriate" with the words "is necessary". Amendment 31 was agreed on division by 349 votes to 221.¹⁷⁰ Amendment 31 was a cross-party amendment also in the names of Lord Tyler (Liberal Democrat), Lord Goldsmith (Labour) and Lord Cormack (Conservative).

¹⁶² [HL Hansard, 23 April 2018, col 1419.](#)

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

¹⁶⁵ [HL Hansard, 8 May 2018, cols 31 and 44–5.](#)

¹⁶⁶ *ibid.*, col 139.

¹⁶⁷ *ibid.*, col 112.

¹⁶⁸ *ibid.*, cols 30–1.

¹⁶⁹ *ibid.*, col 31.

¹⁷⁰ [HL Hansard, 25 April 2018, cols 1581–4.](#)

As introduced in the Lords, Clauses 7 [9], 8 [removed at report] and 9 [11] of the Bill would have enabled ministers to make regulations that “make such provision as the Minister considers appropriate” with regard to ‘correcting deficiencies’ in retained EU law, complying with international obligations, and implementing the withdrawal agreement respectively. Amendment 31 removed the wording “the Minister considers appropriate” and inserted the word “necessary” in clause 7(1) [9(1)]. Amendment 42 made similar changes to clause 8, and was agreed without division¹⁷¹ (this was made prior to the decision of the House to agree government amendment 47A, which removed clause 8 from the Bill). Lord Lisvane’s amendments 86 and 87 made similar changes to powers under clause 17 [22] (which could be used to make consequential amendments through regulations), and were agreed without division on day four of report.¹⁷² Similar wording in clause 9 [11] was not amended during report in the Lords.

The white paper which preceded the Bill said the 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”.¹⁷³ The House of Lords Delegated Powers and Regulatory Reform Committee had observed that the Bill is “drafted in much wider terms”, by setting a test “based on the subjective judgment of the Minister as to what he or she considers to be ‘appropriate’” rather than “a test based on objective necessity”.¹⁷⁴ It recommended that the “subjective ‘appropriateness’ test” in clauses 7 [9] and 8 (since removed by government amendment 47A) “should be circumscribed in favour of a test based on objective necessity”.¹⁷⁵

The issue of appropriate versus necessary had been discussed during the Bill’s committee stage.¹⁷⁶ Responding to this discussion, Lord Callanan, Minister of State at the Department for Exiting the European Union, said that the Government would return to the issue of the threshold for exercising delegated powers in the Bill on report.¹⁷⁷

On moving amendment 31, Lord Lisvane argued that by removing the reference to the minister’s view of what was appropriate, the Bill “would be left with a statement of objective necessity”.¹⁷⁸ He stated that whilst he accepted that ‘necessary’ was a high bar, he believed that ‘appropriate’ was

¹⁷¹ [HL Hansard, 25 April 2018, col 1630.](#)

¹⁷² [HL Hansard, 30 April 2018, cols 1983–84.](#)

¹⁷³ HM Government, [Legislating for the United Kingdom’s Withdrawal from the European Union](#), March 2017, Cm 9446, p 11.

¹⁷⁴ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 1 February 2018, HL Paper 73 of session 2017–19, p 5.

¹⁷⁵ *ibid*, pp 6 and 8. The Committee recommended that clause 9 [11] should be removed from the Bill altogether (*ibid*, p 9).

¹⁷⁶ See: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 14–18.

¹⁷⁷ [HL Hansard, 7 March 2018, col 1200.](#)

¹⁷⁸ [HL Hansard, 25 April 2018, col 1568.](#)

far too low.¹⁷⁹ Lord Lisvane referred to government amendment 83C which sought to address these concerns. In summary, this amended provisions in schedule 7 relating to the laying of explanatory statements when regulations were made under clause 7(1) [9(1)] or 9 [11]. It inserted a requirement for the minister to make a statement as to why, in their opinion, there were good reasons for the instrument and that the provisions within it represented a reasonable course of action.¹⁸⁰ Government amendment 83C was agreed by the House on day six of report, without division.¹⁸¹

Lord Lisvane argued that amendment 83C still did not solve the problem, quoting from the Delegated Powers Committee's twenty-third report on this point:

The requirement to state good reasons is a very low threshold. We would always expect Ministers to have good reasons before doing anything, and certainly when making new law in secondary legislation [...]

It does not advance matters for Ministers to commit to lay a document that merely confirms their belief that they are acting lawfully [...]

The test for political decision-making is not simply whether there are good reasons. There may be good reasons for doing something and better reasons for not doing it.¹⁸²

Lord Cormack argued that “whichever side of the Brexit argument one is on [...] one can still believe that it is of fundamental importance that the powers of Ministers should be contained in a sensible and democratic manner by Parliament”.¹⁸³ Lord Tyler argued that the amendment would fulfil the original position of the Government when they set out what they intended to do with the Bill, namely that “only changes needed to make retained EU law work after exit day would be implemented”.¹⁸⁴

Baroness Faulkner of Margravine (Liberal Democrat) stated that she had not come to a definitive view on the amendment, but expressed concern that the interpretation of appropriate could cause time delays in times of financial crisis:

Redenominating values and thresholds from euros to sterling may be appropriate in a UK regime because most UK firms' balance sheets are denominated in sterling. However, it could be argued that it is not

¹⁷⁹ [HL Hansard, 25 April 2018, col 1568.](#)

¹⁸⁰ Government amendment 83C is discussed in more detail in section 2.22 of this Briefing.

¹⁸¹ [HL Hansard, 8 May 2018, col 127.](#)

¹⁸² House of Lords Delegated Powers Committee, [European Union \(Withdrawal\) Bill: Government Amendments](#), 23 April 2018, HL Paper 124 of session 2017–19, p 3.

¹⁸³ [HL Hansard, 25 April 2018, col 1569.](#)

¹⁸⁴ *ibid*, col 1573.

“necessary” to do so ahead of the UK’s exit from the EU. Litigation would take time while the courts determined whether the Minister had acted under “necessary” or “appropriate”, but in financial crises time is not something regulators have at their disposal.¹⁸⁵

Responding for Labour, Lord Goldsmith, argued that “in circumstances where great powers are being given, one needs to be very clear where the discretion lies”.¹⁸⁶ He said that he believed that the amendment would introduce an objective test.¹⁸⁷

Responding to the debate, Lord Callanan, Minister of State at the Department for Exiting the European Union, stated that the delegated powers in the Bill had “rightly” been one of the most scrutinised areas and he did not doubt the “best intentions” of those supporting the amendment.¹⁸⁸ However, he questioned the exact meaning of ‘necessary’:

For example, in the context of Clause 7 [9], would the course of action a Minister takes have to be no more than necessary to correct the deficiency? Or must it be necessary to correct a deficiency for the power to be engaged in the first place—and if so, necessary for what purpose?¹⁸⁹

He referred to section 105B of the Communications Act 2003, which he noted included an obligation for Ofcom to notify its regulatory counterparts in other member states when it is made aware of a security breach that affects a public electronic communications network or service, and Ofcom thinks it appropriate to make such a notification. Lord Callanan added:

It could be argued that it is not strictly necessary to delete the obligation at all. Let us assume, however, that a court accepts that some action is needed in this scenario. A test of necessity could then be taken to mean that the Government should take the minimum action possible to address the deficiency. That might be simply to remove the requirement to share information.¹⁹⁰

Lord Callanan also made reference to government amendments which were then yet to be debated, saying that they represented the Government accepting recommendations where they did not, in its view, “undermine the fundamental operation of the Bill”:

That is why we have accepted the recommendation of the

¹⁸⁵ [HL Hansard, 25 April 2018, col 1571.](#)

¹⁸⁶ *ibid*, col 1574.

¹⁸⁷ *ibid*, col 1575.

¹⁸⁸ *ibid*.

¹⁸⁹ *ibid*, cols 1575–6.

¹⁹⁰ *ibid*, col 1576.

Constitution Committee and tabled government amendments to ensure that, where the powers in Clauses 7(1) [9(1)], 9 [11] or 17(1) [22(1)] are used, a statement must be made as to why there are good reasons for the instrument and the provision made is a reasonable course of action.¹⁹¹

2.9 Creation of Public Bodies (Amendments 32A, 32B, 34A, 54A, 69A, 72B and 89B)

On days three, four, five and six of report, the House agreed without division to government amendments removing the power for ministers to create new public bodies by statutory instrument.¹⁹² As introduced, clause 7 [9] of the Bill allowed ministers to make regulations setting up a new public authority to carry out functions being transferred from the EU back to the UK. At committee stage in the Lords, Members from all sides of the House expressed concerns about this provision, arguing there was a long-established principle that public bodies should be established only by primary legislation.¹⁹³

Moving the amendments at report stage, Lord Callanan, Minister of State at the Department for Exiting the European Union, said that when the Bill was originally drafted, the Government thought it was “only sensible for the sake of contingency” to include powers to establish new public bodies.¹⁹⁴ He said this was to insure against losing any important functions as they were transferred over from the EU, in case no equivalent public authority already existed in the UK. He explained that the Government now considered the establishment of a new public authority would be “necessary only in a very limited number of cases”. Where this arose, the Government would instead bring forward the appropriate provisions under primary legislation. He stated that the new environmental body announced by Michael Gove, Secretary of State for Environment, Food and Rural Affairs, in November 2017 would now be “delivered through a separate legislative vehicle”.¹⁹⁵ Lord Callanan repeated a commitment he had made on the second day of report that a consultation on this new environmental body would be published ahead of the third reading of the European Union (Withdrawal) Bill on 16 May 2018.¹⁹⁶

Amendments 32A, 32B and 34A removed the power in clause 7 [9] to

¹⁹¹ [HL Hansard, 25 April 2018, col 1577.](#)

¹⁹² [HL Hansard, 25 April 2018, cols 1586 and 1593](#) (amendments 32A, 32B and 34A); [HL Hansard, 30 April 2018, col 1933](#) (amendment 54A); [HL Hansard, 2 May 2018, col 2123](#) (amendment 89B); [HL Hansard, 8 May 2018, col 83](#) (amendment 69A); and col 110 (amendment 72B).

¹⁹³ [HL Hansard, 7 March 2018, cols 1216–20.](#)

¹⁹⁴ [HL Hansard, 25 April 2018, col 1584.](#)

¹⁹⁵ *ibid*; and Department for Environment, Food and Rural Affairs, ‘[New Environmental Protections to Deliver a Green Brexit](#)’, 12 November 2017.

¹⁹⁶ [HL Hansard, 25 April 2018, col 1584.](#)

establish a public body by statutory instrument. Amendment 54A amended clause 9 [11] to make it explicit that regulations made under that clause to implement the withdrawal agreement could not be used to establish a new public body. Amendment 89B inserted the same prohibition into the equivalent powers of the devolved administrations provided for in part 3 of schedule 2.¹⁹⁷ Amendments 32A, 32B and 34A would apply to powers of devolved administrations under part 1 of schedule 2 through paragraph 1(3) of schedule 2. This states that clause 7(2) to (9) [9(2) to (9)] apply for the purposes of part 1 of schedule 2. Lord Callanan said that the Government had discussed this with the devolved administrations before tabling the amendments.¹⁹⁸ He said the Government was not aware of any circumstances where the devolved administrations were anticipating using this power to establish a new public body, and they had not raised any concerns about the amendment. Amendments 69A and 72A made consequential changes to provisions in schedule 7 relating to the scrutiny procedure for regulations made under clauses 7 and 9 [9 and 11].

Lord O'Donnell (Crossbench), Lord Newby, Liberal Democrat Leader in the House of Lords, and Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, all spoke briefly to welcome the Government's amendments.¹⁹⁹

2.10 Powers Relating to Fees and Charges (Amendments 33A, 53A, 69B, 72C, 89AA, 104A, 72F, 72G, 72H and 73A)

On days three, four, five and six of report, the House agreed without division to government amendments clarifying that ministers could not use the powers in clauses 7 [9] and 9 [11] to impose or increase fees.²⁰⁰ In the Bill as introduced, clauses 7 and 9 prohibited Ministers from making regulations under these clauses to impose or increase taxation, but concerns were raised during the Lords committee stage that there was no similar restriction on imposing or increasing fees or charges.²⁰¹

During the committee stage debate, Lord Callanan, Minister of State at the Department for Exiting the European Union, drew a distinction between fees, which he defined as “payment only for a service received”, and charges, which he defined as “anything which goes beyond cost recovery”.²⁰² Moving the Government's amendments at report stage, Lord Callanan said that the powers in clauses 7 [9] and 9 [11] could not be used to impose a charge, as by definition charges “contain an element of taxation prohibited in the

¹⁹⁷ Agreed without division on day five of report; [HL Hansard, 2 May 2018, col 2125](#).

¹⁹⁸ *ibid*, col 1585.

¹⁹⁹ *ibid*, cols 1585–6.

²⁰⁰ [HL Hansard, 25 April 2018, col 1588](#) (amendment 33A); [HL Hansard, 30 April 2018, col 1933](#) (amendment 53A); [HL Hansard, 2 May 2018, col 2125](#) (amendment 89AA); [HL Hansard, 8 May 2018, col 84](#) (amendment 69B) and col 110 (amendment 72C).

²⁰¹ [HL Hansard, 12 March 2018, cols 1345–60](#).

²⁰² *ibid*, col 1355.

exercise of these powers”.²⁰³ Government amendments 33A and 53A amended clauses 7 [9] and 9 [11] respectively to put on the face of the Bill that these powers could not be used to impose or increase fees. Amendments 69B and 72C made consequential drafting amendments to the scrutiny provisions in schedule 7.

Amendment 89AA made equivalent changes to the powers of devolved ministers under part 3 of schedule 2 (implementing the withdrawal agreement).²⁰⁴ Speaking to the amendment on day five of report, Lord Keen of Elie, Advocate-General for Scotland, said that amendment 89AA had been agreed by the devolved administrations and the amendment used the same rationale as had been applied to amendment 53A.²⁰⁵ Amendment 33A would be applied to powers used by devolved ministers under part 1 of schedule 2 (the ‘correcting power’) through paragraph 1(3) of schedule 2. This states that clause 7(2) to (9) [9(2) to (9)] apply for the purposes of part 1 of schedule 2.

Speaking on day three of report stage, Lord Callanan explained how the powers in clauses 7 [9] and 9 [11] could be used in relation to fees and charges once the amendments were made:

The powers in clause 7(1) and 9 will still be able to repeal fees regimes that are no longer needed, reduce fees and make amendments to pre-exit powers to provide for fees and charges. An example would be correcting a deficiency in an existing fee-setting power, such as a reference to a directive which is no longer appropriate. They will not, however, be able to impose or increase a fee or charge themselves.²⁰⁶

Baroness Kramer, Liberal Democrat Spokesperson for the Treasury and Economy, and Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, both welcomed the government amendments.²⁰⁷

Lord Callanan noted that there were separate specific powers in schedule 4 to make provision in relation to fees and charges, subject to “stringent scrutiny provisions”.²⁰⁸ These powers would enable an “appropriate authority” to make regulations about imposing or increasing fees and charges, including tax-like charges. The House of Lords Delegated Powers and Regulatory Reform Committee has noted that the government amendments to clauses 7 [9] and [11] were intended to create a “clear demarcation” between the powers in these clauses and those in schedule 4, but that: “It offers little consolation to be told that one is being taxed under

²⁰³ [HL Hansard, 25 April 2018, col 1587.](#)

²⁰⁴ [HL Hansard, 2 May 2018, col 2125.](#)

²⁰⁵ *ibid*, col 2129.

²⁰⁶ *ibid*.

²⁰⁷ *ibid*, cols 1587–8.

²⁰⁸ *ibid*, col 1587.

schedule 4 rather than under clause 7 or clause 9”.²⁰⁹ The Committee was opposed to the fact it would remain possible for Ministers to impose “tax-like” charges in regulations made under schedule 4.

A number of government amendments placing further restrictions on the use of the schedule 4 powers were agreed to without debate on day six of report stage.²¹⁰ Amendment 104A inserted a new paragraph [5] into schedule 4 which introduced a partial sunset on the regulation-making powers in schedule 4. No new fees and charges regimes could be created under this power after two years from exit day. However, after that point, regulations could still be made to revoke or alter existing fees and charges regimes, and any regulations already made under the power would continue in force. In a delegated powers memorandum, the Government explained the reasoning behind this amendment. It said it intended:

[...] to establish all the new fees and charges regimes required at the same time as making the other legislative preparations for our exit from the EU under this Bill. We are therefore happy to ensure that this power falls away at the same time as the deficiencies correcting power [clause 7, now clause 9], which we expect to be the principal vehicle for granting functions to public authorities and will, therefore, sunset the power at two years after exit day.²¹¹

The Delegated Powers Committee welcomed this amendment “as an improvement on having no sunset provision at all in schedule 4”, although it remained opposed to the fact that tax-like charges could be imposed in secondary legislation.²¹²

Amendments 72F, 72G, 72H and 73A modified paragraph 8 [12] of schedule 7 relating to the scrutiny procedure for regulations made under schedule 4. The Government explained the changes as follows:

The Bill as introduced provided that any SIs made under the powers in schedule 4 which established a new fee or charge regime (or which sub-delegated this power) had to be subject to the affirmative procedure. In other cases, ministers held discretion to choose between the negative or affirmative procedures as appropriate.

The Government is committed to ensuring that there is proper scrutiny of the exercise of the powers in the Bill. The Government is

²⁰⁹ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Government Amendments](#), 23 April 2018, HL Paper 124 of session 2017–19, p 1.

²¹⁰ [HL Hansard, 8 May 2018](#), col 46 (amendment 104A) and col 110 (amendments 72F, 72G, 72H and 73A).

²¹¹ Department for Exiting the European Union, [Supplementary Delegated Powers Memorandum](#), 23 April 2018, p 6.

²¹² House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), HL Paper 128 of session 2017–19, p 2.

therefore proposing amendments which require all SIs under schedule 4 to be subject to the affirmative procedure unless they are adjusting fees or charges to account for inflation. The Government believes that allowing inflation related adjustments to be subject to the negative or affirmative procedure is proportionate and still allows for greater scrutiny if appropriate.²¹³

The Delegated Powers and Regulatory Reform Committee welcomed these amendments.²¹⁴

2.11 Removal of Delegated Powers to Comply With International Obligations (Amendment 47A and 89ZA)

On the third day of report, the House agreed without division to a government amendment (amendment 47A) removing clause 8 from the Bill.²¹⁵

As introduced, clause 8 of the Bill gave 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". The power was a Henry VIII power, as it could be used to make any provision that could be made by an Act of Parliament, including amending or repealing previous primary legislation.

The House of Lords Delegated Powers and Regulatory Reform Committee criticised the Government for not being explicit about the sort of international obligation it had in mind under clause 8, save for one example about trans-frontier television, given in a delegated powers memorandum.²¹⁶ The House of Lords Constitution Committee concluded that the power in clause 8 was a broad one, but that this "may be justified given the degree to which the UK's international obligations will change as a result of the UK leaving the European Union".²¹⁷ However, it recommended that ministers should only be able to use the power if they could "demonstrate that there are 'good reasons' for its use and can show that the use of the power is a 'reasonable course of action'".

²¹³ Department for Exiting the European Union, [Supplementary Delegated Powers Memorandum](#), 23 April 2018, p 7. Emphasis as in original.

²¹⁴ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), HL Paper 128 of session 2017–19, p 1.

²¹⁵ [HL Hansard, 25 April 2018, col 1642](#).

²¹⁶ 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 was subsequently published in which the relevant paragraph is paragraph 72.

²¹⁷ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 50.

Baroness Goldie, a Government Whip, explained at report stage that the power was originally included in the Bill to ensure that the UK's withdrawal from the EU "did not affect its reputation as a nation which honours its promises and respects its international obligations".²¹⁸ However, she said that it had "become clear" to the Government that "there are better and more effective ways to ensure that the Government's international obligations continue to be met than through clause 8". The Government stated in a delegated powers memorandum that it had also "become clear that very few of the UK's international obligations will be affected in ways that can be remedied by the clause 8 power".²¹⁹ Baroness Goldie said that any measures still required to remedy or prevent breaches of the UK's international obligations would be made in other primary legislation, or "under other delegated powers where that is permissible".

Baroness McIntosh of Pickering (Conservative) spoke to her amendment 47 which sought to ensure that clause 8 could be used to comply with any international obligations arising from the UK remaining in the European Economic Area (EEA) or joining the European Free Trade Association (EFTA) after leaving the EU.²²⁰ She urged the Government to maintain clause 8 in the Bill and to "keep an open mind" about membership of the EEA or EFTA as an alternative to remaining within the customs union. Baroness Goldie explained that the Government was negotiating to remain within the EEA for the duration of the implementation (or transition) period, but after that "as has been made clear, we are not seeking to remain in the single market through the EEA Agreement".²²¹ Equally, she said the Government had no plans to rejoin EFTA. She argued that, in any event, joining the EEA or EFTA would give rise to new obligations which would not be covered by clause 8, which covered only existing obligations.²²²

Lord Beith (Liberal Democrat) said that the removal of clause 8 would be "quite welcome" to the Constitution Committee—of which he is a member—which had "considerable concerns about its breadth".²²³ However, Lord Beith said he was worried that the Government were seeking to remove clause 8 because they "have satisfied themselves that there is nothing they could do under clause 8 that they could not do under clause 17 [21] and its broad powers" to make consequential provisions.

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, put her name to the amendment. She argued that any international obligations for which legislation was necessary would be better

²¹⁸ [HL Hansard, 25 April 2018, col 1637.](#)

²¹⁹ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 23 April 2018, p 5.

²²⁰ [HL Hansard, 25 April 2018, cols 1632–4.](#)

²²¹ *ibid*, col 1638.

²²² *ibid*, cols 1638–9.

²²³ *ibid*, col 1634.

dealt with under the Withdrawal Agreement and Implementation Bill.²²⁴ In her view, there were “too many just-in-case powers” in the Bill, so removing one represented “an improvement”. The House of Lords Delegated Powers and Regulatory Reform Committee also welcomed the removal of clause 8 from the Bill.²²⁵

As introduced, the powers in clause 8 were mirrored in part 2 of schedule 2 to give equivalent powers to the devolved authorities. These paragraphs were also removed from schedule 2 by government amendment 89ZA, agreed to on day five without division.²²⁶ Further consequential amendments, removing references to clause 8 throughout the Bill, were agreed to without division on the fifth and final days of report.²²⁷

2.12 A ‘Meaningful’ Vote (Amendment 49)

On the fourth day of report, the House voted in favour of a cross-party amendment that set out a procedure for parliamentary approval of the outcome of negotiations with the EU.²²⁸ Amendment 49 has been dubbed the ‘meaningful vote’ amendment. It inserted a new clause [10] into the Bill, requiring that:

- The Government can conclude a withdrawal agreement with the EU under the terms of Article 50 only if a draft of the agreement has been:
 - approved by a resolution of the House of Commons; and
 - subject to the consideration of a motion in the House of Lords.
 (subclause 1)
- The Government must “so far as practicable” make arrangements for the Commons resolution to be debated and voted on before the European Parliament debates and votes on the draft withdrawal agreement.
 (subclause 2)
- The Government can implement a withdrawal agreement only if Parliament has approved it and any transitional measures agreed within or alongside the withdrawal agreement by an Act of Parliament
 (subclause 3)

²²⁴ [HL Hansard, 25 April 2018, cols 1635–6.](#)

²²⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), 26 April 2018, HL Paper 128 of session 2017–19, p 1.

²²⁶ [HL Hansard, 2 May 2018, col 2123.](#)

²²⁷ *ibid*, col 2125 (amendments 89C and 89D); and [HL Hansard, 8 May 2018](#), col 45 (amendment 102A), col 46 (amendments 104B and 104C), col 109 (amendment 72ZD), col 111 (amendments 77F, 77G and 78D) and col 122 (amendment 83AA).

²²⁸ [HL Hansard, 30 April 2018, col 1870.](#)

- If:
 - the Commons does not approve a resolution on a draft withdrawal agreement by 30 November 2018 (subclause 6); or
 - an Act of Parliament to approve the withdrawal agreement does not receive royal assent by 31 January 2019 (subclause 7); or
 - no withdrawal agreement has been reached between the UK and the EU by 28 February 2019 (subclause 8)
 then the Government must follow any direction in relation to the Article 50 negotiations which has been:
 - approved by a resolution of the House of Commons; and
 - subject to the consideration of a motion in the House of Lords.
 (subclause 5)

The Government has previously made a number of commitments relating to Parliament's role in approving any deal reached with the EU, although it has not put these on the face of the Bill. The Prime Minister, Theresa May, said in her Lancaster House speech in January 2017 that the Government would put the final deal agreed with the EU to a vote in both Houses of Parliament before it came into force.²²⁹ During the Commons committee stage of the European Union (Notification of Withdrawal) Bill (the legislation which authorised the triggering of Article 50), David Jones, the then Minister of State at the Department for Exiting the European Union, said this vote would cover not only the withdrawal arrangements, but also the future relationship with the EU.²³⁰ He said the Government expected and intended this vote would take place before the European Parliament voted on the deal, but it could not guarantee this as it did not control the timing of what happened in the European Parliament.²³¹ In a written ministerial statement in December 2017, David Davis, Secretary of State for Exiting the European Union, laid out further details about the Government's intentions to:

- hold a vote in both Houses on the final deal agreed with the EU (covering both the withdrawal agreement and the terms of the future relationship) as soon as possible after the conclusion of negotiations;
- lay the withdrawal agreement before Parliament for scrutiny under the terms of the Constitutional Reform and Governance Act 2010; and
- introduce a Withdrawal Agreement and Implementation Bill to give the withdrawal agreement domestic legislative effect

²²⁹ Prime Minister's Office, '[The Government's Negotiating Objectives for Exiting the EU: PM's Speech](#)', 17 January 2017.

²³⁰ [HC Hansard, 7 February 2017, col 264.](#)

²³¹ *ibid*, cols 264 and 326.

(providing Parliament had voted in favour of the deal).²³²

Clause 9 [11] of the European Union (Withdrawal) Bill was amended at committee stage in the Commons to add a condition that ministers cannot make regulations to implement the withdrawal agreement without the prior enactment of a statute by Parliament approving the final terms of the UK's withdrawal from the EU.²³³ The amendment was tabled by Dominic Grieve (Conservative MP for Beaconsfield), and the vote which approved it was the Government's only defeat on the Bill in the House of Commons.

Moving amendment 49 at report stage in the Lords, Viscount Hailsham (Conservative) said the Prime Minister and other senior ministers had promised Parliament would have "a meaningful vote".²³⁴ He felt parliamentarians, particularly MPs, had "a right and duty to determine what is meant by 'a meaningful vote'". He argued that if the Government agreed terms with the EU, then Parliament, particularly the House of Commons, should be able to accept or reject the agreement; have "the right to suggest further negotiations" if it decided to reject the deal; to determine that the UK would leave the EU with no terms agreed; or to determine that the UK should stay in the EU on the existing terms.²³⁵ Should the Government not reach terms with the EU, then Viscount Hailsham believed that Parliament should be able to accept that the UK should leave with no deal, or to determine the UK should stay in the EU on existing terms, or to request further negotiations. His position was that:

[...] whatever the outcome, terms or no terms, this country's future should be determined by Parliament, ultimately the House of Commons, and not by ministers. In a parliamentary democracy, that is what ought to be meant by 'a meaningful vote'.²³⁶

He maintained that the Government's offer of "a take or leave it vote" meant that "unless Parliament insists, Parliament will not have a genuine, meaningful vote".²³⁷

Viscount Hailsham suggested the 2016 referendum was "an instruction to the Government to negotiate withdrawal on the best terms that could be achieved", but the "final and conclusive decision" could be made "only when the negotiations have crystallised into agreed terms or no agreed terms".²³⁸ At that point, he argued it would be for Parliament to "determine what is in the national interest". He believed that if the House of Commons decided

²³² House of Commons, '[Written Statement: Procedure for the Approval and Implementation of EU Exit Agreement](#)', 13 December 2017, WS342.

²³³ [HC Hansard, 13 December 2017, cols 521–5.](#)

²³⁴ [HL Hansard, 30 April 2018, col 1847.](#)

²³⁵ *ibid*, cols 1847–8.

²³⁶ *ibid*, col 1848.

²³⁷ *ibid*.

²³⁸ *ibid*, col 1849.

that “public opinion should be tested in a second referendum”, there would be “nothing undemocratic about such a process”. He commended amendment 49 to the House on the grounds that it “enables Parliament, primarily the House of Commons, to make all the decisions that I have identified”, and “[c]rucially, it preserves the primacy of the House of Commons”.²³⁹

Lord Hannay of Chiswick (Crossbench), another signatory to the amendment, argued there was “a compelling case” for covering the possibility of a no-deal scenario “if a parliamentary approval process is to be genuinely meaningful”.²⁴⁰ He said that the Government had never made a commitment to give Parliament any say on a no-deal outcome, and this left “a void—a vacuum” that was “not really tolerable for such an eventuality”.

Lord Wallace of Saltaire, Liberal Democrat Spokesperson for the Cabinet Office, whose name was also on the amendment, said that the House was “rightly concerned that a referendum which was partly won on an argument to restore parliamentary sovereignty should not be allowed to lead to greater executive power”.²⁴¹ He argued that amendment 49 put the Government’s promises about parliamentary votes into legislative form.²⁴² He rejected the Government’s assertion that the amendment imposed “false deadlines” on the negotiation process, arguing that if ministers were correct that negotiations were on track to reach an agreement with the EU by October, then “the amendment offers no difficulties for the Government”. However, he said that if all that was agreed by October was “a loose statement of principles, with the hard details of our future relationship kicked down the track to be sorted out in the implementation period”, then “Parliament needs to intervene”. He believed that the amendment would guard against the “unfortunate outcome” of leaving the EU with no detailed agreement on the future relationship.

Lord Howard of Lympne (Conservative) spoke against the amendment, arguing that it “could, and very probably would, lead to not one but several constitutional crises”.²⁴³ He argued the proposed new clause would give the House of Lords a veto on any agreement reached by the Government with the EU, even if the Commons had endorsed it. He said this could happen in two ways. Firstly, the Lords could decline to consider the motion required in subclause 1 of the new clause. Secondly, as the amendment stipulated a withdrawal agreement may be implemented only if it has been approved by an Act of Parliament which must receive royal assent before the end of January 2019, Lord Howard argued the Lords “simply by delaying the passage of the Bill beyond next January, could defy not only the will of the people but the will of the elected Chamber of Parliament”.

²³⁹ [HL Hansard, 30 April 2018, col 1849.](#)

²⁴⁰ *ibid*, col 1850.

²⁴¹ *ibid*.

²⁴² *ibid*, col 1851.

²⁴³ *ibid*, col 1852.

Lord Howard also highlighted the fact that in such circumstances, the terms of the new clause would take negotiations “out of the hands of the elected Government of our country” and mean they would instead be decided on by a resolution of the Commons and the consideration of a motion in the Lords.²⁴⁴ He said that the Commons was “not a negotiating body” and he did not believe it wanted or should have that role. He described the amendment as “thoroughly and fundamentally misconceived” and said if it was passed, it would “immeasurably weaken the Government’s negotiating position with the EU”.

Lord Howarth of Newport (Labour) made similar arguments about the “constitutional dangers that lurk within the amendment”.²⁴⁵ His view was that Parliament’s role was to advise the Government and hold it accountable, not to negotiate, and that Parliament should “not try to usurp” the role of the Government. He concurred that there must be a “meaningful vote”, but he disagreed with the view that a take-it-or-leave-it vote would not be meaningful. Lord Howarth described subclause (5) of the new clause, giving the Commons the right to direct the Government what to do if the Commons did not approve the draft withdrawal terms, as “the most extraordinary provision”.²⁴⁶ He argued that legislation should not “tie this Government’s hands as they seek to perform this particular complex, sensitive, immensely difficult, crucial set of negotiations”.

Lord Lamont of Lerwick (Conservative) also described the amendment as “extraordinary”:

[...] what happens is that the House of Commons or Parliament effectively takes over negotiations and can impose conditions. This is a most extraordinary thing. It has never been the case before that Parliament has dictated how a Government should negotiate a treaty, but this is what would happen under the provisions of the amendment [...] This would be for Parliament to assume extraordinary powers in a way that has never happened before. It would be a major constitutional innovation.²⁴⁷

He also agreed with Lord Howard’s arguments that the procedures and timetables imposed by the amendment would make it possible for the Lords to “actually actively sabotage the whole process”.²⁴⁸

Lord Grocott (Labour) and Lord Dobbs (Conservative) both argued, for different reasons, that the amendment was unnecessary. Lord Grocott said that it was “otiose” to make statutory provision for the Lords to consider a

²⁴⁴ [HL Hansard, 30 April 2018, col 1853.](#)

²⁴⁵ *ibid*, col 1854.

²⁴⁶ *ibid*, cols 1854–5.

²⁴⁷ *ibid*, cols 1855–6.

²⁴⁸ *ibid*, col 1856.

motion, since it could already do so whenever it chose.²⁴⁹ He also found it a “bizarre circumstance” that “the unelected House of Lords should pass an amendment which effectively tells the House of Commons how to hold the Government to account”. In his view, the Commons “does not need any advice, still less any extra powers given to it by us—it has them already”. On this point, Lord Mackay of Clashfern (Conservative) agreed it was “arrogant in the extreme for Members of the House of Lords [...] to tell the House of Commons what to do”.²⁵⁰ Lord Dobbs pointed out the Government had already “repeatedly promised a meaningful vote” and, he said, there would “fury” and “uproar” if the Government “broke that promise and tried to offer an unacceptable vote—or no vote at all”.²⁵¹ He said the Government “cannot under any conceivable circumstances avoid a meaningful vote”. He believed the amendment was not only “irrelevant” but also “damaging” because it was “designed to undermine our negotiating position”.

Speaking in support of the amendment, Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, denied the amendment was about “creating a constitutional crisis” or “asking the Commons to become a negotiator”.²⁵² Rather, she said it was “to ask the Commons and Parliament to decide whether the outcome of the negotiations is good enough for the country”. She said the amendment would put into law the Prime Minister’s undertaking about giving both Houses a vote on the outcome of the negotiations.

Baroness Hayter set out five reasons to support the amendment.²⁵³ Firstly, she said it would ensure the withdrawal agreement was put into statute, in a way that a motion would not do. Secondly, she said it would make sure parliamentary votes were “meaningful” by ensuring the outcome would be binding on the Government. Thirdly, in order to be “meaningful”, she said the votes in both Houses must offer a “reasonable choice”, not merely a “Hobson’s choice” of a vote “either to exit on a deal if we think it is poor, or else to crash out on no deal”. Fourthly, she said the vote promised by the Government would give no role to Parliament if the Government decided to walk away without a deal, but she believed that “cannot be something that the Government decide without Parliament”. Finally, she said the Government’s promised vote said nothing about the consequences if Parliament rejected the withdrawal deal, or if no deal was reached in the first place. She argued that the amendment “in its different ways, answers all those shortcomings”.

In response, Lord Callanan, Minister of State at the Department for Exiting the European Union, declared the amendment was not “innocuous [and] measured”, but contained “a number of constitutional, practical, legal and

²⁴⁹ [HL Hansard, 30 April 2018, col 1858.](#)

²⁵⁰ *ibid*, col 1861.

²⁵¹ *ibid*, col 1862.

²⁵² *ibid*, col 1864.

²⁵³ *ibid*, cols 1864–5.

political difficulties”.²⁵⁴ He said it would “create a profound constitutional shift in terms of which branch of the state holds the prerogative to act in the international sphere”.²⁵⁵ He argued there were “very good practical reasons” why it was “a well-established feature of our constitution that the Executive represent the country in international diplomacy”. He maintained it would be “impossible for negotiators to demonstrate the flexibility necessary for an effective negotiation if they are stripped of their authority to make decisions”. He said the Executive branch must be competent to negotiate if the UK was to remain a “trusted and effective” negotiating partner.

Lord Callanan called attention to the “extremely broad” scope of subclause (5) of the new clause, declaring it would enable Parliament to give directions to the Government that “could feasibly encompass delaying or thwarting our exit completely”, which he believed “is the motivation of many of the supporters of this amendment”. He suggested the “arbitrary deadlines and milestones” would “create a perverse negotiating incentive for the EU to string out the negotiations for as long as possible”.²⁵⁶

Lord Callanan said that in opposing the amendment, he was not trying to suggest the Government was not accountable to Parliament.²⁵⁷ He repeated the Government’s commitment to bring forward a motion in both Houses on the withdrawal agreement and the terms of the future relationship as soon as possible after the negotiations have concluded. He said it would “of course” be binding on the Government—if Parliament were to reject the deal the Government had negotiated, then it could not be implemented and the UK would leave the EU automatically under the terms of Article 50.²⁵⁸ If Parliament supported the motion, then Lord Callanan reiterated that the Government would bring forward the Withdrawal Agreement and Implementation Bill, which he said would “of course [...] be amendable”. He said this would be in addition to the ratification process required under the Constitutional Reform and Governance Act 2010. Having repeated the Government’s commitments, Lord Callanan asserted that “[t]o discount these assurances is to go against the convention that assurances to Parliament can be relied upon”.

Furthermore, Lord Callanan said that the amendment was “unnecessary”, because following Dominic Grieve’s amendment to clause 9 it was “a simple legal fact” that there would be “no mechanism by which the Government can give the withdrawal agreement domestic legal effect without introducing primary legislation”.²⁵⁹

²⁵⁴ [HL Hansard, 30 April 2018, col 1866.](#)

²⁵⁵ *ibid*, col 1867.

²⁵⁶ *ibid*, col 1868.

²⁵⁷ *ibid*.

²⁵⁸ *ibid*, cols 1868–9.

²⁵⁹ *ibid*, col 1869.

The House voted in favour of the amendment by 335 votes to 244, a majority of 91.²⁶⁰

Following a Cabinet meeting which took place the day after the Government was defeated on this amendment, the Prime Minister's spokesperson said the Cabinet had "expressed its strong disappointment at the defeats inflicted on the EU (Withdrawal) Bill in the House of Lords, saying they risk tying the Government's hands behind its back in negotiations with Brussels".²⁶¹ The Prime Minister reportedly said that the Government would be "robust" when the Bill returns to the House of Commons.²⁶²

2.13 Parliamentary Approval of Negotiating Mandate (Amendment 51)

On the fourth day of report, the House voted in favour of a cross-party backbench amendment that put a new condition on the Government's ability to use the powers in clause 9 [11] to implement the withdrawal agreement. Amendment 51 made the use of these powers subject to Parliament approving a mandate for negotiations about the UK's future relationship with the EU.²⁶³

Moving amendment 51, Lord Monks (Labour) said it was time Parliament "exerted influence" on the conduct of the talks about the future relationship.²⁶⁴ He said the amendment would ensure the UK's negotiators "work to a mandate approved by Parliament to guide them in the talks". He said it was intended not as "a straitjacket or a corset", but as "a device to make sure that the Government come clean about what they are trying to do in the negotiations" through "a parliamentary vote on the main principles of what Britain would like that future relationship to be". He argued that "no one outside the innermost court of the Prime Minister really knows what the UK is trying to achieve, except in the most general and vague terms".

Seeking to pre-empt criticism that it would be unconstitutional for Parliament to establish a mandate, Lord Monks argued it "would not in fact be unprecedented", as Parliament had intervened in recent years regarding UK military intervention in the Middle East and Libya.²⁶⁵ In his view, the decision on the UK's future relationship with the EU was "just as momentous as a declaration of war" and "too important for Parliament just to stand tamely on the touchline".²⁶⁶

²⁶⁰ [HL Hansard, 30 April 2018, col 1870.](#)

²⁶¹ Joe Watts, '[Theresa May Vows to Overturn Lords Plan Which Could Stop Brexit](#)', *Independent*, 1 May 2018.

²⁶² *ibid.*

²⁶³ [HL Hansard, 30 April 2018, col 1911.](#)

²⁶⁴ *ibid.*, col 1902.

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*, col 1903.

Baroness Wheatcroft (Conservative), another signatory to the amendment, argued that giving Parliament a say would strengthen the Government's negotiating hand, as it would enable those at the negotiating table to tell their interlocutors Parliament would not accept a particular proposal.²⁶⁷ She suggested it would help the Government "to have some idea of where the red lines are where Parliament and the House of Commons, in particular, are concerned".

Lord Campbell of Pittenweem (Liberal Democrat), whose name was also on the amendment, argued that "the requirement to state the terms of mandate might once and for all force the Cabinet to clearly indicate precisely what they are seeking to achieve".²⁶⁸ In his view, a "mandate based on principles" would "not tie the hands of the Government", but would "set out in a clear and unequivocal way precisely what the objectives are".

Lord Lea of Crondall (Labour), another signatory to the amendment, suggested that the House of Commons Exiting the European Union Committee's report on *The Future UK-EU Relationship* was an example of "the sort of remit" with "the degree of specificity that is needed in a mandate".²⁶⁹ He argued the Government would get more respect in other European capitals if it was franker about what it sought from the negotiations.²⁷⁰

Lord Howarth of Newport (Labour) argued the amendment was unnecessary, as it was already clear that what the Government needed to seek in the negotiations was to "restore self-government with a minimum of economic dislocation".²⁷¹ He did not see "any point in Parliament denying the Government freedom of manoeuvre as they seek to achieve that". Lord Hamilton of Epsom (Conservative) also believed it was "quite clear" what the Government want: "a bespoke free trade deal that carries on business as we have done in the past".²⁷² He argued that if the Government did not achieve this, it was because "the EU is not prepared to give us that", and giving the Government a parliamentary mandate would "not make the slightest bit of difference".²⁷³

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, said Labour would support the amendment, as it would ensure the mandate was "approved not just by what is a rather divided Cabinet at the moment, but by Parliament, which is where the decision

²⁶⁷ [HL Hansard, 30 April 2018, col 1904.](#)

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*, col 1906; and House of Commons Exiting the European Union Committee, [The Future UK-EU Relationship](#), 4 April 2018, HC 935 of session 2017–19. Lord Lea initially referred to a report he said the Committee had published on 13 March, but then went on to quote passages from the 4 April report.

²⁷⁰ [HL Hansard, 30 April 2018, col 1907.](#)

²⁷¹ *ibid.*

²⁷² *ibid.*, col 1906.

²⁷³ *ibid.*, cols 1905–6.

should lie”.²⁷⁴

Lord Callanan, Minister of State at the Department for Exiting the European Union, acknowledged that Parliament had “a critical role in scrutinising the Government’s negotiating position”.²⁷⁵ He said the Government was fulfilling its responsibility to provide both Houses with “ample opportunities” for scrutiny, and went on to list activities ministers had undertaken in this regard, such as statements, committee sessions, speeches, papers, parliamentary appearances and engagement with stakeholders. However, he said the Government “simply cannot hold up the already tight negotiating timeline by providing for a further approval process prior to negotiations ending”. He argued it “must be for the Government, not Parliament, to set our goals for the negotiations [...] and to conduct them”. He repeated the commitments the Government had already made about giving Parliament a vote on the final deal.²⁷⁶

The House voted in favour of amendment 51 by 270 votes to 233, a majority of 37.²⁷⁷

2.14 Power to Modify the European Union (Withdrawal) Act (Amendment 53)

On day four of report, the House agreed to an amendment tabled by Lord Lisvane (Crossbench) and supported by the Government which removed ministers’ ability to use delegated powers in clause 9 [11] to modify the European Union (Withdrawal) Act itself.²⁷⁸

Clause 9 [11] would give ministers the power to make regulations to implement the withdrawal agreement (subject to certain conditions). Subclause (2) provides that these regulations “may make any provision that could be made by an Act of Parliament”, which means that ministers could use secondary legislation to amend, repeal or revoke primary legislation—what is known as a Henry VIII power. As originally drafted, clause 9(2) [11(2)] expressly provided that the power could be used to modify the European Union (Withdrawal) Act itself.

The breadth of the Henry VIII powers in the Bill as drafted has previously been criticised, particularly in respect of clause 9 [11]. The House of Lords Constitution Committee said the Bill as originally drafted “weaves a tapestry of delegated powers that are breath-taking in terms of both their scope and

²⁷⁴ [HL Hansard, 30 April 2018, col 1909.](#)

²⁷⁵ *ibid.*

²⁷⁶ *ibid.*, col 1910.

²⁷⁷ *ibid.*, col 1911. The Tellers for the Contents reported 270 votes; the Clerks recorded 271 names.

²⁷⁸ [HL Hansard, 30 April 2018, col 1933.](#)

potency”.²⁷⁹ On the use of Henry VIII powers, the Constitution Committee did not believe that the Government had “sufficiently engaged with the need for [...] safeguards”.²⁸⁰ It recommended that clause 9 [11] should be removed from the Bill.²⁸¹ The House of Lords Delegated Powers and Regulatory Reform Committee said the Bill conferred “wider Henry VIII powers than we have ever seen”.²⁸² The Committee described the power in the original clause 9(2) to amend or repeal the European Union (Withdrawal) Act by statutory instrument as “wholly unacceptable”, and also recommended that clause 9 [11] be removed from the Bill altogether.²⁸³

At report stage, Lord Judge (Crossbench), former Lord Chief Justice of England and Wales, spoke to his amendment 52A, which would have prevented the delegated powers in clause 9 [11] being used to make changes to primary legislation (ie, removing the Henry VIII element of the powers). He argued that Henry VIII powers in general gave too much power to ministers:

[T]hat single individual is by regulation empowered to override, repeal or amend primary legislation which has been enacted after both Houses have been through the processes [of scrutiny of primary legislation].

[...] in a democracy that is a remarkable law-making power given to a single individual. Vesting such power in a single individual is a very dangerous constitutional habit. Clauses such as this are inserted into primary legislation with what I at best can say is casual indifference.²⁸⁴

In Lord Judge’s view, the Henry VIII powers in clause 9 [11] specifically were “about as pointless as they can ever have been” because ministers would have only “minimal” opportunity to exercise them in the short time between the granting of royal assent to a bill authorising the withdrawal agreement and exit day (the point at which the sunset provision in the clause would end the availability of the power).²⁸⁵

Lord Lisvane, a member of the Delegated Powers and Regulatory Reform Committee, said he “respectfully commend[ed]” Lord Judge’s “excoriation” of Henry VIII clauses, agreeing with him that “too often” statutory instruments received “merely perfunctory examination”.²⁸⁶ He said that if

²⁷⁹ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill: Interim Report](#), 7 September 2017, HL Paper 19 of session 2017–19, p 2.

²⁸⁰ *ibid*, p 15.

²⁸¹ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 52.

²⁸² House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 1 February 2018, HL Paper 73 of session 2017–19, p 5.

²⁸³ *ibid*, p 9.

²⁸⁴ [HL Hansard, 30 April 2018, col 1927](#).

²⁸⁵ *ibid*, col 1928.

²⁸⁶ *ibid*, col 1929.

Lord Judge did not press his amendment, or if it was unsuccessful, his own amendment 53 was a fall-back option. Amendment 53 would amend clause 9(2) [11(2)] so that the Henry VIII power to modify primary legislation would remain, but could not be used to modify the European Union (Withdrawal) Act itself. By signing amendment 53, the Government had already indicated its support for Lord Lisvane’s proposal, something which the Delegated Powers and Regulatory Reform Committee welcomed.²⁸⁷

Responding for Labour, Lord Goldsmith said that his party also welcomed the Government’s acceptance of Lord Lisvane’s amendment, as it removed “the most egregious part of the Henry VIII clause”.²⁸⁸

Baroness Goldie, Government Whip, confirmed that amendment 53 meant the Government would not be able to use clause 9(2) [11(2)] to amend the Bill once it was an Act.²⁸⁹ She said the Government still needed to have “flexibility to respond to developments in negotiations” but noted that the decision to introduce a Withdrawal Agreement and Implementation Bill would provide another avenue to make the legislative changes required to implement the withdrawal agreement.²⁹⁰ However, even with the introduction of this second bill, she said the amended power in clause 9 would “residually [serve] as a supplementary measure to implement the more technical elements of the withdrawal agreement” in time for exit day, including potentially making changes to primary legislation.²⁹¹

Lord Judge withdrew his amendment, and amendment 53 was agreed without division.²⁹²

2.15 Dublin III Regulation: Refugee Family Reunion (Amendment 59)

On the fourth day of report, the House agreed to an amendment moved by Lord Dubs (Labour) seeking to maintain the effect of EU rules about refugee family reunion.²⁹³

Amendment 59 sought to require that the Government make arrangements, including through negotiations with the EU, to preserve the rights of those seeking asylum—including unaccompanied minors, adults and children—to join a family member, sibling or relative in the UK. These rights are currently

²⁸⁷ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), 26 April 2018, HL Paper 128 of session 2017–19, p 1.

²⁸⁸ [HL Hansard, 30 April 2018, col 1930.](#)

²⁸⁹ *ibid*, col 1932.

²⁹⁰ *ibid*, col 1931.

²⁹¹ *ibid*, col 1932.

²⁹² *ibid*, col 1933.

²⁹³ *ibid*, col 1952.

provided for under Regulation (EU) No 604/2013, which is also known as both the Dublin Regulation and the Dublin III Regulation.²⁹⁴ The amendment would also require the Government to report to Parliament within six months of the passing of the Bill, and every six months thereafter, on the progress made in negotiations with the EU to secure continued reciprocal arrangements on refugee family reunion.

The House of Commons Library has explained the operation of the Dublin III Regulation as follows:

Separate to the [UK's] Immigration Rules, EU law provides a route of entry to the UK for people who have already entered Europe as asylum seekers and have family living in the UK.

The primary objective of the Dublin III Regulation (which applies to the UK and all other EU member states) is not family reunion. Rather, its purpose is to specify a hierarchy for determining which member state should be responsible for processing an asylum claim made by someone who has entered the EU. However, the Regulation does prioritise respect for family reunion above certain other considerations, such as which EU state the person initially entered.

For example:

- Unaccompanied minors who have a family member or sibling who is legally present in another member state are eligible to be transferred to that member state, provided it is in their best interests (Article 8 of the Regulation).
- People who have a family member who has applied for or been granted international protection in another member state are eligible to be transferred to that member state, provided that they submit a written request (Articles 9 and 10). The definition of family member includes post-flight family members of people granted international protection.

The Dublin rules only determine which country a person can stay in whilst they are waiting for a decision on their asylum application. If asylum is refused, the applicant would be liable to removal to their country of origin.²⁹⁵

Moving amendment 59, Lord Dubs said his aim was to “maintain after Brexit one of the main existing legal routes to safety for unaccompanied child refugees”.²⁹⁶ He explained the Dublin procedure enabled unaccompanied

²⁹⁴ [Regulation \(EU\) No 604/2013](#).

²⁹⁵ House of Commons Library, [The UK's Refugee Family Reunion Rules: Striking the Right Balance?](#), 1 March 2018, p 16.

²⁹⁶ [HL Hansard, 30 April 2018, col 1946](#).

child refugees who are in one EU member state to join a relative in another EU country. For example, a Syrian child in France can join an uncle in Sweden, and then make an asylum claim in Sweden. Lord Dubs said the amendment was “not asking for anything new, just not to stop something that is working fairly well”.²⁹⁷ The UK’s participation in Dublin III would end when it left the EU, unless a new arrangement is negotiated. Lord Dubs recognised that the UK could not “achieve this unilaterally”, so he said the amendment would “establish that the Government will negotiate with our EU partners to maintain this legal route to safety”.²⁹⁸

Lord Dubs said estimates varied, but up to 800 or more children had been transferred to the UK under the Dublin III regulation, mainly from France and Greece.²⁹⁹ He spoke about the “desperate” situation of refugee children in the Calais area, following the removal of the ‘Jungle’ encampment, and on the Greek Islands. He said that in the absence of the Dublin Regulation, there existed only a “limited option” for UK entry clearance officers to allow applications outside the Immigration Rules; out of 20,000 applications for family reunion in these circumstances between 2013 and 2015, he said only 51 had been successful. Lord Dubs believed public opinion in the UK was “essentially humanitarian”, and in favour of taking some vulnerable child refugees.³⁰⁰

Lord Bassam of Brighton (Labour), Baroness Butler-Sloss (Crossbench) and Baroness Sheehan (Liberal Democrat) all spoke to support the amendment. Lord Bassam argued it was appropriate to legislate on this matter as it “sets a benchmark” and “gives an instruction” to the Government.³⁰¹ Baroness Butler-Sloss pointed out it was not simply a humanitarian issue, but a question of protecting children who currently enjoyed rights to come to the UK because they had family here. She acknowledged the Government “had good intentions” in this area, but felt waiting until a future immigration bill was introduced to legislate “does not go far enough”.³⁰² Baroness Sheehan said Brexit should not be about “doing away with one of the very few safe and legal routes that exists to bring some of the most vulnerable children to the UK”.³⁰³ Lord Goldsmith said Labour would “strongly support” the amendment.³⁰⁴

In response, Lord Duncan of Springbank, Parliamentary Under Secretary of State at the Northern Ireland Office and the Scotland Office, said that “having efficient and effective asylum systems” would continue to be a

²⁹⁷ [HL Hansard, 30 April 2018, cols 1946–7.](#)

²⁹⁸ *ibid*, col 1947.

²⁹⁹ *ibid*.

³⁰⁰ *ibid*, col 1948.

³⁰¹ *ibid*.

³⁰² *ibid*, col 1949.

³⁰³ *ibid*.

³⁰⁴ *ibid*, col 1950.

priority on which the UK would work closely with its EU partners.³⁰⁵ He promised that as part of the Brexit negotiations, the UK would be seeking to agree with the EU a series of measures to enable unaccompanied children in the EU to join close family members in the UK or another EU member state, but that any such agreement would require agreement and implementation by individual member states.³⁰⁶ He said the Government would bring forward “appropriate legislation as necessary” once the outcome of the negotiations was known.³⁰⁷ However, he felt that “in many cases Dublin III is simply not fit for purpose”, and “in some instances there is opposition within member states to the functioning of Dublin III”. He therefore argued that the UK needed to “go beyond” the existing arrangements and “[set] in place very clear measures which are safe and sure” to address the issues Lord Dubs had raised. He stated that to legislate now for “what is, in effect, a pre-negotiation settlement” would cause the Government difficulties.

The House voted in favour of the amendment by 205 votes to 181, a majority of 24.³⁰⁸

2.16 Sunset Clause for Power to Make Consequential Regulations (Amendment 86A)

On day four of report, the House agreed to a government amendment imposing a ten-year sunset provision on the power to make consequential regulations under clause 17(1) [22(1)].³⁰⁹

As originally drafted, clause 17(1) [22(1)] would have allowed ministers “by regulations [to] make such provision as the minister considers appropriate in consequence of this Act”. As noted above, the House agreed to amendment 86 moved by Lord Lisvane (Crossbench) to amend clause 17(1) [22(1)] so the power to make consequential regulations could be used only when “necessary”, not simply when the minister considered it “appropriate”.³¹⁰

Clause 17(2) [22(2)] provides that this power could be used to modify both primary and secondary legislation. The fact it could be used to modify primary legislation means that it could be used as a Henry VIII power. However, clause 17(3) [22(2)] imposes a restriction on using the power as a Henry VIII power to modify new primary legislation made after the European Union (Withdrawal) Bill was given Royal Assent. Assuming that occurred within the 2017–19 session, this restriction would mean that:

- Until the end of the 2017–19 session, the power could be used

³⁰⁵ [HL Hansard, 30 April 2018, col 1950.](#)

³⁰⁶ *ibid*, cols 1950–1.

³⁰⁷ *ibid*, col 1951.

³⁰⁸ *ibid*, col 1952.

³⁰⁹ *ibid*, col 1984.

³¹⁰ *ibid*, col 1983.

- to modify any primary legislation.
- From the 2019–20 session onwards, the power could be used to modify primary legislation passed before the end of the 2017–19 session. It could not be used to modify new primary legislation passed in the 2019–20 session or later.

This restriction would not apply if the power was being used to modify an enactment other than primary legislation. In other words, this restriction would only apply if the power was being used as a Henry VIII power.

The House of Lords Constitution Committee found the power in clause 17(1) [22(1)] was “very broad in scope, has the capacity to go well beyond what are ordinarily understood to be consequential matters and includes a Henry VIII power”.³¹¹ It recommended that the power to make consequential provisions be removed from the Bill altogether.³¹²

Government amendment 86A introduced a further time restriction on the power in clause 17(1) [22(1)], so that it would cease to be available ten years from exit day. This new restriction would apply to all uses of the power, not just to using it as a Henry VIII power. Moving the amendment, Lord Callanan, Minister of State at the Department for Exiting the European Union, said it was in response to “valuable concerns” raised at committee stage about the potential misuse of the power.³¹³ He said it was unusual for there to be a sunset provision on a power to make consequential amendments, but “given the unique nature of this Bill”, this was an “exceptional case”.³¹⁴ He explained the Government had arrived at the figure of ten years as “the consequences of the Bill may only come to light long after our exit from the EU” and it was thought that ten years “should ensure that the majority of consequential amendments can be made”.³¹⁵ The amendment was agreed to without division.

Lord Beith (Liberal Democrat), a member of the Constitution Committee, observed that ten years was the longest sunset period he had ever heard of in a bill, but nevertheless “some date by which to end these rather wide powers is welcome”.³¹⁶ The House of Lords Delegated Powers and Regulatory Reform Committee concurred that the sunset provision was “an improvement” to the Bill.³¹⁷

³¹¹ House of Lords Constitution Committee, [European Union \(Withdrawal\) Bill](#), 29 January 2018, HL Paper 69 of session 2017–19, p 53.

³¹² *ibid*, p 54.

³¹³ [HL Hansard, 30 April 2018, col 1983](#).

³¹⁴ *ibid*, cols 1983–4.

³¹⁵ *ibid*, col 1984.

³¹⁶ *ibid*.

³¹⁷ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), 26 April 2018, HL Paper 128 of session 2017–19, p 2.

Government amendment 117B was agreed to without division.³¹⁸ This amended paragraph 28 [38] of schedule 8 to make clear that although there is a ten-year sunset on using the regulation-making power in clause 17(1) [22(1)], any regulations made before the cut-off point would continue in force and would not automatically expire when the power to make new regulations ceased.

2.17 Northern Ireland Border Arrangements (Amendment 88)

On day five of report, the House agreed to amendment 88 by 309 votes to 242.³¹⁹ Amendment 88 inserted a new clause [13] into the Bill, subclause (1) of which would require Ministers of the Crown, in exercising powers under the Bill, to act in a way compatible with the Northern Ireland Act 1998 and that they must:

(b) have due regard to the joint report from the negotiators of the EU and the United Kingdom Government on progress during phase I of negotiations under Article 50 of the Treaty on European Union.³²⁰

Subclause (2) would mean that regulations made under clauses 7 [9], 8³²¹, 9 [11] or 17 [22] of the Bill could not be made which:

(a) diminish any form of North-South cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of co-operation, including the continued operation of the North-South implementation bodies, or

(b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature—

- (i) physical infrastructure, including border posts,
- (ii) a requirement for customs or regulatory compliance checks,
- (iii) a requirement for security checks,
- (iv) random checks on goods vehicles, or
- (v) any other checks and controls,

that did not exist before exit day and are not subject to an agreement between Her Majesty's Government and the Government of Ireland.³²²

Amendment 88 was a cross-party amendment, tabled by Lord Patten of Barnes (Conservative), Lord Murphy of Torfaen (Labour), Baroness O'Neill

³¹⁸ [HL Hansard, 8 May 2018, col 141.](#)

³¹⁹ [HL Hansard, 2 May 2018, cols 2116–18.](#)

³²⁰ *ibid*, col 2073.

³²¹ Clause 8 of the Bill had been removed on day three of report by government amendment 47A, see section 2.11 of this briefing for further information.

³²² [HL Hansard, 2 May 2018, col 2073.](#)

of Bengarve (Crossbench) and Baroness Suttie (Liberal Democrat). On moving the amendment, Lord Patten explained that it reflected what he “understood to be the Government’s policy” on a frictionless border and the relationship between the border and the Good Friday Agreement.³²³ However, he argued that despite the Government’s intentions, the amendment should be put into the Bill because it would support the Prime Minister’s position in the face of what he described as “the over-the-cliff, on-to-the-rocks Brexit” which he believed was supported by some members of the House of Commons.³²⁴ Lord Patten spoke to the relationship between a frictionless border and trade but also asserted that the “border is closely related to the survival of the Good Friday Agreement”.³²⁵ He expressed concern that security installations could produce “the exact opposite of security”.³²⁶ Lord Murphy said the purpose of the amendment was to enshrine the principles of the Good Friday Agreement in the Bill.³²⁷

On the functioning of the amendment, Lord Alderdice (Liberal Democrat) expressed concern that subclause 2(b)(iii) could restrict the operation of potentially necessary security on the border in the future. He said that the restriction on the creation of a requirement for security checks, which did not exist before exit day, under 2(b)(iii) combined with a requirement that an agreement be reached between the UK and Irish Governments, could mean that security risks were not addressed “promptly”.³²⁸ However, Lord Carlile of Berriew (Crossbench) said that in his view Lord Alderdice had misinterpreted the amendment. Lord Carlile argued that whilst it did not allow “an intergovernmental requirement” for security checks, there was no “absolutely no question that security checks will be required from time to time”.³²⁹ Lord Campbell of Pittenweem (Liberal Democrat) argued that the amendment’s function was restricted to the use of powers by ministers conferred on them under the Bill and that this did not therefore “preclude in any circumstances, nor could it, the exercise of other powers for the purpose of security”.³³⁰

Several Members expressed concern that the amendment’s requirement that changes in border arrangements would need to be subject to an agreement between the UK and Irish Governments could be perceived as a move toward joint authority. For example, Lord King of Bridgwater (Conservative) said that whilst he believed the intention was good,³³¹ he contended the last line of the amendment could introduce “something like a touch of joint authority”.³³² Lord Empey (Ulster Unionist Party) argued that this is what it

³²³ [HL Hansard, 2 May 2018, col 2073.](#)

³²⁴ *ibid.*

³²⁵ *ibid.*, col 2076.

³²⁶ *ibid.*

³²⁷ *ibid.*, col 2107.

³²⁸ *ibid.*, col 2081.

³²⁹ *ibid.*, col 2082.

³³⁰ *ibid.*, col 2092.

³³¹ *ibid.*, col 2089.

³³² *ibid.*

would in effect create whereas Lord Bew (Crossbench) described it as “a strong hint”.³³³ Lord Murphy responded to these points by arguing that the line was present in the amendment to reflect the position of the British and Irish Governments as joint guarantors to the Good Friday Agreement.³³⁴ Lord Trimble (Conservative) questioned why there was no reference to “the people of Northern Ireland, Northern Ireland Assembly or the Northern Ireland Executive”.³³⁵ Lord Bew said although there was a “great deal of spirit” behind the amendment he believed that the failure to mention the Good Friday Agreement, as opposed to the Northern Ireland Act 1998, was a problem.³³⁶ He argued this was because the Act did not signal, as the Agreement did, that the Agreement was dependent on the agreement between the parties to it.³³⁷ Lord Murphy argued that the Northern Ireland Act 1998 “incorporated a great deal of the Agreement and was based on the principle of the consent of the people of Northern Ireland”.³³⁸

On 16 August 2017, the UK Government published its position paper on Northern Ireland and Ireland.³³⁹ In that paper, the Government stated that it wished to:

- Uphold the Belfast (‘Good Friday’) Agreement in all its parts.
- Maintain the Common Travel Area and associated rights.
- Avoid a hard border for the movements of goods.
- Aim to preserve North-South and East-West cooperation, including on energy.³⁴⁰

The Government argued that “it was clear” that the high-level objectives of the UK Government, the Irish Government and the EU were “wholly aligned” with regards to these issues.³⁴¹

Responding to the debate on day five of report, Lord Duncan of Springbank, Parliamentary Under Secretary of State at the Northern Ireland Office and Scotland Office, said that many of the elements of the amendment were “exact statements” of government policy.³⁴² However, the Minister argued that the second half of amendment 88 consisted of political rather than legislative statements and that these left a “conspicuous ambiguity”.³⁴³ The Minister said that the Government intended to return to the House with

³³³ [HL Hansard, 2 May 2018, cols 2103 and col 2096 respectively.](#)

³³⁴ *ibid*, col 2107.

³³⁵ *ibid*, col 2085.

³³⁶ *ibid*, col 2096.

³³⁷ *ibid*.

³³⁸ *ibid*, col 2108.

³³⁹ HM Government, [Northern Ireland and Ireland: Position Paper](#), 16 August 2017.

³⁴⁰ *ibid*, p 1.

³⁴¹ *ibid*, p 2.

³⁴² [HL Hansard, 2 May 2018, col 2110.](#)

³⁴³ *ibid*.

wording set out in another bill that would achieve the same objective:

It is important to recognise that it is the intention of the Government to return not with ambiguous statements which may or may not be subject to misinterpretation but to return in the appropriate bill with the exact, detailed language which will give the absolute confidence that we must have in this law. That is why we are unable to support the amendment [...]³⁴⁴

2.18 Future Interaction with the Law and Agencies of the EU (Amendment 93)

On day six of report, the House agreed an amendment on the UK's future interaction with the law and agencies of the EU, by 298 votes to 227.³⁴⁵ Amendment 93 was a cross-party amendment in the names of the Lord Bishop of Leeds, Lord Goldsmith (Labour), Baroness McIntosh of Pickering (Conservative) and Lord Teverson (Liberal Democrat). The amendment added a new clause [18] which would explicitly provide that nothing in the Bill could prevent the UK from:

- (a) replicating in domestic law any EU law made on or after exit day, or
- (b) continuing to participate in, or have a formal relationship with, the agencies of the European Union after exit day.

Moving the amendment, the Lord Bishop of Leeds said he was doing so for two principal reasons.³⁴⁶ Firstly, to “assist the Government” in shaping its case for the UK's future relationship with the EU. Secondly, he argued that it was consistent with amendment 49, agreed by House on day four of report.³⁴⁷ The Bishop of Leeds said the amendment was based on commitments made by the Prime Minister in her Mansion House speech on 2 March 2018, stating:

[In her speech] [T]he Prime Minister confirmed for the first time that the UK will seek to maintain a formal relationship with certain EU agencies after Brexit. She further acknowledged that the terms of the future UK-EU relationship may see the UK Parliament take the step of replicating certain provisions of EU law.³⁴⁸

³⁴⁴ [HL Hansard, 2 May 2018, col 2110.](#)

³⁴⁵ [HL Hansard, 8 May 2018, cols 27–30.](#)

³⁴⁶ *ibid*, col 11.

³⁴⁷ Amendment 49 was a cross-party amendment that set out a procedure for parliamentary approval of the outcome of negotiations with the EU. Dubbed the ‘meaningful vote’ amendment it was agreed on division by 335 votes to 244, and is discussed in more detail in section 2.12 of this Briefing.

³⁴⁸ [HL Hansard, 8 May 2018, col 12.](#)

The Lord Bishop quoted sections from the speech, including the Prime Minister saying that:

We will also want to explore with the EU, the terms on which the UK could remain part of EU agencies such as those that are critical for the chemicals, medicines and aerospace industries [...] We would, of course, accept that this would mean abiding by the rules of those agencies and making an appropriate financial contribution.³⁴⁹

He also spoke to other parts of the Mansion House speech, saying that the Prime Minister went on to argue that membership of EU agencies would be the “only way to ensure that products need[ed] to undergo only one series of approvals in one country”.³⁵⁰ In addition the Bishop of Leeds said that the Prime Minister believed that it would allow the UK to contribute its technical expertise in setting and enforcing appropriate rules governed by EU agencies. On the subject of replacing EU agencies, the Bishop of Leeds further expressed concern that replicating existing bodies such as the European Maritime Safety Agency would be immensely complex and would “put a huge strain on the civil service taking many years to negotiate”.³⁵¹ He concluded that, in his opinion, the amendment would not place an additional burden on the Government, and further that it was right for the House to send the amendment back to the Commons because the Government’s policy was not elucidated during discussion of these issues at the Commons’ stages of the Bill:

It is fair to say that, although amendments relating to EU agencies were rejected in the House of Commons, that was possibly because the Government had not at that point announced their policy position. Now that their policy position is clear, sending this amendment back to the Commons would simply give an opportunity for further debate on future UK-EU co-operation.³⁵²

Baroness McIntosh of Pickering echoed the Lord Bishop’s speech, and expressed additional concern for the future of British staff working for agencies such as the European Environment Agency based in Denmark many of whom “are married to Danes, Swedes or people of other nationalities”.³⁵³

Lord Teverson, chair of the House of Lords European Union Committee’s Energy and Environment Sub-Committee, also expressed concern about evidence submitted to the Committee when it examined the UK’s withdrawal from the EU and the environment. He stated that witnesses from

³⁴⁹ [HL Hansard, 8 May 2018, col 12](#). The Prime Minister’s speech in full is available here: Prime Minister’s Office and 10 Downing Street, ‘[PM Speech On Our Future Economic Partnership with the European Union](#)’, 2 March 2018.

³⁵⁰ [HL Hansard, 8 May 2018, col 13](#).

³⁵¹ *ibid.*

³⁵² *ibid*, cols 13–14.

³⁵³ *ibid*, col 15.

UK industry had said they “did not want to have to manufacture a third set of rules and regulations—not just for North America and the EU but our own as well”.³⁵⁴ Lord Teverson also argued that retaining the UK’s involvement in EU agencies would help maintain “information, contact and networking, which otherwise we will forsake”.³⁵⁵

The amendment was supported by several other Members who spoke in the debate.³⁵⁶

However, Lord Brown of Eaton-under-Heywood (Crossbench) expressed concern that the amendment would weaken the Government’s negotiating position.³⁵⁷ Lord Hannay of Chiswick (Crossbench) argued that it did not require the Government to achieve anything in negotiations, but rather it would leave the possibility of future cooperation open.³⁵⁸ Lord Brown said he did not agree because otherwise it would make no “sense to move an amendment that is not intended to have any effect on the Government as they pursue this legislation”.³⁵⁹ In addition, Lord Adonis (Labour) argued the amendment would have “zero impact” as he could not see anything in the Bill what would prevent the UK from having a future relationship with EU agencies.³⁶⁰

Baroness Hayter of Kentish Town, Shadow Deputy Leader of the House spoke in favour of the amendment, stating that she disagreed with both Lord Brown and Lord Adonis and viewed the amendment as important and meaningful because “it would restrict the pretty wide powers given to ministers in the Bill”.³⁶¹ Baroness Hayter argued it was important so that the powers in the Bill could not be used to prevent the UK from implementing “necessary” EU rules or ways of working which would “frustrate our participation in any of these agencies”.³⁶² She also agreed with the Bishop of Leeds that the amendment was consistent with the Prime Minister’s stated aims in her Mansion House speech.

Responding to the amendment, Lord Callanan, Minister of State at the Department for Exiting the European Union, said that, whilst he understood the sentiment behind the amendment, the Government considered its inclusion in the Bill would be “both completely unnecessary and totally inappropriate”.³⁶³

³⁵⁴ [HL Hansard, 8 May 2018, cols 17–18.](#)

³⁵⁵ *ibid*, col 18.

³⁵⁶ For example: Lord Haskell (Labour), col 16; Lord Cormack (Conservative), col 16; Lord Dykes (Crossbench), cols 16–17; and Lord Whitty (Labour), col 19,

³⁵⁷ *ibid*, col 20.

³⁵⁸ *ibid*, col 21.

³⁵⁹ *ibid*.

³⁶⁰ *ibid*.

³⁶¹ *ibid*.

³⁶² *ibid*.

³⁶³ *ibid*, col 23.

He said that nothing in the Bill could bind the actions of a future Parliament:

A provision which essentially provides that future Parliaments can mirror EU law, which this Bill neither requires nor prevents, is therefore completely unnecessary. Nor does the Bill prevent Parliament approving any future relationship between the UK and the EU, including its agencies and institutions.³⁶⁴

Lord Callanan also stated if there were to be a future role in the UK for any EU agency as part of the withdrawal agreement it would be legislated for in the Government's proposed Withdrawal and Implementation Bill.³⁶⁵ He said the same would apply to any future relationships, "which will, as necessary, be legislated for in due course".³⁶⁶ Lord Callanan also expressed concern that, even if it were not the Bishop of Leeds' intention, the amendment could be seen as a way to save, or partially save, the European Communities Act for the purposes of mirroring changes in EU law after exit.³⁶⁷

2.19 Date of Exit Day (Amendments 95, 99 and 74)

On the sixth day of report, the House agreed to a package of amendments, moved by the Duke of Wellington (Conservative) and supported by Labour and the Liberal Democrats, which removed the fixed date of exit day from the Bill. The House voted in favour of amendment 95 by 311 votes to 233, a majority of 78.³⁶⁸ The other amendments in the package, 99 and 74, were agreed without division.³⁶⁹

In the Bill as introduced in the House of Lords, 'exit day' was defined in clause 14 [19] 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
- 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.

³⁶⁴ [HL Hansard, 8 May 2018, col 23.](#)

³⁶⁵ *ibid*, col 24.

³⁶⁶ *ibid*.

³⁶⁷ *ibid*.

³⁶⁸ *ibid*, col 41.

³⁶⁹ *ibid*, cols 45 and 110.

As originally drafted, the Bill did not give a date for exit day, but gave ministers the power to specify it later in regulations. 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 the Government was making this change “to remove any confusion or concern about what ‘exit day’ means”.³⁷⁰

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 European Communities Act 1972 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 in the Commons 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 Kingdom ceases to be a member of the EU is different from that specified in the definition”.³⁷¹

Theresa May said the Government had decided to accept Oliver Letwin’s amendments because “[i]t is important we have the same position legally as the European Union”.³⁷² 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.³⁷³

At report stage in the Lords, the Duke of Wellington proposed in his amendments 95, 99 and 74 that the wording of the Bill should revert to the original drafting where no exit date was specified.³⁷⁴ In his view, it was “certainly unnecessary” for the Government to fix the date of exit day in domestic legislation, because the date of the UK’s exit from the EU was determined as a matter of international law by Article 50. He argued that a date “should not be defined and specified in the Bill”, in case it became necessary “in the national interest to agree an extension”, as provided for in Article 50. He noted that the House of Commons Exiting the European Union Committee had said fixing the date in the Bill would remove flexibility and “create significant difficulties if negotiations went down to the 59th minute of the 11th hour”.³⁷⁵

³⁷⁰ Jasper Jolly, [‘The Government Just Revealed It Will Put the Official Brexit Time into Law’](#), *City AM*, 9 November 2017.

³⁷¹ 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.

³⁷² [HC Hansard, 20 December 2017, col 1065](#).

³⁷³ *ibid*, cols 1218–22.

³⁷⁴ [HL Hansard, 8 May 2018, col 32](#).

³⁷⁵ *ibid*; and House of Commons Exiting the European Union Committee, [European Union \(Withdrawal\) Bill](#), 17 November 2017, HC 373 of session 2017–19, p 6.

The Duke said the purpose of his amendments was to give the House of Commons “another opportunity [...] to think about whether including the date is really expedient”.³⁷⁶ He questioned the point of putting the date in the Bill when it might have to be changed in circumstances that could not currently be foreseen.³⁷⁷ He suggested that removing the fixed date from the Bill would give the Government “a bit more flexibility to secure and obtain ratification of the best possible deal”.

Lord Hannay of Chiswick (Crossbench), a signatory to the amendment, argued that since the date of exit day had not originally been in the Bill, the Government’s choice to add it in “was a purely political decision”.³⁷⁸ In his view it was “premature” to rule out at this stage the possibility of seeking an extension to the Article 50 negotiating period. Speaking for the Liberal Democrats, Lord Newby agreed. He said the package of amendments made in the Commons was “a very silly move” by the Government, done “only under pressure” from different parts of the Conservative Party, whereas “the original position of having flexibility in the Bill made eminent sense”.³⁷⁹

Lord Grocott (Labour), opposed the amendment. He suggested that the possibility of prolonging the negotiating period would simply ensure that “work expands to fill the time available”.³⁸⁰ He also feared that the “undoubted interpretation from the world outside” would be that the amendment was “designed to put further down the track the date on which we shall leave the European Union”.³⁸¹

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, spoke in favour of the amendment. She said that being “curtailed by a strict date” could put the UK’s negotiators “at a disadvantage” compared to the EU, which was “not so constrained”.³⁸² She pointed out that the wording of Article 50 states that the EU Treaties will cease to apply to the UK “from the date of entry into force of the withdrawal agreement or, failing that, two years after [...] notification”. She suggested this meant the withdrawal agreement could contain a leaving date after the end of the two-year period, perhaps one or two weeks later to “allow the last-minute arrangements to be made”. She thought that if this suited all parties, including the Government, “it would seem silly not to be able to do that”. She urged Members to support the amendment, to “remove the straitjacket the Government inserted at the behest not of the negotiators, but of certain ardent Brexiteers”.

³⁷⁶ [HL Hansard, 8 May 2018, col 32.](#)

³⁷⁷ *ibid*, col 33.

³⁷⁸ *ibid*.

³⁷⁹ *ibid*, col 34.

³⁸⁰ *ibid*.

³⁸¹ *ibid*, col 35.

³⁸² *ibid*, col 38.

Lord Callanan, Minister of State at the Department for Exiting the European Union, said he saw “no reason” to change the Bill’s provisions on exit day.³⁸³ He pointed out that the Bill had left the Commons “reflecting the reality of international law”, as well as the concerns of MPs who had been on both sides of the referendum campaign. He said he could not see why the amendments were seeking to restore the original drafting “when that drafting was considered at great length, on many occasions, and was rejected” in the Commons.

Following the Duke of Wellington’s amendments, the Bill now states in clause 19 that exit day is “such day as a Minister of the Crown may by regulations appoint”. Paragraph 14 of schedule 7 provides that such regulations must be made using the affirmative procedure.

2.20 European Economic Area (Amendment 110A)

On the final day of report, the House voted in favour of a cross-party backbench amendment concerning the European Economic Area (EEA). The amendment would prevent the Government from bringing many of the clauses of the Bill into force until it adopted a negotiating objective to ensure that an international agreement is made which would enable the UK to continue to participate in the EEA after exit day. Amendment 110A was agreed on division by 247 votes to 218, a majority of 29.³⁸⁴

Moving the amendment, Lord Alli (Labour) said the amendments the House had already passed on a customs union (amendments 1 and 4) were “only one half of the equation”, as a customs union would deal only with goods.³⁸⁵ He argued a framework was also needed to deal with trade in services. Since the UK had a trade surplus with the EU in services, he believed a customs union with the EU that covered goods and that did not have “an EEA equivalent” covering services would “damage our profitable export business and therefore the jobs and livelihoods of many thousands of people”.

Lord Alli argued that while the EEA was similar to the EU single market, the two were not identical.³⁸⁶ He said EEA membership would not involve the common agricultural policy, the common fisheries policy, political integration or arbitration through the European Court of Justice (ECJ). He argued membership of the EEA would offer “flexibility in control over free movement of labour and people”. He believed the UK’s access to European markets would be “radically improved” by continued participation in the EEA. He expressed the hope that the “voice of business” would be heard and that “common sense will prevail over political dogma”. He suggested it

³⁸³ [HL Hansard, 8 May 2018, col 39.](#)

³⁸⁴ *ibid*, col 80. The Tellers for the Contents reported 245 votes; the Clerks recorded 247 names. The Deputy Speaker later clarified that 247 was the correct number, not 245 as announced in the Chamber (*ibid*, col 105).

³⁸⁵ *ibid*, col 57.

³⁸⁶ *ibid*.

was “up to the elected House to decide on the EEA”, but by voting for the amendment, the Lords would give the Commons the opportunity to take that decision.³⁸⁷

Baroness Verma (Conservative), another signatory to the amendment, echoed many of Lord Alli’s points.³⁸⁸ She argued that remaining within the EEA would “offer business certainty” and would give the UK “influence through the many committee networks that exist for non-EU members in the EEA”. She believed continued EEA membership would send “a strong message” to both the EU and to other countries with which the UK sought to conclude free trade agreements that the UK was a “trusted” partner, “a nation looking outward, and stronger for our relationship within the EEA”.³⁸⁹

Lord Mandelson (Labour), a former Business Secretary and European Union Trade Commissioner, also argued that having voted in favour of the customs union “to stop the imposition of trade barriers that would decimate our manufacturing base”, the House should “do the same for Britain’s service industries as well”.³⁹⁰ He noted that in the case of goods, if there was no preferential trade agreement between the UK and the EU, World Trade Organisation (WTO) rules would provide a fall-back option. However, he argued there were no effective WTO rules to fall back on for cross-border trade in services. He believed there was “almost no precedent” for a free trade agreement covering services, that it would be “extremely hard” to negotiate one, and that it was “not possible, given EU rules, and the red line of the British Government, for us to achieve anything like the sort of trade agreement that the Government speak of”.³⁹¹

Lord Mandelson therefore believed that continued EEA membership was “the only dependable means available to us outside the European Union” to maintain access to the EU market for trade in services.³⁹² He said it would give the UK “what amounts to free trade in services” through “coverage by right of all the regulatory standards and rules, harmonised within Europe’s single market”. He believed that without this access, the impact on cross-border delivery of services to Europe would be “savage”, and the UK economy “simply cannot afford this loss”. He accepted that being in the EEA but not in the EU would present the UK with “a dilemma over rule-making”, but he suggested that with its large economy, and as a former EU member state, the UK would be “in a reasonable position to frame the negotiations over our EEA membership”.³⁹³ He felt the UK “would be entitled to expect and receive some flexibility” as it would also benefit the EU27 to keep trade barriers to a minimum.

³⁸⁷ [HL Hansard, 8 May 2018, col 58.](#)

³⁸⁸ *ibid*, cols 59–60.

³⁸⁹ *ibid*, col 60.

³⁹⁰ *ibid*.

³⁹¹ *ibid*, col 61.

³⁹² *ibid*.

³⁹³ *ibid*, cols 61–2.

Lord Wallace of Saltaire (Liberal Democrat) said that during the referendum, the leave campaign had argued the UK had to leave the customs union and the single market to be able to negotiate its own free trade deals outside the EU and to determine its own regulatory standards.³⁹⁴ However, he said these arguments had “evaporated”, as a number of countries had made it “quite clear that they are not prepared to offer us anything better than we would get as a member of the European Union” and the Government had said it wanted to maintain the existing “high standards of regulation”. He questioned what arguments there could now be to support staying out of the customs union and single market.

Speaking against the amendment, Lord Forsyth of Drumlean (Conservative) questioned “what on earth are we, in this unelected House, doing asking the House of Commons to think again?”³⁹⁵ He pointed out that a backbench Labour amendment on EEA membership was defeated at committee stage in the House of Commons.³⁹⁶ Intervening, Lord Kinnock (Labour) said a “great majority” of Labour MPs had supported that amendment and the “very small” margin of defeat demonstrated “the very strong body of opinion” in the House of Commons in favour of the principle set down in Lord Alli’s amendment.³⁹⁷ Continuing, Lord Forsyth said that being in the EEA but outside the EU would be “the worst of all worlds” and “certainly not” in the interest of the country.³⁹⁸ He suggested that supporting the amendment would be to “fly in the face of the biggest democratic vote in our history”.³⁹⁹ He argued that Parliament would have its say in a vote on the final agreement reached with the EU, and to support the amendment would undermine the Government’s negotiating hand by suggesting that the Prime Minister’s objectives of a trade agreement with the EU could not be achieved.

Lord Bilimoria (Crossbench), another signatory to the amendment, said EEA membership was “not the best option”, but should be considered “the least worst option” if the UK had to leave the EU.⁴⁰⁰ He suggested the Irish border situation would not be solved by a customs solution alone, but free movement of people, capital, goods and services would also be required. He said the EEA solution “incorporates the four freedoms but also gives us

³⁹⁴ [HL Hansard, 8 May 2018, cols 62–3.](#)

³⁹⁵ *ibid*, col 64.

³⁹⁶ [HC Hansard, 13 December 2017, cols 563–6.](#) Labour’s amendment in the Commons was defeated by 314 votes to 292, a majority of 22. The amendment, new clause 22, would have provided that: “No minister may, under this Act, notify the withdrawal of the United Kingdom from the EEA Agreement, whether under Article 127 of that Agreement or otherwise”. Heidi Alexander (Labour MP for Lewisham East), who tabled this amendment, said that it “would not decide on the substantive question of EEA membership, but would guarantee that at a future moment, the House would have its say” ([HC Hansard, 15 November 2017, col 426](#)).

³⁹⁷ [HL Hansard, 8 May 2018, cols 58 and 64.](#)

³⁹⁸ *ibid*, col 65.

³⁹⁹ *ibid*, cols 65–6.

⁴⁰⁰ *ibid*, col 68.

freedom”, as it would not require membership of the customs union, did not cover the common agricultural or fisheries policies, was not regulated by the ECJ and offered “some flexibility” on movement of people. However, Lord Green of Deddington (Crossbench) countered that it was “not as simple as that”, pointing out that Norway (an EEA member) had never exercised this flexibility.⁴⁰¹ He said to do so would require them to prove “severe difficulties in the labour market”, and to review the arrangement every three months.

Lord Howarth of Newport (Labour) agreed that EEA membership entailed “accept[ing] the principle of free movement of people”.⁴⁰² He also argued that non-EU members of the EEA had to enact “a large volume of legislation similar to that of the European Union”, with a right of consultation but no representation in the EU’s governing institutions.⁴⁰³ Furthermore, he said that paying in “considerable sums” to schemes to reduce economic and social disparities within the EEA, particularly within newer EU member states, was a condition of EEA membership.⁴⁰⁴ He felt it was “clear” that remaining in the EEA would mean “we would not have taken back control of our laws, our borders or our money”, which was what people had voted to do in the referendum.

Baroness Altmann (Conservative) argued that Lord Howarth’s analysis “omit[ted] important elements”, and that in fact, being in the EEA was “consistent with the referendum vote”.⁴⁰⁵ For example, she said there would be “no more risk of ever-closer union”, as the EEA was “strictly an economic union”. She argued that the EEA did not cover policy areas that “British people may be concerned about as EU members”, such as VAT, justice and home affairs or commercial policy. She said EEA membership did not present “the same risk to our sovereignty” as EU membership, since decisions were taken by unanimity, not qualified majority, EEA law did not have direct effect (unlike EU law), and “in extremis, a non-EU EEA member state could veto proposed rules, as Norway has done in the past”. In her view, the EEA offered “a way out of the impasse our negotiations are in”.⁴⁰⁶

Speaking for Labour, Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, explained why her party was calling on its Members to abstain on this amendment.⁴⁰⁷ She said she agreed “wholeheartedly” with Lord Alli that a deal on services was necessary for the UK economy to thrive, but in her view, the “particular model defined may have some shortcomings”. The non-EU members of the EEA—Norway, Iceland and Liechtenstein—are all members of the European Free Trade

⁴⁰¹ [HL Hansard, 8 May 2018, col 68.](#)

⁴⁰² *ibid*, col 72.

⁴⁰³ *ibid*, col 71.

⁴⁰⁴ *ibid*, col 72.

⁴⁰⁵ *ibid*, col 76.

⁴⁰⁶ *ibid*, col 75.

⁴⁰⁷ *ibid*, cols 77–8.

Association (EFTA), along with Switzerland.⁴⁰⁸ Baroness Hayter suggested that EFTA might not welcome the UK, with its population more than four times the size of EFTA's, as a new member.⁴⁰⁹ Furthermore, she said the UK would have to negotiate new rules if it wanted to be in both the EEA (as a non-EU member state) and be in a customs union with the EU, as she said the current EFTA rules would not allow this. She argued that since amendment 51 had been passed, the Government's mandate for negotiating the future relationship with the EU would have to be approved by Parliament, and that was the point at which Parliament should "help steer the course for our future long-term trading relationship", including deciding whether the UK should be in or out of a customs union or the internal market.

Responding for the Government, Lord Callanan, Minister of State at the Department for Exiting the European Union, explained the UK had reached agreement with the EU at the March meeting of the European Council that the EU's international agreements would continue to apply to the UK during the implementation period (or transition period as the EU refers to it).⁴¹⁰ This would include the EEA Agreement, so the UK would remain within the EEA during the transition period. However, this would cease at the end of the transition period. Lord Callanan argued that seeking to remain in the EEA after that would not be compatible with the Government's aims, nor the referendum result:

Seeking to negotiate to remain in the EEA Agreement would not pass the first test that the Prime Minister set out for our future economic partnership with the EU. It would not deliver control of our borders or our laws. On borders, it would mean we would continue to have to accept all four freedoms of the single market, including freedom of movement. On laws, it would mean the UK having to implement new EU legislation on which, in future, we would have little influence and, of course, no vote. This would not deliver on the British people's desire as expressed in the referendum to have more direct control over decisions that affect their daily lives.⁴¹¹

The Government was defeated, and clause 110A was agreed. As amended, clause 19 [24] now provides that certain provisions of the Bill would come into force on the day the Bill is passed, and the remaining provisions (including those repealing the European Communities Act 1972 and retaining EU law in domestic law) would be brought into force by subordinate legislation. However, these remaining provisions could not be brought into force until the Government made continued participation in the EEA a negotiating objective; and the requirement for such a negotiating objective

⁴⁰⁸ European Free Trade Association, '[The Basic Features of the EEA Agreement](#)', accessed 9 May 2018.

⁴⁰⁹ [HL Hansard, 8 May 2018, col 77.](#)

⁴¹⁰ *ibid*, col 79.

⁴¹¹ *ibid*.

could not be modified by secondary legislation under the Act.

2.21 Powers of Sifting Committees (Amendments 70 and 77)

On day six of report, the House agreed amendment 70 by 225 votes to 194.⁴¹² This related to the powers available to sifting committees that would be established under the Bill and gave the Houses the power to require the affirmative procedure to be used for negative instruments under certain circumstances. A further amendment, Amendment 77, was consequential on 70 and agreed without division.⁴¹³ Amendment 70 was a cross-party amendment tabled in the names of Lord Lisvane (Crossbench), Baroness Smith of Basildon (Labour), Lord Norton of Louth (Conservative) and Lord Sharkey (Liberal Democrat). The agreement of amendment 70 meant that government amendments 70A and 70BB could not be called due to pre-emption.⁴¹⁴

At committee stage in the Commons, the Government accepted amendments tabled by Charles Walker MP, chair of the House of Commons Procedure Committee, to establish a new Commons sifting procedure for secondary legislation made under clauses 7 [9], 8⁴¹⁵ or 9 [11] of the Bill.⁴¹⁶ These amendments provided that before making a negative instrument under these clauses, a minister would have to 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 had ten sitting days to make a recommendation about whether it agreed this was the appropriate procedure. However, the minister would not be bound by this recommendation, and could still have proceeded with making a negative instrument even if the committee had recommended against it. The minister could also have proceeded with making a negative instrument if the committee failed to produce a recommendation within ten sitting days.⁴¹⁷

This sifting procedure had been criticised during consideration of the Bill in the House of Lords because it would allow ministers to ignore a committee's recommendation to use the affirmative rather than the negative procedure. For example, on day eight of the Lords committee stage, Lord Lisvane, a former Clerk of the House Commons, described this feature of the Bill as “extraordinary” and “very concerning”.⁴¹⁸ He moved an amendment which would have given either House the ability to require that the affirmative procedure apply, describing this as “a procedure with actual teeth”, as recommended by the House of Lords Delegated Powers and

⁴¹² [HL Hansard, 8 May 2018, cols 102–5.](#)

⁴¹³ *ibid.*, col 111.

⁴¹⁴ *ibid.*, col 88.

⁴¹⁵ Removed by government amendment 47A, see section 2.11 of this Briefing.

⁴¹⁶ [HC Hansard, 12 December 2017, col 280.](#)

⁴¹⁷ These arrangements are set out in paragraphs 3, 6(4), 7(4) and 13 of schedule 7.

⁴¹⁸ [HL Hansard, 19 March 2018, cols 143–4.](#)

Regulatory Reform Committee.⁴¹⁹ Lord Lisvane subsequently withdrew his amendment at debate at that time, but said that leaving the choice of procedure to ministers, including for Henry VIII powers, “remain[ed] concerning”.⁴²⁰

Responding to the debate on this issue in committee, Baroness Evans of Bowes Park, Leader of the House of Lords, said that the Government would introduce amendments to incorporate references to a new sifting procedure in the Lords that would apply to regulations being made under clauses 7 [9], 8 or 9 [11].⁴²¹ This would have been added to the Bill by government amendments 70A and 70BB, however, they were pre-empted by amendment 70.

Amendment 70 replaced paragraphs 3(1) to (7) of schedule 7, which included the previous iteration of the sifting process, as amended in the House of Commons. Amendment 70 would provide that if a Minister of the Crown proposed to make a statutory instrument under powers in clauses 7 [9], 8, 9 [11] or 17 [22], and they proposed to do so under the negative procedure, the instrument would have to be laid in draft before both Houses. The minister would also have to provide a memorandum setting out the minister’s reasons for thinking the instrument should be subject to the negative procedure. In contrast to the previous iteration of the provisions, either House could then require that the affirmative procedure apply instead, if a committee of either House made such a recommendation within ten sitting days (beginning with the first sitting day after the day on which the instrument was laid). The committee’s recommendation could be rejected if the relevant House so resolved within five sitting days of the recommendation being made (beginning with the first sitting day after the day on which the recommendation was made). However, the House itself could recommend that the affirmative procedure should apply if it makes such a recommendation within 15 sitting days (irrespective of the committee reporting on the instrument).

Moving the amendment, Lord Lisvane argued that the Government should not be able to ignore the recommendations of the sifting committee:

As the Bill stands, the scrutinised are to choose the level of scrutiny to which they are subject. This cannot be right. The sifting provisions now in the Bill are better than nothing, but not much, because it is the very making of a recommendation by a sifting committee that brings into play the Minister’s power to ignore the committee and to choose the negative procedure over the affirmative.⁴²²

⁴¹⁹ [HL Hansard, 19 March 2018, cols 143–4](#); and House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), 1 February 2018, HL Paper 73 of session 2017–19.

⁴²⁰ [HL Hansard, 19 March 2018, col 157](#).

⁴²¹ *ibid*, col 153.

⁴²² [HL Hansard, 8 May 2018, col 87](#).

Lord Lisvane argued that he did not want to see the Bill, as introduced in the Lords, set a precedent for ministerial powers in the “flock of exit bills” in the coming months. He stated that “this is one such power that I suggest should not be replicated”.⁴²³ Lord Lisvane explained that amendment 70 had been crafted by the Delegated Powers and Regulatory Reform Committee, which argued that its amendment respected:

[T]he principle that Parliament is the ultimate arbiter of the correct use of its procedures. And in any event the Government say that they will usually accept the recommendations of the sifting committee.⁴²⁴

The Committee also argued that such an arrangement was not unprecedented, citing similar provisions in the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011.⁴²⁵

[W]hat we take from these three Acts is the principle that the ultimate arbiter of whether the Government are using delegated powers appropriately must be Parliament rather than the Government.⁴²⁶

Speaking at committee stage on the previous amendment moved by Lord Lisvane on this subject, Baroness Evans said that if the sifting committees of both Houses recommended the affirmative procedure should be used for a particular instrument, the Government’s “expectation” was that “such recommendations are likely to be accepted”.⁴²⁷ If not, the Government would expect to justify fully its reasons, but such occasions would be “hopefully, very rare”.

In supporting amendment 70 on report, Lord Sharkey described Baroness Evans’ comments as “a very weak argument”:

It is not based on principle. It is based on a suggestion of compliance, except in undefined, unexampled and no doubt exceptional circumstances. What it really means, of course, is that the Government, at their absolute discretion, will be able to impose the negative procedure on SIs, denying Parliament the more robust and intensive scrutiny provided by the affirmative procedure.⁴²⁸

⁴²³ [HL Hansard, 8 May 2018, col 87.](#)

⁴²⁴ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Government Amendments](#), 23 April 2018, HL Paper 124 of session 2017–19, p 3.

⁴²⁵ The Committee stated that the Acts “impose longer timeframes and the super-affirmative procedure [...] we have recommended much shorter timeframes and (like the Government) have not recommended the super-affirmative procedure” (ibid, p 3).

⁴²⁶ ibid

⁴²⁷ [HL Hansard, 19 March 2018, col 154.](#)

⁴²⁸ [HL Hansard, 8 May 2018, col 88.](#)

Lord Sharkey argued that it was important to “guard against the unnecessary” transfer of power to the executive.⁴²⁹

Amendment 70 was also supported by Baroness Smith of Basildon, Shadow Leader of the House of Lords. She argued that the Government’s statements that it would likely accept the recommendations of the sifting committees of both Houses (should they agree) were “a bit woolly for legislation”.⁴³⁰

Baroness Smith said that “all of us want” to see EU law on the UK statute book as accurately and as quickly as possible, but argued that to do that “we must have confidence in the process and procedures that we have in place”.⁴³¹

Responding to the debate, Baroness Evans of Bowes Park, repeated the point she made at committee, namely that if both sifting committees recommended the affirmative procedure, the Government’s “expectation is that such recommendations are likely to be accepted”.⁴³² Baroness Evans further said amendment 70 raised the serious problem of a disagreement between the Houses.⁴³³ She also argued that the process could cause delays in the approval of statutory instruments:

Given that this House and the other place do not often sit on Fridays, 10 sitting days is already likely to stretch across three weeks. The addition of an extra five-day period, during which each House could overrule its own sifting committee, potentially extends this process into a fourth week. Of course, if any of this were to occur around either House’s normal recesses, the period would be longer still. Then, after that, any negative instrument would still have a praying period of 40 days during which, as now, a debate could be sought.⁴³⁴

Referring to the Acts cited by the Delegated Powers and Regulatory Reform Committee, Baroness Evans said that she remained of the view that establishing similar mechanisms in this Bill “was not proportionate for the sifting role which we are proposing”.⁴³⁵ Baroness Evans also raised a concern that, as government amendments 70A and 70BB would be pre-empted by amendment 70, it created uncertainty around the role of the Lords in sifting, should the Commons subsequently disagree to amendment 70 and remove it from the Bill:

There is no guarantee that the other place will accept an amendment that changes the nature of something they themselves put into the Bill. Therefore, the role of your Lordships’ House in this important process

⁴²⁹ [HL Hansard, 8 May 2018, col 88.](#)

⁴³⁰ *ibid*, col 96.

⁴³¹ *ibid*, col 97.

⁴³² *ibid*, col 98.

⁴³³ *ibid*.

⁴³⁴ *ibid*.

⁴³⁵ *ibid*, col 99.

will become uncertain. That is a situation which I would very much like to avoid.⁴³⁶

In response, Lord Lisvane said that he did not believe that was likely to happen.⁴³⁷

Government Amendments 75A and 75B

Government amendments 75A and 75B sought to provide that regulations made under clause 17(1) [22(1)] would be subject to the Bill's sifting committee procedures. They would also enable regulations made under 17(1) [22(1)] to be made under the affirmative procedure at the discretion of the minister. These were both added to the Bill without division.⁴³⁸ The Delegated Powers and Regulatory Reform Committee had reported on amendments 75A and 75B, stating that although it welcomed the Government's "acceptance of the principle that regulations under clause 17(1) [22(1)] are able to be made under the affirmative procedure, this is no substitute for amendment 70".⁴³⁹

2.22 Government Amendments to Explanatory Statement Requirements (Amendments 83C, 83F, 83G, 83H, 83J, 72ZA, 72ZB, 78A, 78B, 83N, 83L, 83M, 77H, 78E, 83AB, 83B and 83K)

In the Bill as introduced to the Lords, paragraph 22 [27] of schedule 7 provides that statutory instruments containing regulations made under clauses 7(1) [9(1)], 8, or 9 [11] should be accompanied by explanatory statements, which must provide certain specified information on the regulations. Amendments were made during report to extend these provisions.

'Good Reasons' (Amendments 83C, 83F, 83H, and 83J)

Government amendments 83C, 83F, 83H and 83J related to explanatory statements made under paragraph 22 [27] of schedule 7. All of these government amendments were debated on day six of report and agreed to without division.⁴⁴⁰

Government amendment 83C altered provisions in schedule 7 relating to the laying of explanatory statements when regulations were made under clause 7(1) [9(1)] or 9 [11], by inserting a new subparagraph (2A) into

⁴³⁶ [HL Hansard, 8 May 2018, col 100.](#)

⁴³⁷ *ibid*, col 102.

⁴³⁸ *ibid*, col 111.

⁴³⁹ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill: Further Government Amendments](#), 26 April 2018, HL Paper 128 of session 2017–19, p 2.

⁴⁴⁰ Amendment 83C, [HL Hansard, 8 May 2018, col 127](#); Amendments 83F, 83H, and 83J, *ibid*, col 129.

paragraph 22. Paragraph 22 already included provision to require ministers to make explanatory statements when laying statutory instruments under certain powers in the Bill. New subparagraph (2A) added a further requirement for the minister to make a statement as to why, in their opinion, there were ‘good reasons’ for the instrument and that the provisions within it represented a reasonable course of action.

On moving amendment 83C, Baroness Goldie, a Government Whip, said it was a response to the debate on ‘appropriate’ versus ‘necessary’. She said that although the Government were disappointed that the House had agreed to amendment 70 (which had amended references in some parts of the Bill from appropriate to necessary), it still wished to commend these amendments to the House “in an effort to increase transparency by some considerable measure”.⁴⁴¹ Amendments 83H and 83J were consequential changes made as a result of amendment 83C.⁴⁴²

Lord Beith (Liberal Democrat) welcomed amendment 83C. He said it went “some way” to meeting the concerns expressed by the House of Lords Constitution Committee in its own amendment 83D (which was withdrawn).⁴⁴³ This would have provided that an explanatory statement under paragraph 22 of schedule 7 [paragraph 27] would have to explicitly state whether the instrument made no more than technical changes, or whether a policy choice had been made. Lord Beith said that if ministers did not address this issue in any ministerial statement made according to the provisions of amendment 83C, he expected that the issue would be taken up by the House, and “therefore, I am not unduly worried and am not anxious to press the amendment which found favour with the committee”. Responding for Labour, Lord Goldsmith argued that amendment 83C did not undermine the importance of the amendments the House had already agreed on the issue of appropriate versus necessary.⁴⁴⁴

Government amendment 83F altered the rules governing explanatory statements made under schedule 7, paragraph 22 [27], such that they had to include the “purpose” of any change rather than “the reasons for it”. Baroness Goldie explained that:

The Government have reflected carefully on the concerns raised within this House that the intention behind a modification to retained EU law might not always be clear. Such concerns were particularly focused on how modified retained EU law may be interpreted in light of Clause 5(3) [6(3)], and whether a modification to retained EU law is to be subject to the principle of supremacy of EU law. These concerns have also been raised in relation to Clause 6(6) [7(6)] and whether an

⁴⁴¹ [HL Hansard, 8 May 2018, col 123.](#)

⁴⁴² *ibid.*

⁴⁴³ *ibid*, col 125.

⁴⁴⁴ *ibid*, col 126.

item of retained EU law which is modified after exit day is still to be interpreted in accordance with retained case law.⁴⁴⁵

Creating Criminal Offences (Amendment 83G)

Government amendment 83G related to a debate on the powers under the Bill which could be used to create criminal offences. Clauses 7(7)(c) [9(7)(c)], 8(3)(b) and 9(3)(c) [11(3)(c)] stipulate that regulations under clauses 7 or 9 could not be used to create a “relevant criminal offence”.⁴⁴⁶ Such an offence is defined as one for which a sentence of more than two years’ imprisonment could be imposed. However, the powers could be used to create a criminal offence for which the penalty would be a shorter prison term or a punishment other than imprisonment. Government amendment 83G would provide that:

Where an instrument or draft creates a criminal offence, the statement required by sub-paragraph (2A) [added by amendment 83C] must (among other things) include an explanation of why, in the relevant Minister’s opinion, there are good reasons for creating the offence and for the penalty provided in respect of it.

The creation of criminal offences had been the subject of proposed (non-government) amendments at committee, which were subsequently withdrawn.⁴⁴⁷ Amendments to the provisions were also debated at report. On day three of report, the House debated cross-party amendments in the name of Lord Judge (Crossbench), Baroness Hayter of Kentish Town (Labour), Lord McNally (Liberal Democrat) and Viscount Hailsham (Conservative), which would have prevented regulations under clauses 7 and 9 from being used to create criminal offences.⁴⁴⁸ Following debate at that time, the lead amendment 34 was withdrawn and the related amendments 44, 54 and 97 were not moved.⁴⁴⁹ Lord Judge explained why he had been prepared to not push his amendment further:

The reason that I have been prepared to compromise with an interference with what I regard as a fundamental constitutional principle is that I recognise that there is a continuity required. We cannot suddenly not have criminal offences which exist on 31 March but which we no longer have on 1 April.⁴⁵⁰

⁴⁴⁵ [HL Hansard, 8 May 2018, col 123.](#)

⁴⁴⁶ Clause 8 was removed from the Bill by government amendment 47A, see section 2.11 of this Briefing.

⁴⁴⁷ House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 23–6.

⁴⁴⁸ [HL Hansard, 25 April 2018, cols 1588–93.](#)

⁴⁴⁹ *ibid*, col 1593.

⁴⁵⁰ *ibid*.

He also said that he was persuaded to act against his instinct because the powers granted by the Bill had a sunset provision applied to them.⁴⁵¹

In responding to the debate on day three of report, Baroness Goldie argued that serious omissions or weaknesses to law enforcement could arise if the Bill did not include a capacity to create criminal offences in certain circumstances.⁴⁵² She also referred to government amendment 83G, stating that it would require:

[A] statement to be made alongside all instruments made under the main powers that seek to create a criminal offence. The statement will be made in writing by a Minister before the instrument is laid and then usually published in the Explanatory Memorandum to inform the deliberations of committees and the House.⁴⁵³

She added that such a statement would:

[E]xplain why, in the relevant Minister's opinion, there are good reasons for creating the offence and for the penalty provided in respect of it. This is in line with the approach taken in the Sanctions and Anti-Money Laundering Bill, and it will increase the level of transparency, ensuring that where the Government seek to create a criminal offence the Minister's reasoning is clear and justified to Parliament.⁴⁵⁴

Baroness Goldie said that she expected the Houses to vote against the instrument if they did not feel the reasons given in the statement were good enough, saying that "I remind noble Lords that all statutory instruments made under the main powers in the Bill creating criminal offences must be affirmative".⁴⁵⁵ On formally moving amendment 83G on day six of report, Baroness Goldie argued that "the Government's plans for creating an offence will now be even more transparent to Parliament, and our reasoning will have to be clear and justified".⁴⁵⁶ Amendment 83G was agreed without division.⁴⁵⁷

Urgent Procedures (Amendments 72ZA, 72ZB, 78A, 78B and 83N)

Government amendments 72ZA, 72ZB, 78A, 78B and 83N were all agreed without division on day six of report.⁴⁵⁸ The amendments related to the

⁴⁵¹ [HL Hansard, 25 April 2018, col 1593.](#)

⁴⁵² *ibid*, col 1590.

⁴⁵³ *ibid*.

⁴⁵⁴ *ibid*.

⁴⁵⁵ *ibid*.

⁴⁵⁶ [HL Hansard, 8 May 2018, col 124.](#)

⁴⁵⁷ *ibid*, col 129

⁴⁵⁸ Amendments 72ZA and 72ZB, *ibid*, col 109; Amendments 78A and 78B, *ibid*, col 111; and Amendment 83N, *ibid*, col 133.

making of explanatory statements when ministers exercised powers under the Bill's provisions on urgent cases, paragraphs 4(2) [5(2)] and 14(2) [18(2)] of schedule 7. These paragraphs would allow the 'made affirmative' procedure to be used for regulations under clause 7 [9] or clause 9 [11] if the Minister considered it "necessary" "by reason of urgency". Under the made affirmative procedure, an instrument may be made without first being approved by both Houses, but it would lapse after a month unless both Houses approve it during that time.

During the Bill's committee stage, Baroness Evans of Bowes Park, the Leader of the House, indicated that the Government would look again at the information the Government would be required to provide to Parliament in urgent cases. Lord Sharkey (Liberal Democrat) had argued at committee that "[w]hat is missing is any requirement for an explanation of why the Minister believes that the case is in fact urgent".⁴⁵⁹ Baroness Evans said the Government had already promised that explanatory memoranda would contain an explanation by the Minister as to why s/he considered that the statutory instrument merited the urgent procedure, but she also promised that the Government "will consider this issue further before report to see whether we can provide further assurances to your Lordships on it".⁴⁶⁰

On day six of report, Lord Sharkey referred to amendment 83N whilst speaking to his own amendment 72 on this issue (which he later withdrew), saying that "the Government appear to have recognised the force of the arguments we advanced in Committee".⁴⁶¹ Responding, Baroness Evans said that "the Government have always been committed to ensuring an appropriate level of scrutiny is afforded to the Bill's provisions".⁴⁶²

Amongst its provisions, amendment 83N would require that a Minister of the Crown seeking to make a regulation under the above paragraphs must:

[M]ake a statement in writing explaining the reasons for the Minister's opinion that, by reason of urgency, it is necessary to make the regulations without a draft of the instrument containing them being laid before, and approved by a resolution of, each House of Parliament.

Sub-Delegated Legislation (Amendments 83L and 83M)

Government 83L and 83M were approved without division on day six of report.⁴⁶³ Amendment 83L added a series of requirements for further explanatory statements in certain cases where powers to make regulations had been sub-delegated by powers under the Bill. Moving the amendments,

⁴⁵⁹ [HL Hansard, 19 March 2018, col 147.](#)

⁴⁶⁰ *ibid*, col 156.

⁴⁶¹ [HL Hansard, 8 May 2018, col 106.](#)

⁴⁶² *ibid*, col 107.

⁴⁶³ *ibid*, cols 131 and 133.

Lord Callanan, Minister of State at the Department for Exiting the European Union, explained that the amendments would:

[P]rovide that Ministers must make written statements explaining the appropriateness of any relevant sub-delegation. These statements will be published alongside any SI creating a legislative power that is not to be exercised by Ministers by statutory instrument or devolved equivalent.⁴⁶⁴

Amendment 83M introduced a reporting requirement for those to whom regulation making powers were sub-delegated, the purpose of which Lord Callanan explained was:

To ensure that, once delegated, the exercise of such powers remains transparent, we have also required that a report on the exercise of each power should be laid before Parliament each year. I expect that relevant departmental Select Committees and committees of this House will take a close interest in these reports and use them as a basis to scrutinise and challenge both the bodies exercising these powers and sponsoring Ministers if Members of the other place or noble Lords are displeased by the way these powers are being used in practice.⁴⁶⁵

Responding for Labour, Lord Goldsmith, described the changes as added safeguards, and said that he appreciated the changes and was happy to see them go through.⁴⁶⁶

Equalities Legislation and Clause 17(1) [22(1)] (Amendments 77H, 78E, and 83AB)

The Government stated in a delegated powers memorandum that it would table amendments requiring the minister to make a number of statements alongside all statutory instruments made under the power in clause 17(1) [22(1)] to make consequential provision.⁴⁶⁷ This would include statements explaining what the instrument does, the reasons for the instrument and its impact (if any) on equalities legislation. The Government said this would “broadly align with the types of statement to be made under other powers in the Bill”.

Amendments 77H and 78E—agreed without division—amended paragraph 14 [18] of schedule 7 that deals with the scrutiny procedure in certain urgent cases so that it would also apply to regulations made under

⁴⁶⁴ [HL Hansard, 8 May 2018, col 130.](#)

⁴⁶⁵ *ibid.*

⁴⁶⁶ *ibid.*, col 131.

⁴⁶⁷ Department for Exiting the European Union, [Supplementary Delegated Powers Memorandum](#), 23 April 2018, p 8.

clause 17(1) [22(1)].⁴⁶⁸

Amendment 83AB—also agreed without division—extended the requirement about making an equalities statement to regulations made using the consequential power in clause 17(1) [22(1)].⁴⁶⁹ Lord Wallace of Tankerness (Liberal Democrat) and Lord Low of Dalston (Crossbench) welcomed this measure.⁴⁷⁰ However, Lord Low expressed disappointment that in all the equalities statements required under the Bill, the minister would have to state whether s/he was “satisfied” that the regulation did not remove any protection provided by equalities legislation, which Lord Low argued was too subjective.⁴⁷¹

Other Changes to Paragraph 22 [27] of Schedule 7 (Amendments 83B and 83K)

Government amendment 83B sought to alter paragraph 22 [27] of schedule 7, such that a reference to explanatory statements being laid “before each House of Parliament or before the House of Commons only”, was made to refer only to “each House of Parliament”. Government amendment 83K sought a similar change to a reference to the laying of instruments or draft instruments where an equivalent had been previously laid before both Houses. Both amendments were agreed without division.⁴⁷²

2.23 Francovich Claims (Amendment 117)

On the final day of report, the House agreed without division to a government amendment that would allow *Francovich* damages claims to be brought for two years after exit day where the claim related to an alleged breach of EU law that occurred before exit day.⁴⁷³

As a result of the *Francovich* case in 1991—brought because the Italian Government failed to implement an EU directive on time—the *Francovich* 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; and
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.⁴⁷⁴

⁴⁶⁸ [HL Hansard, 8 May 2018, col 111.](#)

⁴⁶⁹ *ibid*, col 122.

⁴⁷⁰ *ibid*, cols 115 and 121.

⁴⁷¹ *ibid*, col 113.

⁴⁷² *ibid*, cols 122 and 129.

⁴⁷³ *ibid*, col 141.

⁴⁷⁴ James Segan, ‘[The Great Repeal Bill: What Will Happen to Accrued Rights to Claim Francovich Damages?](#)’, Blackstone Chambers, 3 October 2017.

Paragraph 4 [3] of schedule 1 provides that there would be no right in domestic law post exit to damages in accordance with the *Francovich* rule. In the Bill as introduced, the only exception to this was for proceedings which had already begun before a UK court before exit day, even if they had not yet been finally decided before exit day (paragraph 27(3) [37(3)] of schedule 8 in the Bill as introduced). Amendment 117 introduced a second exception (now in paragraph 37(7) of schedule 8) to allow new claims to be brought within two years from exit day “so far as the proceedings relate to anything which occurred before exit day”.

Moving the amendment, Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, said the Government remained firmly of the view that *Francovich* damages would no longer be relevant when the UK ceased to be bound to follow EU obligations that apply to member states.⁴⁷⁵ However, he said the Government’s amendment responded to concerns raised at committee stage that individuals should have a right of action after exit for things that had occurred before the UK left the EU. He said the amendment would provide “a fair and sensible opportunity to seek damages for pre-exit breaches of EU law” whilst also setting “a clear and certain cut-off point”. The amendment was agreed to without further debate.

3. Amendments to the Bill’s Devolution Provisions

3.1 Background to Clause 11 [15]

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.⁴⁷⁶ 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.⁴⁷⁷ 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.

As originally introduced into the Lords, clause 11 [15] of the European Union (Withdrawal) Bill would amend 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 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. The Government has explained that the

⁴⁷⁵ [HL Hansard, 8 May 2018, col 141](#).

⁴⁷⁶ [Explanatory Notes](#), p 14.

⁴⁷⁷ Scotland Act 1998, s 29(1).

intention of this would be to maintain the current parameters of devolved competence as regards EU law.⁴⁷⁸ Clause 11 [15] as originally drafted would have provided for devolved areas returning from the EU on exit to be released from the restriction in clause 11 [15] following an Order in Council.⁴⁷⁹

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.⁴⁸⁰ After the UK withdraws from the EU, the power which the EU exercises in relation to common frameworks will return to the UK.⁴⁸¹ 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 across the UK single market and to enable the UK to strike free trade deals with third countries”.⁴⁸² The agreement of UK common frameworks has been (and continues to be) the subject of extensive discussion between the devolved administrations and the UK Government in the Joint Ministerial Committee on EU Negotiations (JMC(EN)), which was established in October 2016.⁴⁸³ 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.⁴⁸⁴ These principles included that common frameworks should 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;
- enable the management of common resources;
- administer and provide access to justice in cases with a cross-border element; and
- safeguard the security of the UK.⁴⁸⁵

⁴⁷⁸ [Explanatory Notes](#), p 14.

⁴⁷⁹ Part 1 of schedule 2 would make corresponding provision in relation to the competence of the devolved executives.

⁴⁸⁰ Department for Exiting the European Union, [Legislating for the United Kingdom's Withdrawal from the European Union](#), March 2017, Cm 9446, p 27.

⁴⁸¹ *ibid.*

⁴⁸² *ibid.*, p 27.

⁴⁸³ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee Communiqué](#), 24 October 2016.

⁴⁸⁴ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communiqué](#), 16 October 2017. In the absence of ministers from the Northern Ireland Executive, a senior civil servant from the Northern Ireland Civil Service was in attendance.

⁴⁸⁵ *ibid.*, p 2.

Such frameworks would respect the devolution settlements and the democratic accountability of the devolved legislatures.⁴⁸⁶ They would also “ensure recognition of the economic and social linkages between Northern Ireland and Ireland” and respect the Belfast Agreement.⁴⁸⁷

Both the Scottish and Welsh Governments expressed opposition to the Bill’s provisions on devolution as originally drafted, and had recommended that their respective legislatures withhold legislative consent for the Bill. This 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 would interact with the devolution 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”.⁴⁸⁸ 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.⁴⁸⁹

The Scottish Parliament and the National Assembly for Wales have both passed ‘continuity bills’ which would seek to incorporate elements of EU law that operate in devolved areas into Scottish and Welsh domestic law.⁴⁹⁰

Lords Committee Stage Government Amendments

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 UK Government would bring amendments to clause 11 [15] at the Bill’s report stage in the House of Commons.⁴⁹¹ It had been an aim of the UK and devolved governments that amendments should

⁴⁸⁶ Joint Ministerial Committee (EU Negotiations), [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017, p 2.

⁴⁸⁷ *ibid*, p 3.

⁴⁸⁸ Welsh Government, ‘[Joint statement from First Ministers of Wales and Scotland in Reaction to the EU \(Withdrawal\) Bill](#)’, 13 July 2017.

⁴⁸⁹ *ibid*.

⁴⁹⁰ Further details on legislative consent, the Joint Ministerial Committee on EU Negotiations and the Scottish and Welsh continuity bills can be found in: House of Commons Library, [Legislative Consent and the European Union \(Withdrawal\) Bill \(2017–19\): The Joint Ministerial Committee, Proposed Amendments, and the “Continuity Bills”](#), 29 March 2018; and [Brexit: Devolution and Legislative Consent](#), 29 March 2018.

⁴⁹¹ [HC Hansard, 6 December 2017, col 1021](#).

be made through agreement. Amendments were not tabled before report in the Commons because agreement was not reached between the UK and devolved governments.

Government amendments to clause 11 [15] were moved for debate on day nine of the Bill's committee stage in the House of Lords. The Government's amendments to clause 11 [15] would mean that all devolved powers currently within the competence of the EU would return to the devolved administrations by default, but the amendments would also provide that the UK Government could make exceptions in regulations (thereby 'ring-fencing' specified areas). For example, it would have provided that:

An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown [...]⁴⁹²

Amongst its other provisions, the UK Government's committee amendments would have made it a requirement for the UK government to consult with Scottish or Welsh ministers (or the relevant Northern Ireland department) before laying a statutory instrument containing such regulations before the UK Parliament. Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, also explained that the amendments would have provided for a duty on the Government to produce explanatory statements.⁴⁹³

On moving the government amendments on day nine of committee, Lord Keen explained that the Government had put them forward to "facilitate scrutiny of the Government's current position on clause 11 [15]".⁴⁹⁴ He stated that the Government would not push them to a vote and would instead withdraw them and "reflect seriously" on the points made, incorporating them into its discussions with the devolved administrations.⁴⁹⁵

Common Frameworks

On 9 March 2018, the UK Government published a 'working document' which provided a breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland.⁴⁹⁶

⁴⁹² [Government amendment 302A](#). Similar wording is used for the National Assembly for Wales and for the Northern Ireland Assembly.

⁴⁹³ [HL Hansard, 21 March 2018, col 352](#).

⁴⁹⁴ *ibid*, col 350.

⁴⁹⁵ *ibid*. For a summary of the debate on the Government's amendments at committee see: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018.

⁴⁹⁶ Cabinet Office, [Frameworks Analysis: Breakdown of Areas of EU Law That Intersect With Devolved Competence in Scotland, Wales and Northern Ireland](#), 9 March 2018.

It outlined:

1. 49 policy areas where no further action is required;
2. 82 policy areas where non-legislative common frameworks may be required; and
3. 24 policy areas that are subject to more detailed discussion to explore whether legislative common framework arrangements might be needed, in whole or in part.⁴⁹⁷ For example, standards for the marketing and cultivation of genetically modified organisms.⁴⁹⁸

The document also included twelve policy areas that the UK Government believes are reserved (or excepted in the Northern Ireland Act 1998), but are subject to ongoing discussion with the devolved administrations.⁴⁹⁹ For example, elements of product safety and standards related to explosive atmospheres.⁵⁰⁰

Speaking during day nine of committee, and referring to the above document, Lord Keen of Elie explained that it was within the 24 policy areas identified that the Government expects to use temporary ring-fencing:

It is the table that identifies 24 areas where it is considered there will have to be some temporary ring-fencing so that we can establish the next stage of the process for the single market—the framework agreements that will then form the basis for that single market.⁵⁰¹

Lord Keen stated that in those cases where common frameworks required legislation, the UK Government would implement them by way of primary legislation.⁵⁰²

3.2 Agreement with the Welsh Government and Report Stage Government Amendments

On 24 April 2018, the UK and Welsh Governments reached agreement on amendments to clause 11 [15] and on an intergovernmental agreement with a related memorandum (which included additional commitments on the functioning of the arrangements).⁵⁰³ The Scottish Government has stated

⁴⁹⁷ Cabinet Office, [Frameworks Analysis: Breakdown of Areas of EU Law That Intersect With Devolved Competence in Scotland, Wales and Northern Ireland](#), 9 March 2018, p 1.

⁴⁹⁸ *ibid*, p 8.

⁴⁹⁹ *ibid*.

⁵⁰⁰ *ibid*, p 19.

⁵⁰¹ [HL Hansard, 21 March 2018, col 403](#).

⁵⁰² *ibid*, col 337.

⁵⁰³ Cabinet Office, [‘European Union \(Withdrawal\) Bill: Agreement between the UK and Welsh Governments’](#), 25 April 2018.

that it is unable to support the amendments.⁵⁰⁴ The UK Government's report stage amendments to clause 11 [15] built on those it tabled at committee and made additional changes (such as a 'consent decision' mechanism). The intergovernmental agreement and memorandum included a number of non-legislative commitments "supporting" the amendments.⁵⁰⁵

The intergovernmental agreement and its associated memorandum make a number of commitments between the parties. For example, the UK Government has committed not to legislate for England where a regulation has been made restricting the competence of the devolved institutions:

For England, temporary preservation will be given effect by the UK Government committing not to bring forward legislation that would alter areas of policy in so far as the devolved legislatures are prevented from doing so by virtue of clause 11 [15] regulations, for as long as those regulations are in force.⁵⁰⁶

It also stated that as part of the implementation of the agreement, the Welsh Government would take steps to secure repeal of its 'continuity bill' before the European Union (Withdrawal) Bill receives royal assent.⁵⁰⁷ Speaking on day five of report, Lord Keen of Elie said the UK and Welsh Governments were still in discussion about how the repeal should be given effect. He also stated that if any amendments to the Withdrawal Bill were appropriate in this regard the Government would propose them at third reading.⁵⁰⁸

The memorandum sets out the process by which frameworks are to be agreed. This states that work will take place (termed 'deep dives') in May and June 2018 to refine policy thinking on legislative frameworks and on "cross-cutting issues in conjunction with a broader review of intergovernmental relations".⁵⁰⁹ Non-legislative frameworks were still being discussed but would be the subject of deep dives from June 2018 onwards. Annex A to the memorandum sets out the policy areas that are "likely to be subject to clause 11 [15] regulations". Paragraph 7 of the memorandum sets out the process by which clause 11 [15] regulations would be made.

In his letter to the UK Government stating that the Welsh Government would recommend legislative consent be given to the Bill as result of the amendments and agreement, Mark Drakeford AM, the Welsh Government's

⁵⁰⁴ Scottish Government, '[Withdrawal Bill Amendments 'Undermine Devolution', Says Minister](#)', 25 April 2018.

⁵⁰⁵ House of Commons, '[Written Statement: European Union \(Withdrawal\) Bill: Clause 11](#)', 25 April 2018, HCWS646.

⁵⁰⁶ Cabinet Office, '[Intergovernmental Agreement on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#)', 24 April 2018, para 5.

⁵⁰⁷ *ibid*, para 10.

⁵⁰⁸ [HL Hansard, 2 May 2018, col 2132](#).

⁵⁰⁹ Cabinet Office, '[Memorandum on the European Union \(Withdrawal\) Bill and the Establishment of Common Frameworks](#)', 24 April 2018, para 5.

Cabinet Secretary for Finance, said that:

Although the position we have currently developed does not meet the whole of our aims I recognise that the trilateral discussion process represents very significant progress from where we started.⁵¹⁰

Mr Drakeford also stated that he would have preferred the common frameworks to have been developed without the need for legislative constraints. However, he stated that he recognised that the UK Governments report stage amendments, along with the agreement and memorandum, represented “a recognition that the default position is that responsibility for policy in areas devolved to Wales should continue to lie with the National Assembly”.⁵¹¹

In his written statement on the amendments to clause 11, David Lidington, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, stated:

Irrespective of our ongoing discussions, the UK Government will honour the commitments they have made towards the Scottish Government in these documents, including seeking their agreement before maintaining a temporary framework.⁵¹²

The Government tabled a large number of technical and consequential amendments to schedules 2 and 3, as well as to clause 11 [15], for debate on day five of report. Due to the way the Bill is structured, changes to the functioning of clause 11 [15] necessitated a number of consequential changes to other provisions (including to both schedules 2 and 3). This Briefing does not provide a discussion of the specific function of each technical or consequential amendment agreed by the House on day five of report.

The following sections of this Briefing describe the effect of the main government amendments which were spoken to on report. All these amendments were added to the Bill without division.

Devolution ‘by Default’

Lord Keen of Elie described government amendment 89DA as the “main course”, with the Government’s other amendments to the devolution provisions as “amuse-bouches”.⁵¹³ Government amendment 89DA removed the original clause 11(1) to (3) from the Bill [15]. These contained the

⁵¹⁰ Welsh Government, [‘Letter from Mark Drakeford to the Chancellor of the Duchy of Lancaster’](#), 24 April 2018.

⁵¹¹ *ibid.*

⁵¹² House of Commons, [‘Written Statement: European Union \(Withdrawal\) Bill: Clause 11’](#), 25 April 2018, HCWS646.

⁵¹³ [HL Hansard, 2 May 2018, col 2129.](#)

original provisions on restricting the competence of the devolved legislatures.

The amendment replaced the previous restriction in clause 11 [15] with the presumption that the competency of the devolved legislatures would not be restricted unless the UK Government made specific regulations in areas where a common framework was needed.⁵¹⁴ Using the example of the Scottish Parliament, amendment 89DA would amend section 29(2)(d) of the Scotland Act 1998 such that a provision is outside competence in so far as it was incompatible with a new section 30A(1).⁵¹⁵ This new section 30A would be inserted into the 1998 Act by the amendment, with subclause (1) providing that:

An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

Government amendment 89DA would provide that this potential restriction would not apply to any modification that would have been within the competence of the relevant legislature immediately prior to exit day.

The UK Government's 25 April 2018 supplementary delegated powers memorandum stated that the purpose behind the amendments was to allow the Government to ensure that the parameters of devolved competence were maintained in respect of retained EU law where frameworks might be needed, whilst allowing other areas to pass to the devolved institutions.⁵¹⁶ The Government argued in the memorandum that the use of subordinate legislation for this purpose was appropriate because the areas to which regulations might apply was under current discussion between the UK and devolved governments.⁵¹⁷ The UK Government has argued it must be able to reflect changes resulting from these discussions and that subordinate legislation gives greater flexibility in this regard than primary legislation.⁵¹⁸

⁵¹⁴ As compared with releasing competencies under an Order in Council in the clause 11 provisions as originally introduced.

⁵¹⁵ As originally introduced to the House, this restriction would have been amended such that a provision would be outside competence in so far as it was incompatible with retained EU law. Provisions for Wales and Northern Ireland are functionally analogous, within similar amendments made to the Governance of Wales Act 2006 and the Northern Ireland Assembly Act 1998.

⁵¹⁶ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 7.

⁵¹⁷ *ibid.*

⁵¹⁸ *ibid.*

Speaking to the fifth group of amendments on day five of report (which included 89DA),⁵¹⁹ Lord Keen of Elie described the Government's amendments to clause 11 [15] as very complex and extensive "from Amendment 89DA through to Amendment 92AD, with consequential amendments from Amendment 89DB through to Amendment 117C".⁵²⁰ On moving the amendments to clause 11 [15] (including 89DA), Lord Keen said that the Government had accepted the case for a "more targeted and proportionate approach".⁵²¹ He said the Government believed that where common approaches were needed they could not all be designed and implemented before exit day. Lord Keen argued that it therefore made sense for existing frameworks to be maintained where necessary. However, he said this could and should be done in "a more measured way".⁵²²

Lord Griffiths of Burry Port, Labour Shadow Spokesperson for Wales, said that the Labour Party was "more than happy" to support intergovernmental agreement and the 'inversion' of clause 11 [15].⁵²³

Mechanism for Obtaining a 'Consent Decision' and Explanatory Statements

Government amendment 89DA would also introduce a 'consent decision' mechanism. This was a new provision compared to the content of the Government's committee stage amendments.

Before a Minister of the Crown could lay regulations before Parliament for approval, the relevant devolved legislature would have to make a 'consent decision', unless a period of 40 days had passed without the legislature making such a decision. The 40-day period is defined in the amendment as the period beginning with the day on which a copy of the draft was provided to the relevant devolved ministers. A consent decision under the provisions would be defined as:

- (a) a decision to agree a motion consenting to the laying of the draft,
 - (b) a decision not to agree a motion consenting to the laying of the draft, or
 - (c) a decision to agree a motion refusing to consent to the laying of the draft;
- and a consent decision is made when the Parliament first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

⁵¹⁹ This included the following government amendments: 89DA, 89DB, 89DC, 90A, 90B, 90C, 92AA, 92AAA, 92AB, 92AC, 92AD, g92BA, 92BB, 92BC, 92DA, 92DB, 92EA, 106B, 108A, 72EA, 112C and 117C.

⁵²⁰ [HL Hansard, 2 May 2018, col 2163.](#)

⁵²¹ *ibid*, col 2129.

⁵²² *ibid*, col 2130.

⁵²³ *ibid*, col 2160.

Before a Minister of the Crown proposed to lay a draft regulation before a devolved legislature they would have to provide a copy to the relevant devolved ministers and inform the legislature's presiding officer that a copy had been provided.

A further requirement for explanatory statements was also added to the Bill on day five of report. Government amendments 92BC, 92DB, and 92EA sought to insert new provision into the devolution acts to this effect, introducing a requirement for Ministers of the Crown to make a statement explaining the effect of a regulation before it is laid under powers granted by clause 11 [15] or part 1 of schedule 3 of the Bill. If the relevant devolved legislature has not made a decision to agree a motion consenting to the laying of the draft, the Minister would also have to make a statement as to why, despite this, they had laid the draft before each House of Parliament. Additionally, the Minister:

[M]ust lay before each House of Parliament any statement provided for the purpose of this sub-paragraph to a Minister of the Crown by the [devolved ministers] giving the opinion of the [devolved ministers] as to why the [devolved legislature] has not made that decision.

The consent decision and the explanatory statement provisions would not apply where a draft of an instrument contained regulations which related only to the revocation of a specification.

In his written statement on the amendments to clause 11 [15], David Lidington, Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, explained that the consent decision provisions built on the debate held at committee.⁵²⁴ He argued that “there should be a presumption of acting with consent, with a means for the UK Parliament to act where agreement is not possible”.⁵²⁵

Speaking to the Government's amendments to clause 11 [15] on day five of report, Lord Keen of Elie said that its committee amendments were not a final offer from the Government. He said the Government had listened to the issue of consent which had been raised during committee,⁵²⁶ but that only the UK Parliament should act where there was cross-UK impact:

The devolved Administrations thought it right that there was a role for the devolved legislatures in deciding whether specific areas should be the subject of a freeze. We also heard that in the debate in this House. This House agreed that a role for the devolved legislatures

⁵²⁴ House of Commons, [‘Written Statement: European Union \(Withdrawal\) Bill: Clause 11’](#), 25 April 2018, HCWS646.

⁵²⁵ *ibid.*

⁵²⁶ For further information see: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 45–6.

was important in this process, but that it must be balanced against preserving the right—indeed, I would say, the responsibility—of the United Kingdom Parliament to act, where there may be a cross-United Kingdom impact. Only the UK Parliament can do that.⁵²⁷

Lord Keen said the Government's report amendments should minimise areas of disagreement by ensuring that the UK Parliament would be presented with the arguments from both the UK and devolved governments where there was disagreement.⁵²⁸ He said that this was supported, and complemented, by the intergovernmental agreement.

Supporting the Government's amendments, Lord Griffiths of Burry Port, Labour Shadow Spokesperson for Wales, linked the consent decision mechanism with the Sewell Convention:

On secondary legislation, the National Assembly and the Scottish Parliament will be asked for their consent, and the United Kingdom Government make the same commitment not to normally proceed without such consent, as applies to primary legislation that touches on devolved policies.⁵²⁹

Lord Griffiths argued that the amendments went beyond the Sewell Convention through the provisions on explanatory statements:

Indeed, it contains further safeguards compared to Sewel, because if the United Kingdom Government want to press on with making regulations in the absence of consent, they have to present not just their views but those of devolved Ministers as to why their legislature has refused consent. This puts the United Kingdom Parliament in a position of genuinely deciding on the facts, not just on the recommendations of the Westminster Government.⁵³⁰

Government amendment 117C was agreed without division on day six of report.⁵³¹ Broadly, it would provide that consent decisions made before the Bill became an Act could still be considered as consent decisions for the purposes of:

- (a) section 30A(3) or 57(6) of the Scotland Act 1998,
- (b) section 80(8C) or 109A(4) of the Government of Wales Act 2006,
- or
- (c) section 6A(3) or 24(5) of the Northern Ireland Act 1998 [...]

⁵²⁷ [HL Hansard, 2 May 2018, col 2130.](#)

⁵²⁸ *ibid*, cols 2130–1.

⁵²⁹ *ibid*, col 2161.

⁵³⁰ *ibid*.

⁵³¹ [HL Hansard, 8 May 2018, col 142.](#)

Temporary Powers: Sunset Provisions and Reporting on Progress Towards Repeal of Ring-Fencing Powers

Government amendment 89DA also added sunset provisions to the regulation making powers under clause 11 [15]. This was not included in the Government's committee amendments, and reflected the debate held in the House on this issue during committee.⁵³²

The amendment would provide that no regulations could be made under clause 11 [15] after the end of a period of two years beginning on exit day. This provision would not affect the continuation in force of regulations which were made before the end of this period. Any regulations made under clause 11 [15] which were in force at the end of the period of five years, beginning with the time at which they came into force, would be revoked in their application to any act of the relevant devolved legislature which received royal assent after the end of that period.

Government amendments were also made to the Bill introducing a mechanism to repeal the regulation making powers under clause 11 [15]. Government amendment 89DC inserted new subclauses (4A), (4B), (4C) and (4D) into clause 11 [15]. Subclause (4B) would give Ministers of the Crown the power to repeal the relevant sections of the devolution acts related to the restrictions on retained EU law, which would be added by the Bill.⁵³³ Until all such provisions had been repealed, subclause (4C) would require Ministers of the Crown to consider whether it was appropriate for the powers to make regulations listed in (4B) to be repealed, or to revoke any regulations that had been made under them. Before exercising any of the powers under provisions listed in subclause (4B), a Minister of the Crown would be required by subclause (4D) to consider the intention that such powers were temporary, and that, where appropriate, they should be replaced with other arrangements. Government amendment 72EA amended schedule 7 such that:

A statutory instrument containing regulations under section 11(4B) [11(9)] may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

Amendment 72EA was agreed without division on day six of report.⁵³⁴

Government amendments were made which would place a duty on the government to report on progress towards repeal. Government amendment 92AD added new part 1A [2] to schedule 3. This would introduce a

⁵³² For further information see: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 48–9.

⁵³³ Specifically: section 30A or 57(4) to (15) of the Scotland Act 1998; section 80(8) to (8L) or 109A of the Government of Wales Act 2006; and section 6A or 24(3) to (15) of the Northern Ireland Act 1998.

⁵³⁴ [HL Hansard, 8 May 2018, col 110](#).

requirement for the UK Government to report on a quarterly basis on progress towards removing retained EU law restrictions. Reports would have to contain details of any steps taken by the UK Government towards implementing any arrangements which were to replace any relevant powers or retained EU law restrictions. They would also have to:

- explain how any principles agreed between the UK Government and the devolved authorities relating to the implementation of any arrangements—replacing any relevant powers or retained EU law restrictions—had been taken into account in the reporting period;
- specify any regulations made under clause 11(4B) [11(9)];
- set out the Minister’s assessment of progress which still needed to be made before a relevant power could be repealed; and
- contain any other information related to any relevant powers, or retained EU law restrictions or arrangements which replace them, that the Minister considers appropriate.

A copy of each report produced under these provisions would have to be provided to the devolved governments.

The UK Government’s 25 April 2018 supplementary delegated powers memorandum stated that the purpose behind the sunsets and repeal powers was to highlight the Government’s intention that the restrictions on devolved competence were temporary:

The powers in subsections (1) to (3C) of clause 11 [15(1) to (6)] and paragraphs 1 to 3 of Schedule 3 allow for restrictions to be placed on devolved competence in relation to retained EU law. These restrictions are only intended to be temporary while discussions on the need for and form of future frameworks are considered. The restrictions sunset five years after the regulations have been made. The power to make regulations sunset two years after exit day.

This power provides a mechanism to repeal those powers (and to make amendments consequential on repeal) earlier than the two year sunset if further restrictions are not needed.⁵³⁵

The memorandum argued that it would not be “appropriate” to retain the powers to implement restrictions for longer than necessary.⁵³⁶

Speaking to the Government’s amendments to clause 11 [15] on day five of

⁵³⁵ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#),

25 April 2018, p 8.

⁵³⁶ *ibid.*

report, Lord Keen of Elie described the sunset provisions as a key change from the Government's committee amendments.⁵³⁷ He said that the amendments placed "beyond doubt" the Government's assertion that the provisions of clause 11 were intended to be temporary.⁵³⁸ These amendments reflected discussions that had taken place during committee.⁵³⁹

In regard to the reporting requirements of amendment 92AD, Lord Wallace of Tankerness (Liberal Democrat) asked whether the 'principles' it referred to were those agreed by the JMC(EN) in October 2017.⁵⁴⁰ He also asked that if so, why these had not been added to the face of the Bill. Lord Keen replied that references in the amendments to 'principles' did refer to those agreed by the JMC(EN) and that they "are carried over in the agreements".⁵⁴¹

Lord Wallace had also tabled amendments to reduce the length of the sunset provisions to three years from five.⁵⁴² Lord Keen said that the Government had arrived at five years following advice from officials:

[T]here have been considerable and in-depth discussions between officials as well as Governments with regard to these provisions. In light of those detailed discussions, particularly at official level, it was concluded that a period of five years would be appropriate for the second part of the sunset provision [...] I cannot say that there is some formula I can apply to justify five years; it is based on the in-depth analysis that has been carried out over a period of time since October last year with regard to how we will deal with these frameworks.⁵⁴³

Lord Griffiths of Burry Port, Labour Shadow Spokesperson for Wales, said that the sunset clauses would ensure that any restrictions on devolved competence would be temporary.⁵⁴⁴ He argued that the amendment was a "huge improvement over where we started".⁵⁴⁵

Equivalent Changes Made to Executive Competence

Part 1 of schedule 3 of the Bill makes corresponding provisions to clause 11 [15] in relation to the competence of the devolved executives. As a consequence of the amendments made to clause 11, the Government

⁵³⁷ [HL Hansard, 2 May 2018, col 2131.](#)

⁵³⁸ *ibid.*

⁵³⁹ For further information see: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 48–9.

⁵⁴⁰ [HL Hansard, 2 May 2018, col 2141.](#)

⁵⁴¹ *ibid.*, col 2164.

⁵⁴² Amendments 89DAF, 89DAJ, and 89DAK. These amendments were not moved.

⁵⁴³ [HL Hansard, 2 May 2018, col 2165.](#)

⁵⁴⁴ *ibid.*, col 2162.

⁵⁴⁵ *ibid.*, col 2163.

tabled a number of amendments to schedule 3.

Currently, similar restrictions are placed on the devolved executives with regard to doing anything incompatible with EU law. As introduced in the House of Lords, part 1 of schedule 3 would have amended these references to refer to retained EU law. Government amendment 92AA amended this restriction to refer not to retained EU law, but to any modification which was of a description specified in regulations made by a Minister of the Crown. It also added to the Bill analogous consent decision procedures and sunset provisions as those which would apply to regulations made under clause 11 [15]. The requirement for explanatory statements for regulations made under clause 11 [15]—added by government amendments 92BC, 92DB, and 92EA—would also apply to regulations made by Ministers of the Crown to restrict devolved executive competence under part 1 of schedule 3. The same reporting requirements introduced on the UK Government by government amendment 92AD would apply to regulations made under part 1 of schedule 3. The power introduced by government amendment 89DC to repeal retained EU law restrictions, would also apply to those restrictions in part 1 of schedule 3. As with their analogous equivalents under clause 11 [15], these requirements would not apply in relation to regulations which only related to a revocation of a specification.

3.3 Other Changes: Powers of Devolved Ministers

Beyond clause 11 [15], a number of other government amendments were made to the Bill's devolution provisions on day 5 of report.

Powers of Devolved Ministers Acting With Ministers of the Crown

Lord Keen of Elie described the first set of government amendments debated on day five of report as:

Truly technical amendments to ensure that the provisions of the Bill deliver the intended policy. They achieve two things. The first is to clarify how the requirement for regulations made by devolved Ministers under Schedule 2 to be within devolved competence interacts with the principle of severance applied by the courts [...]

The second purpose of the amendments is to allow for a devolved Minister and a UK Minister acting jointly to make provision that would not be in the competence of the devolved Minister acting alone.⁵⁴⁶

The Government's 25 April 2018 supplementary delegated powers memorandum explained that the Bill as introduced to the House of Lords

⁵⁴⁶ [HL Hansard, 2 May 2018, col 2119](#). This group included amendments 88A, 89ZZA, 89ZZB, 89ZZC, 89ZZE, 89ZZF, 89ZZG, 89ZZH, 89ZZJ, 89ZZK, 89ZZL, 89ZZM, 89ZZN, 89ZZP, 89ZZQ, 89BC, 89BD, 89BE and 89BF.

would require that regulations can only be made under schedule 2 if every part of them was within the competence of the devolved authority making the instrument.⁵⁴⁷ This was done to ensure that such powers could not be used to legislate outside of a devolved responsibility.⁵⁴⁸ However, the memorandum also refers to concerns raised as to:

[W]hether the wording of this restriction would affect the ability of the courts to sever those parts of an instrument that are *ultra vires* because they are not within devolved competence, and thereby allow those parts that are within competence to remain law.⁵⁴⁹

The Government explained that this was not its intention, and put forward the amendments to clarify the position:

To achieve this the amendments change the wording to require that provisions within an instrument must be within competence. This means that only a specific provision that is outwith competence could be deemed *ultra vires* rather than the whole of the regulations in which it is contained.⁵⁵⁰

The memorandum also explains that, as introduced, the Bill allowed for some combination of instruments made by UK ministers or by devolved ministers under the exercise of different powers. However, this provision applied only to those instruments laid before a single legislature or where the procedure would be the same before different legislatures. The Government's amendments to these provisions would clarify that instruments made by UK ministers and devolved authorities acting jointly may make provision that would otherwise be outside the powers of the devolved authorities acting alone.⁵⁵¹ On speaking to the amendments on day five of report, Lord Keen explained that the Government would be bringing further amendments forward at third reading to "permit combinations of instruments beyond what is normally possible, reflecting the level of joint working that will be needed in relation to these powers".⁵⁵²

Lord Griffiths of Burry Port, Labour Shadow Spokesperson for Wales, welcomed the amendments in the group.⁵⁵³ He said that he hoped the clarification on the use of "so-called composite instruments" would allow for collaborative working between the devolved administrations and the UK

⁵⁴⁷ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 12.

⁵⁴⁸ *ibid.*

⁵⁴⁹ *ibid.*

⁵⁵⁰ *ibid.*

⁵⁵¹ *ibid.*

⁵⁵² [HL Hansard, 2 May 2018, col 2119.](#)

⁵⁵³ *ibid.*, col 2120.

Government.⁵⁵⁴ Lord Griffiths stated that he believed that the amendments to *ultra vires* provision reflected concerns raised by the devolved administrations. He said Labour were glad that the amendments provided greater clarity and that the UK Government had responded positively.⁵⁵⁵

Powers to Sub-Delegate

Lord Keen of Elie described the government amendments in the third group of amendments debated on day five of report as “highly technical”.⁵⁵⁶ Following debate on government amendment 89DA, Lord Keen rose to explain that, following discussions with the clerk, it appeared to Lord Keen that the amendments in group three had been moved and agreed without him speaking to them.⁵⁵⁷ He asked the House whether it wished him to speak to them, but the House did not request it.⁵⁵⁸ The government amendments in the group referred to by Lord Keen made a number of changes including to schedule 2 of the Bill.⁵⁵⁹ These included government amendment 88B which removed the restriction in the Bill (as introduced) that meant that a devolved authority could not make regulations under part 1 schedule 2 which conferred a power to legislate. Amendment 89BA removed a restriction to sub-delegate from part 3 [2] of schedule 2 (89BB was consequential on this change). The government amendments in group three were agreed without division.⁵⁶⁰

The issue of devolved ministers being able to confer a power to legislate had been raised on day nine of the Bill’s committee stage. Lord Hope of Craighead (Crossbench) had tabled an amendment which would have disapplied this restriction in instances where Scottish or Welsh Ministers were making regulations on matters that were within their devolved competence. Baroness Goldie said that she had listened to the contributions made by Members on this subject and that she had taken “particular note of the question of respect as it relates to the perceived unfairness of a possible disparity between the devolved ministerial powers and the corresponding powers for UK ministers”.⁵⁶¹ She said the Government was prepared to look again at these provisions.⁵⁶²

⁵⁵⁴ [HL Hansard, 2 May 2018, col 2119.](#)

⁵⁵⁵ *ibid.*

⁵⁵⁶ [HL Hansard, 2 May 2018, col 2169.](#) These amendments included 88B, 89ZZD, 89BA, 89BB, 89CA, 89CB, 89CC, 117BA, 117BB, 117BC, 117BD, 117BE, 117BF, 117BG, 117BH, 117BJ, 117BK, 117BL, 117BM, 117BN, 117BP, 117BQ, 117BR, 117BS, 117BT, 117BU, 117BV, 117BW, 117BX and 117BY.

⁵⁵⁷ *ibid.*

⁵⁵⁸ *ibid.*, cols 2169–70.

⁵⁵⁹ Schedule 2 of the Bill would give devolved ministers equivalent powers to Ministers of the Crown under clauses 7 [9] (the ‘correcting power’) and 9 [11] (implementing the withdrawal agreement).

⁵⁶⁰ [HL Hansard, 2 May 2018](#), 88B, col 2121, 89ZZD, col 2123, 89BA, 89BB, 89CA, 89CB, 89CC, col 2125; [HL Hansard, 8 May 2018](#), 117BA to 117BY, col 142.

⁵⁶¹ [HL Hansard, 21 March 2018, col 321.](#)

⁵⁶² *ibid.*

The UK Government's 25 April 2018 supplementary delegated powers memorandum explained the amendments would "create parity" with the corresponding powers for UK ministers.⁵⁶³

Removal of Blanket Restriction on Modifying Direct Retained EU Law

Government amendment 89ZZD made changes to the Bill to amend the powers of devolved ministers to make regulations under part 1 of schedule 2 (the 'correcting' power), which amended direct retained EU law. Government amendment 89CA made similar provision as regards powers under part 3 of schedule 2 (implementing the withdrawal agreement). Both amendments were agreed without division.⁵⁶⁴

The UK Government's 25 April 2018 supplementary delegated powers memorandum explained that the amendments to allow the devolved institutions to amend direct retained EU law reflected the wider changes made to clause 11 [15]:

[E]xcept in those areas specified in regulations under clause 11 [15] and Schedule 3 part 1, competence will transfer from the EU directly to the devolved institutions on exit day.

It is right that in those areas where the devolved institutions will have competence over retained EU law from exit day that they should also have responsibility for correcting the relevant retained EU law, including the retained direct EU legislation, in preparation for exit day. The amendments therefore remove the blanket restriction on the Schedule 2 powers modifying any direct retained EU legislation.⁵⁶⁵

The Government argued that it would be appropriate to maintain the restriction in areas subject to regulations restricting competence:

However, in those areas where the devolved institutions will not assume competence immediately on exit day because a common policy framework may be required, the arguments for making corrections to retained direct EU legislation at a UK level continue to apply. Where uniformity of approach is expected to continue after exit day, it would not make sense to adopt divergent approaches to correcting deficiencies while future frameworks are considered.

⁵⁶³ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 4.

⁵⁶⁴ [HL Hansard, 2 May 2018, col 2123 and col 2125](#).

⁵⁶⁵ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 10.

The amendments will therefore provide that the constraint on the devolved authorities using the powers to modify retained direct EU legislation will continue to apply in areas specified as being subject to the general constraint on competence in regulations made under clause 11 [15]/schedule 3 part 1, but only in those areas.⁵⁶⁶

The memorandum explains that in those areas where a regulation restricting competence to modify direct retained EU law applies, but where the area would otherwise be devolved, the UK Government would consult the relevant devolved administrations before making modifications itself.⁵⁶⁷

Government amendments 89ZZD and 89CA also made changes to the limit on conferring functions that correspond to the making of EU tertiary legislation. The memorandum explained:

The current restrictions on conferral of functions that correspond to the making of EU tertiary legislation are related to the restrictions on modifying retained direct EU law and follow the same policy rationale. Tertiary legislation is a form of directly applicable EU law and is used to supplement other principal EU laws, serving a similar role to subordinate legislation in UK law.⁵⁶⁸

The Government argued that in the areas in which devolved institutions would assume responsibility “it is right” that they should be able to confer such functions as is appropriate in preparation for exit day:

The amendments therefore take the same approach as for the modification of retained direct EU legislation. The constraint on conferring such functions will continue to apply in areas specified as being subject to the general constraint on competence in regulations made under clause 11 [15]/schedule 3 part 1, but only in those areas.⁵⁶⁹

Consultation on Quota Arrangements

On day five of report, government amendments were made to paragraph 25(1) [15(1)] in part 3 [2] of schedule 2. Before amendment the paragraph stated that:

No regulations may be made under this Part without the consent of a Minister of the Crown by a devolved authority acting alone so far as the regulations make provision about any quota arrangements or are

⁵⁶⁶ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 10.

⁵⁶⁷ *ibid.*

⁵⁶⁸ *ibid.*

⁵⁶⁹ *ibid.*, p 11.

incompatible with any such arrangements.

Paragraph 25(2) [15(2)] defined a quota arrangement:

In sub-paragraph (1) “quota arrangements” means any arrangements for, or in connection with, the division of responsibility within the United Kingdom or an area including the United Kingdom for—

- (a) an international obligation, or
- (b) any right or other benefit arising from such an obligation,

where the obligation is to achieve a result defined by reference to a quantity (whether expressed as an amount, proportion or ratio or otherwise) or (as the case may be) the benefit is so defined.

Government amendments 89CB and 89CC changed the consent requirement to a requirement to consult with the Secretary of State. The amendments were agreed without division.⁵⁷⁰

3.4 Other Changes: Scrutiny Procedures, Explanatory Statements and Commencement

On day 6 of committee, a series of amendments were agreed to with regard to scrutiny procedures and explanatory statements as they applied to the Bill’s provisions on devolution.

Urgent Scrutiny Procedure

Baroness Goldie, a Government Whip, explained that government amendments 69D, 72ZC, 78C and 115A would allow devolved ministers to use the ‘made affirmative’ urgent scrutiny procedure when making regulations under schedule 2.⁵⁷¹ She said that these powers had not been included in the Bill as introduced because the made affirmative procedure is not “standard” in the devolved legislatures, but following agreement with the devolved administrations the Government were proposing to add the amendments to the Bill to this effect.⁵⁷² Amendments 69D, 72ZC, 78C and 115A were agreed without division.⁵⁷³

Welsh Sifting Committee

In moving government amendments 69C, 70C and 77E, Baroness Goldie explained these provisions would provide for a ‘sifting committee’ procedure to apply to negative procedure instruments laid by Welsh ministers according to their schedule 2 powers.⁵⁷⁴ She stated that these amendments

⁵⁷⁰ [HL Hansard, 2 May 2018, col 2125.](#)

⁵⁷¹ [HL Hansard, 8 May 2018, col 84.](#)

⁵⁷² *ibid.*

⁵⁷³ *ibid.*, cols 86, 109, 111, and 139 respectively.

⁵⁷⁴ *ibid.*, col 84.

had been requested by both the National Assembly for Wales and the Welsh Government.⁵⁷⁵ Amendments 69C, 70C and 77E were agreed without division.⁵⁷⁶

The delegated powers memorandum published by the Government on 25 April 2018 explained that the provisions would operate in the same way as the procedure for the sifting of UK ministers' instruments in Parliament.⁵⁷⁷ However, the Welsh Sifting committee provisions do not reflect amendments made to the Bill's sifting committee provisions by amendment 70, which was agreed after this set of amendments and gave either House the power require the affirmative procedure was applied. The Welsh sifting arrangements only provide that a committee could recommend the affirmative procedure.

Baroness Goldie stated that the Government were not proposing to add a similar procedure to cover Northern Ireland because of the Assembly's "very specific arrangements for committees", arguing that in this context it would not be appropriate.⁵⁷⁸ The Scottish Government had previously informed the UK Government that both it and the Scottish Parliament wished to apply their own form of sifting arrangement to the schedule 2 power.⁵⁷⁹

Explanatory Statement Requirements for Scottish Ministers:

The Scottish Government (after consultation with the Scottish Parliament) requested that the same requirements which apply to UK ministers to make explanatory statements when sub-delegating powers should apply to Scottish ministers. The UK Government's 25 April 2018 supplementary delegated powers memorandum explained that:

The Scottish Ministers will therefore be required to make a statement when exercising their powers in Schedule 2 and part 1 of Schedule 4 to delegate a power to make legislation on an authority other than a minister to explain why this action is appropriate. The authority to which the power is delegated must then lay before the Scottish Parliament an annual report on the exercise of the sub-delegated power, if exercised that year.⁵⁸⁰

⁵⁷⁵ [HL Hansard, 8 May 2018, col 84.](#)

⁵⁷⁶ *ibid*, cols 86, 106, and 111 respectively.

⁵⁷⁷ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 23 April 2018, p 8.

⁵⁷⁸ [HL Hansard, 8 May 2018, col 84.](#)

⁵⁷⁹ *ibid*.

⁵⁸⁰ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 11.

Baroness Goldie stated that government amendments 83KA, 83P, 83LA, 83MA and 112B would require:

Scottish Ministers to make the same explanatory statements when exercising the powers, under this Bill or when amending regulations made under Section 2(2) of the European Communities Act, that UK Ministers must make when exercising their powers.⁵⁸¹

She explained that this obligation to explain consisted of seven elements:

The first is a “good reasons” statement; the second is an equalities statement; the third is a statement explaining the purpose and effect on retained EU law of the instrument; the fourth is a statement of urgency when using the made affirmative procedure; the fifth is a “good reasons” statement when using any delegated powers to amend European Communities Act Section 2(2) regulations; the sixth is, where appropriate, a statement of the “good reasons” for creating a criminal offence, and of the sentence attached; and the final one is, where appropriate, a statement to explain why sub-delegation of the power is appropriate. As is the case where a UK Minister sub-delegates the powers, there will also be a duty on the authority to which the power is delegated to then lay before the Scottish Parliament an annual report on the exercise of the sub-delegated power, if exercised that year.⁵⁸²

Amendments 83KA, 83P, 83LA, 83MA and 112B were agreed without division.⁵⁸³

Explanatory Statements When UK and Devolved Ministers Are Acting Jointly

On moving government amendment 83AC, Baroness Goldie stated this would clarify that the duties on UK ministers to make explanatory statements when exercising powers under the Bill would apply when exercising schedule 2 powers jointly with a devolved minister.⁵⁸⁴ She further explained the reason for the amendment:

A purpose of joint exercise will allow greater scrutiny by requiring instruments to be considered by this Parliament and the relevant devolved legislature. It would not, therefore, be correct for Parliament to receive less information in relation to the instrument than it would have received if the UK Minister had been acting alone, and this amendment clarifies that this will not be the case. The duty will not

⁵⁸¹ [HL Hansard, 8 May 2018, col 85.](#)

⁵⁸² *ibid.*

⁵⁸³ *ibid.*, cols 129, 133, 133, 133, and 139 respectively.

⁵⁸⁴ *ibid.*, col 85.

extend to devolved Ministers, but the statements, as with the instrument, will be the joint product of both Administrations. The statements, in being made available to Parliament, will also therefore be available to the devolved legislatures, and the relevant devolved Administration can choose whether to lay this alongside the joint instrument.⁵⁸⁵

Amendment 83AC was agreed without division.⁵⁸⁶ Amendment 83AC was included in the UK Government's 25 April 2018 supplementary delegated powers memorandum.⁵⁸⁷

Commencement

Government amendments 106B and 108A were agreed without division on day six of report.⁵⁸⁸ They made changes to clause 19 [24] such that the regulation making powers in clause 11 [15] and schedule 3 would come into force on the day on which the Bill was passed.

3.5 Clause 7 [9] Power to Amend Devolution Statutes (Amendments 34B, 34C and 34D and 92B, 92C, 92D, 92E, 92F)

On days three and five of report, the House agreed government amendments 34B, 34C and 34D and 92B, 92C, 92D, 92E, 92F without division, respectively.⁵⁸⁹ This would mean that regulations made under clause 7(1) [9(1)] could not be used to substantively amend the Scotland Act 1998 or the Government of Wales Act 2006. A restriction of this nature already existed for the Northern Ireland Act 1998 by virtue of clause 7(7)(f).⁵⁹⁰

Lord Hope of Craighead (Crossbench) and Baroness Suttie (Liberal Democrat) had expressed concern during the Bill's committee stage that the powers in clause 7(1) [9(1)] could potentially be used to amend the devolution acts without consent. Both had tabled amendments which sought to prevent these powers being used to modify the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998, without

⁵⁸⁵ [HL Hansard, 8 May 2018, cols 85–6.](#)

⁵⁸⁶ *ibid*, col 122.

⁵⁸⁷ Department for Exiting the European Union, [Supplementary Memorandum Concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 25 April 2018, p 10.

⁵⁸⁸ [HL Hansard, 8 May 2018, col 47.](#)

⁵⁸⁹ Amendments 34B, 34C and 34D: [HL Hansard, 25 April, col 1597](#); 92B: [HL Hansard, 2 May 2018, col 2189](#); 92C and 92D (*ibid*, col 2190); 92E (*ibid*, col 2191); and 92F (*ibid*, col 2192).

⁵⁹⁰ Under part 1 of schedule 2, devolved ministers are given similar powers to UK Government ministers under clause 7 [9]. Paragraph 1(3) of schedule 2 applies the provisions of clause 7(2) to (9) [9(2) to (9)] to the exercise of these powers by devolved authorities.

the consent of the relevant devolved legislature.⁵⁹¹

On moving government amendment 34B at report, Lord Callanan, Minister of State at the Department for Exiting the European Union, said the Government had considered the concerns raised at committee and introduced these amendments to prevent clause 7(1) [9(1)] being used to “substantively alter those Acts”.⁵⁹² Amongst its provisions clause 7(7) [9(7)], as introduced, provided that regulations made under 7(1) could not:

(f) amend or repeal the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 16(b) of schedule 7 to this Act or are amending or repealing paragraph 38 of schedule 3 to the Northern Ireland Act 1998 or any provision of that Act which modifies another enactment).⁵⁹³

Government amendment 34B added a reference to the Scotland Act 1998 and the Government of Wales Act 2006 to clause 7(7)(f) [9(7)(g)]. Amendment 34C removed the reference to paragraph 38 of schedule 3 to the Northern Ireland Act 1998. Amendment 34D was a technical amendment reflecting the addition of the other two devolution acts. As with other pieces of the legislation the devolution acts would need to be corrected for deficiencies arising as a result of the UK’s withdrawal from the EU. Having reached agreement with the devolved administrations, Lord Callanan explained that the UK Government was in a position to make the relevant corrections to the devolution acts on the face of the Bill.⁵⁹⁴ As the power under clause 7(1) [9(1)] would no longer be required for this purpose its ability to amend the devolution acts in this way could be removed from the Bill.⁵⁹⁵ Amendments 34B, 34C and 34D were welcomed by Members speaking in the debate.⁵⁹⁶

Paragraph 38 of schedule 3 to the Northern Ireland Act 1998 was referred to by Lord Callanan as the “technical standards reservation”.⁵⁹⁷ As the power to amend this was removed by government amendment 34C, the Minister explained that the Government had to make necessary changes to this provision on the face of the European Union (Withdrawal) Bill. Government amendment 92F added this correcting provision to the Bill.⁵⁹⁸

⁵⁹¹ See: House of Lords Library, [European Union \(Withdrawal\) Bill: Lords Committee Stage](#), 12 April 2018, pp 36–8.

⁵⁹² [HL Hansard, 25 April 2018, col 1594.](#)

⁵⁹³ Clause 7(7)(f).

⁵⁹⁴ [HL Hansard, 25 April 2018, col 1594.](#)

⁵⁹⁵ *ibid.*

⁵⁹⁶ Including by Lord Beith (Liberal Democrat) and Lord Griffiths of Burry Port (Labour): [HL Hansard, 25 April 2018, col 1596.](#)

⁵⁹⁷ [HL Hansard, 25 April 2018, col 1594.](#)

⁵⁹⁸ *ibid.* (amendment 92F was agreed without division on the fifth day of report: [HL Hansard, 2 May 2018, col 2192.](#))

Lord Callanan further explained that:

Since the reservation is consistent across the three devolution settlements, amendments 92B and 92E make the corresponding corrections to the Scotland Act and to the Government of Wales Act.⁵⁹⁹

Government amendments 92C and 92D made two further corrections to the Government of Wales Act 1998 that Lord Callanan explained would otherwise have been made with the clause 7(1) [9(1)] power, or powers under part 1 of schedule 2.⁶⁰⁰ Amendment 92C removed references to the European Parliamentary Elections Act 2002 and 92D removed language referring to the UK as a member state of the EU. Amendments 92B, 92C, 92D, 92E and 92F were all agreed without division.⁶⁰¹

3.6 Position of the Scottish Government

Lord Hope of Craighead (Crossbench) tabled a number of amendments to the Government's own clause 11 [15] amendments for debate on day five of report (the name of Lord Mackay of Clashfern (Conservative) was also against the amendments). He explained that these had been drawn from a letter to the Lord Speaker from the First Minister for Scotland, Nicola Sturgeon. The letter set out a number of amendments that the Scottish Government had drafted which it said would allow it to recommend that legislative consent be given to the Bill by the Scottish Parliament. Quoting from the letter, Lord Hope stated that the First Minister wrote:

The [UK Government's] amendments represent a considerable advance on the original position of the Bill, in its introduction to the Commons [...]

What is not acceptable to the Scottish Government is that these amendments would bind the Scottish Parliament in law in these areas, whereas the commitment on the part of UK Government is binding in political terms only.⁶⁰²

Lord Hope said that he "very much regretted" the absence of Scottish National Party representatives in the House who could represent the views of the Scottish Government.⁶⁰³ Despite this, Lord Hope stated it was important to debate at least some of these amendments. Lord Hope explained that the amendments focussed on the type of procedure (as laid

⁵⁹⁹ [HL Hansard, 25 April 2018, col 1594.](#)

⁶⁰⁰ *ibid*, col 1595.

⁶⁰¹ Amendments 92B, [HL Hansard, 2 May 2018, col 2189](#); 92C and 92D (*ibid*, col 2190); 92E (*ibid*, col 2191); and 92F (*ibid*, col 2192).

⁶⁰² [HL Hansard, 2 May 2018, cols 2133–4.](#)

⁶⁰³ *ibid*, col 2134.

out in the Scotland Act 1998) that delegated legislation must follow in the Scottish Parliament:

The type C procedure [as provided for by the Bill] requires that the measure be approved by resolution of both Houses of Parliament; in effect, it is describing the affirmative procedure for dealing with statutory instruments, which we are very familiar with. The type A procedure has that too, but the essential difference between them is that type A requires the measure to be laid before, and approved by resolution of, the Scottish Parliament as well, so it seeks the agreement of both the devolved legislature and the United Kingdom Parliament.⁶⁰⁴

If the Type A procedure applied to regulations under clause 11 it would therefore require the consent of the Scottish Parliament. Lord Hope described this as the “central point that runs right through all these amendments”.⁶⁰⁵

Responding to the amendments, Lord Keen of Elie argued that they would give a veto to Scotland over the implementation of UK-wide frameworks. He described it as an issue of constitutional propriety:

Whatever view one takes of the devolved settlement and of where we are with regard to the legislation on that, at the end of the day it is not appropriate to accept that one of the devolved administrations could effectively exercise a veto over legislation for the benefit of the other members of the Union—namely England, Wales and Northern Ireland.⁶⁰⁶

Lord Hope responded to the debate on his amendments arguing that situation now was very different to the situation in which the Scotland Act 1998 was drafted:

This is not about trying to construct the market that we were trying to construct in 1998, which was done by separating out the bits that mattered for that market into Schedule 5 so that they were clearly identified. We are dealing with a different, rather more subtle, situation in trying, as the Minister said, to create a functioning internal market with what has come back to us from Europe. That requires a rather more subtle approach that is not really dealt with in the Scotland Act, for understandable reasons.⁶⁰⁷

⁶⁰⁴ [HL Hansard, 2 May 2018, col 2134.](#)

⁶⁰⁵ *ibid.*

⁶⁰⁶ *ibid*, col 2167.

⁶⁰⁷ *ibid*, col 2169.

Lord Hope subsequently withdrew the amendments.⁶⁰⁸

Scotland's Minister for UK Negotiations on Scotland's Place in Europe, Michael Russell, has stated that the Scottish Government continues to seek agreement, "but not at any price".⁶⁰⁹ Arguing that the Bill could still be amended at third reading, Mr Russell said the Bill "must respect the existing devolution settlement and that is why I will continue to try to deliver changes to protect the principles of devolution".⁶¹⁰

4. Amendments Defeated on Division

4.1 Animal Sentience (Amendment 40)

An amendment seeking the recognition of animal sentience in post-exit domestic law was defeated on day three of report.⁶¹¹

Lord Trees (Crossbench), Baroness Jones of Whitchurch (Labour), Baroness Bakewell of Hardington Mandeville (Liberal Democrat) and Baroness Jones of Moulsecoomb (Green) tabled amendment 40 which sought to embed in domestic law the principles of Article 13 of the Treaty on the Functioning of the European Union (TFEU).⁶¹² Article 13 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 policies".⁶¹³ This Treaty provision would not be carried into domestic law by the Bill, and existing domestic legislation does not explicitly recognise that animals are sentient.⁶¹⁴

In response to amendments on animal sentience tabled at committee stage, Lord Callanan, Minister of State at the Department for Exiting the European Union, noted that the Government had published a draft Animal Welfare (Sentencing and Recognition of Sentience) Bill in December 2017.⁶¹⁵ The consultation on the draft Bill closed on 31 January 2018. Lord Callanan said that the Government was analysing the responses and would publish a summary and next steps "in due course", which he hoped would be before report stage of the European Union (Withdrawal) Bill.⁶¹⁶ However, the consultation response was not published before report stage and had not

⁶⁰⁸ [HL Hansard, 2 May 2018, col 2170.](#)

⁶⁰⁹ Scottish Government, '[Update on Brexit Talks](#)', 2 May 2018.

⁶¹⁰ *ibid.*

⁶¹¹ [HL Hansard, 25 April 2018, col 1627.](#)

⁶¹² *ibid.*, col 1614.

⁶¹³ European Union, [Treaty on the Functioning of the European Union \(Consolidated version 2016\)](#), June 2016.

⁶¹⁴ See, House of Commons Library, [Animal Sentience and Brexit](#), (14 December 2017, updated 2 February 2018) for further details about existing domestic legislation on animal welfare and the question of sentience.

⁶¹⁵ [HL Hansard, 5 March 2018, col 880.](#)

⁶¹⁶ *ibid.*

been published by the date on which this amendment was debated. The Government's response to the House of Commons Environment, Food and Rural Affairs Committee's pre-legislative scrutiny of the draft Bill was published on 23 April 2018.⁶¹⁷ In this document, the Government stated it would "set out how we intend to take forward the measures contained in this draft Bill in due course".⁶¹⁸

Moving amendment 40 at report stage, Lord Trees noted that the Environment, Food and Rural Affairs Committee had "applauded the spirit" of the Government's draft Bill, but "severely criticised its execution".⁶¹⁹ He said that there was "a high level of agreement about where we want to go, but no certainty about how to get there". In drafting his amendment, he said he had sought to address criticisms levelled at the Government's draft Bill on animal sentience relating to its "vagueness, ambiguity and openness to misinterpretation". He argued it was "important to get something in law as soon as possible" to establish parity between EU and post-exit UK legislation on animal welfare. He stated this was important for negotiating future trade arrangements in livestock and livestock products with both the EU and non-EU countries, and for reassuring the public that animal welfare standards would be maintained.

Lord Hope of Craighead (Crossbench), Lord Brown of Eaton-under-Heywood (Crossbench), respectively a former Deputy President and President of the Supreme Court, and Lord Mackay of Clashfern (Conservative), a former Lord Chancellor, all expressed concerns about the drafting of the amendment and what this would mean for the possibility of bringing judicial review claims.⁶²⁰

Lord Callanan reiterated that "the Government's commitment to legislating in this area is in no doubt".⁶²¹ He said that the Government intended to retain existing standards of animal welfare once the UK had left the EU and, "where possible and practical, to enhance them".⁶²² He explained that the Government was currently considering how to take forward the recommendations made by the EFRA Committee and others during the consultation.⁶²³ He said he would also consider carefully the formulation in Lord Trees' amendment, although he also acknowledged the concerns about its implications for judicial review.

⁶¹⁷ House of Commons Environment, Food and Rural Affairs Committee, [Pre-Legislative Scrutiny of the Draft Animal Welfare \(Sentencing and Recognition of Sentience\) Bill](#), 1 February 2018, HC 709 of session 2017–19; and [Pre-Legislative Scrutiny of the Draft Animal Welfare \(Sentencing and Recognition of Sentience\) Bill 2017: Government Response](#), 23 April 2018, HC 984 of session 2017–19.

⁶¹⁸ *ibid*, p 4.

⁶¹⁹ [HL Hansard, 25 April 2018, col 1615](#).

⁶²⁰ *ibid*, cols 1617–20.

⁶²¹ *ibid*, col 1623.

⁶²² *ibid*, col 1624.

⁶²³ *ibid*, col 1626.

Amendment 40 was defeated by 211 votes to 169, a majority of 42.⁶²⁴

4.2 Referendum on the Outcome of Article 50 Negotiations (Amendment 50)

An amendment moved by Lord Newby, Leader of the Liberal Democrats in the Lords, that would have required Parliament to decide whether there should be a referendum on the outcome of the Article 50 negotiations was defeated on day four of report.⁶²⁵

Amendment 50 would have required a Minister of the Crown to move a motion in both Houses of Parliament to provide for the option of holding a referendum. The referendum would have offered a choice between accepting the outcome of the negotiations, or seeking to remain in the EU by revoking the UK's withdrawal notification. The motion would have had to be moved before the enactment of a statute to implement a withdrawal agreement, and before any regulations could have been made under clause 9 [11] to implement a withdrawal agreement. If both Houses agreed that a referendum should be held, amendment 50 would have required the Government to bring forward proposals for holding a referendum, and to seek an extension of the Article 50 negotiating period if necessary.

Moving the amendment, Lord Newby explained that the amendment would require a referendum to be held “only if Parliament—the Commons in particular—voted for one”.⁶²⁶ He said such a referendum would be “a people's vote to determine whether the people as a whole approve the outcome of the negotiations or seek to remain within the EU”. He argued that the Government's current negotiating position was to seek “arrangements as close as possible to those that currently obtain” while “accepting that we will not have the benefits nor the influence that we enjoy today”.⁶²⁷ He thought the likely outcome of this would be the UK would end up as “powerless rule-takers”, “poorer, less influential and less secure”. He anticipated that nevertheless, “a large majority” of MPs and Members of the Lords would vote to approve such a deal because the 2016 referendum result had become “sacrosanct”, and had “frozen attitudes in a way alien to the democratic principle, which allows people to change their minds”.

Lord Newby argued that MPs would be “liberated to vote for what they know is in the country's best interest” if a new referendum gave the people “the final say”. While the first referendum was “a mandate to the Government to negotiate Brexit”, Lord Newby said the amendment could allow “the Commons supported by the people” to take the final decision at the end of the process “on whether that mandate has been adequately

⁶²⁴ [HL Hansard, 25 April 2018, col 1627.](#)

⁶²⁵ [HL Hansard, 30 April 2018, col 1898.](#)

⁶²⁶ *ibid*, col 1874.

⁶²⁷ *ibid*, col 1875.

fulfilled”.⁶²⁸ He said that recent polling “shows that a majority of people now want to have a final say”.⁶²⁹

He argued that the amendment was “urgent”, because the motion to approve the deal—promised by the Government and now added to the Bill by amendment 49—could be brought before Parliament before there was another opportunity to legislate for a new referendum.⁶³⁰ Anticipating concerns that there would not be enough time to hold a referendum before exit day on 29 March 2019, Lord Newby said the amendment provided for the Government to seek an extension to the two-year Article 50 negotiating period if necessary.⁶³¹ Under the terms of Article 50, the EU could grant such a request only if all 27 remaining member states agreed to do so. Lord Newby said the supporters of the amendment believed that “in practice, such a request would be granted”.

Another signatory, Lord Butler of Brockwell (Crossbench) said amendment 50 was the “logical consequence” of amendment 49, which stipulated that if Parliament withheld approval of the withdrawal agreement, then the Government must follow any direction approved by the Commons and considered by the Lords.⁶³² He said in these circumstances, the UK could not “realistically expect the EU to be willing to reopen the negotiations and give us a better deal” at Parliament’s behest.⁶³³ He said that leaving with no agreement at all was “not acceptable”, so the only other option left would be to withdraw the notice of the UK’s intention to leave. In his view, the amendment acknowledged that “since the decision to leave the EU was taken by the British people, a decision to withdraw our notice could also be taken only by the British people”. In those circumstances, he believed holding a second referendum was not “ignoring the will of the people”, but “submitting to it”. He said the amendment would not make it certain there would be another referendum, but would ensure it remained an option “if, and only if, Parliament finds the outcome of negotiations unacceptable”.

Lord Adonis (Labour) made a similar argument, saying that if a majority of MPs did not support whatever deal the Government negotiated with the EU, then “the only constitutional course is for the people to judge whether the Brexit treaty is their considered will, or their considered will is to stay in the European Union”.⁶³⁴

Opposing the amendment, Lord Howarth of Newport (Labour) described it as “reckless”.⁶³⁵ He argued there was “no sign” that those who voted to leave had changed their minds, and holding a second referendum would be

⁶²⁸ [HL Hansard, 30 April 2018, cols 1875–6.](#)

⁶²⁹ *ibid*, col 1877.

⁶³⁰ *ibid*.

⁶³¹ *ibid*, col 1878.

⁶³² *ibid*, col 1880.

⁶³³ *ibid*, col 1881.

⁶³⁴ *ibid*, col 1883.

⁶³⁵ *ibid*, col 1885.

“a bad use of energy, time and money”. He expected the result would still be in favour of leaving because there was “deep popular discontent still with the EU”. In his view, if Parliament and the Government were to “renege” on the pledge made by David Cameron’s Government in the leaflet sent to all households before the referendum in 2016 to “implement what you decide”, it would provoke “a very serious crisis”.⁶³⁶

Lord Faulks (Conservative), who was one of the ministers in charge of taking the European Union Referendum Act 2015 through Parliament, said there was “no suggestion” by any major political party at the time that there would be a second referendum.⁶³⁷ He warned that the “whole premise of the amendment is legal uncertainty—precisely the opposite of what the Bill is intended to achieve” because there was no certainty the EU would grant an extension of the Article 50 negotiating period, or that the UK could unilaterally revoke its notification of withdrawal.⁶³⁸ He also felt that if there were to be a second referendum it should offer the possibility of rejecting the deal agreed and leaving the EU without a deal.⁶³⁹ The amendment precluded that option, which Lord Faulks argued was “treating the people with contempt”. He also feared that a second referendum would be “divisive”.

In response to Lord Faulks’ points about legal uncertainty, Lord Kerr of Kinlochard (Crossbench), who was involved in the drafting of Article 50, said there was “absolutely no doubt” that the European Council would agree to the UK revoking its notification of withdrawal and staying in the EU.⁶⁴⁰ He pointed out that the President of the European Council, the President of the European Commission, the President of the European Parliament, the President of France, and the German Chancellor had all said they would prefer the UK to change its mind and not leave the EU. He said it was “a matter of judgment” whether the EU27 would agree to an extension of the Article 50 negotiating period, but his personal judgment was that “we would get the necessary unanimity” if the request was because the House of Commons had mandated a referendum or a general election.

Lord Grocott (Labour) echoed Lord Faulks’ argument that the possibility of a second referendum had not been mentioned at the time the legislation setting up the 2016 referendum was passed.⁶⁴¹ He believed that, only two years after the 2016 referendum, it was too soon to argue that circumstances had changed enough to warrant holding another one. He suggested that some people supported holding another referendum because they believed that “when people voted leave, they did not really know the full details and consequences of what they were voting for”, but Lord

⁶³⁶ [HL Hansard, 30 April 2018, cols 1886–7.](#)

⁶³⁷ *ibid*, col 1887.

⁶³⁸ *ibid*, cols 1887–8.

⁶³⁹ *ibid*, col 1888.

⁶⁴⁰ *ibid*, col 1889.

⁶⁴¹ *ibid*, col 1891.

Grocott dismissed this line of argument.⁶⁴² He maintained it was “increasingly unconvincing that the motives of those seeking a second referendum are an ardent desire to recheck the views of the British public”.⁶⁴³ Rather, he thought that an attempt to hold a second referendum was “an attempt to reverse the decision of the first referendum”, which was “unacceptable”.

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, said that Labour would abstain on the amendment.⁶⁴⁴ She said amendment 50 was unnecessary, as amendment 49, which the House agreed to shortly before, did not close off the possibility of holding another referendum. She argued that the “real question before Parliament is the sort of deal we should be seeking”, and moving the discourse on to the question of a second referendum at this stage would detract from this by “foster[ing] more division and distrust”. She also expressed concern that the “introduction of a new element of uncertainty—that the deal might need to go to a referendum”, could make negotiating with the EU more difficult. She described calling for another referendum now as “premature”, as it was not yet clear what the referendum question should be.

Lord Callanan, Minister of State at the Department for Exiting the European Union, stated that the Government’s position was “unchanged from the time of the referendum”, namely that the Government would respect the referendum result.⁶⁴⁵ He argued that the Bill was “a necessary component of delivering a successful Brexit” and “providing legal certainty”, but “[i]nserting a requirement for a second referendum would have exactly the opposite effect”.

Amendment 50 was defeated on division by 260 votes to 202, a majority of 58.⁶⁴⁶

5. Ministerial Assurances

5.1 Clinical Trials Regulation (Amendment 9)

On day one of report stage, the Government indicated a commitment to implementing as far as possible the EU Clinical Trials Regulation, which is currently not expected to come into application before the UK leaves the EU.

The EU Clinical Trials Regulation ([Regulation EU No 536/2014](#)) is set to replace the EU Clinical Trials Directive ([Directive 2001/20/EC](#)).⁶⁴⁷ Although

⁶⁴² [HL Hansard, 30 April 2018, cols 1891–2.](#)

⁶⁴³ *ibid*, col 1892.

⁶⁴⁴ *ibid*, col 1895.

⁶⁴⁵ *ibid*, col 1896.

⁶⁴⁶ *ibid*, col 1898.

⁶⁴⁷ European Commission, ‘[Clinical Trials—Regulation EU No 536/2014](#)’, accessed 20 April 2018.

the Regulation entered into force on 16 June 2014, the timing of its application depends on the development of a fully functional EU clinical trials portal and database, which will be confirmed by an independent audit. The Regulation becomes applicable six months after the European Commission publishes a notice of this confirmation. The European Commission estimates that the Regulation will enter into application in 2019.⁶⁴⁸

According to the European Commission, the Regulation will secure several benefits:

The Regulation will ensure a greater level of harmonisation of the rules for conducting clinical trials throughout the EU. It introduces an authorisation procedure based on a single submission via a single EU portal, an assessment procedure leading to a single decision, rules on the protection of subjects and informed consent, and transparency requirements.

It will also make it easier for pharmaceutical companies to conduct multinational clinical trials, which should increase the number of studies conducted within the EU.⁶⁴⁹

Under provisions in clause 3(1) and 3(3) of the Bill, an EU Regulation that comes into force at a particular time and is stated to apply from a later time will be retained in UK law after exit day only if it is in force *and* applies before exit day. Therefore, although the Clinical Trials Regulation has been in force since 2014, if it does not come into application on or before 29 March 2019, it would not form part of retained EU law and would not apply in UK domestic law.

On day one of report, Lord Patel (Crossbench) moved amendment 9, which would have specified that the Clinical Trials Regulation would form part of retained EU law.⁶⁵⁰ He said it was “important to the research community, pharma, and indeed the EU institutions that the UK strongly wishes to collaborate [with] in clinical trials across the EU”.⁶⁵¹

In response, Baroness Goldie, Government Whip, agreed that it was in the interests of patients and the life sciences industry across Europe for the UK and the EU to find a way to continue to cooperate in the field of clinical trials.⁶⁵² She said she wished to provide the House “with the strongest possible reassurance on the UK’s commitment to implement the CTR [Clinical Trials Regulation]”.⁶⁵³ She said that if the Clinical Trials Regulation

⁶⁴⁸ European Commission, ‘[Clinical Trials—Regulation EU No 536/2004](#)’, accessed 20 April 2018.

⁶⁴⁹ *ibid.*

⁶⁵⁰ [HL Hansard, 18 April 2018, col 1214.](#)

⁶⁵¹ *ibid.*

⁶⁵² *ibid.*, col 1215.

⁶⁵³ *ibid.*

comes into force during the implementation period, as it is currently expected to do, it will apply to the UK.⁶⁵⁴

The UK and EU agreed in the latest text of the draft withdrawal agreement in mid-March 2018 that, unless otherwise provided in the Agreement, EU law will apply in the UK during the transition period as though the UK continued to be a member state.⁶⁵⁵ Baroness Goldie said that the Withdrawal Agreement and Implementation Bill—which the Government has committed to introducing once a withdrawal agreement has been agreed with the EU and approved in a vote in both Houses—would make the necessary provisions in domestic law for this to happen.⁶⁵⁶

Baroness Goldie said that “if this opportunity does not come to pass”, then the Government would seek to replicate the Clinical Trials Regulation in domestic law as far as possible:

[...] we will give priority to the steps necessary to bring into UK law, without delay, all the relevant parts of the EU Regulation that are within the UK’s control, so that those planning clinical research can do so with certainty. The two key elements of the Regulation that are outside the UK’s control, and therefore not covered by this guarantee or pledge, are, first, the use of a shared central IT portal and, secondly, participation in the single assessment model, both of which require a negotiated UK-EU agreement regarding UK involvement post-Brexit.⁶⁵⁷

Following the Government’s commitment, Lord Patel withdrew his amendment.⁶⁵⁸

5.2 Public Health Protection (Amendment 17A)

On day two of report, Lord Duncan of Springbank, Parliamentary Under Secretary of State at the Northern Ireland Office and Scotland Office, indicated that the Government would consider the issue of public health protection on third reading.⁶⁵⁹ This was in response to an amendment moved by Lord Warner (Crossbench) on ensuring that part of Article 168 of the Treaty on the Functioning of the European Union (TFEU) would form

⁶⁵⁴ [HL Hansard, 18 April 2018, col 1216](#). Baroness Goldie said that the Regulation is currently expected to come into application in March 2020. The websites of the European Commission and the European Medicines Agency both state that the Regulation is due to come into application in 2019 (European Commission, ‘[Clinical Trials—Regulation EU No 536/2004](#)’; and European Medicines Agency, ‘[Clinical Trial Regulation](#)’, both accessed 23 April 2018).

⁶⁵⁵ European Commission and HM Government, [Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), 19 March 2018, Article 122.

⁶⁵⁶ [HL Hansard, 18 April 2018, col 1216](#).

⁶⁵⁷ *ibid.*

⁶⁵⁸ *ibid.*, col 1217.

⁶⁵⁹ [HL Hansard, 23 April 2018, col 1391](#).

part of retained EU law. Amendment 17A would have inserted the following new clause:

Public health protection

Article 168 of the Treaty on the Functioning of the European Union, so far as it requires a Minister of the Crown or a public authority to have regard to the principle that a high level of human health protection must be ensured in the definition and implementation of all policies and activities, forms part of retained EU law.⁶⁶⁰

Article 168 of the TFEU consists of seven paragraphs. Amongst its provisions, the first paragraph states that “a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”.⁶⁶¹

The provisions of clause 4 [5] would ensure that rights and obligations other than those captured by clauses 2 and 3 of the Bill would continue in UK domestic law after the UK withdraws from the EU.⁶⁶² This would include directly effective rights contained within EU treaties.⁶⁶³ Lord Warner explained that he had received legal advice from professors of European law at the universities of Sheffield, Essex and Cambridge, which argued that it was unclear whether Article 168 would fall under this provision. Lord Warner argued that the simplest way to address these concerns would be to put “matters beyond legal doubt” by an amendment “along the lines of” amendment 17A.⁶⁶⁴ Lord Warner said amendment 17A was supported by 52 organisations (including bodies such as the Royal College of Physicians, Cancer UK and Diabetes UK). He said, in his view, this was because there was a fear that “hard-won legal protections for public health will be sacrificed in a rush to do trade deals”.⁶⁶⁵

Lord Warner argued that Article 168 of the TFEU had been important in court cases in the UK. He made reference to a case before the High Court in May 2016, in which tobacco companies sought a judicial review of the Government’s introduction of regulations to introduce standardised packaging for tobacco products.⁶⁶⁶ Lord Warner quoted from Mr Justice Green’s judgment, in which Article 168 of the TFEU was described as being “at the epicentre of policy making [...] and how ‘all’ EU policies must ensure

⁶⁶⁰ House of Lords, [European Union \(Withdrawal\) Bill: Second Marshalled List of Amendments to be Moved on Report](#), 19 April 2018, p 3. Lord Warner moved a similar amendment (amendment 227BD) at committee stage, which was withdrawn. See: [HL Hansard, 19 March 2018, cols 109–27](#).

⁶⁶¹ European Union, [Treaty on the Functioning of the European Union \(Consolidated version 2016\)](#), Article 168, para 1.

⁶⁶² [Explanatory Notes](#), p 28.

⁶⁶³ *ibid.*

⁶⁶⁴ [HL Hansard, 23 April 2018, col 1386](#).

⁶⁶⁵ *ibid.*

⁶⁶⁶ [The Queen v Secretary of State for Health \[2016\] EWHC 1169](#).

a ‘high level of human health protection’”.⁶⁶⁷ The case went to the Court of Appeal, and Lord Warner quoted from the Court’s judgment finding in favour of the Government:

The judge was entitled to place the weight he did on public health objectives of the Regulations: his approach was in line with the high level of human health protection provided for in EU law.⁶⁶⁸

Responding to Lord Warner’s introductory remarks, Lord Duncan stated that as Article 168 had been considered in a case before the UK courts it would remain available as case law after the UK’s withdrawal from the EU:

Going forward, the elements of this and other cases which refer to the key role of public health are, to the extent that they are relevant to EU law, preserved by clause 6(3) [7(3)]. This ensures that retained EU law is to be interpreted in accordance with the pre-exit case law to which it is relevant.⁶⁶⁹

Lord Duncan argued that in this way Article 168 would be available to UK courts and that:

[A]ll EU legislation in the area of public health which becomes part of retained EU law and domestic legislation implementing EU public health requirements will, by virtue of clause 6 [7], continue to be interpreted—I stress that point—by reference to relevant pre-exit case law and treaty provisions. This means that Article 168 and the fact that it was described by the High Court as being at the epicentre of EU policy-making are available to our domestic courts in future.⁶⁷⁰

Lord Duncan also argued that the effect of Article 168 in UK domestic law before withdrawal would continue after withdrawal by virtue of clause 4 [5]:

I also make it clear that the effect of Article 168 in the domestic law of this country before exit will continue after exit by virtue of clause 4 [5]. I will explain. Clause 4 [5] provides that:

“Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which ... are recognised and available in domestic law”,

immediately before exit,

“by virtue of section 2(1) of the European Communities Act [...]

⁶⁶⁷ [HL Hansard, 23 April 2018, col 1386.](#)

⁶⁶⁸ *ibid.*

⁶⁶⁹ *ibid.*, col 1387.

⁶⁷⁰ *ibid.*

continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly)”.

Therefore, in that instance, Article 168—in so far as it was utilised by the courts when Mr Justice Green drew upon it and recognised that it was “at the epicentre” of European policy-making—will be available in the future to UK courts to draw upon, both its elements and its interpretation, and those elements will be available afterwards.⁶⁷¹

The concern that Lord Warner had referred to about the impact of trade deals on public health protections was reflected by other Members. For example, Baroness Finlay of Llandaff (Crossbench) expressed concern that if a trade deal and negotiation ended up in court “something has already gone terribly wrong”.⁶⁷² She argued that stressing public health in the Bill would strengthen the Government’s position to ensure that public health was not inadvertently compromised by future trade agreements.⁶⁷³

Lord Hunt of Kings Heath, Shadow Spokesperson on Health and Social Care (whose name was also on amendment 17A), suggested that in light of the Minister’s intervention the issue should be further considered and then returned to on third reading:

It would be extremely helpful if the Minister would indicate that if we ask for time to look at the detail of his intervention, we could bring it back at third reading. That would be a constructive and very helpful outcome to the debate.⁶⁷⁴

Lord Duncan explained that the Government was “broadly neutral” on the amendment because it believed that the functionality of Article 168 would not be undermined and that if Lord Warner wished to test the opinion of the House he should do so.⁶⁷⁵ Lord Hunt restated that he had found the Minister’s intervention helpful and if the Minister agreed that the issue could be brought back at third reading, it would represent a “sensible, consensual way forward”.⁶⁷⁶ Lord Duncan responded stating that the Government would consider the issue and circulate the information he provided to Members:

For the good of my own health, we will reflect on this matter and we will be able to come back to it in due course. In the meantime, we will ensure that the intervention is circulated widely so that noble Lords can see exactly where we stand on this matter. I hope that that is

⁶⁷¹ [HL Hansard, 23 April 2018, col 1387.](#)

⁶⁷² *ibid*, col 1388.

⁶⁷³ *ibid*.

⁶⁷⁴ *ibid*, col 1389.

⁶⁷⁵ *ibid*, col 1390.

⁶⁷⁶ *ibid*.

helpful.⁶⁷⁷

Lord Warner subsequently withdrew the amendment.⁶⁷⁸

5.3 Environmental Protection (Amendments 27, 28 and 41)

On 12 November 2017, Michael Gove, the Secretary of State for the Environment, announced that the Government would consult on the establishment of a new independent statutory body tasked with holding the government to account for upholding environmental standards in England.⁶⁷⁹ In addition, the consultation would consider whether the new body should also hold public bodies to account.

Alongside the new statutory body, the consultation would examine a new policy statement to ensure environmental principles contained within the EU treaties continued to inform England's environmental policies after withdrawal from the EU. The Government has stated that it will also explore whether the devolved administrations would wish to take a similar or different approach.⁶⁸⁰ The consultation was published on 10 May 2018 and closes on 2 August 2018.⁶⁸¹

On the second day of report, the House debated amendments 27, 28 and 41. These amendments were all broadly on the subject of environmental protections. At the time of the debate the consultation was yet to be published. The provisions of amendment 27 related to the subject of the consultation and would have required the government to:

- take steps to ensure that the UK's withdrawal from the EU did not result in the removal or reduction of any rights, powers, liabilities, obligations, restrictions remedies or procedures that contribute to the protection and improvement of the environment;
- publish proposals for legislation requiring public authorities to apply principals of environmental protection established in EU law, after exit day;
- publish proposals for the establishment of an independent body to ensure compliance with environmental law by relevant public bodies; and
- publish a 'Statement of Environmental Policy' setting out how the government would give effect to a series of listed environmental

⁶⁷⁷ [HL Hansard, 23 April 2018, col 1391.](#)

⁶⁷⁸ [ibid](#), col 1392.

⁶⁷⁹ Department for Environment, Food and Rural Affairs, '[New Environmental Protections to Deliver a Green Brexit](#)', 12 November 2017.

⁶⁸⁰ [ibid](#).

⁶⁸¹ Department for Environment, Food and Rural Affairs, '[Environmental Principles and Governance after EU Exit](#)', 10 May 2018.

principles.⁶⁸²

Amendment 28, tabled by Lord Judd (Labour) would have required the Secretary of State to take all action necessary to safeguard the UK's commitment to "the protection and enhancement of biodiversity and to integrate all relevant EU law and regulations into UK legislation".⁶⁸³

Amendment 41, tabled by Lord Whitty (Labour) would have placed several requirements on the Government to report on how it intended to maintain a relationship with the executive agencies of the EU and the enforcement processes of the EU in respect of environmental standards, food safety and animal welfare.⁶⁸⁴

Amendment 27 was formally moved by Baroness Brown of Cambridge (Crossbench), who had also put her name to the amendment. She referred to the Government's consultation but said that, because the consultation had not yet been published, there was a growing risk that on exit day "there will be a serious environmental governance gap".⁶⁸⁵ She argued that action was needed urgently for several reasons:

[B]ecause exit day is less than a year away; because the implementation period is not yet a certainty; because consultation can be delayed, especially when, as it appears, some departments, including the Department for Transport and the Treasury, would not welcome an independent environmental watchdog to hold the Government to account; and because establishing a new watchdog in law and appointing its members will not be quick.⁶⁸⁶

Speaking to amendment 28, Lord Judd (Labour) explained that biodiversity was important in regard to invasive species and that EU membership assisted the UK with information sharing:

Through European Union membership as it stands, we already have free-flowing information sharing with our fellow member states in the area of biosecurity. These connections should surely be maintained and indeed strengthened, not least because human agency is often the cause of tree pests and pathogens moving to new areas. If we are to protect the UK from future threats [...] such as emerald ash borer, then we need to maintain existing protective measures.⁶⁸⁷

Speaking to amendment 41, Lord Whitty (Labour) argued the agencies listed in his amendment required an effective replacement which also had a

⁶⁸² House of Lords, [European Union \(Withdrawal\) Bill: Second Marshalled List of Amendments to be Moved on Report](#), 19 April 2018, pp 6–7.

⁶⁸³ *ibid*, p 7.

⁶⁸⁴ *ibid*, pp 12–13.

⁶⁸⁵ [HL Hansard, 23 April 2018, col 1421](#).

⁶⁸⁶ *ibid*.

⁶⁸⁷ *ibid*, col 1428.

continuing relationship with the EU agencies. He also expressed concern about how the UK would interact with these agencies during the transition period:

Our industry may still work on the same rules, but it will stop being part of the process and the enforcement. This is a crucial issue on which the Government have to give clarity, not just to this House but to the many industries and the people who work in them, who are dependent on the continuation of that framework.⁶⁸⁸

In response to the amendments, Lord Callanan, Minister of State at the Department for Exiting the European Union, stated the Government welcomed the sentiments behind them, but that it believed they were unnecessary.⁶⁸⁹ He said that the Government would be publishing the consultation in time for the Bill's third reading⁶⁹⁰ and argued that these amendments would "prejudge the outcome of the forthcoming consultation by setting requirements in legislation now".⁶⁹¹ Lord Deben (Conservative), who tabled amendment 27, asked whether it would be possible to bring an amendment forward on third reading, should the House feel that the principles outlined in the consultation were not sufficient. Lord Callanan responded that it would be possible to look at the issue again after the consultation was published:

Yes, we are saying that we will be able to address this issue again after noble Lords have had a chance to look at the consultation on the statement of principles and the consultation on the new environmental body.

I hope my reassurances are enough to enable noble Lords not to press the amendment and that they will take the opportunity to consider the contents of the consultation before we get to Third Reading.⁶⁹²

Amendment 27 was withdrawn and 28 and 41 were not moved.⁶⁹³

5.4 Consultation on Ambulatory References and Contracts

On the final day of report, Lord Callanan, Minister of State at the Department for Exiting the European Union, announced that the Government intended to consult further on ambulatory references,

⁶⁸⁸ [HL Hansard, 23 April 2018, col 1427.](#)

⁶⁸⁹ [ibid](#), col 1432.

⁶⁹⁰ The consultation was published on 10 May 2018 and closes on 2 August 2018; Department for Environment, Food and Rural Affairs, '[Environmental Principles and Governance after EU Exit](#)', 10 May 2018.

⁶⁹¹ [HL Hansard, 23 April 2018, col 1433.](#)

⁶⁹² [ibid](#), col 1436.

⁶⁹³ [HL Hansard, 23 April 2018, col 1436;](#) and [HL Hansard, 25 April 2018, col 1630.](#)

particularly in relation to contracts.⁶⁹⁴

Paragraph 1 of schedule 8 deals with ambulatory references, which are cross-references to EU instruments as they may be amended from time to time in the future. Steve Baker, Parliamentary Under Secretary at the Department for Exiting the European Union, explained at committee stage in the House of Commons that:

At present, the ambulatory cross-references update automatically when the EU instrument referred to is amended. After exit day, the Bill provides that such references will instead be read as references to the retained EU law version of the instrument, which, unless the contrary intention appears, will update when the retained instrument is modified by domestic law. This is necessary in order to prevent post-exit changes to EU law from flowing automatically into UK law. It would not be appropriate for the reference to continue to point to the EU version of the instrument after we have left the EU.⁶⁹⁵

Mr Baker acknowledged that in the paragraph as drafted, the use of the word “documents” had caused concerns about whether that meant the provision would apply to private contracts.⁶⁹⁶ Speaking at report stage in the Lords, Lord Carrington of Fulham (Conservative) expanded on why this could cause a problem:

This is a very important although highly technical area, transposing European law into English law for the sake of contract agreements. Under the way this is currently phrased in the Bill, there is a danger that the UK version of the EU law would be transposed into EU versions of EU law. The amendments are concerned with consulting on how this can be avoided, so that international contracts made under UK law can continue to be made under UK law for the benefit of the City of London, financial services and the accountancy and legal professions in London.⁶⁹⁷

Lord Callanan said that subject to the outcome of the consultation, further legislation might be brought forward under the consequential powers in the Bill.⁶⁹⁸ Lord Carrington of Fulham welcomed the announcement of the consultation.

⁶⁹⁴ [HL Hansard, 8 May 2018, col 78.](#)

⁶⁹⁵ [HC Hansard, 20 December 2017, col 1168.](#)

⁶⁹⁶ *ibid.*

⁶⁹⁷ [HL Hansard, 8 May 2018, col 78.](#)

⁶⁹⁸ *ibid.*