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Baroness Taylor of Bolton  
Chair, Constitution Committee  
House of Lords  
London  
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30 April 2018

Dear Ann,

**EUROPEAN UNION (WITHDRAWAL) BILL**

Thank you for your letter of 23 April acknowledging the Government's response to your committee's report on the EU (Withdrawal) Bill. I am pleased that you found it constructive, and that you recognise the Government's amendments represent significant progress. We have brought forward a substantial package of amendments to address the concerns of the committee, and the House, during the Bill's passage, as we work to ensure the Bill is acceptable to parliamentarians without putting at risk its essential objective of providing the maximum possible legal certainty at the point of exit.

I have set out responses to your queries below, and will be happy to engage further on any follow-up points you may have on these, and other aspects of the Bill and the Government's amendments.

**Status of retained EU law**

Your first query relates to Government amendment 26, pertaining to the status of retained EU law, which was debated and accepted into the Bill on Monday 23 April.

I can confirm that legislation which is retained EU law by virtue of clause 2 (EU derived domestic legislation) will continue as legislation of the same type as it was before exit day. Part of the reason for amendment 26 is to provide clarification that, despite being saved by primary legislation, the domestic status of this legislation is not affected.

Subsection (1) of amendment 26 puts this beyond doubt. This means that any EU derived domestic legislation will continue to be modifiable by the same processes, and with the same procedure, after exit as before. For primary legislation, this will mean that it cannot be modified by legislation made under delegated powers (other than relevant Henry VIII powers) passed prior to exit day.

## **Supremacy**

Your second query relates to clause 5 of the Bill and the application of the principle of supremacy of EU law as modifications are made to retained EU law. You have asked whether, in the interests of legal certainty, where modified material is intended to benefit from the supremacy principle, this will always be made clear in accompanying explanatory material.

In many, if not most cases, our expectation is that it will be obvious from the modification and the context whether the modified law is intended to continue to benefit from the supremacy principle. Nonetheless, we have reflected carefully on the concerns raised that the intention behind a modification to retained EU law might not always be clear. We have therefore brought forward amendment 83F which provides that the statement made before laying a statutory instrument under the Bill, must explain the purpose of the instrument, as well as the other matters set out in that paragraph - including relevant law and the effect of the instrument, if any, on retained EU law. The explanation about the purpose of the instrument should provide relevant information about the intent behind the change to the retained law, so that a court having to decide any issues about a provision that go to intent should have helpful material to assist in reaching a conclusion.

Whether or not the principle of supremacy continues to apply will still need to be considered on a case-by-case basis, as amendments to legislation are brought forward. The Government remains of the view that the Bill should not and could not seek to set a blanket rule as to when an amendment would displace the principle. It will depend on the individual facts of the case. However, the Government's amendment requiring the accompanying statement will result in courts having further information which they are able to draw upon when deciding whether or not the principle of supremacy is intended to continue.

Your letter also references Government amendment 100. The purpose of this amendment is to insert a definition of "anything which is retained EU law by virtue of section 4", a term which is used in multiple places in the Bill, into the definitions in the Bill. This definition is not relevant to the provision the Bill makes on supremacy in clause 5. It is not intended to set out a rule about how the principle of supremacy applies to modifications to EU law retained by virtue of clause 4 of the Bill. Such modifications would need to be considered on a case-by-case basis and in accordance with clause 5(3).

## **Legal Challenge**

Finally, you asked about the justification for Schedule 1 paragraph 1 of the Bill, and specifically the provision which states that retained EU law cannot be challenged on the basis that the original EU instrument was invalid, unless regulations make provision allowing for such a challenge.

The Government's position is that, as domestic courts currently have no jurisdiction to annul an EU measure or declare it invalid, we do not think that it would, in general, be right to provide them with a new wide-ranging new jurisdiction to do so. This would in effect, require

our domestic courts to step into the shoes of the CJEU and consider, for example, questions around whether the relevant EU institution misused its powers or complied with the applicable procedural requirements. Paragraph 1 of Schedule 1 therefore makes clear that generally such challenges will not be possible in domestic law after exit.

The Government does recognise, however, that there may be some circumstances where, for example, individuals and businesses are individually affected by an EU instrument which has been converted. For example, a decision of an EU institution or body may be addressed directly to an individual or business.

After exit, they would continue to be able to challenge such decisions before the CJEU and to have them annulled within the EU. The converted form of the decision would, however, remain in force within the UK. Even if domestic courts were to assume jurisdiction to annul an EU measure or declare it invalid, it would not be immediately clear who would be the respondent in any such challenge.

The Bill, as introduced, therefore provided a safeguarding mechanism (at paragraph 1(2)(b) of Schedule 1) to enable Ministers to propose, and Parliament to agree, in regulations, specified circumstances in which challenges may be brought in domestic law to the validity of retained EU law.

Your committee will be aware that Lord Beith's amendment 18 was agreed to by the House during Report stage on 23 April. This amendment removes the power at paragraph 1(2)(b) (and the related provisions in subparagraph 1(3)) to make any such regulations. The general exclusion provided for in paragraph 1 of the Schedule remains; and therefore, under the Bill as amended, the general position taken by the Bill, that there should be no ability for individuals to bring any such challenges after exit, remains. The Government will reflect carefully on this important technical issue in light of the House's decision.

Kind Regards,

A handwritten signature in blue ink, appearing to read 'Martin Callanan', written in a cursive style.

**LORD CALLANAN**  
**MINISTER OF STATE FOR EXITING THE EUROPEAN UNION**