



Baroness Taylor of Bolton
Chairman, Constitution Committee
House of Lords
London
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11 April 2018

Dear Baroness Taylor

**GOVERNMENT RESPONSE TO THE LORDS CONSTITUTION COMMITTEE
REPORT ON THE EUROPEAN UNION (WITHDRAWAL) BILL**

Thank you for your Committee's report of 29 January on *The EU (Withdrawal) Bill*. The report contained a thorough analysis of the key issues as the Bill progresses to the next stage.

Since Steve Baker MP, Robin Walker MP, the Solicitor General, and the Leader of the House of Lords provided oral evidence to the Committee in December 2017, and your report was published, the Bill has been scrutinised for over 115 hours of debate in Lords Committee. The Government has listened carefully to the views of all members of the House of Lords about the Bill and suggestions for where improvements could be made.

Your Committee's report and the contributions of Committee members during the debates have greatly assisted this process. The Government appreciates the work and rigorous scrutiny of your Committee in relation to the Bill and our exit from the EU more generally.

I welcome this report and set out the Government's response below, including setting out where we propose Government amendments to the Bill during Report stage. These relate to your Committee's recommendations on clause 6(2) of the Bill, the status of retained EU law, and rights of challenge. We intend to bring forward further amendments to the delegated powers and devolution provisions of the Bill as it progresses through Report Stage. I hope we can find further opportunities for dialogue as the Bill progresses through Parliament.

Yours sincerely,

LORD CALLANAN
MINISTER OF STATE FOR EXITING THE EUROPEAN UNION

ANNEX A: GOVERNMENT RESPONSE TO REPORT RECOMMENDATIONS

1. Retained EU law

EU-derived domestic legislation: Clause 2 appears significantly broader than it needs to be. It is not constitutionally necessary or appropriate for primary legislation, which will continue in force in any event, to be treated as “retained EU law” by clause 2 and subject to the powers of amendment in clause 7.

The Government recognises the Committee’s concerns surrounding the breadth of retained EU law in clause 2, and the consequences of it including primary legislation, which would become subject to the Bill’s delegated powers, including those in clause 7. However, we believe that the wide scope of clause 2 is crucial to the Bill’s underlying purpose of ensuring that we have a functioning statute book following our departure from the EU. We would also like to reassure the Committee that clause 2 only encompasses the specific content within domestic legislation which relates to the EU or the EEA. As such, if an Act of Parliament contains specific provisions relating to the EU or EEA, amongst other provisions, only that element of the Act that relates to EU or EEA matters would be within the scope of clause 2 - not the entire Act.

In drafting the Bill, clause 2 was drawn broadly deliberately. During our membership of the EU, our EU obligations have been incorporated across a huge proportion of our domestic statute book, in both primary and secondary legislation, and not just in regulations made under the European Communities Act 1972 (ECA). Therefore we believe it is vital for two reasons that this broad category of domestic legislation forms part of ‘retained EU law’.

The first reason relates to the interpretation of this law. Clause 6 makes clear that all retained EU law (including that under clause 2) must be interpreted in light of the pre-exit case law of the Court of Justice for the European Union (CJEU) and of the domestic courts, and retained EU general principles. The wide scope of clause 2 is therefore important to ensure that the domestic legislation which implements our EU obligations will operate in the same way following our departure from the EU. Without this, parts of our domestic law will not be subject to the same requirements for legal interpretation or precedent after exit day, effectively changing the understanding of what our law is.

Secondly, the wide scope of clause 2 is essential so that any deficiencies that might arise within this domestic legislation upon our withdrawal from the EU can be corrected using the deficiencies power in the Bill. When we leave the EU, a significant number of deficiencies will emerge across this whole body of law, which it will be appropriate to correct to ensure our statute book continues to function. For example, the definition of “environmental assessment” in the Harbours Act 1964 will need to be amended to cover obligations arising under retained EU law, and “another EEA State” will need to be substituted with “an EEA State” where it occurs throughout this legislation. It is therefore essential for the stability and clarity of our domestic statute book that all relevant domestic law which relates to the EU (or EEA) can be corrected using the Bill’s deficiencies power.

We hope this allays some of the concerns in relation to the scope of clause 2, and further demonstrates why clause 2 in its current form is essential to providing certainty and stability within our domestic statute book following our departure from the EU.

Reciprocal rights: The implications of the Bill for reciprocal rights remains uncertain, as such rights are inextricably linked to the legal relationship between the UK and the EU post-exit. The ambiguities in the interpretation and effect of clause 4 will inevitably

cause legal uncertainty about a fundamental provision of the Bill. The ambiguities need to be resolved.

The Bill's purpose is to provide continuity, clarity and control as we exit the European Union. The purpose of clause 4 is to continue to make available in domestic law any rights, powers, liabilities, obligations, restrictions, remedies, and procedures, which currently flow into our domestic law through section 2(1) of the ECA, to the extent these are not captured by the EU law converted under clause 3. While we recognise the Committee's intention in relation to this recommendation, we see it as an essential clause to ensure that there are no holes left within our domestic statute book, following our exit, that would create uncertainty for both individuals and businesses. The power in clause 7 to correct deficiencies specifically makes clear that reciprocal arrangements which it is no longer appropriate to continue or which no longer exist are a form of deficiency and enables ministers to make provisions to correct them.

We share the Committee's desire to ensure that no legal uncertainty arises due to our exit and that any ambiguities in the Bill should be resolved. However we do not believe that uncertainty will arise over the interaction between the EU law retained by clause 4 and what is retained by clause 2. The Bill has the effect of retaining domestic implementing legislation as well as rights, obligations, etc. that do not require implementation because they have direct effect under section 2(1) of the ECA. Both are retained as they applied immediately before exit day. Therefore any potential overlap that may arise between the EU law retained through clause 2 and clause 4 would reflect the position in our law as it has effect prior to exit-day, and be handled in the same way. So, for example, domestic implementing regulations retained under clause 2 that proved to be inconsistent with a treaty right retained under clause 4 would have to be applied in a manner consistent with the treaty right in question, or may even fall to be quashed.

It should be noted that clause 4 does not bring EU directives into our domestic law, as the requirements of EU directives will have been transposed into our domestic law before our departure from the EU. Instead, through clause 2, we will preserve the national legislation which has domestically implemented EU directives. It would therefore be both unnecessary and confusing to bring EU directives themselves into our domestic law.

However, in some cases arising from a failure of implementation of a directive, the courts have found that a provision within a directive has direct effect, and can be relied upon by an individual. In order to ensure that the Bill takes an accurate snapshot of EU law that applies in the UK before our exit, clause 4 will convert into domestic law the effect of any pre-exit finding that a particular provision of a directive had direct effect.

We hope this explanation reassures the Committee that the EU law retained through clauses 2 and 4 of the Bill will not give rise to legal uncertainty.

2. Status of retained EU law

A single legal status for retained direct EU law: 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 is that of domestic primary legislation.

Human Rights Act 1998: If our recommendation is accepted to assign all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be removed from the Bill, since it will become redundant. If the Bill is not amended so as to assign

to all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be amended so that it provides not only for the legal status (for the purposes of the Human Rights Act 1998) of retained direct EU legislation under clause 3, but also for the legal status (for HRA purposes) of the category of retained EU law to which clause 4 gives rise.

Delegated powers: If our principal recommendation to assign retained direct EU law a single legal status is not implemented, paragraph 3 of schedule 8 should be amended to clarify whether the retained EU law to which clause 4 gives rise is to be treated, for delegated powers purposes, in the same way as retained direct EU legislation under clause 3.

We recognise this has been a point of significant interest during Committee debates. We welcome the in depth engagement of the Committee and others with this topic and we have very carefully considered all views raised.

We understand the attraction of the Committee's recommendation to accord domestic primary legislation status to all retained direct EU law for all purposes, particularly with regard to how retained direct EU law will be amended in the future. However, as we set out during Committee debates, the Government considers that such an approach would present significant practical and constitutional problems, which could have considerable impacts on our domestic statute book for the foreseeable future.

We have, however, tabled amendments which signpost how the Bill provides for the status of retained EU law, including for the purposes of the Human Rights Act 1998, about which the Committee expressed particular concern. The amendments also make more restrictive provision from the Bill's previous position in relation to how retained direct EU law can be amended. The new provisions are intended to reflect the likely significance of the content and the position in the legislative hierarchy of EU law, making a distinction between retained direct principal EU legislation (retained EU Regulations which are not tertiary regulations) and retained direct minor EU legislation (retained EU tertiary legislation, decisions and future domestic subordinate legislation made under retained direct EU legislation).

These amendments do not give EU Regulations greater protection from amendment than Acts of the UK Parliament, which would be constitutionally inappropriate. The amendments will however preserve the crucial ability to regularly adjust EU tertiary legislation, where that was an envisaged part of its design (such as adding to lists or modifying technical standards to account for market developments) using existing powers to amend subordinate legislation. Our detailed discussion of these issues can be found below.

In line with this policy to reflect the hierarchy of retained EU law the Government has also tabled amendments to provide that retained direct minor EU legislation will be treated as subordinate legislation for the purposes of the Human Rights Act and retained direct principal EU Regulations will be treated as primary legislation for the purposes of the Human Rights Act.

We consider that the Committee's recommendation to give all retained direct EU law the status of primary legislation presents several problems. Firstly the direct EU law which is being converted into domestic legislation under clauses 3 and 4 of the Bill covers both a vast range of different policy areas and different types of EU law, from regulations dealing (for example) with agriculture and farming, to detailed and technical pieces of tertiary legislation and individual Commission decisions. Treating all of this law as primary legislation would mean that routine amendments to thousands of technical pieces of converted law - for

example to take account of technological updates - could only be made under primary legislation or if a suitable power were to be made available. This would have real practical consequences for the efficacy of our law for the foreseeable future, as well as the capacity of both Government and Parliament to make these amendments.

Secondly, there is also a question of the constitutional appropriateness of according this vast amount of direct EU law the status of primary legislation. Direct EU law will come onto our domestic statute book in a unique way. It will not in itself have been scrutinised and approved by our Parliament, or have undergone the detailed line-by-line scrutiny of both Houses of Parliament as other primary legislation does. The appropriateness of nevertheless deeming this to be primary legislation must therefore be carefully considered.

It is due to this breadth and uniqueness that the Government chose to take a more tailored approach to direct EU law, and not to simply assign a single domestic legislative status to this new category of law. The Bill already provides in a number of different places how this converted law is to be treated for specific purposes. The Government therefore believes that the Bill already identifies and provides for the areas within our statute book where something material turns on whether converted EU law should be treated as secondary or primary legislation for particular purposes.

The Government has also considered the debate about how retained direct EU legislation should be amended after the UK's withdrawal from the EU. We have, in particular, heard concerns that the Bill as introduced does not recognise the internal hierarchies of EU law, as it provides for the same mechanism to amend all retained direct EU legislation. We recognise arguments that EU Regulations are infrequently adjusted and are comparable to domestic primary legislation. Regulations sit above tertiary legislation which plays a comparable role in the EU to domestic secondary legislation.

As mentioned above the Government has therefore tabled amendments which set out relevant provisions on status of retained direct EU law and how this can be amended in future. The Government's amendments seek to balance maintaining certainty about the law and Parliamentary scrutiny with a managed process of change once this law is part of the UK legal order. The Government is particularly concerned to ensure that, where it is integral to the functioning of a legislative regime, the law can be regularly adjusted through a proportionate process.

The power in clause 7 of the Bill is key to ensuring that the law is not deficient on day 1 after our withdrawal from the EU. Following any such corrections, however, regulatory regimes must also work on day 2, day 20 and day 200.

Without the ability to adjust retained direct EU legislation through subordinate legislation we face a serious risk of these regimes ceasing to function. Before exit day, these regimes could be adjusted in EU law, and after exit day they need to be adjustable by relevant domestic delegated powers, including both pre-existing powers and those we are transferring from the EU. For example, the Biocidal Products Regulation empowers the Commission to adopt Delegated Acts to amend the Annex I to the Biocidal Products Regulation, in order to restrict or to remove the entry for an active substance to the market. This is clearly an important public health matter which should be continued.

The Government's amendments therefore provide for a distinction between how retained direct EU legislation adopted via co-decision and tertiary legislation may be amended. In line with our long-standing policy that major changes to the law following our withdrawal from the EU should be conducted via primary legislation, the Bill aims to ensure that it will not be possible to amend or revoke retained direct principal EU legislation (any EU Regulation that is not EU tertiary legislation) other than by: 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 by other powers but only to make supplemental etc. provision. The amendment therefore provides that EU Regulations have a status akin to that of UK primary legislation in this regard. They will therefore be broadly amendable in a similar range of circumstances and subject to similar conditions of scrutiny as if they were Acts of Parliament.

In relation to retained direct EU tertiary legislation the Government believes that it is appropriate to ensure that this can be amended and updated frequently, with appropriate scrutiny by our Parliament, in the same way that the EU is able to amend and update this legislation at present. To illustrate, as part of the regular cyclical adjustment of the law the UK Parliament makes around 1000 statutory instruments each year. By comparison, in 2017, the EU adopted more than 500 basic pieces of tertiary legislation and slightly under 500 amending pieces of tertiary legislation. These instruments, normally providing for technical and operational detail of a policy set out in Acts (in the UK) or principal EU Regulations (in the EU) are part of the modern legislative system which requires statute, including lists, definitions and the scope of measures to be adjusted at a pace which was not the case in previous eras. Under the Government's amendments, retained direct EU tertiary legislation will therefore be amendable 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.

Clause 17 and the legal status of retained EU law: We recommend that all retained direct EU law should be treated as primary legislation and that clause 17 should be amended to make clear that it confers upon ministers no authority to change or otherwise determine the legal status of retained EU law.

As set out above, the Government believes that the Bill delivers legal certainty in relation to the treatment of direct EU law where something material turns on whether converted EU law should be treated as secondary or primary legislation for particular purposes. The Government's amendments provide general propositions in relation to the status of retained EU law and signpost relevant provisions in the Bill.

However, to ensure that no inconsistencies emerge within our statute book following our exit, we continue to consider it is prudent that there remains a means to address any other areas where it would be appropriate to provide further clarification as to how retained direct EU legislation is to be treated for specific purposes. Where that happens we have set out that we intend to use the consequential power at 17(1) to provide how they should apply to retained direct EU legislation. This remains our intention.

This exercise would not be about categorising retained direct EU legislation as primary or secondary legislation overall. It is about ensuring that the statute book makes sense, and is able to operate effectively, after exit.

For example, if an existing provision within UK law provides that an Act of Parliament is to be treated in a particular way, we may need to clarify whether retained direct EU legislation should also be treated in this way. Preventing the clause 17(1) power from being capable of addressing such a situation therefore risks legal uncertainty and confusion emerging, so undermining the core aim of this Bill.

3. Supremacy principle

Remove supremacy principle: We recommend that retained direct EU law should be made to prevail over pre-exit domestic law by providing in the Bill that retained direct

EU legislation under clause 3 and all law that is converted into domestic law by clause 4 is to be treated as having the status of an Act of the UK Parliament enacted on exit day. No equivalent provision needs be made in relation to EU-derived domestic legislation under clause 2: such legislation already has the status of either primary or secondary legislation in domestic law, and already has a domestic date of enactment. This would achieve the aims of including the supremacy principle via different means.

We thank the Committee for its detailed scrutiny of the principle of supremacy and status in the Bill. The Committee's recommendations on supremacy are inextricably linked to its recommendation on status which we have responded to above in Section 2. We also note the Committee recognises the policy aim of the inclusion of the supremacy principle is one it shares with the Government, albeit that it does not agree with how this has been given effect within the Bill.

We believe ending the supremacy of EU law in relation to new domestic law made after exit is crucial to giving effect to the referendum result. In relation to legislation made before we leave, the Bill takes a practical approach to maintaining maximum continuity in the way that pre-exit laws interact with each other, and the relationship between pre-exit domestic law and what will become retained EU law. This is crucial to ensuring that we do not, unnecessarily, alter the existing hierarchy of our laws. That is why, so far as practicable, the Bill retains the principle of supremacy as it applies now in relation to retained EU law and pre-exit domestic legislation. The principle ultimately only applies in a strictly limited and diminishing way. Over time, Parliament will pass new legislation which will not be subject to the principle. The Government believes that this approach strikes the right and sensible balance.

We note that in their recent report, the Bingham Centre strongly endorses the position taken in the Bill on the principle of supremacy, stating that this approach is required by the Rule of Law¹. The approach taken in this Bill mitigates the risk that UK laws could change overnight, with all the damaging uncertainty that would bring for businesses and individuals who rely on the stability of the current statute book. The Government's concern is that remaining silent within the Bill - or taking a different approach - would risk being seen as changing the law unnecessarily and creating uncertainty as to its meaning and effect. It may call into question how the existing hierarchy of our statute book is to function and create uncertainty about which rule takes precedence in the event of a conflict. The point of the Bill's approach is to have as much continuity as sensibly possible in this regard.

We believe the Bill's approach to this issue strikes the right and sensible balance between ending the supremacy of EU law whilst maintaining coherence and continuity in the way our statute book functions.

Clarify extent of Supremacy principle: If the "supremacy principle" were to continue to feature in the Bill, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of that principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the "supremacy principle".

¹ Bingham Centre, "The EU (Withdrawal) Bill A Rule of Law Analysis of Clauses 1-6", 21 February 2018. Available at https://www.biicl.org/documents/1865_bingham_centre_report_on_eu_withdrawal_bill_clauses_1-6_final_v2.pdf?showdocument=1

The Government has noted the Committee's recommendation that, if we do not amend retained EU law to become primary legislation, further clarity could be provided about the application of the principle of supremacy. We recognise and share the Committee's desire to provide maximum certainty on how the supremacy principle will impact retained EU law as it is modified over time, and are actively considering how best to provide this clarity.

Clause 5(3) sets out that when a pre-exit enactment or rule of law is modified it can continue to be subject to the supremacy principle, if that is consistent with the intention of the modification. The Government maintains that this is an entirely sensible approach in order to deliver certainty and continuity.

The Government believes that, in general, it should be clear from the drafting of the modification what the intent is. The intention of the amending legislation with regards to supremacy will either be clear from the nature of the amendment that is being made or could be made clear at the point it is brought forward, for example in accompanying explanatory material which our courts would be able to take into account in the normal way. It is therefore inevitable that whether or not the principle of supremacy continues to apply to modified retained EU law will need to be considered on a case by case basis as amendments to legislation are brought forward. The Bill does not seek to - and could not - set a blanket rule as to when an amendment would displace the principle. It will depend on the individual facts of the case.

4. General Principles of EU law and Francovich Damages

General principles: We recommend that the Government provides greater clarity on how the Bill deals with the general principles and how they will operate post-Brexit.

Francovich: We recommend that the Government provides the House of Lords with an updated view about the applicability of the Francovich principle and any transitional arrangements regarding it.

The Government remains of the view that, after we cease to be a member of the EU, general principles challenges should not continue indefinitely. Simply put, this would not be in keeping with our promise to return sovereignty back to this Parliament.

The Bill is intended to take a 'snapshot' of EU law as it exists and applies in the UK on exit day. The Bill makes clear that general principles that have been recognised by the CJEU prior to exit are being brought into domestic law by the Bill. It will therefore be necessary to look at the case law of the CJEU to determine whether a particular principle constitutes a retained general principle of EU law.

The Government has reflected upon the concerns that have been raised, particularly about the impact on those whose cause of action precedes exit but who are unable - for whatever reason - to issue proceedings before the change takes effect. We brought forward amendments at Report in the House of Commons to provide reassurance that, where a breach of the general principles occurred or gave rise to a potential claim before exit day, the Bill will not prevent individuals and businesses from making certain claims based on a breach of the general principles of EU law for a further three months after exit day.

Having reflected further upon the arguments raised during Lords Committee, the Government has tabled further amendments which would allow for such challenges to continue for up to two years after exit day, subject of course to standard limitation periods.

We believe this strikes a good balance between ensuring – on the one hand – that individuals and businesses will still have the opportunity to bring these challenges, while – on the other hand – delivering the result of the referendum and maintaining our parliamentary sovereignty.

In keeping with the concerns expressed during the debate and by the Committee the Government has also tabled a similar amendment in respect of the availability of Francovich damages so that it will be possible for such damages to be sought for up to two years after exit day.

5. Interpretation of retained EU law

Post-exit CJEU case law: We recommend 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. We further recommend that the Bill should state that, in deciding what weight (if any) to give to a post-exit judgment of the CJEU, the court or tribunal should take account of any agreement between the UK and the EU which the court or tribunal considers relevant.

We thank the Committee for their views on this area and would like to reassure them that, following significant engagement with stakeholders, the Government has tabled an amendment to clause 6(2) which provides further clarity on the provision, and which is intended to address the concerns expressed.

Clause 6(2) of the Bill reflects the Government's policy that, while our domestic courts and tribunals should in no way be bound by, or required to consider, anything done by the CJEU, an EU entity or the EU itself after exit day, they should be able to take such things into account where it is helpful to do so.

Our approach was designed to reflect our belief that our courts are best placed to consider whether and to what extent to have regard to post-exit CJEU case law when interpreting retained EU law. It was never the Government's intention to place judges in a difficult position.

With that in mind, the Government has carefully reflected upon all views - including the Committee's recommendation - to consider how best to ensure the Bill is sufficiently clear, while still achieving the underlying policy aim. The Government has tabled an amendment which we consider best meets these objectives.

The amended wording will directly address concerns raised and accept many of the suggestions that have been made. First, it will remove the opening "need not have regard to" wording from the beginning of the provision. Secondly, it will remove the word "consider". Thirdly, it will change "appropriate" to "relevant" and make clearer that courts may look at post-exit CJEU case law, or things done by an EU entity or the EU itself, so far as it is relevant to any matter before the court. These changes are designed to make it clear that the Government does not expect the judiciary to make policy choices when interpreting retained EU law.

Modified retained EU law: We recommend that the Government's statement accompanying regulations which modify retained EU law should also provide an explanation of the intention of the modification, to guide the courts in applying clause

6(3). The inclusion of “among other things” in clause 6(3) generates unnecessary uncertainty about the provision and should be removed or replaced with specific other factors.

The Government understands the arguments in favour of providing further statements on whether any modifications to retained EU law are intended to be interpreted in line with clause 6(3), and are actively considering whether and how this might be best addressed.

We do note, however, that requiring a detailed statement for each modification as to its intent could risk unnecessarily complicating matters. Courts will already have the text of the modification itself, together with a statement explaining the reasons for it, the law before exit day that it is relevant to, and any effect of the modification on retained EU law. Nevertheless, we do recognise the Committee’s concern that the intent of a modification may not always be clear.

Pending cases: We recommend that the Government seek to clarify in any withdrawal or transition agreement whether domestic courts can continue to make references to the CJEU in relation to cases that began before exit day. We recommend that, irrespective of any implementation bill, pending cases are dealt with in the European Union (Withdrawal) Bill.

We further recommend that rulings on cases that have been referred to the CJEU before exit day are treated as pre-exit case law—such that they form part of “retained EU case law”—and that the Government publishes, on exit day, a list of all such cases. If a transition period is agreed, the Government will need to provide for the operation of retained EU case law and its interaction with the CJEU in the withdrawal agreement and implementation bill.

The Government intends to make the position on Ongoing Judicial Proceedings (‘pending cases’) clear in the Withdrawal Agreement, as the Committee has recommended. The Government has also been clear throughout the Bill’s passage that it is in no way designed to legislate for any future agreement between the UK and the EU. This Bill aims to provide a stable and certain domestic statute book on exit day, that functions effectively irrespective of the result of the negotiations and any final agreement with the EU.

This is why the Government does not consider that the Bill should seek to preemptively tie our courts to the CJEU. The Government cannot unilaterally legislate for our future relationship with the EU, and attempting to do this would undermine the snapshot approach taken by the Bill. The Withdrawal Agreement & Implementation Bill will give effect to the agreement reached with the EU, which will include making any changes to existing legislation if necessary.

6. Delegated powers

Clause 7 & 8 : We recommend that the Bill be amended in relation to clause 7 & 8, in line with the Sanctions and Anti-Money Laundering Bill, to provide that, while the power remains available when ministers consider it “appropriate”, they must demonstrate that there are “good reasons” for its use and can show that the use of the power is a “reasonable course of action”. We further recommend that explanatory memoranda should include a certification from the minister that the regulation does

no more than make technical changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made.

As stated in the House, the Government is very grateful for the thoughts of the Committee on this issue, which have helped to frame the thinking going into Report.

The Government is committed to making sure that the purpose of the power and the good reasons for the SIs made under the clause 7 power are transparent to Parliament. To demonstrate this commitment and ensure full and proper scrutiny of the SIs, the Government intends to bring forward an amendment in relation to clauses 7, 8 and 9 of the Bill in line with the Committee's recommendation and the "good reasons" and "reasonable course of action" amendments made to the Sanctions and Anti-Money Laundering Bill.

Regarding the Committee's recommendation that explanatory memoranda include a certification from the minister that the regulation does no more than make technical changes, the clause 7 power has always been intended only to make such changes as are appropriate to correct deficiencies arising from withdrawal. Other primary legislation, such as the Sanctions and Anti-Money Laundering, Trade and Nuclear Safeguards Bills will bring forward new policy. The Government believes a restriction on doing no more than making technical changes is not necessary as the current drafting of the clause 7 power sets a number of limits on its use. These limits include:

- The limitations in the wording of subsection (1) i.e. that it is necessary to identify a deficiency in retained EU for the power to be engaged, that the deficiency must arise from the withdrawal of the UK from the EU, that a provision must be 'appropriate' and serve 'to prevent, remedy or mitigate' that deficiency;
- The limitations in subsection (2) i.e. the exhaustive list of what can be defined as a deficiency (subject to the 'of a kind' sweeper in subsection (3)(a)) which already acts as a 'quasi-list' of what it may be *necessary* to fix;
- The limitations in subsection (7) preventing certain types of provision;
- The sunset in subsection (8) preventing Ministers making any sort of provision from two years after exit day;
- The scrutiny and sifting provisions which ensure that there will be transparency before Parliament and scrutiny of SIs.

Whilst we cannot accept all recommendations on how to narrow the power, in line with our commitment to not taking unnecessarily broad powers, we intend to bring forward amendments to narrow the power by preventing clauses 7, 8 and 9 from being used to establish public authorities, prevent clauses 7 and 9 from imposing or increasing fees and prevent clause 7 from amending the devolution statutes.

The Government understands the Committee's recommendation with regards to regulations making no more than technical changes to retained EU law. The Government has been clear that this Bill is intended to provide continuity and certainty and that it will be for future legislation, proposed by Ministers and scrutinised by Parliament once we have left the EU, to consider where we wish to deviate from the law we are converting and correcting under this Bill. The Committee will have seen this in the form of the other EU exit Bills currently progressing through Parliament, for example the Taxation (Cross-Border Trade), Trade, and Sanctions and Anti-Money Laundering Bills.

That conversion and correction is not, however, devoid of policy choices. We have been open with Parliament since the White Paper, '*Legislating for the United Kingdom's*

withdrawal from the European Union, where we said no major policy decisions will be made in the Bill, but we cannot rule out some policy choices. For example, when a function is transferred from the Commission to a UK body, there is a policy decision to be made about who is best placed to exercise that function domestically. A restriction on making any policy changes, founded on what seem like common sense terms, is unfortunately not so straightforward. The Government does not want to invite litigation regarding swathes of the crucial SIs under this Bill which would only serve to undermine legal certainty and, by doing so, hinder preparation for our exit.

Clause 9: As the clause 9 power cannot be used until a further Act has been passed—likely to be the withdrawal and implementation bill—we cannot see any justification for the inclusion of the power in this Bill. We recommend that clause 9 be removed from the Bill.

The Government's position is that the major policies in the Withdrawal Agreement will be given effect domestically via the Withdrawal Agreement and Implementation Bill. However, the Committee's recommendation does not reference that there are likely to be a significant number of technical changes which are not appropriate for primary legislation and would therefore be better suited to secondary legislation. These could be made through clause 9.

We recognise the sequencing point made by the Committee but we also respect the Commons' decision to amend, rather than remove, clause 9 from the Bill. While the Government does not accept the Committee's recommendation of removing the clause altogether, we do recognise the House's concerns around the power and, in line with our commitment to not taking unnecessarily broad powers, we intend to bring forward amendments to narrow the power to prevent it from being used to impose or increase fees, establish public authorities or amend the Bill itself.

Clause 17: We are concerned that the Bill creates a power to make “consequential provisions” which is potentially 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. We recommend that the power to make “consequential provisions” in clause 17 is removed.

The Government is aware of and understands the concerns relating to the clause 17 powers of the Bill and is considering a way forward that addresses these. However, we cannot accept that clause 17 is removed in its entirety from the Bill. The European Communities Act has been a central piece of legislation securing our membership of the EU for the last 46 years, and a great deal of legislation has stemmed from it during its long history within our statute book. The decision to repeal this Act, as well as other key EU related Acts in Schedule 9, in order to fulfill the wish of regaining independence from the EU, will leave many loose ends that need addressing. The consequential power at clause 17(1) is crucial in order to deal with the impact on the statute book of the provisions in the Bill, e.g. arising from the repeal of the ECA and these other key EU related Acts in Schedule 9.

Examples that were given before the House during Committee, including amending an ambulatory reference to make clear that it will be 'switched off' by the Bill on exit day and amending legislation that references the ECA itself, such as 'Designation Orders' which 'designate' ministers so that they can exercise the power in section 2(2) of the ECA in order to implement EU obligations, illustrate the need for this power. The Government believes that it is only right that it should be able to tidy up such law. The Government has already published a draft SI demonstrating the typical use to which clause 17(1) will be put.

While we acknowledge the Committee's concerns around clause 17, this is a standard type of power contained in many Acts and is used particularly where the full extent of the amendments to other enactments required cannot yet be fully known or where it would be inappropriate to list a large number of consequential amendments necessitated on the face of the Bill itself. The Government recognises that due to the wide scope of the Bill, there is a large range of consequential matters to be dealt with, but that is what makes this power so essential.

This power is however already limited in the sense that it can only be used in consequence of the provisions of the Bill itself, rather than the consequences of our withdrawal from the EU more generally. This will include making consequential provision amending secondary and primary legislation, to ensure that the legislation is clear. For example, the Government will need to repeal provisions in the European Union (Croatian Accession and Irish Protocol) Act 2013, which amended the ECA. The Government will also need to repeal provisions in the European Union (Approvals) Act 2017, which approved Ministers of the Crown voting in favour of certain EU decisions, as section 8 of the European Union Act 2011 which required this will be repealed in Schedule 9 of the Bill.

Of course the Government would not be seeking to take the other powers in this Bill if everything were a simple consequential amendment. The clause 7(1) power will be used to make provision for a different purpose, as those regulations will be correcting deficiencies which arise in consequence of withdrawal, not the consequences of this Bill.

7. Scrutiny of delegated powers

Negative procedure: We do not consider that it is appropriate for the Henry VIII powers in this Bill to be exercisable by the negative procedure, particularly as they might be used to make legislation of substantive policy significance.

Affirmative procedure: If the regulation-making process is deemed acceptable by Parliament for the use of these powers, the Bill should provide for the application of the affirmative procedure in relation to any measure which involves the making of policy.

The Government notes the Committee's recommendations in relation to the scrutiny of the delegated powers, but if all statutory instruments amending primary legislation were affirmative, this would both be inappropriate to the content and require an undeliverable number of affirmative debates before exit day.

Proper scrutiny of the SIs made under this Bill will be essential and to support this, the Government intends to make an amendment requiring Ministers, alongside any SI creating a criminal offence to make a statement explaining the "good reasons" for the offence and the sentence it carries.

The Government is committed to proper scrutiny, which is especially pertinent in regard to the creation of delegated legislative functions. To support this essential scrutiny, the Government intends to make an amendment requiring Ministers to explain why it is appropriate where they provide for a legislative function to be exercised other than by a Minister through SIs and for an annual report on the exercise of those powers to be laid before Parliament.

We have also heard the concerns of the House in relation to the powers to provide for fees and charges in Schedule 4 and intend to bring forward amendments to make all regulations subject to the affirmative procedure unless they are only adjusting for inflation.

The Government believes that, in this instance, whether an SI is amending provisions in primary or secondary legislation is not always the best indication of the type of change that needs to be made or the significance of the change. To be ready for exit day a large number of fairly straightforward technical and textual changes will need to be made to primary legislation if we are to have a functioning statute book on exit day. For example, the Equality Act 2010 refers in several places to “EU law” which will need to be replaced with the term “retained EU law”. Also, some sections in this Act make reference to the European Parliament, an institution that will no longer be relevant to the UK once we leave the EU, and will therefore need to be repealed. Many changes will also be required to secondary legislation, particularly that which was made under section 2(2) of the ECA where, although in line with the limits and purposes of the powers in the Bill, more substantive or sensitive changes are appropriate. The powers therefore need to be broad enough to allow for corrections to be made to both primary and secondary legislation.

There are a number of circumstances where the affirmative procedure is automatically triggered, meaning ministers are not able to exercise discretion. Examples include creating a criminal offence. In other circumstances ministers will have the discretion to choose the appropriate procedure, though when ministers propose to use the negative procedure for SIs under the main powers, this will be subject to the sifting committees. If the sifting committees in the Houses were to make a no doubt well considered and persuasive recommendation we can assure you that the Government’s expectation is that such recommendations are likely to be accepted in most cases. On the rare occasions when we do not agree, we expect to fully justify our reasons to the committee concerned.

With regard to the second recommendation, although technical and minor, even correcting “EU law” to “retained EU law” represents a policy choice. This certification would be arbitrary at best and poses a significant risk of judicial review. The Government is committed to bringing forward primary legislation for major legislative elements of our EU exit and hopes that the Sanctions and Anti-Money Laundering, Trade, Nuclear Safeguards Bills etc along with our commitment to the Withdrawal Agreement and Implementation Bill are evidence of this.

Made affirmative procedure: The made affirmative procedure should be far more tightly drawn and controlled in the Bill.

The made affirmative procedure is only available in urgent cases. To ensure full transparency where this procedure is used, we intend to table an amendment to require ministers to make a statement alongside any urgent SI explaining the reasons for its urgency. We envisage only using this in a small number of cases. This might, for example, be where a deficiency is only identified very close to exit day or where a correction requires a significant lead in time to deliver and legislation needs to be put in place urgently to enable this.

Additional committee scrutiny: We recommend that committee(s) should be empowered to decide the appropriate scrutiny procedure for an instrument, subject to the view of the House, in order to provide the necessary degree of parliamentary oversight.

The amendment establishing the Sifting Committee in the Commons was tabled by the chair of the Procedure Committee and had the unanimous support of the Committee. As the Leader of the Lords said at Second Reading and as reiterated in Committee stage in the House of Lords, the Government plans to provide for similar committee scrutiny in the House of Lords, drawing on the House's existing expertise in secondary legislation. That the Sifting Committee does not make any binding decisions is in harmony with the general position of how committees engaging in pre-scrutiny examination of legislation work.

We understand the concerns that as ministers are not bound to accept the committees' recommendations, the decision is still at their discretion. However, as set out above, our expectation is that recommendations of the sifting committees are likely to be accepted in most cases.

8. Devolution

The Committee has noted the significant potential consequences and risks should the UK Government and the Devolved Administrations not work collaboratively through the Joint Ministerial Committee to ensure an agreed approach to the return of competences from Brussels and pan-UK agreement on common frameworks. The Committee has urged the Government to work closely with the devolved authorities to secure agreement on a revised clause 11 and an approach generally on the common frameworks. The Committee has also noted the constitutional consequences of proceeding with the Bill without legislative consent from the devolved legislatures.

The Government agrees with the Committee that it is important to try to reach agreement with the devolved administrations. Over the past months, we have made a concerted effort in order to reach agreement on clause 11 with the Scottish and Welsh governments. As a result of that engagement, we put forward an amended proposal on clause 11 that was debated during Lords Committee. Our proposed amendment was discussed with the devolved administrations at the Joint Ministerial Committee for EU Negotiations (JMC(EN)) on 22 February and again at a further JMC(EN) on 8 March. Those discussions were supported by a further discussion by the Prime Minister and the First Ministers at the JMC Plenary on 14 March.

Following the constructive and thoughtful debate in Lords Committee, which put forward a number of suggestions, we will consider these and continue to discuss a way forward on clause 11 with the devolved administrations. Our preference, and that of the the First Ministers, is to reach agreement with the devolved administrations on amendments to this Bill, which is the right vehicle for providing legal certainty across the UK.

The offer we put forward on clause 11 at Committee stage would see the vast majority of powers flow directly from Brussels to Edinburgh, Cardiff and Belfast, just as the Scottish and Welsh Governments have argued. However, it is also vital we retain a mechanism to protect our internal market, our common resources, and our reputation as a credible international trading partner. We owe it to our communities and businesses to provide maximum legal and administrative certainty. The devolved administrations have also recognised the need for common frameworks in some areas. The Scottish and Welsh governments supported and agreed the framework principles at the JMC(EN) in October 2017.

Under this revised approach to clause 11, restrictions on devolved competence would be more focused and apply only in relation to specified policy areas. In those areas where a limit does apply, the devolved administrations will still be able to do anything that they can do

now. This serves to maintain existing common frameworks as new approaches are developed and implemented.

In addition, there would still be a requirement for the Government to consult the devolved administrations, and to make an explanatory statement to Parliament, before laying those regulations. Ministers will also be under an express obligation to periodically consider whether to repeal those restrictions and there will be a reporting requirement on the UK Government to set out information relating to the deployment of the new power.

We are continuing to engage extensively with the devolved administrations to identify where legislative and non-legislative frameworks may be required, guided by the principles we previously agreed with the Scottish and Welsh Governments. Our discussions have shown that, even in the limited number of areas where legislation is envisaged, framework arrangements may only be required in part.

The devolved administrations have recognised that we have made a significant offer, but we have not yet reached final agreement.

Inter-governmental relations: We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions.

The Government recognises that as we prepare to leave the EU, maintaining and strengthening our relationships with the devolved governments will prove more crucial than ever before as we seek a deal that delivers for Scotland, Wales, Northern Ireland as well as all parts of England.

We have undertaken a great deal of work to that end. As the Committee has suggested, we want to ensure the Joint Ministerial Committee is as effective as possible for all members and have implemented several changes to improve its efficiency. We have also significantly strengthened our bilateral relations.

Under the Chancellor of the Duchy of Lancaster's chairmanship, the JMC(EN) continues to provide a multilateral space for constructive discussion on both the progress of the negotiations with the EU and on the domestic issues arising as a result of the UK's exit.

Increased bilateral engagement continues to supplement the formal meetings of JMC(EN). The Chancellor of the Duchy of Lancaster will also continue to meet with the First Minister of Wales and Deputy First Minister of Scotland between meetings to take stock of progress and to build an effective agenda for each meeting of the JMC(EN). This regular bilateral engagement has developed a more effective space at JMC(EN) as a result.

Extensive engagement at official level between these meetings continues to drive progress forward on the establishment of common frameworks and discussions on the EU (Withdrawal) Bill.

The Joint Ministerial Committee must continue to provide a space for the UK Government and devolved administrations to engage upstream of the key issues, to agree on progress and to understand where our positions diverge and therefore how we may build common ground. This has and will continue to be the basis of the meetings convened by the Chancellor of the Duchy of Lancaster.

It is important to emphasise that meetings of the JMC require the effective input and coordination of all members and UK Government ministers and officials will of course continue to meet with all administrations between meetings to drive progress.

Northern Ireland: We recommend that the Government publish an assessment of the effect of the Bill and the UK's withdrawal from the EU on the Belfast/Good Friday Agreement before the completion of the Bill's consideration in the House of Lords.

The Government has repeatedly confirmed its strong commitment to the Belfast Agreement. This commitment was also set out in the recent Joint Report on negotiations in December and agreed by both the UK Government and European Union. Our commitment remains absolute and we will continue to uphold our commitment throughout the process of our exit from the EU. The Government has noted the Committee's recommendation in relation to assessing the effect of the Bill and the UK's withdrawal from the EU on the Belfast/Good Friday Agreement.

**DEPARTMENT FOR EXITING THE EUROPEAN UNION
APRIL 2018**