HOUSE OF LORDS Library Briefing

European Union (Withdrawal) Bill: Lords Committee Stage HL Bill 79 of 2017–19

Summary

The European Union (Withdrawal) Bill was considered by the House of Lords at committee stage over eleven days between 21 February and 28 March 2018. No amendments were made to the Bill and no divisions took place during committee stage. All amendments formally moved during the committee stage were subsequently withdrawn by the Member responsible.

This briefing is intended to provide an overview of areas where the Government indicated it would further consider issues raised in amendments tabled by Members, including: Erasmus+ and Horizon 2020; general principles of EU law and the EU Charter of Fundamental Rights; the status of retained EU law; animal sentience; *Francovich* claims; post-exit judgments of the Court of Justice of the European Union; the threshold for exercising delegated powers in the Bill; the creation of public bodies by secondary legislation; powers to impose fees and taxes; powers to create criminal offences; the scrutiny of sub-delegated legislation; implementing the Withdrawal Agreement and a 'meaningful' vote; local government consultation; issues related to the devolution settlement; the publication of retained EU law; and the public sector equality duty in the context of explanatory statements on subordinate legislation.

This is indicative of areas where the Bill *may* change at report stage because the Government has indicated it may return with amendments to areas identified in response to Members' concerns. However, it should be noted that even where the Government has indicated it will look further at an issue, it may not result in amendments being tabled at a later stage. This briefing does not summarise amendments where the Government has stated its opposition but where the Government may be defeated were the issue to return and be voted on at a later stage in the Bill's proceedings. Many Members suggested when withdrawing their amendments at committee stage that they would seek to return to the issue on report.

The Bill is scheduled to be considered for six days on report, between 18 April and 8 May 2018. For clause-by-clause coverage of the Bill's provisions, please see the House of Lords Library briefing *European Union (Withdrawal) Bill*, 25 January 2018.

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12 April 2018

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1. Introduction

The European Union (Withdrawal) Bill was considered by the House of Lords at committee stage over eleven days between 21 February and 28 March 2018.

A total of 477 amendments were tabled to the Bill for consideration at committee stage.[1] However, no amendments were made to the Bill and no divisions took place during committee stage. All amendments formally moved during the committee stage were subsequently withdrawn by the Member responsible. This included the Government's own amendments to the Bill's provisions on devolution under clause 11—the Government withdrew its amendments subject to further discussions with a view to reaching agreement with the devolved administrations on this subject.

As the House did not agree to, or vote on, any amendments, it has not formally expressed a view on any of the amendments tabled at committee stage, and this briefing does not summarise each of the hundreds of amendments discussed. However, the Government indicated on a number of occasions during committee stage that it would consider issues raised in amendments tabled by Members. This is indicative of areas where the Bill *may* change at report stage because the Government has indicated it may return with amendments to the areas identified in response to Members' concerns. This briefing is intended to provide an overview of those areas. However, it is important to note that, even where the Government has indicated it will look further at an issue, it may not result in amendments being tabled at a later stage. Ministers indicated that commitments to consider an issue ahead of report were not necessarily commitments to incorporate changes into the Bill, or to bring back amendments at report stage.[2]

This briefing does not summarise amendments where the Government has stated its opposition but where the Government may be defeated were the issue to return and be voted on at a later stage in the Bill's proceedings. Many Members suggested when withdrawing their amendments at committee stage that they would seek to return to the issue on report.

The Bill is scheduled to be considered for six days at report, between 18 April and 8 May 2018. For clause-by-clause coverage of the Bill's provisions, please see the House of Lords Library briefing *European Union (Withdrawal) Bill*, 25 January 2018.

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[1] House of Lords, 'Lords Amendments—European Union (Withdrawal) Bill', accessed 10 April 2018.

[2] See, for example, Lord Keen of Elie, Advocate General for Scotland, and Lords Spokesperson for the Ministry of Justice, HL *Hansard*, 21 March 2018, col 275 and Lord Callanan, Minister of State at the Department for Exiting the European Union, HL *Hansard*, 14 March 2018, col 1653.

This briefing largely deals with issues and amendments in the order in which debate occurred. However, where similar matters were discussed during more than one committee session, in some cases they have been grouped together in this briefing for ease of reference. In particular, debate on matters relating to devolution took place on the sixth day of committee (clauses 7, 8 and 9) and the ninth day of committee (clauses 10 and 11 and schedule 2). These debates have all been grouped together in one section of this briefing for convenience, as the issues raised are inter-related.

2. Erasmus+, Horizon 2020 and Post-Brexit Immigration Policy for Students and Researchers

On the second day of committee, the Lords debated amendments relating to the UK's future participation in the Erasmus+ and Horizon 2020 programmes and their successors.[3] Erasmus+ is the EU's programme to support education, training, youth and sport in Europe.[4] Horizon 2020 is the EU's programme to fund research and innovation.[5] Both programmes are due to be reviewed ahead of the next multiannual financial framework (MFF) which will run from 2021 onwards.[6] Members from all sides of the House spoke of the importance of Erasmus+ and Horizon 2020 to the UK's education and scientific sectors.[7]

Lord Callanan, Minister of State at the Department for Exiting the European Union, said that the UK's future participation in these programmes was a matter for negotiation with the EU, and would also depend on how they developed in the next MFF. However, subject to those conditions, he said the Government would be happy to be able to participate in both programmes in future.[8]

Lord Hannay of Chiswick (Conservative), Lord Green of Deddington (Crossbench) and Lord Deben (Conservative) called on the Minister to state unequivocally that the post-Brexit immigration system would impose no new restrictions on students or researchers coming to study or work at British universities.[9] Lord Callanan said he was "fairly certain that we would not want to introduce restrictions on mobility in these areas" but that he could "not speculate" on the Government's future immigration policy before it had been published.[10]

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[3] HL *Hansard*, 26 February 2018, cols 455 and 457, amendments 10 and 163.
[4] European Commission, 'What is Erasmus+?', accessed 26 March 2018.
[5] European Commission, 'Horizon 2020', accessed 26 March 2018.
[6] European Commission, 'MFF Post 2020', 9 January 2018.
[7] HL *Hansard*, 26 February 2018, cols 455–77.
[8] ibid, col 480.
[9] ibid.
[10] ibid, cols 480–1.

Lord Callanan said that he had "heard the message from all parts of the House" and would "certainly reflect on these matters before we come back to the issue on report".[11] He recognised that "there are very strong feelings from all parts of the House" and said that the Government would "certainly see what we can do about that".

3. General Principles of EU Law and EU Charter of Fundamental Rights (Clause 5 and Schedule 1)

Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, acknowledged on the second day of committee stage that "the Bill's approach to the general principles of EU law, including fundamental rights" could not be separated from its approach to the EU Charter of Fundamental Rights.[12] He continued:

> In response to the strength of feeling conveyed not just in this House but in the other place, the Government are looking again at these issues. These are highly technical issues in some respects but they are undoubtedly important, so we will look further at whether this part of the Bill can be improved in keeping with some of the concerns that have been expressed.[13]

Clause 5(4) of the Bill provides that the EU's Charter of Fundamental Rights is not part of domestic law on or after exit day. Lord Keen maintained the Government's position that there is no role for the Charter in domestic law once the UK is no longer an EU member state, as the Charter applies to EU member states only when they are acting within the scope of EU law.[14] He reiterated the Government's position that the Charter itself did not create new rights:

> On the specific question of whether the Charter should be kept, our view remains that not incorporating the Charter into UK law should not in itself affect the substantive rights from which individuals already benefit in the United Kingdom. This is because the Charter was never the source of those rights.
>
> […] the Charter is only one of the elements of the UK's existing human rights architecture. It reaffirms rights and principles that exist elsewhere in the EU acquis, irrespective of the Charter, and the Bill

[11] HL *Hansard*, 26 February 2018, col 481.
[12] ibid, col 567.
[13] ibid.
[14] ibid, cols 570–1.

> sets out how those rights and principles will continue to be protected in EU law after exit.[15]

A number of Members argued that the Charter does contain rights which cannot be found elsewhere in domestic law or retained EU law.[16] Several of them pointed to a report by the Joint Committee on Human Rights (JCHR), *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis* which was produced in response to a Government memorandum that was intended to set out how each article of the Charter would be reflected in UK law after exit day.[17] For example, Baroness Lister of Burtersett (Labour) said that the JCHR report "identified a number of rights that are not there other than in the Charter".[18] She asked Lord Keen whether he rejected the JCHR's analysis.

In response, Lord Keen said:

> We have considered that analysis, and that is why I indicated that we were still looking at this. As I said, if rights are identified which are not in fact going to be incorporated into our domestic law in the absence of the Charter, we will look very carefully at ensuring those are not lost.
>
> Clause 5(5) makes it clear that, notwithstanding the non-incorporation of the Charter, retained EU law will continue to be interpreted in a way that is consistent with the underlying rights […]
>
> With regard to those who have expressed concerns about this Bill resulting in a loss of substantive rights, I repeat […] that it is not necessary to retain the Charter to retain those fundamental rights. If we see that there is a potential loss of such fundamental rights, we will address that and that is what we have indicated.[19]

On day four, the committee returned to questions related to the general principles of EU law. 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

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[15] HL *Hansard*, 26 February 2018, col 567–8.

[16] See for example: Lord Goldsmith, ibid, col 539; Lord Pannick, col 548; Lord Wigley, cols 551–2; Baroness Jones of Moulsecoomb, col 553; Lord Kerslake, col 553; Baroness Ludford, col 565; and Baroness Lister of Burtersett, col 570.

[17] 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; and HM Government, *Charter of Fundamental Rights of the EU: Right by Right Analysis*, 5 December 2017.

[18] HL *Hansard*, 26 February 2018, col 570.

[19] ibid.

secondary [EU] legislation".[20] 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.[21]

Paragraph 2 of schedule 1 provides that only general principles of EU law that had been recognised by the CJEU in a case decided before exit day would remain part of domestic law after exit day. Paragraph 3 of schedule 1 provides that there is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law. It further provides that post-exit, courts cannot:

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

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

- related to something that happened before exit day;
- was brought within three months of exit day; and
- did not seek to disapply or quash an Act of Parliament or the common law or anything related to them (ie it could be made against either administrative action or domestic legislation other than Acts of Parliament or rules of law).[22]

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[20] EUR-Lex, 'The Non-Written Sources of European Law: Supplementary Law', 20 August 2010.
[21] Explanatory Notes, pp 18–19.
[22] ibid, p 65.

This three-month window to bring a legal challenge was added as a government amendment at Commons report stage.[23]

Baroness Bowles of Berkhamstead (Liberal Democrat) spoke to her amendment 40ZA which would have allowed challenges to the validity of retained EU law to still be brought after exit day if the challenge related to general principles of EU law.[24] Lord Wallace of Tankerness (Liberal Democrat) raised a question about the interpretation of certain paragraphs of schedule 1. He said that paragraph 2 "suggests that, if it was a general principle of EU law that had been determined by the European Court in a case before exit day, it will continue to be part of domestic law".[25] But he noted that paragraph 3 then provides 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. He questioned why "having apparently established that there is a general principle of EU law that becomes part of our domestic law […] one is not allowed a remedy based on that general principle of EU law". He noted that this matter had also been raised by the Constitution Committee, which concluded:

> The effects of excluding Charter rights, retaining the "general principles", but excluding rights of action based on them, are unclear. This risks causing legal confusion in an area where clarity is needed. […] We recommend that the Government provides greater clarity on how the Bill deals with the general principles of EU law and how they will operate post-Brexit.[26]

Lord Goldsmith (Labour) suggested that the Bill's approach to general principles of EU law undermined the Government's argument that there would be no loss of rights as a result of not incorporating the Charter into domestic law:

> If one looks […] at the reasons given by the Government in their right by right analysis for why certain rights would, according to them, continue to exist, we see—I take this from this JCHR's analysis—that 16 out of 50 of the rights are based, in part at least, on the general principles of EU law. If the general principles of EU law have no more value than as an interpretive tool, that principle would disappear. That means that those rights that the JCHR saw could only continue to exist and give rise to rights because of the general EU rights.[27]

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[23] HC *Hansard*, 17 January 2018, col 1002, amendments 37 and 38.
[24] HL *Hansard*, 5 March 2018, cols 955–6.
[25] ibid, col 956.
[26] House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69 of session 2017–19, p 35.
[27] HL *Hansard*, 5 March 2018, col 960.

In response to such concerns, Lord Keen repeated his commitment that the Government was still looking at this issue:

> While we believe that the compromises we have already made on the general principles of EU law have improved the Bill, the Government are looking again at these issues to see whether this part of the Bill can be improved in keeping with some of the concerns that have been expressed. That is because we understand the complexities of the issues that arise in the context of schedule 1 and we are looking at those at present.[28]

4. Status of Retained EU Law (Clause 5 and Schedule 8)

Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, suggested on day three of committee that the Government was considering possible changes in relation to the legal status of retained EU law. He said:

> [I]t seems to the Government that there is some scope for considering how we can take this forward, and we are open to considering not only the recommendations of the Constitution Committee but of others.[29]

The Constitution Committee noted in its report on the Bill that there are broadly two categories of retained EU law in the Bill:[30]

- '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
- '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. Retained direct EU law has no particular status in domestic law as either primary or secondary legislation, although Paragraph 19 of schedule 8 of the Bill requires that retained EU law be considered primary legislation for the purposes of the Human Rights Act 1998.

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[28] HL *Hansard*, 5 March 2018, col 965.

[29] HL *Hansard*, 28 February 2018, col 670.

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

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".[31]

Although he said that the Government was considering how to take this question forward, Lord Keen indicated that the Constitution Committee's proposal raised "enormous difficulties" as some details of EU-derived legislation were very technical and it would be problematic to be able to amend them only by way of primary legislation.[32] He also said that the Government was looking at a proposal put forward by Paul Craig, Professor of English Law at St John's College, Oxford, who suggested that retained EU law could be categorised as domestic primary or secondary legislation based on the status it had in EU law.[33] Under Professor Craig's proposal, a measure's status in EU law would be determined by the EU procedure originally used to make it.

The House returned to the question of the status of retained EU law on day four of committee. Lord Pannick (Crossbench) spoke to an amendment tabled by members of the Constitution Committee which would have provided that retained EU law is to be treated as primary legislation, enacted on exit day (amendment 33). Lord Pannick explained why there was a need to know about the status of one rule relative to another in domestic law:

> […] the question of hierarchy is determinative of a number of legal questions. Which rule takes priority if there is a conflict between them? On what grounds may the content of a legal rule be challenged? What remedies are available if the legal challenge is successful, and

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[31] House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69 of session 2017–19, p 20.
[32] HL *Hansard*, 28 February 2018, col 670.
[33] ibid, cols 670–1; and Paul Craig, 'European Union (Withdrawal) Bill: Legal Status of Retained EU Law', UK Constitutional Law Association Blog, 26 February 2018.

> what process must be followed if the rule is to be repealed or amended?[34]

He went on to explain the reasoning behind the Constitution Committee's approach of giving all retained EU law the status of primary legislation:

> The simplicity of that approach is that it would ensure, by a means entirely conventional on domestic legal principles, that retained EU law would take priority over previously enacted legislation, as the Government intend, but it would give way to legislation enacted after exit day—again as the Government intend. Another advantage of treating all retained EU law as primary legislation is that it would not be capable of amendment under existing delegated powers which are not Henry VIII powers. Ministers would be able to amend the retained EU law only by using existing Henry VIII powers where applicable, or by using the powers conferred under this Bill.[35]

However, Lord Pannick said that as long as this "serious deficiency" was addressed, he would be content with a solution that conferred a legal status on retained EU law norms based on the status which the norm had in EU law pre-exit day. He mentioned that this approach was suggested by not only Professor Craig, but also by the Bingham Centre for the Rule of Law and Pushpinder Saini, legal counsel to ClientEarth, a group of lawyers concerned with environmental protection.[36]

Baroness Bowles of Berkhamsted (Liberal Democrat) spoke to her amendment (32A), which would have assigned domestic legal status to retained EU law as follows:[37]

- Retained general principles of EU law (EU primary legislation) would be treated as primary legislation in domestic law
- Retained EU legislative acts (EU secondary legislation) would be treated as "secondary legislation-plus, or primary legislation-minus" in domestic law, so it could be amended:
  - by secondary legislation using the 'correcting power' in clause 7 of the Bill until that power expired two years after exit day
  - only by primary legislation once the clause 7 powers had expired

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[34] HL *Hansard*, 5 March 2018, col 884.

[35] ibid, col 885.

[36] Bingham Centre for the Rule of Law, *The EU (Withdrawal) Bill: A Rule of Law Analysis of Clauses 1–6*, 21 February 2018; and ClientEarth, 'QC Opinion on the EU Withdrawal Bill from Blackstone Chambers', 16 February 2018.

[37] HL *Hansard*, 5 March 2018, cols 886–9.

- Retained EU delegated and implementing acts (EU tertiary legislation) would be treated as secondary legislation in domestic law.

Lord Keen repeated that there was "some scope for considering how we can take this forward".[38] He reiterated that the Government was looking at Professor Craig's proposal, and said that it was "willing to look at" Baroness Bowles's scheme. He re-stated that the Constitution Committee's approach "would raise formidable problems for us", and suggested that "a mechanism that avoids actually applying the doctrine of supremacy may find greater traction as a way forward if we can come up with a suitable categorisation for retained EU law, rather than a blanket categorisation of primary legislation".[39]

The status of retained EU law was revisited during discussion of schedule 8 on the eleventh day of committee. Lord Pannick spoke to amendments 358C and 360A. Amendment 358C would have removed paragraphs 3(1) and 3(2) of schedule 8 from the Bill. The Bill's explanatory notes explain that these provisions relate to amending retained direct EU law through subordinate legislation:

> Sub-paragraph (1) of paragraph 3 provides that any existing powers to make subordinate legislation in pre-exit legislation are capable of amending retained direct EU legislation such as converted EU regulations (and sub-paragraph (2) provides that it is treated as secondary legislation for the purposes of scrutiny procedures under those pre-exit powers).[40]

Amendment 360A would have removed paragraph 5 from schedule 8. Paragraph 5 provides that powers to make secondary legislation in Acts passed after the UK's withdrawal from EU would be capable of amending retained direct EU legislation (unless otherwise provided).[41]

In the context of a discussion on the status of retained EU law, Lord Pannick argued that the provisions of paragraphs 3 and 5 of schedule 8 treated retained EU law as analogous to secondary legislation for the purposes of powers to modify it.[42] He described this as "surprising" given that "part of retained EU law […] confers important rights: for example, in the fields of employment, the environment and consumer protection".[43] He questioned

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[38] HL *Hansard*, 5 March 2018, col 896.
[39] ibid, cols 896–7.
[40] Explanatory Notes, p 61.
[41] ibid, p 62.
[42] HL *Hansard* 28 March 2018, col 872.
[43] ibid.

why the powers were needed in addition to those conferred under clauses 7, 8, 9 and 17.[44]

Responding, Lord Keen of Elie explained that the purpose of paragraph 3 of schedule 8 was to remove the "shadow" of the EU treaties from UK law:

> Paragraph 3 of Schedule 8 ensures that the amendment of retained direct EU legislation is subject to parliamentary scrutiny—and, rightly, allows Ministers to bring to Parliament instruments, within the existing scope of the powers, which propose policy that would either have been in areas of the exclusive competence of the EU or which diverges from EU policy. It cannot be rational, once we have left the legal architecture of the EU and the treaties, for the restrictions they place on what this Parliament can consider and approve to continue in some shadowy form after we have left the European Union. That is why we are taking these powers.[45]

Lord Keen described Lord Pannick's amendments as being closely linked with the discussion on retained direct EU law and restated that "the Government have been listening and considering that, and we intend to come back to the House on the matter before Report".[46]

5. Animal Sentience

In response to amendments relating to the recognition of animal sentience, Lord Callanan, Minister of State at the Department for Exiting the European Union, noted on day four of committee that the Government had published a Draft Animal Welfare (Sentencing and Recognition of Sentience) Bill in December 2017.[47] 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.[48] Lord Wigley (Plaid Cymru) asked whether the Government would be prepared to make an amendment to the European Union (Withdrawal) Bill if the consultation summary was not published by report stage, "rather than relying on the possibility of future legislation that may not reach the statute book".[49] Lord Callanan said that he did not want to give "an exact commitment" but would "look at what can be done in its place" if the consultation summary was not available by report stage.[50]

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[44] HL *Hansard* 28 March 2018, col 872.
[45] ibid, col 875.
[46] ibid, cols 873–4.
[47] HL *Hansard*, 5 March 2018, col 880.
[48] ibid.
[49] ibid.
[50] ibid.

The question of animal sentience has arisen in connection with the European Union (Withdrawal) Bill because Article 13 of the Treaty on the Functioning of the European Union (TFEU) states that "since animals are sentient beings", the EU and member states must "pay full regard to the welfare requirements of animals" when "formulating and developing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies".[51] 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.[52]

6. *Francovich* Claims (Schedules 1 and 8)

On day four of committee, Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, indicated that the Government recognised a "potential lacuna" in the Bill's provisions relating to the opportunity to bring claims for *Francovich* damages, and was considering its position on this.[53]

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.[54]

The Bill provides that there would be no right in domestic law post-exit to damages in accordance with the *Francovich* rule (paragraph 4 of schedule 1), although this would not apply to any proceedings which had begun before a UK court before exit day, even if they had not yet been finally decided before exit day (paragraph 27(3) of schedule 8).

Lord Keen acknowledged that this potentially left a gap where "there may be accrued rights as at exit date where no claim has been made"—in other words if the Government had breached EU law before exit day, but

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

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

[53] HL *Hansard*, 5 March 2018, col 977.

[54] James Segan, 'The Great Repeal Bill: What Will Happen to Accrued Rights to Claim Francovich Damages?', Blackstone Chambers, 3 October 2017.

proceedings had not been started before exit day.[55] He said the Government was "open to addressing that issue" because it was "aware of the criticism that has been made about the potential removal of rights that have already accrued as at the exit date". He clarified that the Government was "determining what our position is", although he said he could not commit to bringing an amendment at a later stage.[56]

7. Post-exit Judgments of the Court of Justice of the European Union (Clause 6)

Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, gave a commitment on day five of committee stage that the Government would consider proposals for amending clause 6(2).[57] This clause addresses the question of what weight UK courts should give to the judgments of the CJEU after exit day. It provides that: "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".

Lord Pannick (Crossbench) argued that there were three defects in the drafting of clause 6(2):[58]

- 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 where they consider that those judgments are relevant to the issues before our courts".
- It is "doubtful" that the clause needed to refer to other EU entities, or the EU itself, rather than just the CJEU.

Lord Neuberger of Abbotsbury (Crossbench), who was President of the Supreme Court from 2012 to 2017, concurred with Lord Pannick's first and second points, and said that as drafted, clause 6(2) was "worse than nothing

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[55] HL *Hansard*, 5 March 2018, col 977.
[56] ibid, col 978.
[57] HL *Hansard*, 7 March 2018, cols 1102–3.
[58] ibid, col 1091.

from the judicial perspective".[59] He agreed that clause 6 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".[60] Lord Hope of Craighead, Deputy President of the Supreme Court from 2009 to 2013, also recognised the need for clause 6 to contain more guidance to the judiciary on when to refer to post-exit CJEU judgments.[61]

Several possible amendments to the wording of clause 6(2) were discussed, including one based on the Constitution Committee's recommendation that the Bill should provide that the courts should have regard to post-exit CJEU judgments that the court considers "relevant to the proper interpretation of retained EU law".[62]

Lord Keen said he "recognised the force of the points being made", and suggested that "we have a common desire to ensure that we give appropriate, effective and clear guidance, in so far as it is required, to the judiciary, regarding what is a relatively complex issue".[63] He said the Government would consider "the various formulations" and would "engage with various interested parties once we have come to a view about how we can properly express what we all understand is necessary policy guidance".[64]

8. Delegated Powers: 'Appropriate' or 'Necessary' (Clauses 7, 8, 9 and 17)

On day five of committee, 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.[65]

Clauses 7, 8 and 9 of the Bill would enable Ministers to make regulations to "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.

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

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[59] HL *Hansard*, 7 March 2018, col 1094.
[60] ibid, col 1092.
[61] ibid, col 1096.
[62] ibid, cols 1090–1104; and House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69 of session 2017–19, p 40.
[63] HL *Hansard*, 7 March 2018, col 1102.
[64] ibid, col 1103.
[65] ibid, col 1200.

properly from day one".[66] The Delegated Powers and Regulatory Reform Committee has 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".[67] It recommended that the "subjective 'appropriateness' test" in clauses 7 and 8 "should be circumscribed in favour of a test based on objective necessity".[68]

Lord Wilson of Dinton (Crossbench) moved amendment 71 which would have changed the threshold for making regulations from "considers appropriate" to "is necessary".[69] He said that the "power to make law and amend existing law" was "the dream of tyrants through the ages", and the powers given to Ministers in the Bill were "breath-taking".[70] He argued that ministerial powers should be focused "exclusively on achieving a functional legal system, without going wider", and "if the law as it emerges needs to be improved, it should be improved by separate legislation that goes through proper processes".

Lord Wilson's arguments were endorsed by Lord Lang of Monkton (Conservative), former chair of the Constitution Committee, who said that:

> The amendments in this group are not just a matter of trivial semantics; they are the granular embodiment in microcosm of a fundamental principle—namely, that one pillar of our democracy is the balance of power between the Executive and Parliament. This Bill, if unamended, would tilt that balance quite heavily towards the Executive. To do that would be to degrade what will be a historic Act in due course and jeopardise the rights of Parliament.[71]

Lord Beith (Liberal Democrat) spoke to amendment 244A tabled by members of the Constitution Committee. This would have required that before making regulations under clauses 7, 8 or 9, Ministers would have to lay a statement before both Houses of Parliament setting out whether the proposed instrument "does no more than make technical changes to ensure that retained EU law functions after exit day or whether a policy choice has been made".[72] Lord Beith said the intention of the amendment was to "provide a more objective test and a requirement for Ministers to state that

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[66] HM Government, *Legislating for the United Kingdom's Withdrawal from the European Union*, March 2017, Cm 9446, p 11.
[67] 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.
[68] ibid, pp 6 and 8. The Committee recommended that clause 9 should be removed from the Bill altogether (p 9).
[69] HL *Hansard*, 7 March 2018, col 1178.
[70] ibid, col 1179.
[71] ibid, col 1184.
[72] ibid, cols 1186–7.

they have applied an objective test", for which they could be held accountable. He also said that his amendment did not exclude other amendments that sought to replace "appropriate" with "necessary", a change for which he indicated his support.

Viscount Hailsham (Conservative) spoke to a number of amendments he had tabled (amendments 73 to 79 and 117 to 119), which would have replaced "appropriate" with "essential" or, alternatively, with "on reasonable grounds considers appropriate" as the threshold for exercising the delegated power.[73] He objected to "appropriate" as "a subjective word, very difficult to define in advance, impossible to challenge and non-judicable". He said that the purpose of his amendments was "to tighten the test, to make it judicable and to limit the discretion".

In response, Lord Callanan, Minister of State at the Department for Exiting the European Union, undertook to publish some additional examples of draft statutory instruments to illustrate how the Government envisaged using these powers.[74] Several sample draft instruments have been deposited in the Library and published on the GOV.UK website.[75] Lord Callanan later said during the committee debate on day seven that these examples illustrated that there was a "profound disconnect between the picture painted at times in this House of the types of powers we are taking and the actual uses to which we propose to put those powers".[76]

Continuing his response on day five, Lord Callanan noted that the Constitution Committee had taken a different view from the Delegated Powers Committee regarding whether the test should be that it was 'appropriate' or 'necessary' to exercise the powers.[77] Although the Constitution Committee agreed with the Delegated Powers Committee that "the power of Ministers to do what they consider 'appropriate' is subjective and inappropriately wide", it recommended a different solution:[78]

> We recommend that the Bill be amended, 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'. This will require explanations to be given for the use of the power which can be

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[73] HL *Hansard*, 7 March 2018, cols 1190–1.
[74] ibid, col 1196.
[75] Department for Exiting the European Union, DEP2018-0234, 7 March 2018; and 'Information about the Withdrawal Bill', updated on 8 March 2018, accessed 9 April 2018.
[76] HL *Hansard*, 14 March 2018, col 1599.
[77] HL *Hansard*, 7 March 2018, col 1196.
[78] House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69 of session 2017–19, p 46.

> scrutinised by Parliament. It will also provide a meaningful benchmark against which use of the power may be tested judicially.[79]

The Sanctions and Anti-Money Laundering Bill [HL] is another Brexit-related bill currently before Parliament. At report stage in the Lords, a government amendment was agreed to which added a requirement that when making discretionary sanctions regulations, the Minister must have good reasons to do so, must be satisfied that the imposition of sanctions is a reasonable course of action and must lay a report before Parliament that the first two tests have been met.[80] A similar requirement was added to the Sanctions and Anti-Money Laundering Bill at committee stage in the Commons in respect of regulations creating new criminal offences (for more about this see section 11 of this briefing).[81]

Lord Callanan said that the changes made to the Sanctions and Anti-Money Laundering Bill as it went through the Lords had "clearly informed" the Constitution Committee's recommendation".[82] He said that the Government was "receptive to the arguments made in its report" and was "confident that a mutually agreeable position will be found". However, Lord Wilson of Dinton found the Constitution Committee's proposal "too weak".[83]

Lord Callanan indicated that the amendments tabled by Viscount Hailsham requiring a Minister to have "reasonable grounds" to consider it appropriate to make a regulation was "the right type of approach in not altering the fundamental scope of the powers".[84] In contrast, Lord Callanan said he did not see the Delegated Powers Committee's recommendation to replace "appropriate" with "necessary" as "workable".[85] He justified this position by saying that:

> "Necessary" is a high bar to meet. The courts have said that the nearest paraphrase for "necessary" is "really needed", but such a test would be too constrictive.
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> […] If regulations could only make "necessary" provisions, the powers would be heavily restricted to a much smaller set of essential changes.

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[79] House of Lords Constitution Committee, *European Union (Withdrawal) Bill*, 29 January 2018, HL Paper 69 of session 2017–19, p 46.
[80] HL *Hansard*, 15 January 2018, cols 442 and 452.
[81] Public Bill Committee, *Sanctions and Anti-Money Laundering Bill*, 6 March 2018, session 2017–19, sixth sitting, cols 117–20. The Sanctions and Anti-Money Laundering Bill has not yet completed its Commons committee stage.
[82] HL *Hansard*, 7 March 2018, col 1196.
[83] ibid, col 1181.
[84] ibid, col 1197.
[85] ibid, col 1196.

> For example, if the Government wanted to change references in legislation from euros to sterling, we would expect such a change to be considered "appropriate" both by the courts and, I hope, by this house, but it might not be considered "necessary".[86]

This issue was revisited on the ninth day of committee in relation to clause 17(1), which would give regulation-making powers to "make such provision as the Minister considers appropriate in consequence of this Act". This would include the power to amend primary legislation that had been passed before the end of the parliamentary session in which the present Bill was passed. Responding to Members who had raised the use of the word 'appropriate' in the clause,[87] Lord Keen of Elie, Advocate General for Scotland and Spokesperson for the Ministry of Justice, suggested that the choice of words would be something to which the Government would give further consideration:

> It may be that it turns largely not on the way Clause 17(1) is presently framed, but on the use of a term such as "appropriate". We will give further consideration to the use of that language and whether that is the way this consequential—I stress "consequential"—power should be employed in this context.[88]

9. Creation of Public Bodies (Clause 7)

On day five of committee, Ministers indicated that they were reviewing the drafting of the Bill's powers to create new public bodies by secondary legislation.[89] As drafted, clause 7 would give Ministers the power to make regulations to establish new public authorities in the UK to carry out functions that are currently carried out by EU bodies.

Lord Newby, Liberal Democrat Leader in the Lords, spoke to two amendments (83 and 94) which would have prevented this. Lord Newby said there was a "long-established principle of British practice and law, namely that public bodies are created via primary legislation".[90] He argued that they should not be capable of being established by secondary legislation "for the simple reason that such legislation does not allow their purposes, scope and operating practices to be subject to adequate debate". Lord Adonis (Labour), Lord Hannay of Chiswick (Crossbench), Lord Whitty (Labour), Lord Beith (Liberal Democrat), Baroness Altman (Conservative), Baroness Whitaker (Labour) and Baroness Hayter of Kentish Town, Shadow

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[86] HL *Hansard*, 7 March 2018, col 1198.
[87] For example, Lord Goldsmith (HL *Hansard*, 21 March 2018, col 271).
[88] HL *Hansard*, 21 March 2018, col 274.
[89] ibid, cols 1206 and 1221.
[90] ibid, col 1214.

Spokesperson for Exiting the European Union, all spoke to support this argument.[91]

Lord Callanan, Minister of State at the Department for Exiting the European Union, said the Government's preference would "always be, where possible, to transfer any functions returning from the EU to existing bodies in the UK".[92] However, as negotiations were still ongoing, the Government did not yet know which functions would be returning to the UK, or whether the UK might instead continue a relationship with some EU bodies as part of the "deep and special partnership". Lord Callanan said that the ability to establish new bodies was included in clause 7 "for the sake of contingency", to insure "against losing any important functions as they are transferred over from the EU", in case no such body already existed in the UK. However, he sought to assure the House that "the Government are working hard on finding a resolution to this matter that will satisfy the concerns of noble Lords", and would "revisit it on report".[93]

Baroness Goldie, a Government Whip, also indicated on day five that the Government was "looking very closely at whether the key powers" in clause 7 to establish new public bodies "need to be drawn as widely as they are".[94]

10. Powers to Impose Taxation, Fees, Charges or Levies (Clauses 7, 8, 9, 12 and Schedule 4)

Lord Callanan said on day six of committee that the Government was aware of the concerns of many Members of the House about the raising of fees under clauses 7, 8 and 9, and would "look closely at how we can resolve those concerns" at report stage.[95]

Clauses 7(7)(a) and 9(3)(a) would prevent the Government from using the regulation-making powers in clauses 7 and 9 to impose or increase taxation, but concerns were raised during the debate that there was no similar restriction on imposing or increasing fees or charges. For example, Lord Turnbull (Crossbench) argued that it might be appropriate to use secondary legislation to impose fees or charges that simply covered the costs of administering a service, but that some fees and charges were "equivalent to taxation" and should be subject to the same constraints.[96] He referred to a report on the Bill by the Delegated Powers and Regulatory Reform Committee that pointed out a longstanding principle that the introduction of

[91] HL *Hansard*, 7 March 2018, cols 1216–20.
[92] ibid, col 1220.
[93] ibid, col 1221.
[94] ibid, col 1206.
[95] HL *Hansard*, 12 March 2018, col 1355.
[96] ibid, col 1345.

taxation or its increase should not be permitted simply by secondary legislation.[97] Lord Turnbull suggested that any 'fee', 'charge' or 'levy' that generated a surplus beyond simple cost recovery should be classified as a tax, as should any fee that was set according to "something like wealth or income".[98] He called on the Government to come back at report stage with amendments which made this distinction.

Lord Callanan said that the restrictions in clauses 7 and 9 already prevented Ministers "establishing charges of a type that would involve any element of taxation or tax-like provision".[99] He said that these clauses could not impose a charge, which he defined as "anything which goes beyond cost recovery". They could impose fees, which he defined as "a payment only for a service received", but doing so was not the primary purpose of the clauses. Lord Lisvane (Crossbench) argued that *Erskine May* did not make the same distinction between the definitions of fees and charges.[100] Lord Callanan undertook to look into this.[101]

Concerns were also raised during the day six debate relating to the possible use of clause 8 to impose taxation by secondary legislation. There is no restriction in clause 8 on making regulations that impose taxation as there is in clauses 7 and 9. Lord Lisvane and Lord Tyler (Liberal Democrat) questioned why clause 8 would allow taxation to be imposed by statutory instrument rather than primary legislation.[102] Both referred to the Delegated Powers and Regulatory Reform Committee report (they are both members of that Committee) which posed the same question and concluded that:

> The Government should demonstrate a convincing case (if one exists) before the supremacy of the House of Commons in financial matters gives way to taxation by statutory instrument.[103]

In response, Lord Callanan argued that the power in clause 8 was necessary to prevent any inadvertent breach of the UK's international obligations when it left the EU.[104] As an example, he said that if, post-exit, the UK continued to treat goods and services from the EU more favourably than those from other World Trade Organisation (WTO) members, but did not have an appropriate regional trade agreement in place with the EU, this might be in

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[97] HL *Hansard*, 12 March 2018, col 1345; and House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 1 February 2018, HL Paper 73 of session 2017–19, pp 12–13.
[98] HL *Hansard*, 12 March 2018, col 1346.
[99] ibid, col 1355.
[100] ibid, col 1356.
[101] ibid.
[102] ibid, cols 1347–8.
[103] House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 1 February 2018, HL Paper 73 of session 2017–19, p 8.
[104] HL *Hansard*, 12 March 2018, col 1356.

breach of the WTO's 'most favoured nation' principle.[105] Lord Callanan said that the powers in clause 8 might be needed to ensure that the UK continued to meet its WTO obligations with regard to tariffs, although he hoped that it would never be necessary to use the powers for that purpose, as the Government sought a "good agreement" with the EU on regional trade.

On the basis that the Government had "a duty to plan for the unlikely scenario in which no mutually satisfactory agreement can be reached", Lord Callanan said that the Government could not accept amendments to clause 8. However, he repeated his commitment to "look closely at how we can resolve many of the concerns that have been raised" in the debate on this group of amendments.[106]

On the tenth day of committee the House debated whether clause 12 should stand part of the Bill. Clause 12 relates to financial provisions made under the Bill and would give effect to schedule 4. In the opening words of his response, Lord Callanan said that the Government had heard the concerns expressed in the debate about the powers in schedule 4, and issues about their scrutiny, and would look at this ahead of report. He indicated that he could not provide much detail at present but that the Government would "carefully consider this issue".[107]

Powers under paragraph 1 of schedule 4 would enable an 'appropriate authority' to make regulations enabling a public authority to charge fees or other charges, such as levies connected with the carrying out of a function.[108] Sub-paragraph 3 gives examples of what regulations under paragraph 1 could do. Among other things they could:

(a) prescribe the fees or charges or make provision as to how they are to be determined;
(b) provide for the recovery or disposal of any sums payable under the regulations;
(c) confer power on the public authority to make, by subordinate legislation, any provision that the appropriate authority may make under this paragraph in relation to the relevant function.[109]

The Government's delegated powers memorandum for the Bill explained that powers under schedule 4 could include the creation of tax-like

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[105] HL *Hansard*, 12 March 2018, col 1356–8. For more information about the WTO's most favoured nation principle, see House of Lords Library, *Leaving the European Union: World Trade Organisation*, 28 March 2017.
[106] HL *Hansard*, 12 March 2018, col 1358.
[107] HL *Hansard*, 26 March 2018, col 710.
[108] Explanatory Notes, p 49.
[109] Schedule 4, part 1, paragraph 1(3).

charges.[110] The House of Lords Delegated Powers and Regulatory Reform Committee expressed concern that the powers in schedule 4 were "very wide" and argued that a tax-like charge means a tax.[111] The Committee also concluded that:

> Taxation, including "tax-like charges", should not be permissible at all in regulations made under schedule 4. Fees and charges for services or functions should operate on a cost-recovery basis, leaving taxation for a Finance Bill—a principle enshrined in Article 4 of the Bill of Rights 1688.[112]

Lord Lisvane spoke to amendment 348 and 349. Amendment 348 would have removed paragraph 1(3)(c) of schedule 4 from the Bill. Amendment 349 would have added the following line to the end of sub-paragraph 3: "regulations under this paragraph may not impose or increase taxation". Lord Lisvane expressed concern that the provisions of the Bill were delegating powers to Ministers and could allow other bodies to make law:

> At an earlier stage, I expressed concern that this Bill already proposing to confer sweeping powers upon Ministers, should go even further and permit the making of the law of the land by persons and bodies authorised by a Minister. The authorisation would, as the Minister said in an earlier debate, be subject to the affirmative procedure, but once that authorisation had been made, the law made under it would be under no sort of parliamentary control and, unless in the form of a statutory instrument—which it would not be—would not even be required to be published.[113]

Lord Lisvane said that amendment 349 "returns to the issue of ancient principle" that taxation should be by primary legislation not by statutory instrument.[114] Lord Tyler described approving taxes as "the most basic responsibility and role of the House of Commons".[115]

In the opening words of his response, Lord Callanan, said that:

> I make it completely clear that I have heard the principled and eloquently expressed concerns about the powers in Schedule 4 and their scrutiny, and we will look closely at this ahead of Report. I regret

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[110] Explanatory Notes, p 49.
[111] House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 28 September 2017, HL Paper 22 of session 2017–19, p 23.
[112] ibid, p 24.
[113] HL *Hansard*, 26 March 2018, col 707.
[114] ibid.
[115] ibid, col 708.

> to say that I am unable to provide too much detail on that at the moment, but we will carefully consider this issue.[116]

He went on to argue that the provisions of clause 12 and schedule 4 were key to ensuring that the rest of the Bill could be given effect and that preparations for withdrawing from the EU under the provisions of the Bill required funding.[117] Lord Callanan said that it remained the Government's view that conferring powers on public authorities to allow them to make "provisions of a legislative character" was appropriate.[118] He stated that any such sub-delegation would have to be approved by both Houses following a debate.[119]

Speaking to comments about 'tax-like' charges, Lord Callanan explained that:

> Under the guidance laid down by the Treasury, although fees and charges for services that are set on a strict cost-recovery basis are not taxes, any fee or charge that goes further than direct cost recovery is likely to count as taxation or to be tax-like. This would be the case if it cross-subsidises to construct a progressive regime between large multinationals and small enterprises, if it is a compulsory levy in a regulated and surveilled sector, such as banking, or if it funds the broader functions of an organisation not directly part of the cost of providing a service, such as enforcement.[120]

Lord Callanan argued that the powers under schedule 4 were necessary because the Government directly prohibited the increase or imposition of taxation, including tax-like charges, under other relevant powers in the Bill—particularly clause 7(1).[121] However, he restated that the Government was looking closely at clause 12 and schedule 4 in advance of the Bill's report stage and would "try to see how we might provide appropriate reassurance to a number of the fairly reasonable concerns that have been raised".[122]

11. Powers to Create Criminal Offences (Clauses 7, 8 and 9)

Lord Callanan, Minister of State at the Department for Exiting the European Union, indicated on day six of committee that the Government was "still looking very closely" at how the powers in the Bill to create criminal offences are drawn.[123] Clauses 7(7)(a), 8(3)(b) and 9(3)(c) stipulate that

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[116] HL *Hansard*, 26 March 2018, col 710.
[117] ibid.
[118] ibid.
[119] ibid.
[120] ibid, col 711.
[121] ibid.
[122] ibid, col 712.
[123] HL *Hansard*, 12 March 2018, col 1367.

regulations under clauses 7, 8 or 9 could not be used to create a "relevant criminal offence". A "relevant criminal 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.

A number of amendments were tabled which would have prevented the delegated powers being used to create any criminal offences at all, or alternatively, any criminal offences punishable by a prison term. Opening debate on this group of amendments, Lord Judge (Crossbench), the former Lord Chief Justice of England and Wales, argued that there was "a simple principle: it is wrong for a criminal offence to be created without proper—not notional and not theoretical—parliamentary scrutiny".[124]

He drew a parallel with the Sanctions and Anti-Money Laundering Bill. As introduced in the House of Lords, that Bill contained delegated powers to create criminal offences with a penalty of up to ten years' imprisonment. In its report on that Bill the Constitution Committee said:

> We have recommended previously that delegated legislation should not be used to create new criminal offences. The Delegated Powers and Regulatory Reform Committee said in 2014 that "Where the ingredients of a criminal offence are to be set by delegated legislation, the Committee would expect a compelling justification".[125]

In the case of the Sanctions and Anti-Money Laundering Bill, the Delegated Powers and Regulatory Reform Committee concluded that the Foreign and Commonwealth Office had provided a compelling case for allowing the creation of criminal offences in delegated legislation, but "given the very high penalties" involved, it recommended that sanctions regulations that made provision for criminal offences should be subject to the affirmative procedure.[126] The Constitution Committee found the powers "constitutionally unacceptable" and said they should be removed from the Bill.[127] The House of Lords voted in favour of amendments moved by Lord Judge that removed powers to create offences by secondary legislation.[128]

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[124] HL *Hansard*, 12 March 2018, col 1360.

[125] House of Lords Constitution Committee, *Sanctions and Anti-Money Laundering Bill [HL]*, 17 November 2017, HL Paper 39 of session 2017–19, p 5.

[126] House of Lords Delegated Powers and Regulatory Reform Committee, *Sanctions and Anti-Money Laundering Bill [HL]*, 17 November 2017, HL Paper 38 of session 2017–19, p 6.

[127] House of Lords Constitution Committee, *Sanctions and Anti-Money Laundering Bill [HL]*, 17 November 2017, HL Paper 39 of session 2017–19, pp 5–6.

[128] HL *Hansard*, 15 January 2018, cols 490–1 (division on amendment 45); and HL *Hansard*, 17 January 2018, cols 683–5 (division on amendment 71A). See House of Commons Library, *The Sanctions and Anti-Money Laundering Bill 2017–19*, 15 February 2018, for a summary of the debate on these amendments.

At committee stage in the House of Commons of the Sanctions and Anti-Money Laundering Bill, the public bill committee voted in favour of a government amendment to reinstate the power to make regulations creating new criminal offences with penalties of up to ten years' imprisonment.[129] However, the public bill committee also voted in favour of a new clause proposed by the Government which would require that when making regulations to create a new criminal offence, the Minister would have to lay a report before Parliament confirming there were "good reasons" to do so and explaining what those reasons were.[130]

Speaking during the committee stage of the European Union (Withdrawal) Bill, Lord Judge described the changes made to the Sanctions and Anti-Money Laundering Bill as a "significant government amendment to the original proposal", which showed that the "Government must have implicitly accepted that the theoretical arrangements for parliamentary scrutiny were inadequate".[131] In his view, the threshold ought to be that it was "necessary" to create a new offence, rather than that the Government believed there was "good reason" to do so, but he acknowledged that the changes made "were a significant advance that would greatly increase the opportunity for genuine scrutiny by Parliament".[132] He called on the Government to indicate that "at the very least, the government proposals made in the Sanctions Bill will be carried into this one".

Viscount Hailsham (Conservative) pointed out that the threshold for using the powers in clauses 7, 8 and 9 was that the Minister considered it "appropriate", and that this would also apply to the creation of criminal offences.[133] He argued it was "profoundly unattractive" that the Bill gave "in effect, the power to introduce a criminal offence which attracts a custodial sentence by fiat or declaration". Lord Marks of Henley-on-Thames, the Liberal Democrat Justice Spokesperson, recalled that when he was a member of the Delegated Powers and Regulatory Reform Committee (2012–2015), the Committee had held it as a "cardinal" principle that "it is in general not acceptable for the Government to have the power to create new criminal offences by regulation without an Act of Parliament".[134] Lord Thomas of Gresford, Liberal Democrat Shadow Attorney General, expressed concerns that the Bill could allow criminal offences to be created

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[129] Public Bill Committee, *Sanctions and Anti-Money Laundering Bill*, 27 February 2018, session 2017–19, 1st sitting, cols 20–26.

[130] Public Bill Committee, *Sanctions and Anti-Money Laundering Bill*, 6 March 2018, session 2017–19, sixth sitting, cols 117–120. This clause was added as clause 18 of the Bill. The Sanctions and Anti-Money Laundering Bill has not yet completed its Commons committee stage.

[131] HL *Hansard*, 12 March 2018, col 1360.

[132] ibid, col 1361.

[133] ibid.

[134] ibid, col 1363.

in sub-delegated, or tertiary, legislation, with no parliamentary scrutiny and no sunset clause governing the duration of this power.[135]

In response, Lord Callanan explained that the intent was "largely to ensure that the same types of conduct carry criminal penalties as before" but that previous case law had "created some uncertainty as to whether widening an existing offence"—as might happen if, for example, regulatory enforcement functions were transferred from an EU body to a UK one—"would amount to creating a new offence".[136] Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, argued that it "would not do" for the Government to give itself powers to create new offences on the basis of this possible legal issue.[137] However, Lord Callanan maintained that the powers to create certain criminal offences were needed "to ensure that no offences that are needed fall away as we leave the EU", for example offences relating to breaches of regulatory requirements.[138]

Lord Callanan confirmed that "the solutions found in the Sanctions Bill" were "at the forefront" of Ministers' minds, and the Government intended to meet members of the Lords to discuss the issue further over coming weeks.[139] He said that that the Government was "open to discussion on finding similar solutions in this Bill".[140] However, Lord Judge objected to Lord Callanan's description of the approach in the Sanctions and Anti-Money Laundering Bill as a "mutually agreeable arrangement".[141] He remained of the opinion that the threshold for creating a new offence in secondary legislation should be that it was "necessary" rather than that the Government considered there were "good reasons" for it.

12. Scrutiny of Sub-delegated Legislation (Clauses 7, 8 and 9 and Schedule 8)

Lord Callanan said on day six of committee that the Government would look to see how it could provide "additional reassurances and transparency around sub-delegation" at report stage.[142]

The Bill specifies that regulations made under clauses 7, 8 and 9 could make any provision that could be made by an Act of Parliament. This means that delegated legislation made under these clauses could enable the making of further sub-delegated legislation. In its report on the Bill, the Delegated

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[135] HL *Hansard*, 12 March 2018, cols 1364–5.
[136] ibid, cols 1368–9.
[137] ibid, col 1367.
[138] ibid, col 1369.
[139] ibid, col 1361.
[140] ibid, col 1367.
[141] ibid, col 1370.
[142] HL *Hansard*, 12 March 2018, col 1473.

Powers and Regulatory Reform Committee explained how this would work in practice, and its implications for parliamentary scrutiny:

> The Bill as enacted (primary legislation) confers powers on Ministers to make law by regulations (secondary legislation). This secondary legislation can do anything that Parliament can do (six matters excepted) [for the purposes of clause 7, those matters listed in clause 7(7))] including allowing people or bodies, and Ministers themselves, to make further subordinate legislation (tertiary legislation) without there having to be any parliamentary procedure or any requirement for the tertiary legislation to be made by statutory instrument. Where tertiary legislation is not made by statutory instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. Despite its greater inaccessibility, tertiary legislation is still the law.[143]

The Delegated Powers Committee pointed out that, although the Bill sets a time-limit on use of the regulation-making powers in clauses 7, 8 and 9 (exit day for clause 9 and two years from exit day for clauses 7 and 8), there is no such time restriction on the making of tertiary legislation.[144] The Committee recommended that: "Tertiary legislation should be subject to the same parliamentary control and time-limits as are applicable to secondary legislation".[145]

Lord Lisvane, a member of the Delegated Powers Committee, moved an amendment which would have implemented that recommendation.[146] He said that "the unrestricted power of sub-delegation" had "serious constitutional implications".[147] He acknowledged that the Government had said in the delegated powers memorandum on the Bill that the power to make tertiary legislation was intended to be used "sparingly", but he suggested that "what matters is what is on the face of the Act" because "if the power of sub-delegation is there, you can bet that it will be used when convenient to the Government of the day".

In response, Lord Callanan said that any statutory instruments providing for legislative sub-delegation would be subject to the affirmative scrutiny procedure, which would allow the House to "have vigorous debates on the appropriateness of the conditions proposed for the exercise of the power before voting on the instrument".[148] He maintained that the ability to

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[143] House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 1 February 2018, HL Paper 73 of session 2017–19, p 6.
[144] ibid.
[145] ibid, p 7.
[146] HL *Hansard*, 12 March 2018, col 1471.
[147] ibid, col 1472.
[148] ibid, cols 1473–4.

sub-delegate legislative power was "an appropriate course of action, either to make corrections to retained EU law or to maintain a regime in the future", for example sub-delegating to the Prudential Regulation Authority and the Financial Conduct Authority the power to correct any 'deficiencies' in the EU's binding technical standards for financial services as they were transferred into domestic law. He argued that it would "not be appropriate" for the legislative powers needed to maintain a regulatory regime to be subject to a sunset clause (for example, legislation to add or remove active compounds from a list of regulated biocidal products).[149]

This issue of sub-delegation was revisited on the eleventh day of committee. Lord Lisvane spoke to an amendment to schedule 8, seeking assurance from the Minister on this issue:

> [P]erhaps the most helpful thing the Minister could do in replying to this debate would be to give your Lordships a clear assurance that the tertiary powers will be carefully circumscribed, and that when affirmative instruments delegating those powers come before Parliament—because the actual delegation will be subject to the affirmative process—they do not simply prescribe some general subject area in which the body is to operate and which is to be its responsibility, but are rather more specific and indeed constraining.[150]

Lord Callanan responded that the Government was listening to these concerns and would "reflect closely on them before report".[151] However, the Government was wary of prescribing a "one-size-fits-nobody solution to scrutiny".[152] He was convinced these powers would be required for the foreseeable future and that sunsetting was not the way to deal with them:

> Rather, it is for noble Lords to scrutinise closely and carefully the SIs transferring those powers and the conditions they set out, and to reject them if they do not meet their exacting standards. We in the Government are committed to making sure that Parliament has all the material it needs to do this.[153]

13. Implementing the Withdrawal Agreement and a 'Meaningful' Vote (Clause 9)

Lord Callanan, Minister of State at the Department for Exiting the European Union, said on day seven that the Government had listened "very carefully" to concerns raised about clause 9 as currently drafted and would "take them

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[149] HL *Hansard*, 12 March 2018, cols 1474–5.
[150] HL *Hansard*, 28 March 2018, col 878.
[151] ibid, col 879.
[152] ibid.
[153] ibid, col 880.

away to see whether anything can be done ahead of report to address them".[154]

Clause 9 would give Ministers powers to make delegated legislation for the purposes of implementing a withdrawal agreement negotiated with the EU under the terms of Article 50 of the Treaty on European Union. Clause 9 was amended at committee stage in the Commons to add a condition that these powers cannot be used without the prior enactment of a statute by Parliament approving the final terms of the UK's withdrawal from the EU. The amendment was tabled by Dominic Grieve (Conservative MP for Beaconsfield), and the vote which approved the amendment was the Government's only defeat on the Bill in the House of Commons.[155] Earlier the same day, David Davis, Secretary of State for Exiting the European Union, had laid out 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
- introduce a Withdrawal Agreement and Implementation Bill to give the Withdrawal Agreement domestic legislative effect (providing Parliament had voted in favour of the deal).[156]

On day seven of committee in the Lords, the House discussed a number of amendments which sought to address whether Parliament would have a 'meaningful' vote on the withdrawal agreement, and what would happen if Parliament did not approve the deal negotiated by the Government with the EU, or if no deal was negotiated at all.

Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, said the House of Lords had voted overwhelmingly for a 'meaningful vote' for Parliament during the European Union (Notification of Withdrawal) Act 2017, and she wanted to ensure that this "demand" was put into the Bill.[157] She moved amendment 150 which sought to ensure that the statute mentioned in clause 9 covered not only the terms of the Withdrawal Agreement, but also any transitional arrangements negotiated with the EU. Amendment 150 also sought to put on the face of the Bill the Government's commitment that the Withdrawal Agreement would be voted

[154] HL *Hansard*, 14 March 2018, col 1651.
[155] HC *Hansard*, 13 December 2017, cols 521–5.
[156] House of Commons, Written Statement: Procedure for the Approval and Implementation of EU Exit Agreement, 13 December 2017, WS342.
[157] HL *Hansard*, 14 March 2018, col 1608.

on in both Houses of Parliament before the European Parliament voted to accept or reject the deal.[158] Lord Hannay of Chiswick (Crossbench) spoke in support of this amendment, arguing that it was "inconceivable that this Parliament should not have the same right" as the European Parliament to approve or reject any deal that had been negotiated.[159]

Lord Cormack (Conservative) spoke to amendment 151, which would have required the Government to seek to ensure that the statute mentioned in clause 9 was passed by Parliament before the deal was put to the European Parliament to approve or reject.[160] He argued that this would "guarantee Parliament a meaningful say on the Withdrawal Agreement at a meaningful, realistic, sensible time", because there was "no point in merely going through the motions if Parliament is not going to have a proper opportunity to deliver a verdict at a time when something can be done about it". Lord Reid of Cardowan (Labour) also spoke to this amendment. He argued it would prevent the Government from striking a "sub-optimal" deal with the EU, then "rely[ing] entirely on an 'accept or reject' motion in the House of Commons" and delaying the statute and regulations necessary to implement the Withdrawal Agreement "right up until the eleventh hour", which would "leave the legislature with no real alternative option".[161] In contrast, he believed that placing the statute before Parliament as soon as the deal was reached, with "every effort […] made to enact it prior to the parallel ratification stage in the European Parliament" would "enhance the rights of MPs and Peers to have such a 'meaningful vote' in a meaningful way and at a meaningful time".

Lord Cormack also spoke to amendment 199, which aimed to ensure that if Parliament did not endorse the proposed agreement, the Government would have to seek an extension of the Article 50 deadline so that negotiations could continue.[162] In his view, a "no deal-outcome is not acceptable", and this amendment would offer "a far more sensible way forward than a mere take it or leave it vote", without contradicting the referendum result.

Lord Wigley (Plaid Cymru) spoke to amendment 190, which would have obliged the Government to try to ensure that if Parliament rejected the deal, the UK could remain a member of the EU.[163] He argued that the Government's proposal to offer Parliament a "'like it or lump it' choice […] does not make it a meaningful vote in any sense". He also believed that

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158 HL *Hansard*, 14 March 2018, col 1607.
159 ibid, col 1631.
160 ibid, col 1609.
161 ibid, col 1612.
162 ibid, cols 1609–10.
163 ibid, col 1613.

Parliament should have the ability to "reject the no deal catastrophe—the cliff edge scenario—and be enabled to vote to retain the status quo".

Viscount Hailsham (Conservative) spoke to two amendments (216 and 217) which he said, taken collectively, would enable Parliament, acknowledging the primacy of the Commons, to have "a decisive and conclusive say over the outcome of the Brexit negotiations" whether or not terms had been agreed with the EU.[164] The amendments would have enabled Parliament to require the withdrawal of the Article 50 notification and the UK to remain in the EU, and to hold a referendum either to test public opinion or to ratify a parliamentary decision. According to Viscount Hailsham, David Davis had promised that Parliament would have a meaningful vote, but by offering a take it or leave it vote which would see the UK leaving the EU in either case, he thought Mr Davis also seemed to say that "you cannot actually change what happens".[165]

Lord Liddle (Labour) spoke to amendment 196, which specified that if by 31 October 2018, no deal had been reached between the UK and the EU, or a deal had been rejected by Parliament, then the Government would have to seek an agreement with the EU to: extend the negotiations beyond the two-year period specified in Article 50; continue negotiations during the transition period; or follow any other course of action which had been approved by the House of Commons.[166]

Lord Lisvane (Crossbench) posed the question as to whether the requirement inserted in clause 9 by Dominic Grieve's amendment for the final terms of withdrawal to be approved by a statute would "actually bite" if there were no deal at all.[167]

In response to the points raised in these amendments, Lord Callanan restated the Government's position that there would be a vote on the final deal in Parliament as soon as possible after the negotiations concluded.[168] The Government "fully expect, intend and will make every effort that this vote will take place before the European Parliament votes", but could not make a statutory assurance about this because it could not control the timing of the European Parliament vote. He explained that the Government and Michel Barnier, the EU's chief negotiator, were working towards concluding an agreement by October 2018, and if that timetable was achieved "there should be plenty of time" for a vote in both Houses followed by the European Parliament vote.[169]

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[164] HL *Hansard*, 14 March 2018, col 1614.
[165] ibid, col 1616.
[166] ibid, cols 1618–9.
[167] ibid, col 1634.
[168] ibid, col 1645.
[169] ibid, col 1647.

Lord Callanan rejected any amendments "which could be perceived as a means to delay or disregard" the result of the EU referendum, and he reiterated that the Government would not revoke the Article 50 notification or seek to extend the two-year negotiating period.[170] Lord Callanan maintained that the terms of Parliament's vote on the final deal "are clear: to accept the terms of the final agreement or to move forward without a deal".[171] This was, he said, "fully in line with the terms on which the European Parliament will be voting: a yes or no vote".

Lord Callanan reiterated that clause 9 was "not intended to implement major elements of the withdrawal agreement".[172] Although the Government has also committed to introducing a separate Withdrawal Agreement and Implementation Bill, he said that it was "prudent" to keep clause 9 as part of the European Union (Withdrawal) Bill as it was "crucial" to have "the necessary legislative mechanisms available to us to fully implement the Withdrawal Agreement in time for exit day".[173] He said clause 9 might be used to implement "some technical provisions", and that, whilst the Government could "look again at elements of the power", it would not be removing clause 9 from the Bill in its entirety.[174] However, he assured the House that he was "left in no doubt of the strength of feeling" on clause 9 as a "contentious" area of the Bill, and would continue to hold discussions with Members "to see what can be done ahead of report".[175]

Baroness Hayter withdrew her amendment but said that Labour would try to bring back an amendment at report to ensure that "if Parliament gives the thumbs-down to the deal, it would be the Commons and not the Government that decides what happens next".[176]

14. Local Government Consultation

On day eight of the committee stage, Lord Bourne of Aberystwyth, Parliamentary Under Secretary of State at the Ministry of Housing, Communities and Local Government, undertook to report back to the House at report stage about the Government's plans for consulting local authorities after exit day.[177]

Lord Shipley (Liberal Democrat) moved a proposed new clause (amendment 227) which sought a full consultative role for local authorities in the planning

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[170] HL *Hansard*, 14 March 2018, cols 1647–8.
[171] ibid, col 1649.
[172] ibid, col 1652.
[173] ibid, cols 1652–4.
[174] ibid, col 1651.
[175] ibid, col 1652.
[176] ibid, col 1655.
[177] HL *Hansard*, 19 March 2018, col 86.

and decision-making processes involved in Brexit, and a formal mechanism in domestic law to replicate the advisory role conferred on local authorities by membership of the European Committee of the Regions (the EU's assembly of regional and local representatives).[178] Lord Shipley argued that consultation with local authorities to date had been "inadequate" and the absence of domestic arrangements for local authorities to have an advisory role in policy discussions after exit day was "becoming a matter of increasing concern".

In response, Lord Bourne said that the Government did "not consider it necessary to provide a statutory basis to a domestic replication of the existing consultative rights provided to local authorities through the mechanism of the Committee of the Regions".[179] However, he said that the Government intended to make a ministerial statement to give local government "a clear assurance about how it can expect to be consulted on certain matters which, following their repatriation from Europe, will now be handled at the United Kingdom level".[180]

Lord Bourne argued that this approach would create a "flexible, non-statutory mechanism that, in essence, replicates for local government the rights and responsibilities it had through the Committee of the regions, but in a lighter-touch, non-bureaucratic way". He explained that there was "a complication" because many of the relevant issues would be matters for which the devolved administrations would have responsibility and that would also have to be catered for in the new arrangements.[181] Lord Bourne said that Rishi Sunak, the Minister for Local Government, was engaged in discussions with representatives of the local government associations, and the Government would update the House at the Bill's report stage on progress made.

15. Scrutiny of Secondary Legislation (Schedule 7)

On the eighth day of 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, 8 or 9.[182]

At committee stage in the Commons, the Government accepted amendments tabled by Charles Walker, chair of the House of Commons Procedure Committee, to establish a new Commons sifting procedure for

[178] HL *Hansard*, 19 March 2018, col 79.
[179] ibid, col 85.
[180] ibid, col 86.
[181] ibid.
[182] ibid, col 153.

secondary legislation made under clauses 7, 8 or 9.[183] Before making a negative instrument under these clauses, a Minister must lay the instrument before a Commons committee in draft, along with an explanatory statement setting out why s/he considers the negative procedure appropriate. The committee would have ten sitting days to make a recommendation about whether it agreed this was the appropriate procedure. The Minister would not be bound by this recommendation, and could still proceed with making a negative instrument even if the committee recommended against it. The Minister could also proceed with making a negative instrument if the committee failed to produce a recommendation within ten sitting days.[184]

Baroness Evans explained that the House of Lords Procedure Committee had agreed on 5 March 2018 to her proposal to incorporate the same powers as those of the new Commons sifting committee into the terms of reference of the House of Lords Secondary Legislation Scrutiny Committee (SLSC), as well as conferring the power to appoint sub-committees.[185] The SLSC's existing role in scrutinising the merits of all instruments would continue as before, with the sub-committees fulfilling this function, alongside the new sifting role in relation to SIs flowing from the European Union (Withdrawal) Bill. The main committee would have responsibility for determining the allocation of policy areas between the two sub-committees as well as maintaining oversight of the scrutiny process in general terms, and, if it wished, conducting inquiries into the overall management of secondary legislation. Baroness Evans said that the SLSC would receive additional resources to allow it to fulfil its new role.[186]

Baroness Evans indicated that the House would be invited to agree this proposed arrangement when the Procedure Committee presents its report.[187] She expected it to be when the passage of the Bill is "nearing completion", as the Procedure Committee's report might have to reflect any relevant changes to the Bill agreed by both Houses.

The sifting procedure added to the Bill in the Commons has been criticised because it allows 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 (Crossbench), a former Clerk of the House Commons, described this feature of the Bill as "extraordinary" and "very concerning".[188] He moved an amendment which would have given either House the ability to require the affirmative procedure to apply, describing this as "a procedure with actual teeth", as

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[183] HC *Hansard*, 12 December 2017, col 280.
[184] These arrangements are set out in paragraphs 3, 6(4), 7(4) and 13 of schedule 7.
[185] HL *Hansard*, 19 March 2018, col 152.
[186] ibid, col 153.
[187] ibid.
[188] ibid, cols 143–4.

recommended by the Delegated Powers and Regulatory Reform Committee.[189] 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".[190] If not, the Government would expect to justify fully its reasons, but such occasions would be "hopefully, very rare".

Lord Lisvane's amendment would have extended the sifting procedure to include secondary legislation under clause 17 (powers to make consequential and transitional provision) as well as those under clauses 7, 8 and 9. In response to concerns about the use of the negative procedure for secondary legislation under clause 17, Baroness Evans said the Government intended to publish further draft examples of consequential provisions before report stage, which she hoped would "reassure noble Lords that the negative procedure is being used appropriately".[191] The Government had already published one such example, the European Communities (Designation Orders) (Revocation) (EU Exit) Regulations 2018.[192]

Lord Lisvane withdrew his amendment but said that leaving the choice of procedure to Ministers, including for Henry VIII powers, "remain[ed] concerning".[193]

Baroness Evans also indicated that the Government would look again at the information the Government would be required to provide to Parliament in urgent cases. Paragraph 4 of schedule 7 would allow the 'made affirmative' procedure to be used for regulations under clause 7 if the Minister considered it "necessary" "by reason of urgency".[194] Under the made affirmative procedure, an instrument may be made without first being approved by both Houses, but it lapses after a month unless it is approved by both Houses during that time. Lord Sharkey (Liberal Democrat) argued that: "What is missing is any requirement for an explanation of why the Minister believes that the case is in fact urgent".[195] He spoke to an amendment that would have required the Minister to provide a statement of the grounds for invoking urgency.

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[189] ibid; and House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 1 February 2018, HL Paper 73 of session 2017–19.
[190] HL *Hansard*, 19 March 2018, col 154.
[191] ibid, col 153.
[192] Department for Exiting the European Union, *Draft Statutory Instrument to Illustrate the Use of Powers under the European Union (Withdrawal) Bill: DExEU Note on the Draft Statutory Instrument: The European Communities (Designation Orders) (Revocation) (EU Exit) Regulations 2018*, 9 March 2018.
[193] HL *Hansard*, 19 March 2018, col 157.
[194] Similar provisions in paragraph 14 of schedule 7 would apply to regulations made under clauses 8 and 9.
[195] HL *Hansard*, 19 March 2018, col 147.

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".[196]

16. Devolution Issues (Clauses 7, 8, 9, 10, 11 and Schedule 2)

Much of the debate at committee on the devolution aspects of the Bill focused on the Government's proposed amendments to clause 11. The stated aim of the UK, Scottish and Welsh Governments is to reach agreement on changes to clause 11. The government amendments discussed on the ninth day of committee had not been agreed by the Scottish and Welsh Governments. However, Lord Keen, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, explained that the Government had put them forward to "facilitate scrutiny of the Government's current position on clause 11".[197] 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.[198] However, Lord Keen said he was confident that all parties were invested in trying to reach agreement.[199]

This section of the briefing provides an overview of those areas of the Bill where the Government has indicated that it may return to the issue on report (including on clause 11).

16.1 Clauses 7, 8, 9 and 10 and Schedule 2

On the sixth day of committee, the House discussed several amendments related to the powers under clauses 7, 8 and 9 which could potentially be used to modify the devolution statutes.

Lord Hope of Craighead (Crossbench) spoke to amendment 90 which sought to introduce an additional restriction on the use of powers under clause 7(7). This would have prevented these powers being used to modify the Scotland Act 1998 or the Government Wales Act 2006 without the consent of the relevant devolved legislature. Lord Hope's amendments 130 and 148 would have made equivalent changes to clauses 8 and 9

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196 HL *Hansard*, 19 March 2018, col 156.
197 HL *Hansard*, 21 March 2018, col 350.
198 ibid.
199 ibid, col 351.

respectively.[200] As an example, Lord Hope stated that he believed the "detailed wording" in schedule 5 of the Scotland Act 1998 (which sets out reserved matters) was "quite vulnerable to an inadvertent amendment without that process of obtaining consent".[201]

Lord Hope argued that under clauses 7, 8 and 9 as currently drafted (and whilst they have effect):

> [I]t would be open to a Minister of the Crown to modify the Scotland Acts and Government of Wales Acts in a way that […] could shift the constitutional balance, and to do so without even consulting the Scottish Parliament and the National Assembly for Wales, let alone obtaining their consent.[202]

He also expressed concern that because amendments would be made by delegated legislation they would not be subject to the Sewel Convention.[203] Baroness Suttie (Liberal Democrat) spoke to amendments 91, 131 and 149, explaining that these sought to achieve the same effect as Lord Hope's amendments, but for Northern Ireland.[204] Clause 7(7)(f) contains specific provision for the Northern Ireland Act 1998, which would mean that regulations under clause 7(1) may not:

> [A]mend 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).[205]

Responding to the amendments, Lord Bourne of Aberystwyth, Parliamentary Under Secretary of State for Wales, indicated that the Government would amend the Bill such that the powers under clause 7 would not be necessary:

> I seek to indicate that I can confirm that the Government will bring forward amendments on report to apply the same protection to the Northern Ireland Act as to the Scotland Act and the Government of Wales Act. This means that all the changes we are proposing—bar one, I think, in relation to technical standards, but even that we will be able to spell out in relation to the Bill—and all the powers in relation

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[200] Amendment 148 contains additional provisions requiring the consent of Scottish or Welsh Ministers before any provision which would be within the relevant devolved competence could be made under regulations under clause 9.

[201] HL *Hansard*, 12 March 2018, col 1393.

[202] ibid.

[203] ibid, col 1394.

[204] ibid, col 1396.

[205] Clause 7(7)(f).

> to corrections will be in the legislation when we get to report. We will table amendments on report so that the correction power in Clause 7 will not be necessary. It will be in relation only to international obligations in Clause 8 and complying with the exit in relation to Clause 9.[206]

Later he restated the Government's position:

> I can confirm that we will bring forward amendments on report to apply the same protection for the Scotland Act and the Government of Wales Act as for the Northern Ireland Act, so that all the necessary amendments will appear on the face of the Bill on report.[207]

Lord Hope and Baroness Suttie had tabled further amendments to clause 7,[208] the effect of which would have been to require the UK government to obtain the consent of Scottish, Welsh or Northern Irish Ministers before making regulations under clause 7, so far as the provisions were within the relevant devolved competence. Lord Mackay of Clashfern (Conservative) asked whether the issue could be addressed through amending the Memorandum of Understanding between the UK and the devolved executives.[209] Responding to the debate, Lord Bourne said that he took "very serious note" of Lord Mackay's suggestion and that he would take it away and look at it.[210] In a letter to Members dated 21 March 2018, Lord Bourne referred to the raising of the Memorandum of Understanding during the debate, writing that:

> We have always envisaged that the work to prepare our statute book for exit day should be undertaken in a similar manner to the work we currently undertake to implement EU laws as it is of a similar nature. I therefore believe that we should be seeking to take the successful working practices of the latter and apply them to the former. It may well be that amendment of the Memorandum of Understanding would be the right way to achieve this.[211]

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[206] HL *Hansard*, 12 March 2018, col 1397.

[207] ibid, col 1415.

[208] Amendments 102 and 103. Lord Hope and Baroness Suttie tabled similar amendments to clause 8, amendments 124 and 125 respectively.

[209] HL *Hansard*, 12 March 2018, col 1424.

[210] ibid, col 1433.

[211] Lord Bourne of Aberystwyth, UK Government Minister for Wales, 'Letter to Members of the House of Lords: Clauses 7–9: Protections for Devolution Statutes and Concurrent Power', 21 March 2018.

Clause 10 and Schedule 2

On the ninth day of committee the House considered amendments to schedule 2 (which would be given effect by clause 10). Schedule 2 would grant devolved authorities similar powers to those conferred on the UK Government by clauses 7, 8 and 9, including the 'correcting power', powers for complying with international obligations and powers for implementing the Withdrawal Agreement.

A number of amendments were tabled to schedule 2, the debate on which occurred before the discussion of the Government's proposed amendments to clause 11. The Government responded to several of these schedule 2 amendments stating that the solution reached for clause 11 would necessarily inform the answers it gave to amendments to schedule 2. For example, Baroness Goldie, a Government Whip, responded to Lord Hope of Craighead's amendment 268 stating that:

> We are considering [the issue] in parallel as our discussions continue with the devolved Administrations. The end result must be that both Clauses 10 and 11 dovetail and that they are not in conflict. On that basis, I commit to continuing to keep the noble and learned Lord and this House up to speed on how our policy thinking is developing in these areas.[212]

Lord Hope's amendment 268 would have provided that paragraph 4 of part 1 of schedule 2 did not apply to regulations made under this part by Scottish or Welsh Ministers with regard to matters that were within their devolved competence. Paragraph 4 states that:

> No regulations may be made under this Part by a devolved authority which confer functions which correspond to functions to make EU tertiary legislation.[213]

Paragraph 1, sub-paragraph 4(b) would prevent regulations under part 1 of schedule 2 being used by devolved authorities to confer a power to legislate (apart from powers to make rules of procedure for a court or tribunal). Lord Hope's amendment 266 would have disapplied this restriction in instances where Scottish or Welsh Ministers were making regulations on matters that were within their devolved competence. Lord Hope argued that:

> At first sight that qualification cuts across the concept of devolution, the effect of which is that if a matter is within devolved competence, it

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[212] HL *Hansard*, 21 March 2018, col 325.

[213] Schedule 2, paragraph 4.

> is for the devolved authority to take its own decisions as to how to deal with that matter, in whatever way it regards as appropriate.[214]

He described amendment 266 (and similar amendments he had tabled to the other parts of schedule 2) as probing, to ascertain why the restriction was included.[215]

Responding to Lord Hope, Baroness Goldie explained that the Government:

> [D]o not oppose in principle the idea that these powers should be able to be sub-delegated to and by devolved authorities where appropriate cause is shown. This is already evident in the Bill. Noble Lords will see that this restriction—for instance, in paragraph 1(4)(b) of Schedule 2—is already qualified to allow for the sub-delegation of a power to make rules of procedure for a court or a tribunal. This ensures that the power can be sub-delegated where appropriate to ensure judicial independence.[216]

She stated that the UK Government had invited the devolved administrations to:

> [O]ffer any examples of where sub-delegation would be needed, and we have made clear that where they identify such examples we shall consider drawing further exceptions to the restriction. So far, no examples have been given.[217]

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".[218] She said that the Government was prepared to look again at these provisions.[219]

16.2 Government Amendments to Clause 11

Background

In areas where powers have been devolved, the devolved institutions are prevented from legislating or otherwise acting in a way that is incompatible

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214 HL *Hansard*, 21 March 2018, col 317.
215 ibid, cols 317–8.
216 ibid, col 320.
217 ibid.
218 ibid, col 321.
219 ibid.

with EU law.[220] This is achieved by provisions in the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998. 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.[221] 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, clause 11 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 intention of this would be to maintain the current parameters of devolved competence as regards EU law.[222] Clause 11 would provide for areas to be released from this restriction following an Order in Council. 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.[223] After the UK withdraws from the EU the power which the EU exercises in relation to common frameworks will return to the UK.[224] 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".[225] The Government's "guiding principle" in this would be to ensure that "no new barriers to living and doing business" within the UK are created as a consequence of withdrawing from the EU.[226] The agreement of UK common frameworks has been the subject of discussion between the devolved administrations and the UK Government in the Joint Ministerial Committee on EU Negotiations, which was established in October 2016.[227] At its meeting in October 2017,

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[220] Explanatory Notes, p 14.
[221] Scotland Act 1998, s 29(1).
[222] Explanatory Notes, p 14.
[223] Department for Exiting the European Union, *Legislating for the United Kingdom's Withdrawal from the European Union*, March 2017, Cm 9446, p 27.
[224] ibid.
[225] ibid, p 27.
[226] ibid.
[227] Joint Ministerial Committee (EU Negotiations), *Joint Ministerial Committee Communiqué*, 24 October 2016.

agreement was reached on principles for common frameworks between the UK and devolved governments in areas currently governed by EU law.[228]

Both the Scottish and Welsh Governments have expressed opposition to the Bill's provisions on devolution and have recommended that their respective legislatures withhold legislative consent for the Bill.[229] On 19 September 2017, the Welsh and Scottish Governments jointly published a set of amendments they wished to see made to the Bill, which "seek to correct the deficiencies in the Bill as they relate to devolution".[230] The Governments have stated that these amendments would enable them to consider recommending consent be given to the Bill by the Scottish Parliament and Welsh Assembly.[231] 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.[232]

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 at the Bill's report stage in the House of Commons.[233] This did not happen as agreement was not reached with the devolved administrations. The continuing aim of all parties is to reach agreement.

Government Amendments to Clause 11

The Government tabled several amendments to clause 11 (and its related schedule 3) during the Bill's committee stage in the House of Lords.[234] These were discussed during the ninth day of committee. The Government's amendments to clause 11 would mean that all powers currently within the competence of the EU would return to the devolved administrations by

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[228] Joint Ministerial Committee (EU Negotiations), *Joint Ministerial Committee (EU Negotiations) Communique*, 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.

[229] Welsh Government, 'Joint Statement from First Ministers of Wales and Scotland in Reaction to the EU (Withdrawal) Bill', 13 July 2017.

[230] Welsh Government, 'Written Statement: European Union (Withdrawal) Bill', 19 September 2017.

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

[232] Further details on legislative consent, the Joint Ministerial Committee on European 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.

[233] HC *Hansard*, 6 December 2017, col 1021.

[234] The Government also tabled related amendments to clause 19 and schedule 8.

default, but the amendments would also provide that the UK Government could make exceptions in regulations (thereby 'ring-fencing' specified areas):

> 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 […][235]

Amongst its provisions, the proposed amendments would make 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, has also explained that the amendments would provide for a duty on the Government to produce explanatory statements.[236]

On 9 March 2018, the UK Government published a breakdown of areas of EU law that intersect with devolved competence in Scotland, Wales and Northern Ireland.[237] Described as a working document, 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.[238]

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.[239]

Speaking during the ninth day of committee, and referring to the above document, Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, explained that it is within the

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[235] Government amendment 302A. Similar wording is used for the National Assembly for Wales and for the Northern Ireland Assembly.
[236] HL *Hansard*, 21 March 2018, col 352.
[237] Cabinet Office, *Frameworks Analysis: Breakdown of Areas of EU Law That Intersect With Devolved Competence in Scotland, Wales and Northern Ireland*, 9 March 2018.
[238] ibid, p 1.
[239] ibid.

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.[240]

Lord Keen stated that in those cases where common frameworks required legislation, the UK Government would implement them by way of primary legislation.[241]

Government amendment 323A would have introduced a new quarterly reporting requirement on the UK Government. The reports would have to outline progress towards removing retained EU law restrictions, including how the following principles had been taken into account during the reporting period:

> [P]rinciples—
>
> (i) agreed between Her Majesty's Government and any of the appropriate authorities, and
>
> (ii) relating to implementing any arrangements which are to replace any relevant powers or retained EU law restrictions.[242]

16.3 Debate on Clause 11

On moving the government amendments on the ninth day of committee, Lord Keen explained that the Government had put them forward to "facilitate scrutiny of the Government's current position on Clause 11".[243] As he moved the amendments, 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.[244] However, Lord Keen said he was confident that all parties were invested in trying to reach agreement.[245]

There was a wide-ranging discussion on the Government's proposed amendments, as well as a discussion of issues related to amendments

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240 HL *Hansard*, 21 March 2018, col 403.
241 ibid, col 337.
242 Government amendment 323A.
243 HL *Hansard*, 21 March 2018, col 350.
244 ibid.
245 ibid, col 351.

proposed by Members. The following sections provide an overview of these issues with a focus on those areas where the Government indicated it may return to the issue on report.

UK Single Market

The importance of the UK's single market, and the role of common frameworks in maintaining it, was discussed during the debate on the government amendments. This issue was also discussed earlier on the ninth day of committee, prior to the moving of the Government's own amendments. In the context of a discussion about the retention of the UK Government's power to set what areas should be ring-fenced, Baroness Hayter of Kentish Town, Shadow Spokesperson for Exiting the European Union, stated that:

> The Minister used a phrase […] about the retention of this [power] for the purpose of the internal market. It might be helpful if that wording appeared on the face of the Bill.[246]

Lord Keen responded saying that:

> It is perfectly clear from the proposed amendment to Clause 11 that they are meant to have a very limited function—but I note what the noble Baroness said and I will take it forward.[247]

Requirement for Consultation

There was discussion during the debate on the Government's amendments as to whether the requirement to consult the devolved administrations should instead be a requirement to gain their consent (before the UK Government could 'ring-fence' an area by regulations).[248] For example, Lord Morris of Aberavon (Labour) asked what the definition of 'consult' was, questioning whether it was an informal conversation or a "face-to-face meeting between the First Minister and the Prime Minister?".[249] Lord Wigley (Plaid Cymru) expressed concern that consultation could be a "façade" unless it was a meaningful "coming together of minds".[250] Responding to this discussion, Lord Keen expressed concern that a requirement for consent could amount to a veto and that it was an issue of constitutional propriety:

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[246] HL *Hansard*, 21 March 2018, col 338.
[247] ibid.
[248] For the Scottish and Welsh Governments' view on the issue of consent, see section 16.4 of this briefing.
[249] HL *Hansard*, 21 March 2018, col 382.
[250] ibid, col 380.

> If we have a black and white, sharp-edged consent mechanism for the devolved Administrations, then we have the basis for what has been termed the veto problem. We have the situation in which, beyond the existing devolved competence, any one of these Assemblies could—it is at that level that it must be judged; not would, but could—proceed to legislate within its devolved competence in a manner that impacted upon those in another country within the United Kingdom, whether it be England, Wales, Scotland or Northern Ireland. We cannot go down that road. That would be a fundamental change in the devolved competence that we created in, and have indeed developed since, 1998.[251]

Putting Common Frameworks on the Face of the Bill

Lord Keen responded to the suggestions that those areas that would be ring-fenced should be placed on the face of the Bill. He said that he had listened to these "but whether it can practically be done in the context of the Bill may be another matter".[252] He said this might need to be expressed elsewhere, and that whilst the Government could look at this issue, it would first need to understand what needs to be ring-fenced for the purposes of the framework agreements.[253]

Several Members suggested that the frameworks where the UK Government was proposing to retain powers under its proposed amendments should be stated in the Bill. For example, Baroness Randerson (Liberal Democrat) argued that:

> It is […] essential that the list of powers where legislative competence is to be constrained is defined in the Bill. Those powers are not specified in these amendments. The Government must know what powers they have in mind. I accept that there is perhaps some work to do in turning them into a tidy list but they need to be specified.[254]

Lord Hain (Labour) argued that a schedule should be appended to the Bill containing a list of areas where the devolved administrations and the UK Government agreed that frameworks were needed.[255] Other Members, such as Lord Wallace of Tankerness (Liberal Democrat), also held this view.[256]

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[251] HL *Hansard*, 21 March 2018, col 400.
[252] ibid, col 404.
[253] ibid.
[254] ibid, col 387.
[255] ibid, col 391.
[256] ibid, col 367.

Bodies to Consider Common Frameworks and Devolved Matters

The Government responded to separate amendments by Lord MacKay of Clashfern (Conservative), Lord Foulkes of Cumnock (Labour) and Lord Wigley on establishing new bodies to consider the issue of common frameworks and the devolution of powers returning from the EU. Lord Keen referred to these amendments saying that they were constructive suggestions which "deserved serious thought", and that whilst the Government saw the Joint Ministerial Committee on EU Negotiations as the right forum for engagement at present, it would consider this issue further:

> I would like to take away the ideas that have been brought to the table here today by way of the further proposed amendments and consider how these matters might be incorporated into our policy thinking, while continuing to meet our two stated objectives on legal certainty and respect for the devolved settlements.[257]

Lord MacKay of Clashfern and Lord Foulkes of Cumnock both tabled amendments which sought to establish new fora within which discussions could take place between the UK government and the devolved administrations. Lord MacKay's proposed new clause in amendment 318A would have created a new 'Group on Framework Documents'. This group would have had responsibility to address two questions:

> (7) The first question the group must decide is which of the devolved areas of competence to include in a framework document enabling a single market to be set up in those areas in the United Kingdom.
>
> (8) The second question the group must decide is the terms of the framework document for each of the devolved areas of competence which the group has decided to include.[258]

The group would have to reach agreement on these questions within three months beginning on exit day, or the day on which any transition or implementation period agreed between the UK and the EU ended. Upon reaching agreement, the chair of the group (to be elected) would report to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and the UK Parliament. Sub-clause 11 of the new clause stated that if unanimous agreement was not reached the chair must report to the same bodies, with a statement on the reason or reasons for the disagreement. The UK Parliament would be able to decide the undecided issues under sub-clause 11 of the amendment, and legislate accordingly. Lord Wigley tabled amendment 318AA which would have added a process by

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257 HL *Hansard*, 21 March 2018, cols 353–4.

258 Amendment 318A, sub-clause 7 and 8.

which a failure to reach agreement would be referred to a 'Speaker's Panel' to decide the matter.[259]

Lord Foulkes of Cumnock's amendment 318B would have established a new 'Withdrawal Arrangements Ministerial Council' which would be tasked with reviewing the powers returning to the UK from the EU and determining which of those powers would be reserved and which would be devolved.[260]

A Sunset Clause for Devolution Provisions

On introducing the Government's own amendments, Lord Keen of Elie referred to the suggestion of a sunset clause, saying that it was the Government intention that the powers in its proposed amendments would be temporary:

> I understand why that suggestion has been put forward; we have of course been clear that these are temporary arrangements and I am interested to hear the debate on this point.
>
> I must be clear that the temporary nature of the constraints is not the same as proceeding to a fixed timetable. We need to ensure that these complex matters are given due consideration, and there is a risk that the creation of a sunset merely prolongs the cliff edge.[261]

In response to the subsequent debate on the issue, Lord Keen said that the Government were "listening to the idea that a sunset clause might run for five years".[262]

Several amendments were tabled by Members to introduce a sunset clause into the Government's proposed amendments to clause 11. For example, Lord Foulkes of Cumnock's amendment 318E suggested that clauses 10 and 11 and schedule 2 should cease to have effect after a period of five years beginning with exit day. Lord Wallace of Tankerness tabled amendment 302BA, which would have introduced a two-year lifespan on regulations made to ring-fence powers under the Government's proposed amendments to clause 11. Similarly, Lord Wallace and Lord Thomas of Gresford tabled amendment 312, which would have meant that clause 11 and part 1 of schedule 2 would cease to have effect two years from exit day. Speaking to amendment 302BA, Lord Wallace argued that this was necessary to highlight the Government's position that it viewed the powers as temporary. On the

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[259] Amendment 318AA, sub-clause 12.
[260] ibid, sub-clause 2.
[261] HL *Hansard*, 21 March 2018, cols 352.
[262] ibid, col 404.

difference in length between his sunset provision and that of Lord Foulkes, Lord Wallace said:

> We could have a debate about that but, again, the principle is trying to build confidence to get an agreement between the Scottish and Welsh Governments and the UK Government, and to have a sunset clause would go a considerable way to help that.[263]

16.4 Position of the Devolved Administrations

The Scottish Government set out its response to the UK Government's amendments to clause 11 in a letter to Members of the Scottish Parliament on 12 March 2018.[264] In it, Mike Russell MSP, Scottish Minister for UK Negotiations on Scotland's Place in Europe, reiterated that the amendments did not have the agreement of the Scottish Government. Mr Russell argued that the requirement to consult could result in regulations being made notwithstanding the opposition of the devolved administrations:

> It therefore remains essential that any regulations made under this power be approved by the devolved legislatures as well as by the UK Parliament, in line with the current and long standing constitutional arrangements in the devolution settlements.[265]

He also expressed concern that whilst the UK Government has stated that the arrangements would be temporary:

> [A]ny matters covered by regulations will in effect be reserved, even if on a temporary basis. That would mean that the devolved legislatures could not be certain that the Sewel convention, through which their agreement is sought for primary legislation, would apply in the normal way to UK legislation, made in relation to those matters. The UK Government have refused to confirm that it would.[266]

Mr Russell restated that the Scottish Government wanted an agreed solution and that it was ready to discuss changes to the Bill.

Responding to an oral question on the UK Government's amendments to clause 11 of the Bill, Carwyn Jones, First Minister of Wales, stated that:

> I discussed this with Nicola Sturgeon yesterday. We are both in the same place, which is that it's not adequate that the powers should

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263 HL *Hansard*, 21 March 2018, cols 367–8.

264 Scottish Government, 'EU Withdrawal Bill Amendments', 12 March 2018.

265 ibid.

266 Scottish Government, 'EU Withdrawal Bill Amendments', 12 March 2018.

> remain in one place and that we then see those powers used in a way that is not of benefit to Scotland or Wales. Therefore, there is no possibility that we would agree to something that would give any kind of consent or a free hand to the Government in Westminster to amend secondary legislation without so much as a by your leave or permission from Wales or Scotland.[267]

17. Publication of Retained EU Law and Direction-Making Powers (Clause 13 and Schedule 5)

On the eleventh day of committee, the House discussed amendments to part 1 of schedule 5. Clause 13(1) gives effect to part 1 of schedule 5. This provides for the publication of, amongst other things, retained direct EU law; this is to ensure that retained EU law is accessible after exit day.[268] It makes provision for the Queen's Printer (within the National Archives) to make arrangements for the publication of:

(a) each relevant instrument that has been published before exit day by an EU entity, and
(b) the relevant international agreements.[269]

Relevant instruments would mean an EU regulation, an EU decision and EU tertiary legislation.[270] A relevant international agreement would mean the Treaty on European Union, the Treaty on the Functioning of the European Union, the Euratom Treaty and the EEA agreement.[271] Paragraph 1(3) would allow the Queen's Printer also to make arrangements for the publication of any decision of, or expression of opinion by, the European Court or any other document published by an EU entity. However, it does not require the Queen's Printer to do so.

Baroness Bowles of Berkhamsted (Liberal Democrat) spoke to amendment 354, which sought to add EU directives to the list of relevant instruments. She argued this was important because of "recitals and other parts of directives" remaining available for interpretation in court:

> On that basis it seems to me that directives are not just any old other EU instrument; they should have a rank prescribed in the Bill and not left to the possible halfway house of it being done at the discretion of the Queen's Printer or for there to be special rules about their admissibility. Recitals and indeed whole directive texts and their empowerments will not only be a last resort to reference by the

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[267] National Assembly for Wales, *The Record*, 13 March 2018, col 17.
[268] Explanatory Notes, p 51.
[269] Schedule 5, part 1, paragraph 1.
[270] Schedule 5, part 1, paragraph 2.
[271] Explanatory Notes, p 51.

> court; it is quite likely that, post Brexit, a lot more notice will be taken of them than previously, especially in those areas where any kind of regulatory alignment is sought. I understand from a ministerial meeting that the Treasury is certainly thinking that way.[272]

Responding to these points, Baroness Goldie, a Government Whip, said she was able to confirm that the National Archives would be using the powers under paragraph 1(3) to make pre-exit day directives available online.[273] Baroness Bowles stated that if being present in the National Archives meant that it could automatically be relied on in court without the need for certification it would fulfil the point her amendment was making.[274]

The provisions of paragraph 2 of schedule 5 were also the subject of amendments discussed at committee. Paragraph 2 would give Minsters of the Crown the power to create an exception to the duty placed on the Queen's Printer under paragraph 1(1), should they believe that a relevant instrument has not, or will not, become on exit day, retained direct EU legislation. The Minister would be able to do this by direction. The House of Lords Delegated Powers and Regulatory Reform Committee described the direction-making power in paragraph 2 as highly unusual, comparing the power to proclamations made under Henry VIII:

> The delegated powers memorandum justifies this on the ground that it is a "limited administrative power". Even so, to allow ministers to amend the law by a mere direction, with no associated parliamentary procedure, sets an ominous precedent. Such a direction is what Henry VIII might have called a proclamation. The Statute of Proclamations 1539, which gave proclamations the force of statute law and later gave rise to the term "Henry VIII power", was repealed in 1547 (after the King's death earlier that year).[275]

Lord Lisvane spoke to amendment 355 which would have required any direction given under paragraph 2 be contained in regulations. He argued that despite its proposed use being in "relatively uncontroversial circumstances" it could, as the Delegated Powers and Regulatory Reform Committee wrote, set an "ominous precedent".[276] This was a view that was reflected by other Members; for example, Baroness Kramer (Liberal Democrat) argued that whilst Ministers should be able to make proposals they should not be able to make the final decision with no formal scrutiny:

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[272] HL *Hansard*, 28 March 2018, cols 785–6.
[273] ibid, col 788.
[274] ibid, cols 788–9.
[275] House of Lords Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill*, 28 September 2017, HL Paper 22 of session 2017–19, p 25.
[276] HL *Hansard*, 28 March 2018, col 790.

> Surely there is nothing wrong with a Minister proposing that something is not relevant and appropriate, but to make the final decision on that with no capacity for challenge is completely out of order. That is not a responsibility that should be placed on any member of the Executive.[277]

Viscount Hailsham (Conservative) suggested that requiring the decision to be made through a regulation would give the opportunity for scrutiny of the Minister's judgement:

> If a direction is published, that is after the event; whereas if it has to be done by regulation, that in effect gives everyone the right to say that the Minister has got it wrong. That would be prospective rather than retrospective. Does the regulation procedure not have that advantage? It gives people the right to say the Minister has got it wrong.[278]

Baroness Goldie explained the Government's position was that the direction making power was "a targeted, common-sense provision to enable the Minister to narrow what is […] the necessarily wide task of the Queen's Printer".[279] Whilst she acknowledged the concern expressed by the Delegated Powers and Regulatory Reform Committee that the power was akin to a proclamation, she disagreed with the characterisation.[280] She also stated that the power would not enable a Minister to determine by decree what was or was not retained EU law.[281] However, Baroness Goldie said the Government would "certainly reflect on what has been said" and that she would undertake to look at what Baroness Kramer and Viscount Hailsham had said.[282]

Lord Pannick (Crossbench) also referred to paragraph 2(3) which would require a Minister of the Crown to publish any direction made under paragraph 2. He stated that this is not qualified as to how or where the direction should be published.[283] Responding, Baroness Goldie stated that she had noted "an absence of detail on the mode of publication", and that she had no specific information on that but would undertake to write to him on this point.[284]

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[277] HL *Hansard*, 28 March 2018, col 797.
[278] ibid.
[279] ibid, col 794.
[280] ibid.
[281] ibid.
[282] ibid, col 797.
[283] ibid, col 790.
[284] ibid, col 795.

18. Explanatory Statements and the Public Sector Equality Duty (Schedule 7)

On the ninth day of committee, amendments were discussed to alter the requirements for explanatory statements under schedule 7 of the Bill. Lord Keen of Elie, Advocate General for Scotland and Lords Spokesperson for the Ministry of Justice, indicated that the Government were looking, for report, at "where these could be expanded to address some of the concerns raised in committee".[285]

Paragraph 22 of schedule 7 provides that statutory instruments containing regulations made under clauses 7(1), 8, or 9 should be accompanied by explanatory statements. Lord Low of Dalston (Crossbench) spoke to amendment 242A which would have applied this requirement to regulations made under any part of the Bill, not just clauses 7(1), 8 or 9. He also spoke to amendment 245A. This would have added an additional requirement to schedule 7 paragraph 5, which sets out what must be included in an explanatory statement. Ministers would also have to state that they were satisfied that the instrument did not remove or diminish any protections provided by or under equalities legislation. The requirements under paragraph 22 of schedule 7 were added to the Bill during its committee stage in the House of Commons.

Lord Low stated that his amendments aimed to rule out the use of delegated powers to amend the protection of equality and human rights provided by EU law.[286] He wanted to guard against "excessive" transfer of power from Parliament to the Executive and to ensure that any changes to fundamental rights were subject to "full" parliamentary scrutiny.[287] He expressed concern that the sifting committee introduced into the Bill during its House of Commons stages was welcome but did not address his concern as there would be no mechanism to amend secondary legislation. He also questioned the effective level of scrutiny as "there have been only ten occasions since 1950 when delegated legislation has not been approved by Parliament under the affirmative scrutiny procedure". Lord Low said that his amendments "emanated" from the Equality and Human Rights Commission. [288]

Lord Low argued that the requirements only partially reflected the public sector equality duty,[289] because it:

> [F]ocuses on the first duty in the public sector equality duty—namely, to have regard to the need to eliminate discrimination, presumably

[285] HL *Hansard*, 21 March 2018, col 265.
[286] ibid, col 257.
[287] ibid.
[288] ibid, cols 257–8.
[289] The public sector equality duty came into force on 5 April 2011 and is set out in section 149 of the Equality Act 2010, as amended.

> because of the emphasis that parliamentarians placed on ensuring non-regression during debates in the House of Commons. However, the public sector equality duty also includes other duties—to have regard to the need to advance equality of opportunity, and to foster good relations.[290]

He was concerned that this could cause confusion as to whether Ministers are obliged to comply with the whole of the public sector equality duty.[291] Lord Wallace of Tankerness (Liberal Democrat) also expressed concern about the scope of the public sector equality duty as reflected in paragraph 22.[292]

Responding for the Government, Lord Keen stated that the Government was committed to transparency before Parliament and hoped that:

> [S]tatements we have already committed to in Schedule 7 will assist Parliament and deliver the due level of scrutiny required for secondary legislation. We have been listening to the debate and, for Report, we are looking closely at where these could be expanded to address some of the concerns raised in Committee.[293]

On the public sector equality duty, Lord Keen said that he had heard "the notion that perhaps only a part of that is expressed in schedule 7" and that the Government would consider this before report.[294]

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[290] HL *Hansard*, 21 March 2018, col 259.
[291] ibid.
[292] ibid, col 260.
[293] ibid, col 265.
[294] ibid, col 266.