

HOUSE OF LORDS

Select Committee on the Constitution

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9th Report of Session 2017–19

# European Union (Withdrawal) Bill

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Q in footnotes refers to a question in oral evidence

## SUMMARY

Following the referendum on the UK's membership of the European Union, and the triggering of Article 50 of the Treaty on European Union, the Government introduced the European Union (Withdrawal) Bill to give effect to Brexit. The Bill is designed to address the significant legal challenge that will result from the UK leaving the EU. By preserving existing EU law as it currently applies in the UK, and converting it into domestic law, it seeks to provide continuity and legal certainty on and after exit day. This is an essential task in order to avoid legal chaos. It is also uncharted territory; it is a legal undertaking of a type and scale that is unique and unprecedented, posing significant challenges for both the Government and Parliament.

The body of EU law is found in a number of different places, and in a number of different forms. Some is embodied in existing UK primary legislation; some in secondary legislation. Other elements of EU law are directly effective in the UK (by virtue of the European Communities Act 1972), but are not actually written anywhere in the UK's statute book. Yet further elements of the body of EU law are non-legislative in nature, consisting, for example, of judgments made by the Court of Justice of the European Union, regulatory rulings by EU agencies, or in the interpretation of our own courts.

The task of adapting the body of EU law to fit the UK's circumstances following Brexit is complicated not only by the scale and complexity of the task, but also by the fact that in many areas the final shape of that law will depend on the outcome of the UK's negotiations with the EU. Yet preparations for the amendment of EU law need to be made before it comes into effect as UK law, in order that those changes will take effect on the day of Brexit, and this Bill seeks to provide for them. These amendments will sometimes be minor, for example removing references to EU institutions, and sometimes substantial, such as where an EU regulatory regime needs to be replaced with a UK regime.

We gave early consideration to these challenges in our report on *The 'Great Repeal Bill' and delegated powers*. We acknowledged that the Government would need abnormally wide powers to deliver legal certainty but we said that such powers would need to be tightly circumscribed and subject to close scrutiny by Parliament, for which new scrutiny mechanisms would be needed. Following the publication of the Bill, we examined in our interim report whether the Government had addressed our recommendations. We were disappointed that they had not taken our advice on board and we concluded that the Bill raised a series of profound, wide-ranging and interlocking constitutional concerns.

In this fuller assessment of the Bill we examine these concerns in detail. We conclude that the Bill risks fundamentally undermining legal certainty in a number of ways. The method proposed to create 'retained EU law'—EU law that is being copied over into the UK statute book—will cause constitutionally problematic uncertainties and ambiguities:

- The Bill is not clear exactly what retained EU law will contain; it potentially captures laws that do not need to be saved and creates duplicate copies of laws that have already been transposed into domestic law.
- The Bill transfers rights under EU law, regardless of their applicability post-Brexit, without sufficient clarity as to how they might be amended later.

- The Bill fails to give sufficient clarity and guidance to the courts as to how to go about the task of interpreting retained EU law after the UK leaves the European Union.
- The Bill also seeks, unsuccessfully and erroneously, to perpetuate the “supremacy” of EU law post-Brexit.

The Bill also represents a challenge for the relationship between Parliament and the Executive. While we acknowledge that the Government needs some broad delegated powers—including Henry VIII powers to amend primary legislation—to deliver legal continuity post-exit, these powers need to be restricted and subject to appropriate scrutiny. However, here too the Bill falls short. The Bill grants ministers overly-broad powers to do whatever they think is ‘appropriate’ to correct ‘deficiencies’ in retained EU law. This gives ministers far greater latitude than is constitutionally acceptable. The Bill also includes an unacceptably wide urgent procedure, allowing the Government to make regulations lasting up to a month without any scrutiny by Parliament. In addition, the Bill provides for a power to implement the withdrawal agreement that is no longer required in light of Government commitments to bring forward a further withdrawal and implementation bill.

The Bill also has significant consequences for the devolved administrations and their relationship with the UK Government. The Bill envisages the transfer of competences from the EU level to the UK Government but does not provide clarity and certainty as to which powers will then be devolved and on what timescale. That some of these powers fall within areas of existing devolved competence has raised concerns in the devolved administrations, which makes it essential that inter-governmental relations on the Bill are conducted effectively. The UK Government urgently needs to secure political agreement with the devolved administrations in order to achieve legislative consent from the respective legislatures for the Bill. A failure to secure legislative consent would not legally prevent the Bill from being enacted, but it would have significant constitutional repercussions. In addition, we consider that the Bill poses specific challenges for Northern Ireland, as no executive is currently in operation in Stormont and no Assembly is convened to give its consent.

The Bill is therefore fundamentally flawed from a constitutional perspective in multiple ways. Nevertheless, it is possible to overcome its constitutional deficiencies to make it more fit for purpose. In this report, we propose a number of practical measures to address the flaws in the Bill without jeopardising the achievement of its objectives.

We consider that if relevant retained EU law is given the status of primary legislation, deemed to be enacted on exit day, it will not only have a clear status in relation to other domestic law, but it will also acquire a primacy in relation to pre-exit domestic law consistent both with the current legal status of EU law and the doctrine of parliamentary sovereignty. This would allow for the removal from the Bill of the ill-fitting “supremacy” principle—a European legal concept rather than a UK one—as the domestic principle of the primacy of the most recent Act of Parliament will apply. It also provides a clear position as to how retained EU law will be treated and amended in future.

We conclude that the Bill should provide that the courts shall have regard to judgments given by the CJEU on or after exit day which the court or tribunal considers relevant to the proper interpretation of retained EU law. We further recommend that the Bill should state that, in deciding what weight (if any) to give to

a post-exit judgment of the CJEU, the courts should take account of any agreement between the UK and the EU which the court or tribunal considers relevant.

In relation to the broad delegated powers in the Bill, we propose a revised formulation for the usage of the powers. In line with the Government's recent amendments to the Sanctions and Anti-Money Laundering Bill, we suggest that the delegated powers may be used when ministers consider it 'appropriate' but that they must lay before Parliament, alongside the regulations, a statement setting out the 'good reasons' for the regulations and explaining why this constitutes a 'reasonable course of action'. In this way, the Government can secure the flexible delegated powers it requires, while Parliament will have a proper explanation and justification of their use that it can scrutinise. This statement of reasons and justification for action would appropriately be contained in an explanatory memorandum. In this regard, we welcome the inclusion in the Bill of a requirement for regulations to be accompanied by an explanatory memorandum, setting out what the EU law did before exit day, what is being changed and why, and why the minister considers that the instrument does no more than what is appropriate. We recommend that the minister introducing the regulations should certify, as part of that memorandum, that the regulation does no more than make technical changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made. Such certification would assist Parliament to identify which instruments need greater scrutiny.

We welcome the Government's inclusion of sunset clauses in the Bill, however they do not resolve the other problems with the broad delegated powers it contains. The scrutiny system proposed by the Bill is inadequate to meet the unique challenge posed by Brexit. While we welcome the provisions to create a sifting committee(s) to examine the regulations that will flow from the Bill, we recommend that the committee(s) should be empowered to set the scrutiny procedure for regulations, rather than merely advise on it, in order to provide the necessary parliamentary oversight. We look forward to the Leader of the House of Lords bringing forward proposals for the scrutiny system in the Lords, following discussions with the relevant committees and 'usual channels'.

In relation to devolution, we heard criticisms, in particular, of clause 11. We note the Government's commitment to amend this provision and recognise the need for political agreement between the UK Government and the devolved administrations before the appropriate amendments to the Bill can be finalised. We recognise that effective inter-governmental relations are essential both in order to achieve this task and to secure the aims set out in clause 11. We also call on the Government to publish an assessment of whether, and if so how, the powers in the Bill might be used to amend the Northern Ireland Act 1998 and the potential consequences this may have for the Belfast/Good Friday Agreement.

The Bill as drafted is constitutionally unacceptable. However its aims are valid and it can be amended to make it both appropriate and effective. This report offers a positive and detailed set of recommendations which will help address practical problems in the Bill, overcome the serious constitutional concerns we have identified and give effect to the Government's aims in a way compatible with fundamental principles, in particular the sovereignty of Parliament. We look forward to engaging with the Government on our constructive suggestions for improvement.

We will continue to scrutinise this Bill during its consideration in the House of Lords. We will also be examining the other Brexit bills to ensure that they are constitutionally appropriate.





# European Union (Withdrawal) Bill

## CHAPTER 1: INTRODUCTION

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### Background

1. The European Union (Withdrawal) Bill was brought to the House of Lords on 18 January 2018. The Bill seeks to “repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU.”<sup>1</sup>
2. The UK’s withdrawal from the European Union presents a significant and complex legal challenge, especially given the required timescale. We took the unusual step of looking at these challenges in advance of the presentation of the Bill and we set out some of the constitutional issues and difficulties that would face Parliament when it arrived. Our report, *The ‘Great Repeal Bill’ and delegated powers*, was published in March 2017, shortly before Article 50 of the Treaty on European Union was triggered and set the deadline for withdrawal.
3. Following the introduction of the Bill to the House of Commons in July 2017, we published an interim report assessing it against our earlier recommendations to gauge the extent to which the Government had taken on board our concerns and advice. We were disappointed that many of the problems we had warned of had not been addressed. We concluded that the Bill was “highly complex and convoluted in its drafting and structure” and that it left “multiple and fundamental constitutional questions” unanswered.<sup>2</sup> We began an inquiry on the Bill and issued a call for evidence focusing on the effect of the Bill in three broad areas:
  - (1) the relationship between Parliament and the Executive;
  - (2) the rule of law and legal certainty; and
  - (3) the consequences for the UK’s territorial constitution.
4. As part of this inquiry we received written evidence from a number of organisations and individuals. We heard oral evidence from Lord Neuberger of Abbotsbury, Richard Gordon QC, Professor Gordon Anthony, the Labour and Liberal Democrat spokesmen on the Bill and Government ministers. We also had informal discussions with representatives of committees in the Scottish Parliament and the National Assembly for Wales which were also examining the Bill. We are very grateful for their contributions.

### The Bill

5. The Bill is a substantial piece of legislation and is complex in terms of both its own structure and the legal regime that it will institute. The central purposes and effects of the Bill are fourfold:
  - The European Communities Act 1972 (ECA) is repealed (clause 1).

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1 [European Union \(Withdrawal\) Bill](#) [HL Bill 79 (2017–19)]

2 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), p 2

- Notwithstanding the repeal of the ECA, EU law is retained (clauses 2–4) and its domestic legal status and implications addressed (clauses 5–6).
- Delegated powers are created for the purposes of amending retained EU law, securing compliance with international obligations and implementing any withdrawal agreement (clauses 7–9).
- The powers and competences of the devolved institutions are provided for (clauses 10–11).

6. We examine these clauses and their effect in turn.

## CHAPTER 2: REPEAL OF THE EUROPEAN COMMUNITIES

### ACT 1972

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7. Clause 1 of the Bill provides: “The European Communities Act 1972 is repealed on exit day.” As we noted in our interim report on the Bill:<sup>3</sup>
- The ECA provides for directly effective EU law, such as treaty provisions, regulations and decisions, to have effect in the UK without the need for further enactment. Thus, for instance, regulations adopted by the EU (to the extent that they comply with the requirements for direct effect) become effective and enforceable in the UK without the need for domestic transposition.
  - The ECA provides the basis for the “supremacy” in the UK of directly effective EU law. Among other things, this enables UK courts to “disapply” Acts of the UK Parliament and to quash other legislation to the extent it is inconsistent with relevant EU law.
  - The ECA provides a legal basis for implementing EU law to the extent that this is necessary. For instance, most EU directives—which do not, in the same way as regulations, decisions and some treaty provisions, have direct effect—have been implemented using the delegated law-making powers conferred by the ECA.
8. It follows that repealing the ECA will have three principal effects:
- Directly effective EU law will no longer have effect in the UK, because the ECA will no longer authorise it to do so. Although, even without repeal of the ECA, directly effective EU law would cease to have effect in the UK on exit, because the ECA provides for the direct effect of EU law in the UK only to the extent that the UK’s treaty obligations so require. Post-exit, no such obligations will persist (subject to the terms of any withdrawal or transitional agreement between the EU and the UK).
  - Directly effective EU law will no longer have primacy over UK law—both because there will be no EU law capable of having primacy and because, in any event, domestic accommodation of primacy will cease on repeal of the ECA.
  - The legal basis on which UK secondary legislation has been made so as to implement EU directives will be removed, rendering such secondary legislation invalid.<sup>4</sup>
9. If these three things were to occur immediately on the UK’s exit from the EU, legal chaos would result. The remainder of the Bill is therefore devoted to attempting to ameliorate the consequences that would otherwise follow from the repeal of the ECA. The Bill does so by preserving EU-derived domestic legislation and domesticating directly effective EU law, while assigning broad executive powers for the purpose of amending such law. None of these things, however, can happen until “exit day”.

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3 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), paras 15–17

4 Although EU law would still have a residual effect under the Interpretation Act 1978, [section 16](#).

**Exit day**

10. In our interim report we raised concerns that the Bill contained no express provisions to constrain the scope of ministerial discretion to define “exit day” or that otherwise set criteria by which exit day was to be determined. We also noted that the Bill did not require that ministers prescribe exit day and the power to define exit day was exercisable by statutory instrument not subject to parliamentary procedure. We concluded that the power was “unduly broad in its scope and flexibility” and left open the possibility that ministers might provide through regulations that exit day meant one thing for one purpose and something else for another purpose.<sup>5</sup>
11. The Government subsequently decided to stipulate exit day in the Bill. Steve Baker MP, Parliamentary Under Secretary of State at the Department for Exiting the European Union, told us “We wish to put into the Bill the reality under international treaty law of our exit day, which is as announced, and to give people clarity that there is one exit day and that it is 29 March 2019.”<sup>6</sup>
12. Sir Keir Starmer QC MP, Shadow Secretary of State for Exiting the European Union, criticised the idea of fixing exit day in this way:
- “the proposal to stipulate exit day is really problematic. We have gone from an overly broad position ... where exit day is not determined, not necessarily overseen and could be on different days, to a position where it is absolutely fixed for all purposes. It has swung completely to the other side, and that is a mistake. The leave date is clear from the provision of Article 50. The exit date gets mixed up with the leave date, but the exit date serves a different purpose; it tells you when things have to happen in our domestic law for this whole exercise to work.”<sup>7</sup>
- He added that it “unnecessarily constrains the flexibility the Prime Minister might need in the latter stage of the negotiations.”<sup>8</sup>
13. The Public Law Project suggested that “in the interests of legal certainty, ‘exit day’ should be defined as ‘the day on which the UK ceases to be subject to the EU Treaties.’ This would allow sufficient flexibility for there to be a transition period while also enhancing legal certainty and appropriately limiting the period for which Ministers may exercise the extensive delegated powers contained in the Bill.”<sup>9</sup>
14. The Bill was subsequently amended in the Commons to define exit day as 11pm on 29 March 2019, while giving ministers the power to amend that definition “if the day or time on or at which the Treaties are to cease to apply to the United Kingdom in accordance with Article 50(3) of the Treaty on European Union is different.”<sup>10</sup>
15. **The revised definition of “exit day” in the Bill sets appropriate limits on ministerial discretion and provides greater clarity as to the relationship between “exit day” as it applies in domestic law and the date on which the UK will leave the European Union as a matter of**

5 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 21

6 [Q 49](#) (Steve Baker MP)

7 [Q 23](#) (Sir Keir Starmer QC MP)

8 *Ibid.*

9 Written evidence from the Public Law Project ([EUW0034](#))

10 [Clause 14 \(1–5\)](#)

**international law. It also allows the Government a degree of flexibility to accommodate any change to the date on which EU treaties cease to apply to the UK.**

## CHAPTER 3: RETAINED EU LAW

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### Introduction

16. Clauses 2–4 set out the general approach of the Bill, which is to make all existing EU and EU-derived law<sup>11</sup> part of domestic law post-exit. The Bill creates a novel category of law known as “retained EU law”,<sup>12</sup> consisting of three main elements:
- “EU-derived domestic legislation” that is saved by clause 2. This includes domestic secondary legislation made under the ECA for the purpose of implementing EU directives.
  - “Direct EU legislation” that is rendered part of domestic law by clause 3. This includes EU regulations, EU decisions and EU tertiary legislation (e.g. provisions made under regulations and directives) as they had effect in EU law immediately before exit day.
  - Directly effective EU law that is saved by clause 4. Clause 4 saves directly effective EU law that had effect in the UK by virtue of the ECA and that is not already saved by clause 3. Clause 4 will therefore, for instance, domesticate directly effective treaty provisions and (at least some) provisions in directives that are capable of direct effect.
17. Along with these three categories of “retained EU law”, the Bill makes provision about the post-exit domestic relevance of case law of the Court of Justice of the European Union (CJEU) and general principles of EU law. This gives rise to new domestic categories of “retained EU case law” and “retained general principles of EU law”, both of which are defined in clause 6(7).
18. “Retained EU law” will form a discrete, novel and legally significant category of law. As we concluded in our interim report, “it is imperative, in the interests of legal certainty, that there is maximum clarity as to what counts as retained EU law” on and after exit day.<sup>13</sup> In the rest of this chapter, we consider what constitutes retained EU law. In the following chapters, we examine the status of that body of law, the application of the “supremacy principle” to it and its interpretation by the courts.

### Types of retained EU law

#### *EU-derived domestic legislation*

19. Clause 2(1) provides: “EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day.” As we noted in our interim report, clause 2 casts the net very wide in terms of what counts as EU-derived domestic legislation.<sup>14</sup> The following are examples of things that will fall within it:
- Secondary legislation made under the ECA that implements EU directives or other EU obligations or that otherwise relates to the EU or the European Economic Area (EEA).

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11 Other than the Charter of Fundamental Rights, which is excepted by [clause 5\(4\)](#)

12 [Clause 6\(7\)](#)

13 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 31

14 *Ibid.*, para 24

- Provisions of secondary legislation made under other primary legislation that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA.
  - Provisions in Acts of the UK Parliament that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA.
  - Provisions in devolved primary and secondary legislation that implement EU directives or other EU obligations or that otherwise relate to the EU or the EEA.
20. Retained EU law will therefore have many different legal forms. This already complex picture is made more complicated as it will not always be clear whether something is or is not retained EU law. Judgement will often have to be brought to bear—ultimately, by the courts—on whether, for instance, a given domestic legal provision relates to the EU or the EEA. One consequence is that some parts of a given piece of domestic primary or secondary legislation might constitute retained EU law, while other parts of the same piece of legislation might not.
21. Most of these categories of domestic legislation would remain in force even without clause 2. Most obviously, provisions in Acts of Parliament—such as the Equality Act 2010—that implement EU obligations would not be repealed or otherwise rendered inoperative either by withdrawal from the EU or by repeal of the ECA. As we concluded in our interim report, **clause 2 appears significantly broader than it needs to be.**<sup>15</sup>
22. This has implications when it comes to understanding how the powers to amend retained EU law in clause 7 will work—and, in particular, how far they will extend. (These powers are considered in more detail in Chapter 8.) Clause 7 creates ministerial powers to amend “retained EU law”, which includes, by virtue of clause 6(7), “anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2.”<sup>16</sup> Although legislation that would have continued in force with or without clause 2 cannot continue to be or form part of domestic law “by virtue of” that provision, the Bill provides in clause 14(3) that, in effect, EU-derived domestic legislation is to be *treated* as continuing to be domestic law “by virtue of” clause 2 irrespective of whether it would have continued to be domestic law anyway. In this way, the Bill captures EU-related domestic legislation and treats it as “retained EU law” even when such domestic legislation does not need to be sustained by the Bill because it would have continued to form part of domestic law in any event. The effect is to inflate the range of domestic law—including primary legislation—in relation to which the ministerial “correction” powers conferred by the Bill can be exercised. This, in turn, raises questions about the constitutional appropriateness of those powers, given that their appropriateness turns in part on the range of domestic legislation that is subject to their exercise. **It is not constitutionally necessary or appropriate for primary legislation, which will continue in force in any event, to be treated as “retained EU law” by clause 2 and subject to the powers of amendment in clause 7.**

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15 *Ibid.*, para 25

16 [Clause 6\(7\)](#)



*Direct EU legislation*

23. Unlike EU directives, directly effective EU law does not need to be implemented by means of domestic transposition. Instead it has direct effect through section 2(1) of the ECA, which provides for direct effect insofar as that is required by the UK's treaty obligations. Section 2(1) will be repealed, and those treaty obligations will be extinguished, on exit day. For both of those reasons, directly effective EU law that currently has domestic effect under section 2(1) of the ECA would, if it were not for the Bill, cease to have such effect when exit day arrives.
24. Clause 3 saves a number of forms of EU law that are capable of direct effect: namely, most EU regulations, EU decisions and EU tertiary legislation to the extent that such instruments have effect in EU law immediately before exit day. Regulations, directives and tertiary legislation appear to be saved in their entirety, irrespective of whether each individual element of the relevant legislative instrument is directly effective. Whereas clause 2 purports to save many instruments that do not need to be saved, clause 3 bites on EU law that does need to be saved, at least in the short term, for reasons of legal certainty and continuity.
25. The relationship between retained EU law saved by clauses 2 and 3 may become complex. When some or all of an EU decision, EU regulation or piece of EU tertiary legislation is already given effect by a domestic enactment that is saved by clause 2, it does not constitute "direct EU legislation": it is clause 2, not clause 3, that operates in such circumstances. It is possible, however, to envisage circumstances in which only part of a relevant EU instrument is reflected in domestic legislation. In that scenario, those parts of the EU instrument that are reflected in domestic legislation will be saved (to the extent necessary) by clause 2 while the other elements will be domesticated by operation of clause 3. Thus, post-exit, certain EU instruments may persist in domestic law through the combined effect of clauses 2 and 3, such as some provisions of the Equality Act 2010.

*Treaty rights*

26. Some EU law that is directly effective, and is given domestic effect by the ECA, falls outside the definition of "direct EU legislation" and is therefore not incorporated into domestic law by clause 3 on exit day. The most significant category of directly effective EU law that is outside the scope of clause 3 is directly effective treaty provisions, which are dealt with by clause 4. It provides that any "rights, powers, liabilities, obligations, restrictions, remedies and procedures" which were recognised and available in domestic law pre-exit by virtue of section 2(1) of the ECA will continue to have domestic effect on and after exit day.
27. Some directly effective treaty provisions create rights that can straightforwardly continue to apply post-exit. This will be the case when treaty rights do not turn on reciprocal commitments and arrangements that presuppose membership of the EU. For instance, Article 157 of the Treaty on the Functioning of the European Union (TFEU) enshrines "the principle of equal pay for male and female workers for equal work or work of equal value". This right does not depend on EU membership, and treating it as a domestic law right post-exit, on the grounds that it becomes part of retained EU law under clause 4, is unproblematic. Such rights, however, stand in contrast to treaty provisions that do presuppose EU membership or which



create rights that are reciprocal in nature. Such rights will make little, if any, sense post-exit. For instance, the Government acknowledges that Article 110 TFEU, which prohibits Member States from using discriminatory taxation measures against products from other Member States, will become domestic law under clause 4.<sup>17</sup> However, it is hard to see why or how this law would be retained once the UK has fully left the EU. Similarly, many reciprocal rights—such as the right of EU nationals under Article 49 TFEU to establish and operate a business in another Member State—will become retained EU law under clause 4, but will make little sense post-exit (unless the UK remains part of the single market). Clause 4 will therefore domesticate *all* directly effective treaty provisions, whether or not they will be capable of meaningful application following exit.

28. The Government acknowledges this in the explanatory notes to the Bill. It lists (on a non-exhaustive basis) articles of the TFEU that will be incorporated into domestic law by clause 4, including several articles that deal with the customs union and the single market.<sup>18</sup> However, as the explanatory notes go on to point out, provisions that are domesticated by clause 4 will be “subject to amendment or repeal” using the powers in clause 7, meaning that where a domesticated provision “has no practical application, or makes provision for reciprocal arrangements or rights which no longer exist or are no longer appropriate once the UK has left the EU, statutory instruments can be brought forward to repeal or amend the provisions.”<sup>19</sup>
29. We heard of concerns about the uncertain future of reciprocal rights.<sup>20</sup> The Law Society of Scotland observed that “The explanatory notes state that it is ‘the right itself that is converted not the text of the article’” but in their view “it is very difficult to divorce the right from the text which creates it. Ministers should explain how this actually will work in practice.”<sup>21</sup> Sir Keir Starmer told us: “The explanatory notes ... tend to suggest that the modification powers in clause 7 would be used to get rid of reciprocal rights ... It looks as if the Government are lining up to say that ... we need not worry ourselves about how to deal with reciprocal rights, because we are going to get rid of them anyway.”<sup>22</sup>
30. This uncertain future for reciprocal rights was confirmed by the Government, which wrote:

“This clause deliberately acts as a broad ‘sweeper’ provision. It ensures that, as a starting point, all existing rights which are available in domestic law immediately before exit day as a result of section 2(1) of the ECA will continue to be available in our domestic law after we exit the EU ... As with any other element of retained EU law, these rights may require amendment in order to function clearly and effectively in domestic law after our exit. The Government will consider how these rights can be given effect to in the context of our exit from the EU on a case-by-case basis ahead of exit day.”<sup>23</sup>

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17 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) [HL Bill 79 (2017–19)-EN], para 93

18 *Ibid.*, para 93

19 *Ibid.*, para 95

20 Written evidence from Dr Ludivine Petetin and Dr Annegret Engel, Cardiff University ([EUW0013](#))

21 Written evidence from the Law Society of Scotland ([EUW0007](#))

22 [Q 29](#) (Sir Keir Starmer QC MP)

23 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

31. The Solicitor General, Robert Buckland QC MP, added that the Government was offering “further reassurance” in the form of paragraph 13(b) of schedule 7 to the Bill, which makes:
- “provision for regulations to be made so as to make any provision that restates retained EU law to be clearer and more accessible. For example, some of these directly effective rights, whose wording might appear to be a bit weird because we are no longer a member, can be amended to make them understandable and accessible to retain their force. In other words, there can be reassurance that we are not going to tamper with them; we are just going to ensure that they are as clear as possible.”<sup>24</sup>
32. Clause 4 also extends to (at least some) directly effective provisions contained in EU directives. Directives do not have direct effect in the same sense as EU regulations, EU decisions and some EU treaty provisions. However, when a Member State fails to implement a directive, provisions in directives that satisfy certain criteria (such as clarity and unconditionality) can have a limited form of direct effect. An important limit is that in such circumstances directives are effective “vertically” (that is they are binding on public bodies) but not “horizontally” (they cannot straightforwardly be enforced in proceedings against individuals, companies and so on).
33. Clause 4 is ambiguous in a number of important respects. It presupposes that directives, to the extent that they comply with the criteria for direct effect, can be brought into domestic law. However, it is not clear from clause 4 whether, when brought into domestic law, directly effective provisions of directives will have effect only vertically.
34. Clause 4 also provides that directives will not be brought into domestic law if they are “not of a kind recognised by the European Court or any court or tribunal in the UK in a case decided before exit day”. It is unclear whether this means that there must be a judgment on the specific provision of the particular directive, holding that it has direct effect, or whether it simply requires that the provision in question satisfies the criteria that would be applied if the matter were to be judicially considered. The language of clause 4 supports the latter interpretation, but the explanatory notes appear to endorse the former.<sup>25</sup>
35. Clause 4 appears to domesticate directly effective provisions of directives irrespective of whether the directive has been implemented in domestic law by means of EU-derived legislation that will (where necessary) be saved by clause 2. This gives rise to the question whether the operation of clauses 2 and 4 will result in two versions of some EU norms coexisting within the domestic legal system—the version in EU-derived domestic legislation and the version domesticated by clause 4. An answer to this concern may be that clause 4 is intended to operate only on directly effective provisions in directives to the extent that such provisions have not already been domesticated through the medium of EU-derived domestic legislation. However, this is not clear from clause 4 as drafted. There may be conflict and dispute if, for example, a litigant argues that the rights under clause 4 give them greater rights than the domestic implementation of the EU instrument under clause 2, as the Bill does not tell the court which is to have priority. Lord Neuberger of

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24 [Q 48](#) (Robert Buckland QC MP)

25 See also [Q 10](#) (Richard Gordon QC).

Abbotsbury advised that “the nettle has to be grasped by a provision simply saying which will prevail.”<sup>26</sup>

36. The Government said that any “overlap should not result in any practical difficulties, as it would only arise in circumstances where domestic legislation fully implements the directly effective right. This is no different to the present situation, where domestic legislation may follow from a judgment which establishes that a provision of a directive has direct effect.”<sup>27</sup> However, this explanation does not suggest how a conflict between two different types of retained EU law would be resolved, especially in light of the ambiguities in clause 5 that we turn to later.
37. **The implications of the Bill for reciprocal rights remain uncertain, as such rights are inextricably linked to the legal relationship between the UK and the EU post-exit. The full impact of Brexit upon reciprocal rights will not be known until the UK’s future relationship with the EU is determined. This highlights a broader issue that the uncertain environment in which the Bill is being considered makes it difficult fully to assess its likely consequences, including its constitutional implications, at the time of its passage.**
38. **The ambiguities in the interpretation and effect of clause 4 will inevitably cause legal uncertainty about a fundamental provision of the Bill. This will undermine one of the Government’s main objectives in bringing forward this Bill. The ambiguities need to be resolved.**

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26 [Q 10](#) (Lord Neuberger of Abbotsbury)

27 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

## CHAPTER 4: STATUS OF RETAINED EU LAW

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### Introduction

39. Whether a law counts as primary or secondary legislation is of fundamental importance in the UK legal system. Primary legislation in the form of Acts of Parliament is the product of a legislature that is sovereign, in the sense that it has legally unlimited powers. In contrast, secondary legislation is, by definition, made under limited powers that are capable of being unlawfully exceeded. This distinction has important consequences when considering the status of retained EU law under this Bill.

### Categories of retained EU law

40. Broadly speaking, the Bill creates two types of “retained EU law”. The first type is “EU-derived domestic legislation” under clause 2. As we explain in Chapter 3, this category consists of domestic legislation that already exists. It is therefore already either domestic primary legislation or domestic secondary legislation; and under the Bill, it will have the same status post-exit as it had pre-exit.<sup>28</sup>
41. EU-derived domestic legislation under clause 2 can be distinguished from “retained direct EU legislation” that is domesticated by clause 3 and other directly effective provisions of EU law that are domesticated by clause 4. (We refer to the law domesticated by clauses 3 and 4 collectively as “retained direct EU law”.) The crucial difference between EU-derived domestic legislation and retained direct EU law is that whereas the former already has a particular domestic status, the latter does not. Therefore, while the legal status of EU-derived domestic legislation is clear post-exit, the same is not true of retained direct EU law.
42. The Bill is silent as to the domestic legal status of retained direct EU law. The Government told us that:
- “Legislation which is converted into domestic law by clause 3<sup>29</sup> will ... form part of a unique and new category of domestic law ... Retained direct EU legislation will operate in a different way to both primary and secondary legislation, was not made by UK legislators, and will have a unique status within the domestic hierarchy. It was not considered appropriate, therefore, to assign a single status to retained direct EU legislation for all purposes. The Bill instead sets out the interpretative rules that apply to retained direct EU legislation and sets out in a number of other places what status converted law will have for certain specified purposes.”<sup>30</sup>
43. Giving retained direct EU law a “unique status within the domestic hierarchy” arises only because of the Bill’s present failure to assign it any recognisable legal status. The Government appears to suggest that because directly effective EU law currently stands outside the normal domestic hierarchy of primary and secondary legislation, the same must be true of retained direct EU law post-exit.

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28 However the powers contained in the Bill as presently drafted enable ministers to alter the status of retained EU law. We examine this point below.

29 The same will be true of EU law that is converted into domestic law by clause 4.

30 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

44. **Retained direct EU law will be domestic law. There is no reason why Parliament cannot or should not assign to retained direct EU law a recognisable domestic legal status. The fact that retained EU law began life as something other than domestic law does not prevent Parliament from assigning it a domestic legal status once it becomes domestic law. Nor does the fact that retained direct EU law originated outside the domestic legal system provide any good reason for neglecting to assign it a domestic legal status once it is recognised as domestic law.**

**A single legal status for retained direct EU law**

45. It is essential that the Bill mitigates the legal complexities that will arise from transferring EU law into UK law. For the purposes of clarity, continuity and certainty it is imperative that all retained direct EU law has the same legal status, whatever that legal status might be.
46. Treating all retained direct EU law as primary legislation better accords with the status that directly effective EU law currently has. The status of directly effective EU law is much more closely analogous to domestic primary than to domestic secondary legislation. The Bill's aim of securing legal continuity and certainty is more likely to be achieved if it assigns to retained direct EU law a domestic legal status that accords to the legal status that directly effective EU law currently has.
47. If retained direct EU law is treated as domestic primary legislation, this will mean that it is treated in the same way as directly effective EU law currently is for Human Rights Act (HRA) purposes. At present, directly effective EU law cannot be struck down by a UK court on the ground that it conflicts with the rights under the European Convention on Human Rights (ECHR) that are protected by the HRA. If retained direct EU law is regarded as domestic primary legislation, then it will be in the same position for HRA purposes as directly effective EU law at present.
48. Treating retained direct EU law as primary legislation for all—including HRA—purposes is not without constitutional costs. For example, it means that retained direct EU law cannot be struck down on ECHR grounds, the significance of which will be compounded if the EU Charter of Fundamental Rights (which we consider separately in Chapter 6) is excised from domestic law upon exit, as is currently provided for by the Bill. However, the fact that retained direct EU law will be immune from strike-down under the HRA if it is regarded as primary legislation does not mean that it cannot be challenged under the HRA. The courts' power (indeed, obligation) under the HRA to interpret legislation compatibly with relevant ECHR rights as far as is possible will apply to retained direct EU law, as will the power to issue a declaration of incompatibility if it is impossible to read legislation compatibly with a relevant right. The ECHR-compatibility of retained direct EU law would also be subject to possible challenge before the European Court of Human Rights in Strasbourg. In the light of the fact that the HRA will, in those ways, apply to retained direct EU law even if it is treated as primary legislation, we conclude that the benefits—in terms of clarity, continuity and certainty—of treating all retained direct EU law as primary legislation outweigh any disadvantages in this regard.

49. We also recognise that treating retained direct EU law as primary legislation will render it immune from judicial review on non-HRA grounds. This means, for instance, that retained direct EU law would not be subject to challenge on the ground that it is incompatible with common law principles of procedural fairness or with common law constitutional rights. However, even though courts cannot strike down primary legislation—and would therefore be unable to strike down retained direct EU law if it were given the status of primary legislation—they can and do go to considerable lengths to make it consistent with fundamental common law principles and rights by seeking to interpret it compatibly with such norms. In the light of that, and bearing in mind that directly effective EU law is currently invulnerable to judicial review on domestic, including common law grounds, we conclude that the benefits of treating all retained direct EU law as primary legislation outweigh any disadvantages.
50. We consider it important that retained direct EU law should be immune from revocation under delegated powers (other than powers contained in this Bill) that are not Henry VIII powers. We take this view in the light of the important nature of the legal norms and rights contained in some retained direct EU law, and bearing in mind that there is no straightforward way of setting out in the Bill a formula that would distinguish between retained direct EU law that does and does not concern such matters. We have also taken account of the fact that delegated powers that constitute Henry VIII powers are generally subject to more robust forms of parliamentary control and scrutiny. In the light of those considerations, we consider that significant constitutional advantages—in terms of the separation of powers and the proper delimitation of executive law-making—flow from treating all retained direct EU law as primary legislation.
51. **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.**
52. **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.**

#### **The status of retained direct EU law for particular purposes**

53. Although the Bill does not assign a single status to retained direct EU legislation for all purposes, the Government has indicated what status converted law will have for certain specified purposes. These include, for example, for the purposes of the Human Rights Act and the powers to make subordinate legislation which we discuss in turn below.
54. **We consider this approach to be fundamentally problematic. It is incomplete because it addresses the status of retained direct EU law for some purposes but not for others. It jeopardises legal certainty because assigning different statuses to retained EU law for different purposes, while assigning no status to it for some other purposes, is**



**highly likely to cause confusion. The creation of such confusion is undesirable and incompatible with the Bill’s objective of securing legal continuity and certainty as the UK leaves the EU.**

*The Human Rights Act 1998*

55. Paragraph 19 of schedule 8 provides that “any retained direct EU legislation is to be treated as primary legislation and not subordinate legislation” for the purposes of the HRA. This addresses only the category of retained EU law—that is, retained direct EU legislation—to which clause 3 gives rise. However, the failure to refer to the category of retained EU law to which clause 4 gives rise is problematic given that, like retained EU law under clause 3, it has no pre-existing or inherent domestic legal status. By conferring a legal status on retained direct EU legislation for the purposes of the HRA, the Bill acknowledges the importance of clarity when it comes to the legal status of retained EU law. This casts doubt on the broader approach of the Bill to leave the status of retained direct EU law unaddressed.
56. **If our recommendation is accepted to assign all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be removed from the Bill, since it will become redundant.**
57. **If the Bill is not amended so as to assign to all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be amended so that it provides not only for the legal status (for the purposes of the Human Rights Act 1998) of retained direct EU legislation under clause 3, but also for the legal status (for HRA purposes) of the category of retained EU law to which clause 4 gives rise.**

*Delegated powers*

58. For two years after exit day, the Government will have the power under clause 7 to amend retained EU law.<sup>31</sup> After two years, retained EU law will be subject to amendment only by an Act of Parliament or by delegated powers contained in primary legislation other than the present Bill. The extent to which retained EU law will be vulnerable to amendment (or repeal) through the use of delegated powers in other legislation will turn on whether it is considered primary or secondary legislation. If retained EU law was to be considered primary legislation, then it would be capable of amendment or repeal solely by Acts of Parliament or through the use of Henry VIII powers specifically conferred by other legislation. If, however, it were to be considered secondary legislation, it would be vulnerable to revocation and possible replacement by other secondary legislation more readily: Henry VIII powers would not be needed.
59. Paragraph 3 of schedule 8 provides that pre-exit powers to make subordinate legislation may be exercised, so far as the context permits or requires, to modify retained direct EU legislation. We note, however, that it makes no equivalent provision in relation to the retained EU law to which clause 4 gives rise. This mirrors the failure of the Bill, noted above, to assign a domestic legal status to retained EU law under clause 4.
60. **If our principal recommendation to assign retained direct EU law a single legal status is not implemented, paragraph 3 of schedule 8**

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<sup>31</sup> The clause 7 power is not, however, confined to the amendment of retained EU law. We examine clause 7 in detail in Chapter 8.

**should be amended to clarify whether the retained EU law to which clause 4 gives rise is to be treated, for delegated powers purposes, in the same way as retained direct EU legislation under clause 3.**

61. The effect of paragraph 3 of schedule 8 is that delegated powers in pre-exit Acts of Parliament will, upon exit, apply in a wider range of situations than before, in that they will become exercisable in relation to a new swathe of law, in the form of retained direct EU legislation. This will be unaccompanied, however, by any change in the scrutiny procedures to which the exercise of such powers are subject. Indeed, the implication of paragraph 3 of schedule 8 is that, for the purpose of being amended using powers granted by pre-exit legislation, all retained direct EU legislation is to be taken to have the functional status of subordinate legislation, thereby making it subject to the use of delegated powers whether or not they are Henry VIII powers.
62. **We do not consider that it is appropriate to treat all retained direct EU law as secondary legislation for the purpose of determining whether it is subject to delegated powers in legislation other than this Bill. To do so would leave retained direct EU law, as defined by clauses 3 and 4, open to possible revocation by powers within existing Acts of Parliament which may not currently be readily ascertainable. From the perspective of legal certainty this situation is constitutionally unacceptable.**
63. This is important because, while some elements of retained direct EU law will deal with relatively mundane and technical matters—that is matters of the type that one would normally expect to find in secondary legislation—the same is not true of the whole body of retained direct EU law. Indeed, some parts of that new body of law will concern legal norms and rights that would, had they not originated in EU law, almost certainly have had the status of domestic primary legislation. Sir Keir Starmer QC MP gave an example of this concern:

“Almost of all the workplace rights, from memory, are in delegated legislation. That has not mattered much until now, because they are underpinned by our EU membership. Nobody particularly felt that their workplace rights were vulnerable, because everybody knew that unless and until either we left the EU or the EU provisions changed, although it was a lesser form of legislation, they were in truth enhanced or ring-fenced. If, through this process, they become ordinary delegated legislation, those rights can be removed by provisions other than primary legislation. The ring-fencing just falls apart with the designation. Tied up with what seems like quite a narrow legalistic point about designation are a whole series of possible constitutional consequences, which are very, very wide-ranging.”<sup>32</sup>

64. **As we recommend above (para 52), all retained direct EU law should be treated as domestic primary legislation for all purposes, including for the purpose of determining whether it is subject to the exercise of delegated powers contained in legislation other than this Bill. We are concerned that the Bill, as drafted, would allow delegated powers (that are not Henry VIII powers) in existing legislation to apply to retained direct EU law. This would be constitutionally inappropriate**

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32 [Q 27](#) (Sir Keir Starmer QC MP)



given that some retained direct EU law will concern legal norms and rights that would, had they not originated in EU law, have been contained in domestic primary legislation.

65. **We recognise that the effect of our proposal is to render even technical and mundane elements of retained direct EU law immune from the use of non-Henry VIII delegated powers. However, we do not consider it possible to lay down in the Bill any formula capable of satisfactorily distinguishing between retained direct EU law that should be treated for this purpose as primary legislation and that which should be treated as secondary legislation. We therefore conclude that on balance, and applying a constitutional precautionary principle, it is preferable to treat all retained direct EU law as primary legislation. This will protect important legal norms and rights from revocation by the use of delegated powers which are not Henry VIII powers and which, as such, are often subject to lesser forms of parliamentary control and scrutiny than are Henry VIII powers (which are usually subject to the affirmative procedure).**
66. **In addition, our proposed designation of all retained direct EU law as primary legislation would greatly improve legal certainty. Since this designation would exempt retained direct EU law from revocation by secondary law-making powers other than Henry VIII powers, it should be far easier to identify its vulnerability to change. Henry VIII powers which might be used to amend or repeal this law are a considerably narrower category than the more general and far broader category of secondary legislative powers to which retained direct EU law would otherwise be vulnerable were it designated as secondary legislation.**

### **Clause 17 and the legal status of retained EU law**

67. In relation to determining the status of retained EU law, the Government proposes to rely on clause 17(1), which provides that: “A Minister of the Crown may by regulations make such provision as the Minister considers appropriate in consequence of this Act.” A power to make consequential provision is far from rare. However, the Government’s view is that this power, in the context of this Bill, can be used by ministers to specify whether particular pieces of retained EU law should be designated as primary or secondary legislation. Lord Neuberger told us that it would be “constitutionally questionable” to use clause 17 to determine the status of retained EU law.<sup>33</sup> However, the Solicitor General said:

“there is nothing unusual about these powers. However, I accept that the way and the context in which they are used is somewhat unusual ... I accept that we are in new territory here. Having said that, I think that, when embarking on new territory, all Ministers tread extremely carefully ... This is not an attempt by the Government somehow to change the constitutional landscape deliberately, or unintentionally, which in some ways is worse, to reduce the level of scrutiny and challenge that can be afforded to particular pieces of retained EU law. As I said, a case-by-case basis will be adopted, and the Government’s watchword is: does this increase certainty and improve continuity?”<sup>34</sup>

33 [Q 5](#) (Lord Neuberger of Abbotsbury)

34 [Q 47](#) (Robert Buckland QC MP)

68. The exercise of ministerial powers so as to determine the legal status of domestic legislation is wholly unacceptable in constitutional terms. Although, as set out above, we were told that “there is nothing unusual about these powers”, we do not share that view. There may be “nothing unusual” about a power to make provision consequential on an Act. However, the same cannot be said of a ministerial power to determine, on an instrument-by-instrument basis, whether provisions of domestic law are to be regarded as having the status of primary or secondary legislation. Such a power would not merely be unusual; it would be extraordinary and egregious.
69. **It is constitutionally unacceptable for ministers to have the power to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation. The “case-by-case” approach favoured by the Government would produce a highly inconsistent tapestry of EU law, with given provisions having a different status for different purposes, and individual provisions having a different status from each other. This is a recipe for confusion and legal uncertainty.**
70. **We recommend that all retained direct EU law should be treated as primary legislation and that clause 17 should be amended to make clear that it confers upon ministers no authority to change or otherwise determine the legal status of retained EU law.**

## CHAPTER 5: THE “SUPREMACY PRINCIPLE”

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71. Clause 5 provides that, for certain purposes, “the principle of the supremacy of EU law continues to apply after exit day”. In this way, the Bill seeks to elevate retained EU law by reference to the “supremacy principle”.
72. In this chapter we examine what we understand the Bill to mean by “the principle of the supremacy of EU law”, how it applies and why maintaining it post-exit is constitutionally flawed and will cause legal uncertainty. We conclude that the sensible policy aim behind perpetuating the supremacy principle can be achieved more effectively using domestic law principles and we recommend how this should be done.

### The meaning and nature of the “supremacy principle”

73. The “supremacy principle”, as it is dubbed by clause 5 of the Bill, is a principle of EU law. In order properly to address its meaning and effects in relation to the UK, it is necessary to consider what it means in EU law and what effect it is given in the UK by domestic law.
74. The “supremacy principle” is not set out in the EU treaties. Rather, it is a concept that the CJEU developed early in the life of what became the EU. The principle is that when the domestic law of a Member State conflicts with EU law, it is EU law that takes priority. As the CJEU put it in *Simmenthal*, national courts, in such circumstances, must “apply [EU] law in its entirety”, disregarding “any provision of national law”—whenever it might have been enacted—“which may conflict with [EU law]”.<sup>35</sup> From an EU law perspective, the principle is an uncompromising one: the CJEU has confirmed that EU law has priority over all forms of domestic law, including provisions found in Member States’ constitutions and in constitutional bills of rights.<sup>36</sup>
75. However, it is important to examine how the principle applies in the UK as a result of membership of the EU. In the *Thoburn* case,<sup>37</sup> it was argued on behalf of one of the parties that EU law had primacy over UK law “not by virtue of any principle of domestic constitutional law, but by virtue of principles of [EU] law”—including the “supremacy principle”—already established by the CJEU in cases like *Simmenthal*. This argument suggested that EU law had become “entrenched” in the UK, and that the traditional idea of parliamentary sovereignty was now of only “historical, but not actual, significance”. However, the court rejected these arguments. Lord Justice Laws, giving the judgment, said that the UK Parliament remained sovereign and that EU law had force in the UK only because Parliament, by enacting the European Communities Act 1972, had allowed it to do so. Therefore the far-reaching nature of the claims made by the “supremacy principle” are of limited consequence in the UK: instead, what matters is what domestic law says about whether, and if so to what extent, EU law has priority over UK law.
76. This analysis is supported both by higher judicial authority and by Parliament itself. In the *HS2* case, Lord Reed said that questions about the extent of EU law’s priority over domestic law “cannot be resolved simply by applying the

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35 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] [ECR 629](#). See also *Flaminio Costa v ENEL* [1964] [ECR 585](#).

36 Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhrund Vorratsstelle für Getreide und Futtermittel* [1970] [ECR 1125](#)

37 *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] [QB 151](#)

doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act.”<sup>38</sup> This is consistent with Parliament’s own view of matters. In section 18 of the European Union Act 2011, Parliament confirmed that EU law has effect in the UK “only by virtue of” the ECA.<sup>39</sup> Therefore, what the present Bill calls “the principle of the supremacy of EU law” only applies in the UK because, and to the extent that, Parliament has so provided in the ECA. Indeed, in the *HS2* case, the Supreme Court said that on a proper reading of the ECA, Parliament may not have granted EU law priority over *all* domestic law, and that certain fundamental principles of domestic law would continue to take precedence over EU law.

#### Clause 5: intended effect

77. Clause 5(1) of the Bill states: “The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made on or after exit day.” However, clause 5(2) continues: “Accordingly, the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.”
78. According to its explanatory notes to the Bill, the Government’s intention is that these provisions will operate as follows:
- The “supremacy principle” will not operate in relation to legislation that is enacted on or after exit day. As such, post-exit domestic legislation will not be prevented by the “supremacy principle” from having priority over any retained EU law.
  - However, the “supremacy principle” will operate in relation to legislation that is enacted prior to exit day. Thus, any EU-related law to which the “supremacy principle” applies will take priority over all pre-exit domestic law, including pre-exit Acts of Parliament.
79. **During UK membership of the EU, EU law takes priority over domestic law. This is well-recognised and it would be destabilising if, upon exit, retained EU law’s status radically changed such that pre-exit domestic law could prevail over it. However, while we support the policy aims that underpin clause 5(1) and (2), we consider—for reasons that we explain in the next section—that the way in which those provisions purport to give effect to these aims is conceptually flawed, sits uncomfortably with the doctrine of parliamentary sovereignty and is a potential source of legal confusion.**

#### Clause 5: three problems

80. There are three major problems with clause 5 as it stands. The first two problems suggest that clause 5 should be clarified. However, the third problem leads us to conclude that the whole approach adopted in clause 5(1) and (2) is misconceived, and that an entirely different approach is required if the Bill is to secure its overarching objectives of legal continuity and certainty.

38 *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] [UKSC 3](#), [2014] 1 WLR 324

39 Or by virtue of any other UK legislation that accords domestic effect to EU law. European Union Act 2011, [section 18](#).

*The scope of the “supremacy principle”*

81. Clause 5 refers to “the principle of the supremacy of EU law”. This raises the question of exactly what law that principle, to the extent that it is intended to continue to apply post-exit, is supposed to protect.<sup>40</sup> In particular, it is unclear whether it is intended to protect all retained EU law or only some types of retained EU law. On this point, the Solicitor General told us that:

“supremacy as retained under the Bill will plainly not apply to every aspect of retained EU law. For example, domestic regulations that have been made to implement EU law do not have a supreme status after exit day that they did not have before, so there is no change there ... We all know ... the principle of what supremacy means: it is, if you like, a hierarchy in which particular aspects of law, particularly directly applicable EU law, have to take precedence over pre-exit domestic law in the event of a conflict. That will carry on.”<sup>41</sup>

82. The Solicitor General appears to take the view that retained EU law will benefit from the “supremacy principle” (in respect of pre-exit domestic law) only if it corresponds to pre-exit EU law that itself benefitted from the “supremacy principle”. In very broad terms, this suggests that retained direct EU legislation under clause 3 and directly effective EU law domesticated by clause 4 should benefit from the post-exit “supremacy principle” under clause 5. However, it suggests that EU-derived domestic legislation under clause 2 should not benefit from the post-exit “supremacy principle” because it, unlike the underlying EU law to which it gives effect, did not benefit from that principle pre-exit. We consider this to be a sensible approach, not least because it corresponds to the current position as regards EU law, and thus accords with the Bill’s objective of securing legal continuity. However, none of this is clear from the face of the Bill. Indeed, the Bill says nothing about the types of retained EU law to which the “supremacy principle” is intended to apply following exit.
83. **It is constitutionally unacceptable for the Bill to be ambiguous as to what retained EU law the “supremacy principle” will apply. It is insufficient for the Solicitor General to suggest that there is a shared assumption as to what the “supremacy principle” means and that it will therefore function in the Bill as the Government wishes it to. If references to the “supremacy principle” were to be preserved in the Bill, then clause 5 should be amended to set out clearly the intended scope of the principle.**

*The “supremacy principle” and the common law*

84. It is not clear from clause 5 what types of retained EU law the “supremacy principle” is intended to *benefit*. A further difficulty is that it is not clear when the principle is intended to *bite* upon other forms of domestic law (i.e. forms of domestic law that are intended to yield to retained EU law because of the “supremacy principle”). It is clear that the “supremacy principle” is intended to give (at least some) retained EU law priority over pre-exit legislation. However, the position is less clear when account is taken of clause 5(2), which refers not only to pre-exit “enactments” but also to any “rule of law passed or made before exit day”.

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40 This issue was raised in evidence submitted to us by the Law Society of Scotland (EUW0007).

41 [Q 50](#) (Robert Buckland QC MP)

85. The Solicitor General told us that the reference in clause 5(2) to any “rule of law” is intended to ensure that the “supremacy principle” applies not only to legislation but also to the common law:

“the principle of supremacy will continue to apply in so far as it is relevant to the interpretation or disapplication of any enactment or rule of law—our wording, “rule of law”, has attracted a bit of criticism, but we are mindful of the fact that not all our law is in statute and there are common-law principles and other aspects that need to be embraced by this legislation—that is passed before the day of exit.”<sup>42</sup>

86. The application of the “supremacy principle” to common law “made before exit day” is, however, problematic: the common law emerges and evolves, unlike legislation that definitively takes effect at a certain point in time. This raises questions about the extent to which judges who articulate “new” common law rules or principles are in fact making new law or are declaring the common law as it has always been (whether or not it was previously so appreciated or articulated) and whether or not the supremacy principle would apply in such instances. Therefore it is difficult to say, in respect to any given rule or principle of common law, that it was “made” on a given date. As a result, the application of clause 5(2) to the common law is likely to be far from straightforward.
87. **If references to the “supremacy principle” were to be preserved in the Bill, then clause 5 would need to be amended to provide courts and others with suitable guidance for the purpose of determining whether a rule of the common law should be taken to have been “made” before or after exit. Providing such guidance is unlikely to be a straightforward matter. However, we do not make any specific proposals about what the form or content of any such guidance should be, because we consider, for reasons set out below, the notion of retaining the “supremacy principle” to be misconceived.**

*A post-exit “supremacy principle”: conceptual flaws*

88. We find it impossible to see in what sense “the principle of the supremacy of EU law”, set out in clause 5, could meaningfully apply in the UK once it has left the EU. Following exit, there will be no “EU law” within the domestic legal system, as a central purpose of the Bill is to excise all EU law from the UK legal system. Most EU law that exists immediately prior to exit will remain within the domestic system in the form of retained EU law as a result of the Bill, however, retained EU law will not be EU law: it will be domestic law. As a result, there is no meaningful sense in which “the principle of supremacy of EU law” can apply to retained EU law, given that the latter is not EU law. As Richard Gordon QC told us, “the whole concept of EU supremacy is not an easy one when there is no EU law, because you have just obliterated it on exit day.”<sup>43</sup>
89. **We consider that the notion of maintaining the “supremacy principle” following exit amounts to a fundamental flaw at the heart of the Bill. We do not consider that clause 5 clearly operates to bestow “supremacy” on retained EU law once exit day arrives. The “supremacy” of EU law will cease to apply when the UK leaves the EU**

42 [Q 50](#) (Robert Buckland QC MP)

43 [Q 5](#) (Richard Gordon QC)



**and Parliament repeals the ECA. Retained EU law, being domestic law, cannot benefit from “the principle of the supremacy of EU law”.**

90. This issue cannot be simply resolved by amending the Bill to state that “retained EU law”, rather than “EU law”, has supremacy. The “supremacy principle” is the creation of the CJEU and a principle of EU law. It has meaning and application only in relation to EU law, and to seek to graft that EU law principle onto a legislative scheme whose explicit purpose is to remove EU law from the UK legal system and replace it with domestic law risks confusion and places legal certainty in jeopardy. It does not make sense, either as a matter of language or as a matter of constitutional principle.
91. **The “supremacy principle” is alien to the UK constitutional system: not only did it originate outside that system, it also sits uncomfortably with established constitutional principles, most notably the doctrine of parliamentary sovereignty. If the cumbersome device of seeking to maintain the “supremacy principle” post-exit were the only means of seeking to give retained EU law priority over pre-exit domestic legislation, then attempting to leverage such an approach might be comprehensible, if not necessarily effective. However, as we set out below, we consider that the requisite status can be given to retained EU law in a way that is more straightforward and which accords with UK constitutional principles.**

#### **An alternative approach**

92. Taking into account the text of the Bill, the explanatory notes and the Solicitor General’s evidence to us, our understanding is that clause 5(1) and (2) seeks to give retained direct EU law priority over pre-exit, but not post-exit, domestic law.
93. **We consider the objective of giving retained direct EU law priority over pre-exit, but not post-exit, domestic law to be a sensible one. However, we regard the means employed by clause 5 in seeking to deliver that object to be fundamentally flawed. In our view, the way to deliver this objective would be to put to one side the concept and language of supremacy, and to focus on the domestic legal status of retained direct EU law. We recommend that retained direct EU law should be made to prevail over pre-exit domestic law by providing in the Bill that retained direct EU legislation under clause 3 and all law that is converted into domestic law by clause 4 is to be treated as having the status of an Act of the UK Parliament enacted on exit day.**
94. **No equivalent provision needs be made in relation to EU-derived domestic legislation under clause 2: such legislation already has the status of either primary or secondary legislation in domestic law, and already has a domestic date of enactment. Legal continuity will best be served by treating EU-derived domestic legislation as what it has always been: namely, domestic primary or secondary legislation in the ordinary sense.**
95. This approach has a number of advantages. First, it would secure the priority of retained direct EU law over pre-exit domestic legislation without needing to attempt the logically difficult, if not impossible, task of treating retained direct EU law as benefitting from the “principle of the supremacy of EU law”. Instead, it would prevail, under orthodox constitutional doctrine, by

virtue of a combination of two factors: its deemed legal status (i.e. an Act of Parliament) and the date of its conceptual “enactment” (i.e. exit day). Like any (actual) Act of Parliament, retained direct EU law would thus prevail over earlier inconsistent legislation, while subsequent inconsistent legislation would prevail over it.

96. Second, this proposal accords with the central recommendation made in the previous chapter: namely, that all retained direct EU law should be regarded as primary legislation. In this way, potential difficulties created by the Bill as it is currently drafted would be avoided. For instance, as presently drafted, the Bill envisages that a Minister might use clause 17 to designate a given piece of retained direct EU law as secondary legislation, yet clause 5 would continue to accord to that secondary legislation “supremacy” over pre-exit domestic legislation, including pre-exit Acts of Parliament. The resulting notion of secondary legislation that has “supremacy” over primary legislation risks uncertainty and confusion, introducing a conceptual innovation fundamentally at odds with the doctrine of parliamentary sovereignty as currently understood. Under our proposal, however, no such possibility arises: all retained direct EU law is to be treated as having the status as an Act of Parliament enacted on exit day. All questions about its relationship with other legislation will fall to be answered using the established principles of domestic law that condition the relationship between a given Act of Parliament and other domestic laws.
97. Third, the difficulties identified above concerning the operation of the “supremacy principle” with respect to common law “made before exit day” would no longer arise, because there would be no question of the “supremacy principle” applying. Instead, the relationship between retained direct EU law and the common law would be set by established principles that govern the relationship between Acts of Parliament and the common law.
98. Fourth, and more generally, our approach accords with the principles and traditions of the UK constitution. The EU “supremacy principle” is one that has no domestic constitutional counterpart, and there is no need to retain it once the UK leaves the EU. Moreover, excising the “supremacy principle” from domestic law is wholly consistent with the thrust and purpose of the present Bill. Although the Bill perpetuates in domestic law a vast body of what was EU law, the crucial point is that it turns what was EU law it into domestic law. It is therefore to domestic principles of constitutional law, not the EU law principle of “supremacy”, to which Parliament should look in seeking to stipulate what the legal status and effects of retained EU law—a new body of *domestic law*—will be.
99. **Treating retained EU law saved by clauses 3 and 4 as primary legislation would avoid the need for any “supremacy principle”, and would greatly simplify its constitutional position by ascribing to it a status consistent with the doctrine of parliamentary sovereignty. It would also complete the task of excising EU law from domestic law by making clear that retained direct EU law is, after exit day, domestic rather than EU law, subject only to the doctrines and principles of the UK constitution and not in any way contingent for its status upon the externally-derived constitutional doctrines of the EU.**



### The “supremacy principle” and changes to relevant law

100. Clause 5(3) envisages that the “supremacy principle” may apply to pre-exit domestic legislation even if such legislation is modified on or after exit day, provided that “the application of the [supremacy] principle is consistent with the intention of the modification”. This suggests that pre-exit legislation does not necessarily, when modified post-exit, become post-exit legislation, thereby removing it from the scope of the operation of the “supremacy principle”. However, pre-exit legislation that is modified will continue to be regarded as pre-exit legislation—and so subject to the “supremacy principle”—only if that is “consistent with the intention of the modification”.
101. If our principal recommendation, set out above, is adopted, clause 5(3) will need to be removed from the Bill, as no questions will arise about the circumstances in which the “supremacy principle” does and does not apply. However, if that recommendation is not adopted, then clause 5(3) will need to be amended, since it is insufficiently clear as it stands, and this risks creating legal uncertainty. Specifically, the phrasing of subsection (3)—“consistent with the intention of the modification”—is problematic, as it is not clear how such an intention or its absence would be discerned.
102. A further connected problem arises as to whether “supremacy principle” is intended to protect only “retained EU law” or whether it continues to apply to retained EU law once it has been modified. The definition of “retained EU law” in clause 6(7) suggests that retained EU law does not lose its status as such merely because it has been modified. However, it is difficult to see why retained EU law that has been substantially amended, and bears little resemblance to the EU law from which it originated, should continue to benefit from the “supremacy principle” merely because it began life as EU law.
103. **If the “supremacy principle” were to continue to feature in the Bill, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of that principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the “supremacy principle”. However, in the light of our principal recommendation, that retained direct EU law should be treated as primary legislation enacted on exit day (para 93), we make no detailed recommendations on these matters.**

## CHAPTER 6: CHARTER OF FUNDAMENTAL RIGHTS

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### Introduction

104. Clause 5(4) provides, “the Charter of Fundamental Rights is not part of domestic law on or after exit day.” The explanatory notes state:

“The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU *acquis* into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill. References to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights. Given that the Charter did not create any new rights, subsection (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights or principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.”<sup>44</sup>

105. We do not comment on the content or merits of the Charter rights, as this is best reserved for the Joint Committee on Human Rights. However, we address below the constitutional questions arising from clause 5(4), primarily whether removing the Charter changes the legal landscape and, if so, what consequences follow.

### Rights and principles

106. Sir Keir Starmer QC MP argued that the removal of the Charter would “take away rights and protections.” He said that if no rights were being lost then it was a “completely pointless exercise ... If you are not going to change the rights, do not just scatter them back to their sources.” He acknowledged that if the Charter was saved by the Bill “There would have to be modifications because some of the rights—voting for Members of the European Parliament, for example—would have to be either removed or modified.”<sup>45</sup>
107. However, the Solicitor General told us that “the Charter itself is often misunderstood. It is not a free-standing set of rights; it applies to EU institutions and then it applies to Member States only where they act within the scope of EU law. So its own sphere is limited.”<sup>46</sup> He said that “What matters to the person in the street is whether their rights are preserved” and that “The underlying principles and rights are preserved, so the outcome for the person in the street is a good one.”<sup>47</sup>
108. Although clause 5(4) excludes the Charter from domestic law, clause 5(5) goes on to provide that clause 5(4) “does not affect the retention in domestic law ... of any fundamental rights or principles which exist irrespective of the Charter.” A number of witnesses suggested that exactly which rights this includes was not clear.<sup>48</sup>

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44 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), paras 103–104

45 [Q 31](#) (Sir Keir Starmer QC MP)

46 [Q 51](#) (Robert Buckland QC MP)

47 *Ibid.*

48 For example, written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde ([EUW0023](#)), Professor Phil Syrpis, University of Bristol Law School ([EUW0009](#)) and the Public Law Project ([EUW0034](#)).

109. The Law Society of Scotland recommended “the fundamental rights and principles which exist ‘irrespective of the Charter’ should be set out in the bill ... it would be helpful if the Government could identify what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of ‘retained general principles of EU law’ in clause 6(7).”<sup>49</sup> Lord Neuberger told us “I suspect that in Clause 5(5) the reference to ‘corresponding retained fundamental rights’ could well lead to litigation.”<sup>50</sup>

110. Professor Alison Young said that it may be:

“difficult to separate the general principles from the Charter, particularly as the two develop symbiotically, with general principles deriving from the Charter and being relevant to the interpretation of the rights and principles found in the Charter. The Court of Justice of the European Union (CJEU) often refers to both the general principles and the Charter in support of the same human right. This may also result in greater uncertainty.”<sup>51</sup>

111. The Chartered Institute of Taxation suggested that it would be “helpful to explicitly state what is *not* considered to be a general principle of EU law, particularly if it remains the position that full effect is not given to the general principles of EU law.”<sup>52</sup>

112. This confusion is made more pertinent when read in light of paragraph 3 of schedule 1, which limits reliance on the general principles: “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.”<sup>53</sup> However, as a result of an amendment to the Bill at report stage in the Commons, paragraph 27 of schedule 8 provides that this does not apply to any proceedings which begin within 3 months from exit day, as long as the challenge involves something that occurred before exit day and that does not seek the disapplication or quashing of an Act of Parliament. In effect, this provides a short transition period, post-exit day, for the commencement of litigation relating to the general principles of EU law.

113. Following committee stage on the Bill in the Commons, the Government published a right-by-right analysis of the Charter, which set out where Charter rights exist in other directly applicable EU law or domestic law.<sup>54</sup> The Government set out in this analysis how the Charter rights and general principles would function post-exit:

“The Bill is retaining the general principles of EU law, as they have been recognised by the CJEU before exit day, for interpretative purposes. Furthermore, the Bill will retain pre-withdrawal CJEU case law which is relevant to the interpretation of retained EU law ... The Government has made clear that we are willing to look again at some of the technical detail about how the Bill deals with the general principles of EU law ...

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49 Written evidence from the Law Society of Scotland ([EUW0007](#))

50 [Q 9](#) (Lord Neuberger of Abbotsbury)

51 Written evidence from Professor Alison Young, University of Oxford ([EUW0003](#))

52 Written evidence from the Chartered Institute of Taxation ([EUW0019](#))

53 [Schedule 1, paragraph 3\(1\)](#)

54 HM Government, *Charter of Fundamental Rights of the EU: Right by Right Analysis*, 5 December 2017, para 16: [http://data.parliament.uk/DepositedPapers/Files/DEP2017-0757/Analysis\\_of\\_the\\_Charter\\_of\\_Fundamental\\_Rights\\_of\\_the\\_European\\_Union.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2017-0757/Analysis_of_the_Charter_of_Fundamental_Rights_of_the_European_Union.pdf) [accessed 24 January 2018]

The rights landscape is complex and our approach is to seek to maximise certainty and minimise complexity and not remove any substantive rights that UK citizens currently enjoy.”<sup>55</sup>

114. It also said that “retained EU law will need to be read consistently with the general principles of EU law (including those that constitute fundamental rights) where it is possible to do so, and broadly speaking [that] does not affect the current position as regards the pre exit case law of the CJEU ... Principles codified in the Charter which are found in directives or in the Treaties may also be relevant for interpretative purposes.”<sup>56</sup>

115. In light of the right-by-right analysis of the Charter, we asked whether this list of rights could be set out in the Bill itself. The Solicitor General said:

“The danger of putting a list in a schedule is that it becomes an exhaustive and final authoritative list, rather than something that is meant to be guidance. Again, if we try to do that, we are getting into the territory of fettering the discretion of the courts in a way that I think would be unhelpful.”<sup>57</sup>

He concluded that “to the very greatest extent, the Charter does not add anything substantive to our law.”<sup>58</sup>

### Remedies

116. We also heard concern that the removal of the Charter would weaken the remedies available to protect rights.<sup>59</sup> Under the Charter, courts have the power to disapply domestic legislation in favour of fundamental rights, whereas under the Human Rights Act courts can issue only a declaration of incompatibility. As Lord Neuberger explained “the Charter applies only in relation to EU law, but ... it is a stronger power. On the other hand, the power under section 3 of the Human Rights Act is not a long way from that. It enables judges to indulge in rather imaginative interpretation, to ensure that legislation complies with the human rights convention ... [but] the Charter power is, as it were, more muscular.”<sup>60</sup>

117. An example of the importance of the Charter of Fundamental Rights in this regard was provided in *Benkharbouche*<sup>61</sup> where it was used by the Supreme Court independently of other provisions of EU law to disapply domestic law. Professor Young wrote:

“Schedule 1 to the Bill makes it clear that ‘there is no right of action in domestic law on or after exit day based on failure to comply with any of the general principles of EU law’ ... This prevents claims of the nature found in *Benkharbouche*, where the Charter was used independently from other provisions of EU law. ... But claimants *will* still be able to rely on general principles of EU law, which protect fundamental rights. They will not be able to use these general principles *on their own*, but

55 *Ibid.*, para 16

56 *Ibid.*, paras 18 and 19

57 [Q 51](#) (Robert Buckland QC MP)

58 *Ibid.*

59 See [Q 31](#) (Sir Keir Starmer QC MP) and written evidence from the Public Law Project ([EUW0034](#)) and BrexitLawNI ([EUW0014](#)).

60 [Q 9](#) (Lord Neuberger of Abbotsbury)

61 *Benkharbouche (Respondent) v Secretary of State for Foreign and Commonwealth Affairs (Appellant)* [2017] [UKSC 62](#)

they will still be used to interpret EU-derived law, which then in turn could be used to disapply legislation. For the claimants in *Benkharbouche*, the stronger remedy currently found under EU law for protection of fundamental rights will disappear. They would only be able to obtain a declaration of incompatibility under section 4 HRA arising from the breach of article 6 ECHR. This, in turn, is not available to tribunals, but only to the high court and higher courts.”<sup>62</sup>

118. Professor Mullen *et. al.* argued that the qualifications on the applicability of the general principles set out in the Bill “effectively limit the role of the general principles to that of acting as guides to the interpretation of statutes and other rules of law which count as EU-derived law for purposes of the Bill.”<sup>63</sup> Professor Merris Amos argued, “In order to retain existing levels of rights protection, it must be possible to challenge converted retained EU law in UK courts in the same way that it would be possible were this law retained EU law (as defined in the Withdrawal Bill) or if the UK were still a member of the EU.”<sup>64</sup>
119. **The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day.**
120. **The effects of excluding the Charter rights, retaining the “general principles”, but excluding rights of action based on them, are unclear. This risks causing legal confusion in a context where clarity is needed. We look forward to the views of the Joint Committee on Human Rights on the implications for rights of excluding the Charter of Fundamental Rights in the Bill. We recommend that the Government provides greater clarity on how the Bill deals with the general principles and how they will operate post-Brexit.**
121. A further point is that the *Francovich* rule will no longer apply in domestic law after exit day. The rule allows individuals to claim compensation if they are affected by a government’s failure to comply with EU law. The effect of the Bill is that there will be no right of redress against the Government for breach of an EU directive after exit day.
122. Professor Phil Syrpis told us:
- “The second express exclusion in schedule 1 relates to the right to damages in accordance with the principle in *Francovich*. Such a right will not be available post-exit. Presumably, other EU law principles (for example, the rule in *Marleasing*, that national law should be interpreted ‘as far as possible’ in accordance with EU law principles) therefore

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62 Alison Young, *Benkharbouche and the Future of Disapplication*, UK Constitutional Law Association, 24 October 2017: <https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/> [accessed 24 January 2018]

63 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde (EUW0023)

64 Written evidence from Professor Merris Amos, Queen Mary University of London (EUW0006)

survive. The express exclusions, taken together, serve to make the task of the UK courts more difficult. They need to make distinctions not only between the pre- and post-Brexit case law of the CJEU, but also between parts of the EU law *acquis*, some of which is converted, some of which is not. The choices they make are, to put it mildly, likely to be politically salient, and there is little in the Bill to guide them.”<sup>65</sup>

123. During committee stage of the Bill in the House of Commons, the Solicitor General said that the Government would “consider further” whether more detailed transitional arrangements were required.<sup>66</sup> **We recommend that the Government provides the House of Lords with an updated view about the applicability of the *Francovich* principle and any transitional arrangements regarding it.**

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65 Professor Phil Syrpis, University of Bristol Law School ([EUW0009](#))

66 HC Deb, 21 November 2017, [col 979](#)



## CHAPTER 7: INTERPRETATION OF RETAINED EU LAW

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124. The separation of powers is a fundamental constitutional principle. Parliament makes the law and the courts interpret and apply it. However, in order for the separation of powers to operate effectively in this regard, Parliament must properly play its part. That means, among other things, that legislation must be sufficiently clear. A risk attached to any uncertainty in the law is that courts will be required to fill gaps, which may engage them unavoidably with political or policy decisions.
125. As we set out in the preceding chapters, the creation of retained EU law by the Bill will introduce uncertainties and ambiguities into the law. These will be compounded if the Bill does not direct the courts clearly as to how they should go about the task of interpreting retained EU law.
126. In our report, *The ‘Great Repeal Bill’ and delegated powers*, we anticipated that the Bill would need to address how the UK courts interpret judgments of the CJEU post-Brexit:
- “the Government may wish to consider whether the Bill should provide that, as a general rule, UK courts ‘may have regard to’ the case law of the Court of Justice (and we stress that it should be optional) in relation to judgments made both before and after the UK’s exit from the EU in order to assist in the interpretation of UK law. This will allow UK courts to take into account the judgments of the Court of Justice, but not be bound by them.”<sup>67</sup>
127. The Bill addresses the question of the post-exit status of CJEU case law, albeit it does not adopt the model that we advocated. In particular, the Bill draws a distinction between pre- and post-exit CJEU case law.
128. While we primarily refer in this chapter to courts and tribunals, we note that the applicability of post-exit CJEU case law will also be an issue for regulators. Many of the rules of regulators such as the Prudential Regulation Authority and the Financial Conduct Authority implement EU directives or transpose EU regulations, and therefore they will also need clarity as to how they should treat post-exit CJEU case law.

### Pre-exit CJEU case law

129. Clause 6(3) sets out the general principle that questions about the “validity, meaning or effect” of retained EU law must be decided “in accordance with any retained case law and any retained general principles of EU law”. “Retained case law” is defined in clause 6(7) as including both “retained domestic case law” (pre-exit domestic case law that relates to retained EU law) and “retained EU case law” (pre-exit CJEU case law that relates to retained EU law).
130. Clause 6 requires the courts “to decide in accordance with” retained case law (i.e. pre-exit CJEU case law). However, the requirement is subject to important provisos:
- It applies only in respect of retained EU law insofar as that law “is unmodified on or after exit day.”<sup>68</sup> Retained EU law that has been

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67 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 27

68 [Clause 6\(3\)](#)

amended may be decided upon in accordance with retained EU case law if doing so is consistent with the intention of the modifications.<sup>69</sup>

- It applies only insofar as retained case law is “relevant” to the question about retained EU law with which the domestic court is dealing.<sup>70</sup>
- The Supreme Court and (in certain circumstances) the High Court of Justiciary are not “bound” by retained EU case law; those courts, where relevant, can depart from retained EU case law on the same basis as they can depart from their own case law.<sup>71</sup>

**131. The Bill takes a clear and sensible approach to the applicability of pre-exit case law post-Brexit.**

**Post-exit CJEU case law**

132. The Bill provides that domestic courts and tribunals are not bound by post-exit CJEU case law. They are not required to “have regard to” post-exit CJEU case law but “may do so” if they consider it “appropriate”.<sup>72</sup> Thus, a clear distinction is drawn between pre- and post-exit CJEU case law: the former is, in general, binding, while the latter is not.

133. However, as the Faculty of Advocates pointed out “Clause 6 offers only vague advice ... In the absence of any explanation of underlying policy, the assessment of appropriateness is effectively rendered arbitrary.”<sup>73</sup>

134. The President of the Supreme Court, Baroness Hale of Richmond, called for Parliament to tell the courts “what we should be doing ... [and] saying how much we should be taking into account” CJEU judgments.<sup>74</sup> Her predecessor as President, Lord Neuberger, raised similar concerns about the level of guidance provided by the Bill on the domestic role of post-exit CJEU case law.<sup>75</sup> In evidence he considered whether the type of factors which courts might be expected to take into account in deciding appropriateness might include economic and political factors. He concluded:

“Judges are not naturally the people to take into account factors of that sort. It puts them very much into policy issues, where, on the whole, the tradition in this country has been to keep them out. If they have to decide whether to take those factors into account—and, if so, how—they will do their duty, as they must, but they may not make decisions that are welcome here. It would be better to give them guidance.”<sup>76</sup>

The Learned Society of Wales suggested, “Allowing the courts to decide on a case by case basis whether regard should be had to post exit day decisions of the ECJ is tantamount to delegating to the courts a policy decision which rightly belongs elsewhere.”<sup>77</sup>

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69 [Clause 6\(6\)](#)

70 [Clause 6\(3\)](#)

71 [Clause 6\(5\)](#)

72 [Clause 6\(1\)\(2\)](#)

73 Written evidence from the Faculty of Advocates ([EUW0033](#))

74 O. Bowcott, ‘UK’s new supreme court chief calls for clarity on ECJ after Brexit’, *The Guardian*, (5 October 2017): <https://www.theguardian.com/law/2017/oct/05/uks-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexit> [accessed 24 January 2018]

75 BBC News, ‘UK judges need clarity after Brexit: Lord Neuberger’ 8 August 2017: <http://www.bbc.co.uk/news/uk-40855526> [accessed 24 January 2018]

76 [Q 1](#) (Lord Neuberger of Abbotsbury)

77 Written evidence from the Learned Society of Wales ([EUW0012](#))



135. Lord Neuberger said:

“If Parliament wants to do its job rather than to get the judges to do what is ultimately a policy job, it should give guidance on that to judges. It should say that they can or cannot take it into account or that they may or may not do so ... If this course is taken, I would favour at least a list of “mays” and “may nots”. The problem of simply having “may” is that it implies that you should probably not take other things into account. If you have “may not” only, it implies that anything else is okay. If you have ‘may’ and ‘may not’, it gives the court a degree of flexibility.”<sup>78</sup>

136. Richard Gordon QC proposed that clause 6(2) should be amended to provide that a court should take into account post-exit case law “if it considers it relevant to the case before it.”<sup>79</sup>

137. We discussed with witnesses whether guidance should be given to the courts and whether such guidance should be in the Bill. Lord Neuberger said that “in a perfect world ... it would be carefully thought out and in the statute.”<sup>80</sup> Tom Brake MP concurred: “It would be helpful to have it in primary legislation, because it reduces the scope for doubt and the ability for it to be changed in the future.”<sup>81</sup> However, Richard Gordon said “if one opts for a model of guidance, I would prefer to see it in guidance and not in statute. It might create a lack of clarity to have it in the Act itself, particularly if it is a list of what you may take into account, leaving quite difficult questions as to whether or not one is caught by the type of things in the permissive part of the statute.”<sup>82</sup>

138. The Solicitor General said:

“although it is tempting to try to create some sort of list of dos and don’ts for the judiciary, that in itself is fraught with danger ... the Government could be properly criticised for unduly fettering the discretion of courts and judges, who, frankly, can and should be trusted to interpret the law as they have done for many generations. I am therefore of the school of thought that errs on the side of brevity when it comes to directions or provisions of this nature ... I note the arguments about the use of the word ‘appropriate’ ... I do not think that there will be a perfect solution to this, but I am all ears when it comes to phraseology that—subject to my rule about brevity—could be used to achieve the desiderata not just of Lord Neuberger but of all members of the judiciary who might be faced with this task in future.”<sup>83</sup>

139. He continued:

“because we are leaving the EU, the idea that they [judges] would be required to take into account the judgments of another jurisdiction would not be true to the purpose of Brexit. Having said that, there is nothing to stop judges considering the case law, as they do with case law from a number of jurisdictions. Inevitably, because of our 43-year relationship with the EU and the closeness of it, the case law of Luxembourg will

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78 [Q 2](#) (Lord Neuberger of Abbotsbury)

79 [Q 2](#) (Richard Gordon QC)

80 [Q 2](#) (Lord Neuberger of Abbotsbury)

81 [Q 18](#) (Tom Brake MP)

82 [Q 2](#) (Richard Gordon QC)

83 [Q 50](#) (Robert Buckland QC MP)

continue to be germane in some cases, but a clear line has to be drawn post exit as to its effect.”<sup>84</sup>

140. A degree of flexibility is needed; it would be imprudent to prescribe a one-size-fits-all approach, given the enormous variety of cases that may arise, and the way in which the situation may evolve over time. It is likely that the relevance of post-exit CJEU case law will wane as UK and EU law grow apart. However, the extent to which UK and EU law will diverge is likely to vary from area to area. There may, for instance, be areas in which the UK chooses (or, pursuant to any new legal relationship with the EU, is required) closely to align domestic law with EU law. In those areas, post-exit CJEU case law will remain relevant.
141. **The Bill leaves it to judges to decide when it is appropriate to be guided by post-exit CJEU case law—and, when it is, what amount of weight should be ascribed. We are concerned that the Bill leaves courts without proper guidance on this fundamental question of policy and that, by deciding to attach weight or indeed not to attach weight to post-exit CJEU cases, judges may become involved in political controversy.**
142. **We recommend that the Bill should provide that a court or tribunal shall have regard to judgments given by the CJEU on or after exit day which the court or tribunal considers relevant to the proper interpretation of retained EU law. We further recommend that the Bill should state that, in deciding what weight (if any) to give to a post-exit judgment of the CJEU, the court or tribunal should take account of any agreement between the UK and the EU which the court or tribunal considers relevant.**

*Modified retained EU law*

143. Clause 6(3) requires UK courts and tribunals to decide questions concerning retained EU law in accordance with retained case law and retained general principles of EU law only “so far as that [retained EU] law is unmodified on or after exit day”. However, clause 6(6) provides that clause 6(3) “does not prevent” relevant questions concerning modified retained EU law from being decided in accordance with retained case law and retained EU general principles “if doing so is consistent with the intention of the modifications”. Professor Young said, “this creates uncertainty surrounding whether the modified retained EU law should be interpreted in line with EU case law up to exit day, particularly as many of these modifications would occur through delegated legislation which may provide little information as to the intention of these modifications.”<sup>85</sup>
144. **We recommend that the Government’s statement accompanying regulations which modify retained EU law (see para 211) should also provide an explanation of the intention of the modification, to guide the courts in applying clause 6(3).**
145. The Faculty of Advocates noted that the requirement in clause 6(3) (to decide relevant questions concerning retained EU law in accordance with retained case law and retained general principles of EU law) “is equally unclear. It

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84 [Q 50](#) (Robert Buckland QC MP)

85 Written evidence from Professor Alison Young, University of Oxford ([EUW0003](#))

applies only so far as the retained law is unmodified. It tells the court to have regard ‘among other things’ to the limits of EU competences; but there is no indication as to what other things may be relevant.”<sup>86</sup>

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

*Pending cases*

147. Two issues arise with extant litigation that involves EU law. The first is pending cases in the domestic courts that would, if Brexit were not taking place, potentially involve a referral to the CJEU. The second is pending cases already lodged with the CJEU before exit day.
148. On the first type of pending cases, the Law Society of Scotland said:
- “There is no provision in [clause 6] which expressly deals with the situation where there are pending cases before the domestic courts on exit day. But, given that clause 6(1)(b) appears to be quite absolute in its terms, it could be argued that it would apply to such pending cases and prevent such a court from referring a matter to the ECJ on or after that day even although it could have done so on the previous day. However, it is thought that such a construction might be objectionable on the grounds that it is retrospective if it applies to pending cases.”<sup>87</sup>
149. The Government’s policy is that the UK’s withdrawal from the EU necessitates a cut-off point for references to the CJEU. The timing of that cut-off point will depend on the provisions of any withdrawal or transition agreement for the jurisdiction of the CJEU, but whenever it arrives the issue of pending cases will need to be addressed.
150. **Preventing new references to the Court of Justice of the European Union after exit day provides clarity and certainty for new litigation; however it may undermine procedural fairness and access to justice in cases that were already under way, albeit that they had not, by exit day, resulted in a reference to the CJEU. Litigants in cases that began before the notification of withdrawal under Article 50 of the Treaty on European Union, or indeed before the referendum in 2016, will be treated differently in a way that was not reasonably foreseeable when their cases began. We recommend that the Government seek to clarify in any withdrawal or transition agreement whether domestic courts can continue to make references to the CJEU in relation to cases that began before exit day.**
151. On the second type of pending cases, those already lodged with the CJEU, the Law Society of Scotland asked “Whether all cases, or only some selection of those cases, which are pending before the ECJ on exit day should continue to be dealt with by the ECJ?”<sup>88</sup> In the House of Commons, Bill minister Dominic Raab MP said “When we exit the EU, we will know exactly how many pending UK cases are registered with the European Court, awaiting a preliminary reference and thus covered by any proposed agreement we have with the EU on the treatment of pending cases. That is important to deliver

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86 Written evidence from the Faculty of Advocates ([EUW0033](#))

87 Written evidence from the Law Society of Scotland ([EUW0007](#))

88 *Ibid.*

certainty about how and when the Court’s jurisdiction in the UK will be brought to an end.”<sup>89</sup>

152. The Solicitor General told us:

“That would be one of the potential functions of clause 9 [which allows ministers to make regulations for implementing a withdrawal agreement], which would deal with some of the necessary and important technical provisions that would ensure continuity so that ongoing cases were not disrupted. It is not at all the intention to upset the apple cart when it comes to cases that have been commenced prior to exit.”<sup>90</sup>

He continued “I do not think that it would have any effect on ongoing cases. If you are already a litigant and your case has been referred to the CJEU—that is, you have commenced your case pre exit—it will carry on.”<sup>91</sup>

153. **The Government proposes to provide for the handling of pending cases with the CJEU in the withdrawal agreement and implementation bill. However, in the event that a withdrawal agreement is not reached, a bill would be needed to make provision on pending cases. We recommend that, irrespective of any implementation bill, pending cases are dealt with in the European Union (Withdrawal) Bill. We further recommend that rulings on cases that have been referred to the CJEU before exit day are treated as pre-exit case law—such that they form part of “retained EU case law”—and that the Government publishes, on exit day, a list of all such cases.**

154. Outside of pending cases, an additional scenario exists where the cause for legal action arises before exit day, but litigation does not commence until after the UK has left the EU. As noted above, the Bill provides that proceedings which begin three months from exit day may challenge a failure to comply with any of the general principles of EU law, as long as the challenge involves something that occurred before exit day and that does not seek the disapplication or quashing of an Act of Parliament.<sup>92</sup> In effect, this provides a short transition period, post-exit day, for the commencement of litigation relating to the general principles of EU law, though no reference to the CJEU would be possible. **We recommend that, as with cases that have already commenced (see para 150), the Government seek to clarify in any withdrawal or transition agreement whether domestic courts can make references to the CJEU after exit day in relation to new cases, where the cause of action arose prior to exit day, subject to the normal statute of limitations.**

#### *Transition period*

155. The scheme for interpreting CJEU case law post-Brexit set out in the Bill does not take into account the possibility of a transition period. Robin Walker MP told us “In the event that an implementation period is agreed between us, it will be enabled in UK law through the withdrawal agreement and implementation bill, which will specify the role that the European Court of Justice will have during the implementation period, as recognised under UK

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89 HC Deb, 14 November 2017, [col 290](#)

90 [Q 50](#) (Robert Buckland QC MP)

91 *Ibid.*

92 [Schedule 27, paragraph 27\(5\)](#), as read with [schedule 1, paragraph 3\(1\)](#)

law ... there will be a role for the European court in enforcing those rules and regulations during an implementation period.”<sup>93</sup>

156. **If a transition period is agreed, the Government will need to provide for the operation of retained EU case law and its interaction with the CJEU in the withdrawal agreement and implementation bill.**

## CHAPTER 8: DELEGATED POWERS

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### Introduction

157. The Bill contains a number of broad delegated powers, as noted by the Delegated Powers and Regulatory Reform Committee in its report on the Bill.<sup>94</sup> In the delegated powers memorandum, the Government said these powers were needed due to the impending deadline for withdrawal, the scale of the legal changes that must occur before exit day and the need for flexibility for ministers and the devolved administrations to “deliver a functioning statute book for day one post-exit.”<sup>95</sup>
158. We anticipated in our earlier report, *The ‘Great Repeal Bill’ and delegated powers*, that the Bill would likely “propose that Parliament delegate to the Government significant powers to amend and repeal (primary) and revoke (secondary) legislation” to give effect to Brexit.<sup>96</sup> We also recognised that “relatively wide” delegated powers were inevitable to remove laws that will be redundant on exit day and to ensure the coherent operation of the United Kingdom’s legal systems.<sup>97</sup> However, we warned that the scale of the transfer of legislative competence to the Government raised “constitutional concerns of a fundamental nature” regarding the balance of power between Parliament and the Executive.<sup>98</sup> We stressed that the delegated powers granted under the Bill should be as “limited as possible.”<sup>99</sup>
159. In our interim report, published shortly after the introduction of the Bill in the Commons, we concluded:
- “the number, range and overlapping nature of the broad delegated powers would create what is, in effect, an unprecedented and extraordinary portmanteau of effectively unlimited powers upon which the Government could draw. They would fundamentally challenge the constitutional balance of powers between Parliament and Government and would represent a significant—and unacceptable—transfer of legal competence. We stress the need for an appropriate balance between the urgency required to ensure legal continuity and stability, and meaningful parliamentary scrutiny and control of the executive.”<sup>100</sup>
160. These powers are set out principally, but not exclusively, in clauses 7–9. We assess these powers clause by clause, drawing attention in particular to their breadth and to Henry VIII powers. The broad delegated powers in the Bill must be read in light of the issues to which we drew attention earlier in this report concerning the complexities and ambiguities with the concept of retained EU law, including uncertainties as to its domestic legal status. The application of broad delegated powers to uncertain legal concepts is very likely to lead to serious difficulties, which strengthens the case for the amendments to the Bill we propose in Chapters 4 and 5.

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94 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal) Bill* (3rd Report, Session 2017–19, HL Paper 22)

95 *European Union (Withdrawal) Bill Delegated Powers Memorandum*, para 14

96 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 45

97 *Ibid.*, para 46

98 *Ibid.*, para 47

99 *Ibid.*, para 46

100 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 44



161. Clause 7 provides a general power to deal with deficiencies in the law arising from withdrawal. More specific provisions in clauses 8 and 9 relate respectively to compliance with international obligations and implementing any withdrawal agreement.

### Clause 7

162. Clause 7(1) provides:

“A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate—

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU.”

### *Appropriateness*

163. The power for ministers to do what they consider “appropriate” is subjective and wide. The Faculty of Advocates stated:

“Clause 7(1), which contains the principal corrective power, is formulated to enable an exercise of power which is ‘appropriate’ rather than ‘necessary’. As a matter of standard legal interpretation, the latter term would be understood as containing an objective test, whereas the word ‘appropriate’ is subjective, being in essence a matter of the Minister’s opinion—albeit she would [be required] to act reasonably and rationally when deciding whether it was ‘appropriate’ to make a particular provision. There is also concern about whether more policy-driven changes might be made under the head of appropriateness. Necessity might be thought to require a more clearly evidenced justification from the Minister.”

They continued “It would also provide reassurance that the exercise of the power is more obviously litigable, ‘necessity’ being a test that judges can more readily adjudicate than ‘appropriateness’.”<sup>101</sup>

164. The minister, Steve Baker MP, said “‘necessary’ could be interpreted as ‘logically essential’, and if there were a spectrum of choices then one could say that no one of them was logically essential because there was a choice. So we think it is right to say ‘appropriate’.”<sup>102</sup> **We do not agree with the minister that the interpretation of “necessary” by the courts would limit the remedies available to address a deficiency in retained EU law; it would require only that a remedy was required.**
165. A similar issue regarding the use of the word “appropriate” arose in relation to the Sanctions and Anti-Money Laundering Bill 2017–19.<sup>103</sup> Clause 1 of that Bill, as introduced, provided that “An appropriate Minister may make sanctions regulations where that Minister considers that it is appropriate” for a number of purposes. In response to consideration of the Bill in the

101 Written evidence from the Faculty of Advocates ([EUW0033](#))

102 [Q 53](#) (Steve Baker MP)

103 [Sanctions and Anti-Money Laundering Bill \[HL\] 2017–19](#)



House of Lords, the Government tabled an amendment at report stage that stated:

“An appropriate Minister may not decide that it is appropriate to make regulations to which this section applies unless, in respect of each discretionary purpose stated in the regulations, that Minister—

(a) has considered whether there are good reasons to pursue that purpose and has determined that there are, and

(b) has considered whether the imposition of sanctions is a reasonable course of action for that purpose and has determined that it is.”

166. The amendment further required that the minister, when making regulations, lay a report before Parliament stating how they reached their conclusion that there were “good reasons” and that this was a “reasonable course of action”. The amendment was agreed by the House on 15 January 2018.
167. **The power of ministers to do what they consider “appropriate” is subjective and inappropriately wide. 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 scrutinised by Parliament. It will also provide a meaningful benchmark against which use of the power may be tested judicially.**

### *Deficiencies*

168. Clause 7(2) elaborates on the types of “deficiencies” the power is intended to address. While the “deficiencies” set out in clause 7(2) are designed to form an exhaustive, rather than illustrative list, clause 7(3) states that anything similar to the list in 7(2) may count as a deficiency and allows ministers to describe or provide for additional deficiencies by regulation.
169. The delegated powers memorandum states:
- “The purpose of the power is carefully described. It is limited to addressing failures of EU law to operate effectively or any other deficiencies which arise from withdrawal; it avoids an attempt at defining ‘necessary’ changes. There are some changes that might not strictly be necessary for the law to remain functional but will resolve clear deficiencies.”<sup>104</sup>
170. The terms “failure” and “deficiency” are vulnerable to broad interpretation. Clause 7(9) expands clause 7(1) by linking the terms “failure or other deficiency” to the operation of any other provision in the Bill. It is left to the subjective opinion of a minister to determine what a “deficiency” is. This extends the possible scope of an already loosely framed provision.
171. A number of witnesses drew attention to clause 7 being unclear and vague.<sup>105</sup> The Faculty of Advocates wrote “The draftsman’s lexicon contains a selection of terms whose meaning is clearly left to the courts. Thus, the concept of a

<sup>104</sup> [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 38

<sup>105</sup> See, for example, written evidence from Client Earth ([EUW0021](#)).

‘deficiency’ is not defined; however it seems likely that ministers will need to be prepared to justify in advance the substance of any identified deficiency.”<sup>106</sup> They pointed out that in housing law<sup>107</sup> “the word ‘deficiency’ does not have any particular legal connotation. It simply means ‘something lacking’.”<sup>108</sup>

172. As we pointed out in our interim report, although the courts, using their judicial review powers, may rule on whether a minister has taken an overbroad view in exercising the power, their task will be made difficult by the breadth of the power and, more generally, the overlapping nature of delegated powers in the Bill.<sup>109</sup> Professor Young concluded that these powers were “broad and vaguely worded” and that this could give rise to potential litigation.<sup>110</sup>
173. Richard Greenhill explained that:
- “delegated legislation is vulnerable to quashing if a court considers it to be *ultra vires*. The broader the enabling powers, the more likely courts are to infer that Parliament cannot have intended such powers to exist without implied limits. Uncertainty as to such limits risks undermining confidence in the state of the law with the possibility of administrative chaos if important regulations are retroactively quashed.”<sup>111</sup>
174. The Government stated, “Any list of deficiencies cannot be prospective as the Government must have the necessary flexibility to reflect the outcome of the negotiations. The serious consequences of not correcting these deficiencies and leaving gaps in the UK statute book has been widely recognised.” It added that it “is committed under the correcting power to making only appropriate changes to remedy deficiencies in retained EU law arising from the UK’s withdrawal from the EU.”<sup>112</sup> It is unclear, however, what this commitment adds, given that the power in the Bill can be used only to make amendments that ministers consider appropriate.
175. The Government argued that “The power in clause 7 in particular is intrinsically limited. To be exercised there must be a deficiency in retained EU law and this deficiency must be caused by withdrawal.”<sup>113</sup> The explanatory notes add: “The law is not deficient merely because a minister considers that EU law was flawed prior to exit.”<sup>114</sup> The minister, Steve Baker MP, told us “The Government do not propose these powers lightly, and we want to limit the powers that we take simply to those that we need in order to meet the purposes of the Bill.”<sup>115</sup>
176. **We are concerned that applying a subjective test of “appropriateness” to a broad term like “deficiency” makes the regulation-making power in clause 7(1) potentially open-ended. However, requiring that ministers set out the “good reasons” to use the power and that it is a “reasonable course of action”, as we recommend above (para 167), would ameliorate the subjective nature of “deficiencies”.**

106 Written evidence from the Faculty of Advocates ([EUW0033](#))

107 *Hall v Wandsworth LBC* [2005] 2 All [ER 192](#) (CA) per Carnwath LJ

108 Written evidence from the Faculty of Advocates ([EUW0033](#))

109 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 38

110 Written evidence from Professor Alison Young ([EUW0003](#))

111 Written evidence from Richard Greenhill ([EUW0025](#))

112 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

113 *Ibid.*

114 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 114

115 [Q 53](#) (Steve Baker MP)

*Policy versus technical changes*

177. Clause 7(7) restricts the general power given by clause 7. We previously advised that the Bill should “clearly set out a list of certain actions that *cannot* be undertaken by the delegated powers ... as another means of mitigating concerns that may arise over this transfer of legislative competence.”<sup>116</sup> Regulations under clause 7(7) may not impose or increase taxation, make retrospective provision, create a “relevant” criminal offence (those which carry a penalty of more than two years imprisonment<sup>117</sup>), or amend, repeal or revoke the Human Rights Act 1998 or, with limited exceptions, the Northern Ireland Act 1998. Powers under the clause also cannot be used to implement the withdrawal agreement, the vehicle for which is clause 9.
178. This is a narrow range of exclusions. As we noted in our interim report,<sup>118</sup> the limited scope of these restrictions is accentuated when read in light of the broad ministerial powers elsewhere in clause 7, in particular in clause 7(5) (discussed below).
179. In our report, *The ‘Great Repeal Bill’ and delegated powers*, we said that it was important “that the Bill should recognise the distinction ... between necessary amendment to the law to adapt it to Brexit, and discretionary amendments that are intended to implement changes to policy. The delegated powers granted by the Bill should allow the Government significant leeway to adapt EU law, without allowing those same powers to be used to effect substantive change to implement Government policy.”<sup>119</sup> We recommended that a general provision be included in the Bill to that effect.<sup>120</sup> No such provision is in the Bill. In our interim report we concluded that “the powers in the Bill as drafted provide considerable scope for significant policy changes to be made. The Bill therefore fails to respect the distinction for which we called in our earlier report between technical and policy changes.”<sup>121</sup> Although the explanatory notes state that the Bill “does not aim to make major changes to policy or establish new frameworks in the UK beyond those which are necessary to ensure the law continues to function properly from day one”,<sup>122</sup> it leaves open the possibility that the powers in the Bill could be used to make significant policy changes.
180. The Public Law Project said:

“Strikingly, the Explanatory Notes suggest that issues arising out of ‘reciprocal arrangements’ could be a basis for finding retained EU law deficient and that the powers could therefore be used to remove the rights of EU citizens in the UK. The explanation advanced is that because other EU states will no longer have any obligations to UK citizens, an obligation on the UK to respect EU citizens’ rights would be a ‘deficiency’ in retained EU law. This is an extraordinarily broad interpretation of the concept of ‘deficiency’. If correct, it signifies

116 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 51

117 [Clause 14](#)

118 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 42

119 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 43

120 *Ibid.*, para 50

121 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 39

122 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 14

that the powers in the Bill would allow Ministers through delegated legislation to make very significant changes to retained EU law not only in connection with the rights of EU citizens but more generally. Many other EU law obligations could be described as ‘reciprocal’ in this sense and therefore changed through delegated legislation if the powers in the Bill are not circumscribed.”<sup>123</sup>

181. Tom Brake MP said:

“in 20 years of being a member of Parliament I have never before experienced the sort of scope which the EU (Withdrawal) Bill gives to Ministers to do exactly what they want. They can make significant policy changes through secondary legislation. If new agencies have to be set up to take over from EU agencies, or if current agencies have to be given additional powers, you would expect that to come through primary legislation.”<sup>124</sup>

182. The minister, Steve Baker MP, told us:

“it would be wonderful to be able to tell you that we would make strictly no policy changes ... but I have to accept that I can say only that we will not make major policy changes, and that those would be brought forward in primary legislation.”<sup>125</sup>

183. The Solicitor General added “I can repeat the assurance, which we give repeatedly but importantly, that we do not intend to use the provisions in this Bill to sneak through substantial or substantive policy changes in a way that would not pass the test of proper parliamentary scrutiny.”<sup>126</sup>

184. **Given the wide scope of the powers in clause 7, and the subjectivity with which they may be used, ministerial assurances that the powers will not be used to make “major” or “substantive” policy changes are insufficient. The powers must be more tightly circumscribed on the face of the Bill so that they do not allow for major policy changes to be effected by them. We make a recommendation to this end below (para 211).**

### *Henry VIII powers*

185. Clause 7(1) is a potentially expansive Henry VIII power. The following provisions determine the scope of the power:

- Clause 7(5) makes clear that the regulation-making power in clause 7(1) is a general Henry VIII power: “Regulations under this section may make any provision that could be made by an Act of Parliament.”
- Clause 7(6) provides that the clause 7(1) power can be used for the purpose of transferring the functions of EU entities to domestic entities—a power that includes creating new domestic public authorities.
- Clause 7(6), similar to clause 7(2), gives examples of the types of matters to which the clause 7(1) power extends, but these examples are not exhaustive.

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123 Written evidence from the Public Law Project ([EUW0034](#))

124 [Q 14](#) (Tom Brake MP)

125 [Q 53](#) (Steve Baker MP)

126 [Q 48](#) (Robert Buckland QC MP)

186. While the clause 7(1) power may be expected to be used primarily to amend retained EU law, it is clear, both from clause 7 and from the explanatory notes, that the power extends beyond this. As the Government states in the explanatory notes: “The power could be used to amend law which is not retained EU law where that is an appropriate way of dealing with a deficiency in retained EU law.”<sup>127</sup>
187. **Clause 7 is an open-ended Henry VIII power, which allows for legal changes that would usually require primary legislation, for example creating public authorities under clause 7(6)(b). This power does not meet the recommendation of our earlier report, that it be “as limited as possible”.**
188. **We concluded in our interim report, “the Government will require some Henry VIII powers in order to amend primary legislation to facilitate the UK’s withdrawal from the European Union, but they should not be granted lightly, and they must come with commensurate safeguards and levels of scrutiny.”<sup>128</sup> The restrictions in clause 7(7) do little to mitigate the delegation of excessive powers to the Executive. The Henry VIII power in clause 7 is not subject to appropriately significant scrutiny (to which we turn in the next chapter).**

### Clause 8

189. Clause 8 contains a regulation-making power intended “to prevent or remedy any breach” of international obligations arising from withdrawal.<sup>129</sup> As with clause 7, the power in clause 8 is not restricted to modifying retained EU law.
190. Clause 8 contains a Henry VIII power in similar terms to clause 7(5) with restrictions on the power analogous to those in clause 7(7). But the restriction on using the power to impose or increase taxation does not apply in clause 8. As with clause 7, the power may be used when the minister considers it “appropriate”. However, the requirement that its use is “to prevent or remedy any breach, arising from the withdrawal of the United Kingdom from the EU, of the international obligations of the United Kingdom”<sup>130</sup> makes it more clearly targeted.
191. **While the clause 8 power is broad, it may be justified given the degree to which the UK’s international obligations will change as a result of the UK leaving the European Union. We recommend that the clause be amended, in line with our recommendation for clause 7 (para 167), to provide that power be available only when ministers consider it “appropriate”, can demonstrate that there are “good reasons” for its use and can show that the use of the power is a “reasonable course of action”.**

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127 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 122

128 Constitution Committee, [European Union \(Withdrawal\) Bill: interim report](#) (3rd Report, Session 2017–19, HL Paper 19), para 48

129 [Clause 8\(1\)](#)

130 *Ibid.*



## Clause 9

192. Clause 9 is a broad general power enabling the Government to legislate to implement a withdrawal agreement. Clause 9(1) states:

“A Minister of the Crown may by regulations make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day, subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.”<sup>131</sup>

193. The power may not be used until “a statute by Parliament approving the final terms of withdrawal” has been passed. The Government has committed to introducing an implementation bill to legislate for the outcome of the negotiations with the European Union, which would also serve the purpose of activating clause 9. Bill minister Steve Baker MP told us:

“The Clause 9 powers relate to things that we simply must have done by exit day or perhaps some preparatory measures that we might need to take by exit day that, for reasons of time, might need to run in parallel with the passage of the Bill. The substance of the implementation period is really a matter for that subsequent piece of legislation and would not be dealt with in this Bill and I would not expect us to use the Clause 9 powers to bring it forward.”<sup>132</sup>

194. Clause 9 contains a Henry VIII power in similar terms to clause 7(5), with the addition that it may be used to amend the European Union (Withdrawal) Act itself. The restrictions on this power are analogous to those in clause 7(7), save for the restriction prohibiting the amendment or repeal of the Northern Ireland Act 1998. Professor Gordon Anthony told us:

“on one reading you could say that regulations under Clause 9 could be used to amend the Northern Ireland Act to give effect to the withdrawal agreement. A number of questions relate to that. First, can secondary legislation be used to amend a constitutional statute? The other relates to the procedures that govern the making of regulations, which are in paragraph 6 of Schedule 7. That refers to resolutions in both Houses of Parliament but does not include any role for the Northern Ireland institutions.”<sup>133</sup>

195. Robin Walker MP explained the Government’s position:

“The provisions under Clause 9 would allow us only to implement the terms of the withdrawal agreement and the result of negotiations with the EU. It is therefore important that any changes to the Northern Ireland Act that might be needed to give effect to the agreement can be made. Unlike the known amendments that were made in the Bill to correct deficiencies, we cannot know exactly what amendments would look like until an agreement on our withdrawal from the EU has been made, but we have been very clear that any changes would have to be devolution-neutral—they would not make any change to the competencies in that respect—and of course would have to be compliant with our international

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131 [Clause 9\(1\)](#)

132 [Q 49](#) (Steve Baker MP)

133 [Q 36](#) (Professor Gordon Anthony)



obligations under the existing international agreements between Britain and Ireland and our obligations under the Belfast agreement. So we are talking about very minor technical things that would reflect the withdrawal agreement reached between the UK and the EU.”<sup>134</sup>

He added that any policy change required under the withdrawal agreement in relation to Northern Ireland would take place in the implementation bill rather than through use of the clause 9 power.<sup>135</sup>

196. **It would require the strongest of justifications for ministers to be given a broad power by regulations to alter as they think “appropriate” any existing law, including the Act providing the power, on the basis of the terms of the withdrawal agreement.**
197. **As the clause 9 power cannot be used until a further Act has been passed—likely to be the withdrawal and implementation bill—we cannot see any justification for the inclusion of the power in this Bill. Parliament will be better placed to scrutinise the appropriateness of such a power, and the restrictions and safeguards it might require, when the terms of the withdrawal agreement are known. We recommend that clause 9 be removed from the Bill.**

### Sunset clauses

198. In our report, *The ‘Great Repeal Bill’ and delegated powers*, we concluded that:

“The extent to which sunset clauses will be a viable means of controlling the powers granted to the Government ... will depend on the specifics of the Bill ... if the Government seek discretion to domesticate and amend significant elements of the body of EU law by secondary legislation, then it is essential Parliament consider how that discretion might be limited over time.”<sup>136</sup>

199. The Bill includes sunset provisions on the powers in clauses 7–9: those in clauses 7 and 8 will be available for two years from exit day, while the power in clause 9 expires on exit day. We received evidence suggesting that the powers could be used to amend the Act and bypass the sunset clauses.<sup>137</sup> This would be unacceptable, however we do not consider that regulations to achieve such effect would be approved by Parliament even if they were to be proposed by Government.
200. **Although we welcome the inclusion of the sunset provisions in clauses 7(8), 8(4) and 9(4), they do not resolve the other problems with these powers.**

### Clause 17

201. Clause 17(1) empowers ministers by regulations to make such provision as they consider “appropriate” in consequence of the Bill, permitting modification of “any provision made by or under an enactment”. It is a Henry VIII power. The power is limited such that it applies only to primary legislation passed or

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134 [Q 52](#) (Robin Walker MP)

135 *Ibid.*

136 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 73

137 Written evidence from Unlock Democracy ([EUW0032](#)) and Dr Antonios Kouroutakis, IE Law School ([EUW0024](#))

made before the end of the parliamentary session in which the Bill is passed i.e., assuming the Bill is enacted this session, only to Acts passed in or before session 2017–19.<sup>138</sup>

202. It is difficult fully to envisage what use might be made of these powers. Earlier we noted the Government’s view that clause 17(1) would allow ministers to designate items of retained EU law as either primary or secondary legislation in the domestic context (see para 67). This would allow these “consequential” powers, which in most bills are intended to be used only for technical or other ancillary matters, to be used to make major structural changes to the meaning of retained EU law.
203. The Government stated in the delegated powers memorandum that there were precedents for such wide consequential powers.<sup>139</sup> It argued that, given the uncertainty of the situation, the Government needed these wide powers.<sup>140</sup> While similar provisions exist in other statutes, in light of the other extensive powers in this Bill and the ambiguities about how they might be used, these examples are imperfect analogies. The consequential powers in this Bill will have broader application than similar provisions in other statutes.
204. Clause 17(5) empowers a minister by regulations to make such transitional, transitory or saving provision as the minister considers appropriate in connection with the coming into force of any provision of the Bill. As with clause 17(1), the possible uses of the power must be assessed in the broader context of the Bill. While the regulation-making power under clause 17(1) is subject to the negative procedure, regulations under clause 17(5) may be subject to no parliamentary procedure. Richard Greenhill said that clause 17(5) “gives ministers the power to make significant and potentially controversial transitional arrangements without the guarantee of even negative procedure scrutiny by Parliament.”<sup>141</sup> He added, “It is customary for most Acts to enable commencement and transitional regulations to be made without any parliamentary scrutiny and without requiring such regulations to be laid before Parliament. But this is inappropriate in the special case of Brexit, where policy choices relating to timing and transition are uncertain and momentous in their own right.”<sup>142</sup>
205. **Clause 17 supplements and expands the already broad Henry VIII power in clause 7. There are minimal restrictions on its use and the wide range of purposes for which it might be used are not clearly foreseeable.**
206. **We agree that the Government may require a power to make “transitional, transitory and saving provisions”. However, we are concerned that the Bill creates a power to make “consequential provisions” which is potentially very broad in scope, has the capacity to go well beyond what are ordinarily understood to be consequential matters and includes a Henry VIII power. If Parliament has approved, subject to detailed and appropriate circumscription, other**

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138 [Clause 17\(3\)](#)

139 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 97 citing “section 92 of the Immigration Act 2016, section 213 of the Housing and Planning Act 2016, section 115 of the Protection of Freedoms Act 2012, section 59 of the Crime and Courts Act 2013 and section 73(2) of the Immigration Act 2014.”

140 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 98

141 Written evidence from Richard Greenhill ([EUW0025](#))

142 *Ibid.*

**broad delegated powers for ministers, it would be constitutionally unacceptable to undo these restrictions and protections by conferring a general power on ministers to make “consequential provisions” to alter other enactments. We recommend that the power to make “consequential provisions” in clause 17 is removed.**

## CHAPTER 9: SCRUTINY OF DELEGATED POWERS

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### Introduction

207. Effective parliamentary scrutiny of the extensive regulation-making powers in the Bill is essential. Parliament must ensure that the information provided alongside the regulations allows for proper scrutiny and that the procedures the regulations will be subject to are appropriate. A number of our witnesses set out arguments along these lines.<sup>143</sup>

### Explanatory memoranda

208. In our report, *The ‘Great Repeal Bill’ and delegated powers*, we recommended that ministers should “sign a declaration in the Explanatory Memorandum to each statutory instrument amending the body of EU law stating whether the instrument does no more than necessary to ensure that the relevant aspect of EU law will operate sensibly in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the outcome of negotiations with the EU.”<sup>144</sup> We further recommended that “the Explanatory Memorandum to each statutory instrument sets out clearly what the EU law in question currently does (before Brexit); what effect the amendments made by the statutory instrument will have on the law (as it will apply after Brexit) or what changes were made in the process of conversion; and why those amendments or changes are necessary.”<sup>145</sup>

209. The Government committed to meet part of the latter recommendation, which we welcomed in our interim report.<sup>146</sup> The Bill requires that all explanatory memoranda accompanying statutory instruments must:

- explain what any relevant EU law did before exit day,
- explain what is being changed or done and why, and
- include a statement that the minister considers that the instrument does *no more than what is appropriate* (emphasis added).<sup>147</sup>

210. During committee stage in the House of Commons, the Government amended the Bill to require that explanatory memoranda also “contain information regarding the impact of the instrument on equalities legislation.”<sup>148</sup>

211. **We welcome the requirements in the Bill for publishing explanatory memoranda for instruments resulting from the Bill. If our earlier recommendation is accepted (para 167), we would expect the memoranda to include a statement from the minister setting out the ‘good reasons’ for the regulations and explaining that this constitutes a ‘reasonable course of action’. We further recommend that explanatory memoranda should include a certification from the minister that the regulation does no more than make technical**

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143 See, for example, written evidence from Association of British Insurers ([EUW0022](#)) and Dr Antonios Kouroutakis, IE Law School ([EUW0024](#)).

144 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 102(1)

145 *Ibid.*, para 102(2)

146 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), paragraph 52

147 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 60

148 HC Deb, 12 December 2017, [col 282](#)

**changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made. Such certification would assist Parliament to identify which instruments need greater scrutiny.**

### *Parliamentary procedures*

212. Clause 16 gives effect to schedule 7, which contains scrutiny procedures for each delegated power in the Bill. Schedule 7 sets out three scrutiny procedures: negative, draft affirmative and made affirmative.
213. Witnesses expressed concern about the parliamentary procedures for scrutinising regulations flowing from the Bill. Unlock Democracy said “if parliament proceeds ahead using the existing procedures for scrutinising delegated legislation, it will simply not be able to do its scrutiny job properly, and will certainly be open to the charge of abdicating very serious oversight responsibilities.”<sup>149</sup> It argued that “it is completely untenable, from both a practical and democratic perspective, to use existing procedures, given the wide scope of the powers and sheer number of statutory instruments arising from the bill that will need scrutiny in what is likely to be a short time frame. The bill must be taken as an opportunity for the serious reform that is needed.”<sup>150</sup>

### *Negative procedure*

214. Most instruments will be subject to the negative procedure, whereby they are approved automatically after a set period of time, without parliamentary debate, unless either House objects or they are withdrawn by the Government. The Government justified the use of the negative procedure: “We anticipate a large number of fairly straightforward changes, including to primary legislation, will be needed in consequence of this Bill.”<sup>151</sup>
215. **We do not consider that it is appropriate for the Henry VIII powers in this Bill to be exercisable by the negative procedure, particularly as they might be used to make legislation of substantive policy significance. The Government has not offered sufficient justification for the widespread application of the negative procedure in this context, given the constitutional implications for the separation of powers.**

### *Affirmative procedure*

216. Instruments subject to the affirmative procedure require the formal approval of both Houses of Parliament before they become law, but cannot be amended. Part 1 of schedule 7 sets out scrutiny procedures for the regulation-making powers contained in clause 7 of the Bill. Paragraph 1(1) and (2) determine which measures require affirmative procedure. They are:
- Establishing a new public authority in the United Kingdom
  - Transferring functions to a newly created public authority
  - Transferring EU legislative functions to a public authority in the UK
  - The setting of new fees or charges by a public authority

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149 Written evidence from Unlock Democracy ([EUW0032](#))

150 *Ibid.*

151 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 100

- Creating or widening the scope of a criminal offence (clauses 7–9 read with clause 14 expressly preclude the creation by regulations of a criminal offence which carries a possible prison sentence of more than two years)
  - Creating or amending a power to legislate.
217. Even some of the areas which require affirmative procedure are concerning since they encompass matters for which primary legislation would normally be required—for example, for establishing a public authority. Client Earth argued:
- “While it may be necessary to temporarily assign existing functions to existing domestic bodies, or to seek continued relationships with certain EU bodies where possible, or to establish new institutions via powers in the Withdrawal Bill, these measures should be temporary and subject to proper review in due course ... Any new domestic governance institutions established in the wake of Brexit must have adequate resources, full independence, relevant expertise and sufficient legal powers. Such bodies should be established by Parliament (not Government).”<sup>152</sup>
218. Professor Young argued that the limited instances in the Bill where the draft affirmative resolution procedure has to be used do not cover “all of the situations where delegated legislation may involve the exercise of a policy choice.”<sup>153</sup>
219. **We are concerned that, despite the broad powers in clauses 7–9 to make changes to retained EU law, only a narrow range of matters are subject to affirmative procedure. The narrowly-circumscribed set of circumstances for which affirmative procedure is required is constitutionally unacceptable. If the regulation-making process is deemed acceptable by Parliament for the use of these powers, the Bill should provide for the application of the affirmative procedure in relation to any measure which involves the making of policy.**

*Made affirmative procedure*

220. The made affirmative procedure, set out in paragraph 3 of schedule 7, is designed for urgent cases. It allows an instrument which would otherwise be subject to affirmative procedure to be made “without a draft of the instrument being laid before, and approved by a resolution of, each House of Parliament if it contains a declaration that the Minister of the Crown concerned is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved.”<sup>154</sup> The procedure allows instruments to be made and come into force before they are debated by Parliament. The Government justifies this procedure as there may be insufficient time available to make necessary changes before exit day using the draft affirmative procedure, and because of the “exceptional circumstances” of withdrawing from the EU.<sup>155</sup> The only safeguard is that regulations which take effect through made affirmative procedure cannot remain in force unless approved by both Houses within one month.<sup>156</sup>

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152 Written evidence from Client Earth ([EUW0021](#))

153 Written evidence from Professor Alison Young, University of Oxford ([EUW0003](#))

154 [Schedule 7, paragraph 3\(2\)](#)

155 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), paras 52–53

156 [Schedule 7, paragraph 3\(4\)](#)



221. Professor Young argued, “there is a need for detailed scrutiny over the decision of the Minister of the Crown that a matter is so urgent that it requires to be enacted without Parliamentary approval, particularly as measures taken under that measure will remain lawful even if the measure itself is not approved within a month and new regulations can be made, presumably, if still urgent, through the same procedure.”<sup>157</sup> The Public Law Project stated that “The potency of the powers that could be exercised in ‘urgent’ cases is hard to overstate. Ministers could deprive people of their liberty and Parliament would not be able to do anything about it ... Particularly worryingly, acts done while the provisions were in force would retain the force of law, even if Parliament later struck down the law.”<sup>158</sup>
222. In our report on fast-track legislation, we accepted that in limited circumstances a fast-track affirmative procedure may be necessary.<sup>159</sup> But we qualified this with a reminder “of the importance of executive self-restraint”.<sup>160</sup> **We reiterate the conclusion of our interim report, that “given the significance of the issues at stake, and the breadth of the powers involved, we are not convinced that urgent procedures are acceptable.”**<sup>161</sup> **The made affirmative procedure should be far more tightly drawn and controlled in the Bill.**

#### Additional committee scrutiny

223. We argued in our report, *The ‘Great Repeal Bill’ and delegated powers*, that the Government should “make a recommendation for each statutory instrument as to the appropriate level of parliamentary scrutiny that it should undergo.”<sup>162</sup> A parliamentary committee or committees should consider that recommendation and be able to recommend a strengthened scrutiny procedure as appropriate. A statutory instrument amending “EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure.”<sup>163</sup> However, as we noted in our interim report, “Given the breadth of the powers in the Bill, and the possibility that these will be used to make substantive policy changes, we are concerned that no consideration has been given to the need for enhanced parliamentary procedures.”<sup>164</sup>
224. A number of witnesses advocated a strengthened scrutiny procedure or additional committee scrutiny.<sup>165</sup> Sir Keir Starmer QC MP told us that he was in favour of “an additional category in the triaging”<sup>166</sup> of secondary legislation and noted that “having that triaging, that greater scrutiny and the ability to do something about the secondary legislation will be really

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157 Written evidence from Professor Alison Young, University of Oxford ([EUW0003](#))

158 Written evidence from the Public Law Project ([EUW0034](#))

159 Constitution Committee, *Fast-track Legislation: Constitutional Implications and Safeguards* (15th Report, Session 2008–09, HL Paper 116), para 139

160 *Ibid.*

161 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), paragraph 60

162 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123), para 102(3)

163 *Ibid.*

164 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 54

165 See, for example, written evidence from the Association of British Insurers ([EUW0022](#)), Professor Alison Young, University of Oxford ([EUW0003](#)) and the Environmental Policy Forum ([EUW0016](#)).

166 [Q 26](#) (Sir Keir Starmer QC MP)

important, given the wider range of policy issues covered and the great volume that is going to come through in pretty short order.”<sup>167</sup>

225. We concluded in our interim report that the Bill failed to adopt our proposal for “a sifting mechanism within Parliament that considers whether a particular piece of delegated legislation contains policy decisions that should trigger an enhanced form of Parliamentary scrutiny.”<sup>168</sup> However, during committee stage on the Bill in the House of Commons, the Government announced its support for amendments proposed by Charles Walker MP, Chair of the Commons Procedure Committee, to create a sifting committee to examine the statutory instruments (SIs) flowing from the Bill and to report on the procedure to which they should be subject.<sup>169</sup>
226. **We welcome the establishment of a sifting committee in the Commons to consider whether negative instruments resulting from this Bill are subject to the appropriate procedure. The House of Lords will need to adjust its procedures to address this task and may wish to consider whether a joint committee should be established with this function.**
227. **The Bill does not give the sifting committee(s) power to strengthen the parliamentary control of an instrument, only to recommend that it be strengthened. We recommend that committee(s) should be empowered to decide the appropriate scrutiny procedure for an instrument, subject to the view of the House, in order to provide the necessary degree of parliamentary oversight.**
228. **In our view, the Bill as drafted proposes scrutiny measures that are inadequate to meet the unique challenge of considering the secondary legislation that the Government will introduce once the Bill is passed.**

#### *Role of the House of Lords*

229. The Government expects around 800–1,000 statutory instruments to flow from the Bill to deliver Brexit. It is essential that the House of Lords has capacity to scrutinise these effectively, especially in the limited time available.
230. Baroness Evans of Bowes Park, the Leader of the House of Lords, told us:
- “it is worth noting that it is quite common to have about 1,000 SIs in a one-year session, so one could say that in a two-year session 2,000 is not extraordinary. But I accept that we are in a different situation, which is why we are taking our role seriously. As a Government we are looking at the part that we play to make sure that SIs come to the House in a much better state than perhaps they have done in the past. That is why the Parliamentary Business and Legislation Committee, of which I am a member, is now overseeing secondary as well as primary legislation.”<sup>170</sup>
231. She continued: “We have the head of the Policy Profession, First Parliamentary Counsel and the head of the Government Legal Department overseeing a panel of civil servants who are reviewing the quality of Explanatory Memoranda. In every department we also now have a nominated Minister

167 [Q 26](#) (Sir Keir Starmer QC MP)

168 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 10

169 See [paragraph 13 of schedule 7](#). The Government has tabled draft Commons standing orders to establish the sifting committee in the House of Commons.

170 [Q 54](#) (Baroness Evans of Bowes Park)

who is in charge of secondary legislation in their department and a senior responsible civil servant working with them.”<sup>171</sup>

232. In terms of the House of Lords scrutiny, Baroness Evans said:

“We have a highly regarded Committee structure. I think that there is a unique role and voice for the Lords and we will be looking to build on what we have and to ensure that we have a comparable process to that in the Commons for these particular SIs under the Bill ... I am minded to look at building on the work of the Secondary Legislation Scrutiny Committee, enhancing its resources so that, hopefully, it can play a comparable role in dealing with the SIs.”<sup>172</sup>

The Leader of the House indicated that discussions would take place with the relevant committees and the usual channels on how to proceed.

233. **We look forward to the Leader of the House bringing forward proposals for scrutiny in the House of Lords early in the passage of the Bill. Enhanced scrutiny will be essential for the statutory instruments resulting from this Bill, once it has passed, and from other Brexit-related Bills. We welcome the commitment from the Leader of the House to enhance the resources available to the House for this scrutiny.**

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171 [Q 54](#) (Baroness Evans of Bowes Park)

172 *Ibid.*

## CHAPTER 10: DEVOLUTION

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### Introduction

234. The Bill addresses devolution in two main ways. Clause 10 and schedule 2 confer on the devolved administrations power to make regulations which correspond to the powers conferred on UK ministers by clauses 7 to 9. The schedule 2 powers are however “shared” with UK ministers. Clause 11 restricts the powers of devolved institutions in relation to retained EU law, giving determining power to UK ministers and providing for joint decision making in certain situations.
235. The primary concern we have in this process is that the devolution settlements must not be undermined. We welcome the discussions that are currently taking place between the UK government and the devolved administrations to seek consensus on the approach of the Bill to meeting the challenges posed by Brexit.

### Clause 10

236. Clause 10 confers powers “involving” devolved authorities rather than directly “on” devolved authorities. The clause, in conjunction with schedule 2, paragraph 1(1), provides devolved executives with powers analogous to those given to UK ministers by clause 7 to deal with deficiencies arising from withdrawal. In general, schedule 2 replicates the main provisions of clauses 7, 8 and 9, empowering devolved institutions to make similar regulations. It also contains specific restrictions, including that no regulations may be made by a devolved authority unless every provision of them is within the competence of the devolved authority. The powers are tailored to each of the devolved territories to reflect differences in competence and institutional structure. Schedule 2, paragraph 1(2) gives a parallel power to UK ministers “acting jointly with a devolved authority”.
237. We heard concerns about the lack of involvement for devolved administrations in the use of the powers in the Bill. The Faculty of Advocates stated, “There is currently no formal role for consultation with, let alone consent from, the devolved authorities to the exercise of powers by UK ministers in otherwise devolved matters.” They argued that “There is an urgent need for some form of mechanism for consultation to be agreed and adopted, and we suggest there is no reason in principle why design of that process should not begin now, even before the Bill is enacted.”<sup>173</sup>
238. Professor Mullen *et. al.* argued that “a formal requirement for UK Ministers to seek consent for the use of powers in devolved areas should be sought on grounds of political practice and constitutional principle.” They pointed to section 30 of the Scotland Act 1998, “which requires draft orders [devolving competence] to be approved by both Houses of the UK Parliament and by the Scottish Parliament”, and to the Sewel convention, and commented that these “formal mechanisms for consent, even where (as was the case with the independence referendum) the constitutional stakes are high, can be established in a way that engenders a productive co-operation and dialogue between the centre and the devolved institutions.”<sup>174</sup>

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173 Written evidence from the Faculty of Advocates ([EUW0033](#))

174 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde ([EUW0023](#))

239. The Government explained how it envisages the parallel power being used:

“It is therefore the devolved institutions themselves who will make the amendments in the majority of cases for areas that fall within their competence. The powers conferred on UK Government ministers by the Bill can also be used to amend domestic laws in devolved areas. This reflects the approach taken, for example, in respect of s2(2) of the ECA which is used for the implementation of EU law. The power has been used in this way, for example, for reasons of efficiency where the same change is being made across all four nations. We have committed that these powers will not normally be used to amend domestic law in areas of devolved competence without the agreement of the relevant devolved administration.”<sup>175</sup>

240. At report stage in the House of Commons, the Government amended the Bill such that the devolved administrations no longer generally need to receive the “consent” of UK ministers to make regulations using these powers, however they may not proceed until after “consulting” with the UK Government.

### Clause 11

241. Clause 11 amends the devolution statutes to restrict competence in relation to retained EU law. At present, under the Scotland Act 1998,<sup>176</sup> the Northern Ireland Act 1998<sup>177</sup> and the Government of Wales Act 1998 (substantially amended by the Government of Wales Act 2006<sup>178</sup>), the devolved legislatures cannot make law incompatibly with EU law. Each of these Acts<sup>179</sup> is amended by clause 11 so that the restriction concerning EU law is removed, but a new restriction is introduced: an Act of a devolved legislature “cannot modify, or confer power by subordinate legislation to modify, retained EU law.” This restriction does not apply “so far as the modification would, immediately before exit day, have been within the legislative competence” of the legislature in question.

242. The restriction also does not apply so far as Her Majesty may by Order in Council provide. Therefore, where the UK Parliament and the relevant devolved legislature agree, areas of legislative competence can be released to the devolved administrations, permitting them to modify retained EU law.<sup>180</sup> The Government explained:

“The purpose of the power is to provide an appropriate mechanism to broaden the parameters of devolved competence in respect of retained EU law. It therefore adopts a similar approach to the established procedure within the devolution legislation for devolving new powers (e.g. s.30 orders in the Scotland Act 1998). Without the power it would be necessary for the UK Parliament to pass primary legislation (having sought Legislative Consent Motions from the relevant devolved legislatures) in order to release areas from the new competence limit.”<sup>181</sup>

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175 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

176 Scotland Act 1998 [section 29\(2\)\(d\)](#)

177 Northern Ireland Act 1998, [section 6](#)

178 Government of Wales Act 2006, [section 108A](#)

179 In the case of Wales, the 2006 Act.

180 Further ancillary provisions are inserted in the Government of Wales Act 2006 and the Northern Ireland Act 1998 as to how such Orders in Council are to be made.

181 [European Union \(Withdrawal\) Bill Delegated Powers Memorandum](#), para 91

### Constitutional implications

243. In our interim report, we noted that “the UK’s departure from the European Union will have profound consequences for the devolution settlement within the UK. The ambiguities and uncertainties in the Bill extend to issues of devolved competence and this has implications for the balance of the power within the Union and the future of the devolution settlements.”<sup>182</sup> The Government argued that “The current devolution settlements were agreed after the UK became a member of what is now the EU and reflect that context. As a Member State of the EU we did not need to consider where the powers exercised at EU level would sit within the UK if we were not a member. However, now, as we leave the EU, that is a question we do have to consider.”<sup>183</sup>

244. We heard arguments that the Bill fails to recognise the constitutional significance and autonomy of the devolved institutions.<sup>184</sup> Professor Richard Rawlings, Professor of Public Law, University College London stated:

“when clause 11 is put together with the future trumping by Parliamentary Sovereignty of retained EU law, and more particularly with the central capacities to add to, or otherwise modify, that newly classified body of law, the scale of the potential shift in the constitutional balance as between the three Celtic lands and the UK Government and government of England is made apparent. At one and the same time, Westminster and Whitehall are freed up to shape a post-Brexit world in crucial respects, and the devolved institutions are locked down and required to wait for partial release. However nicely dressed up, this is formal recentralisation of power and exercise of constitutional hierarchy in spades ... the dry and technical language cannot disguise the constitutional and political significance of proposals pursued in the name of legal certainty and continuity.”<sup>185</sup>

245. We also heard arguments that “As powers are ‘released’ piecemeal from Westminster, this would be a move towards a conferred powers model, in contrast to the original reserved powers model.”<sup>186</sup> Professor Mullen *et. al.* went further and argued that clause 11 alters:

“the framework of the devolution settlements by replacing a cross-cutting constraint on devolved competence with what is effectively a new set of reservations. It would also overlay the current reserved powers model of devolution with a conferred powers model in relation to retained EU law. This is not a mere technicality; rather the reserved powers model is a central element of the constitutional strength of the current devolution arrangements.”<sup>187</sup>

246. However, the Bill minister Robin Walker MP told us:

“The Orders in Council power is modelled on the power in the Scotland Act, which is very clearly a reserved powers model and not a conferred

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182 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), p 2

183 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

184 Written evidence from Unlock Democracy ([EUW0032](#))

185 Written evidence from Professor Richard Rawlings, University College London ([EUW0015](#))

186 Written evidence from Professor Michael Keating, University of Aberdeen ([EUW0008](#))

187 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde ([EUW0023](#))



powers model ... maintaining that framework first and foremost is the logical conclusion of a Bill designed to provide continuity and certainty, but we are clear that there are mechanisms in the Bill to increase the competence of each of the devolved Administrations through that power ... We think that it reflects the existing constitutional arrangements, but we want to provide the maximum reassurance possible.”<sup>188</sup>

He added, “there is no question of intruding on that or on the existing competence of the devolved Administrations. It is very important to reflect that the Bill explicitly protects their existing competence.”<sup>189</sup>

247. This view was not shared by committees of the Scottish Parliament and the Welsh Assembly. The Finance and Constitution Committee of the Scottish Parliament said, “Clause 11 represents a fundamental shift in the structure of devolution in Scotland” and its effect “will be to adversely impact upon the intelligibility and integrity of the devolution settlement in Scotland.”<sup>190</sup> The External Affairs and Additional Legislation Committee of the National Assembly for Wales advised removing “the clause 11 restriction on the devolution settlement ... [as it] places a new and significant constraint on the devolution settlement and shifts the power dynamic around setting common UK frameworks firmly in the direction of the UK Government.”<sup>191</sup>
248. While amendments to clause 11 were defeated during committee stage in the House of Commons, the Secretary of State for Scotland said that the Government would table its own amendments to clause 11.<sup>192</sup> However, no Government amendments were tabled at report stage and clause 11 remains unchanged.
249. **Clauses 10 and 11 create an area of joint responsibility. While the Government has clarified aspects of how joint responsibility will operate, there remains significant uncertainty as to how and when these joint powers will be exercised. We are left only with assurances from the Government that it hopes to identify quickly, in consultation with the devolved administrations, which powers can be transferred to the devolved institutions.**
250. **Clause 11 has significant potential consequences for the devolution settlements if the transfer of powers and competences from the EU level to the devolved administrations does not take place swiftly and smoothly post-Brexit. We urge the Government to work closely with the devolved authorities to secure agreement on a revised clause 11.**

### Common frameworks

251. The Government’s principal policy objective, in connection with clauses 10 and 11, is to identify areas which need a common approach across the UK and then to release areas of competence “where it is agreed that a common approach established by EU law does not need to be maintained and can be

188 [Q 52](#) (Robin Walker MP)

189 *Ibid.*

190 Scottish Parliament Finance and Constitution Committee, *European Union (Withdrawal) Bill LCM—Interim Report*, 1st Report, 2018 (Session 5), SP Paper 255, 9 January 2018

191 National Assembly for Wales External Affairs and Additional Legislation Committee, Letter from the Chair to Welsh MPs on the European Union (Withdrawal) Bill, Annex 1: Objectives explained, 10 October 2017: <http://www.senedd.assembly.wales/documents/s67198/Annex%201%20-%20Objectives%20Explained.pdf> [accessed 24 January 2018]

192 HC Deb, 6 December 2017, [cols 1019–21](#)

changed.”<sup>193</sup> The Government produced a list of the existing EU competences that interact with the devolved settlements, to inform discussions about common frameworks. It identifies 111 areas for Scotland, 64 for Wales and an estimated 149 for Northern Ireland.<sup>194</sup>

252. Following a meeting of the Joint Ministerial Committee (EU Negotiations) in October 2017, the Government and the devolved administrations agreed the principles which should govern the establishment of common frameworks. The communique explained:

“As the UK leaves the European Union, the Government of the United Kingdom and the devolved administrations agree to work together to establish common approaches in some areas that are currently governed by EU law, but that are otherwise within areas of competence of the devolved administrations or legislatures. A framework will set out a common UK, or GB, approach and how it will be operated and governed. This may consist of common goals, minimum or maximum standards, harmonisation, limits on action, or mutual recognition, depending on the policy area and the objectives being pursued. Frameworks may be implemented by legislation, by executive action, by memorandums of understanding, or by other means depending on the context in which the framework is intended to operate.”<sup>195</sup>

253. However, the Faculty of Advocates said:

“the list of areas where the UK government considers that a common policy framework may be required is long, and its content is very broadly drawn. Some of the 111 areas listed are so imprecise as to be incapable of meaningful understanding, for example ‘land use’. If this list is the basis for identifying where proposed legislation of the Scottish Parliament post exit may involve an area that ‘need(s) a common framework’, it threatens to encroach on matters that are already devolved and legislated on by Holyrood under the current settlement. Moreover, the Faculty entertains considerable doubt that identification and release of areas that matter to the Scottish administration could take place ‘rapidly’.”<sup>196</sup>

254. Professor Tom Mullen *et. al.* said:

“While there are good arguments in principle for the development of new mechanisms to ensure co-ordination between the UK and devolved levels in order to replicate the unifying force currently exerted by EU law, this does not justify the allocation of all repatriated EU competences to the UK level. It is implausible to suggest that common UK frameworks are required in all areas currently governed by EU law.”<sup>197</sup>

255. Sir Keir Starmer QC MP told us, “essentially where competence has been devolved, the powers coming back from Brussels ought to go to the devolved

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193 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#), para 39

194 House of Commons Public Administration and Constitutional Affairs Committee, *Devolution and Exiting the EU and Clause 11 of the European Union (Withdrawal) Bill: Issues for Consideration* (First Report, Session 2017–19, HC 484), Appendix 1

195 Joint Ministerial Committee (EU Negotiations) Communique, 16 October 2017, <https://www.gov.uk/government/news/progress-made-at-eu-talks-with-devolved-governments--2> [accessed 24 January 2018]

196 Written evidence from the Faculty of Advocates ([EUW0033](#))

197 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde ([EUW0023](#))

Administrations ... Rather than holding it, we would devolve it, but we accept that there needs to be a framework for dealing with areas where different considerations apply.”<sup>198</sup>

256. The Government pointed out that the arrangements are only intended to last until decisions on common approaches are taken: “Where frameworks are not needed, policy areas can be released from the transitional arrangement in the Bill, including through the Order in Council procedure.”<sup>199</sup> Robin Walker MP told us “there is an understanding that many of the various lists of the powers ... would not require common frameworks.”<sup>200</sup>

257. However, Professor Rawlings said that:

“this process does not establish positive duties on the part of the UK Government to devolve. Legally-speaking, suggested ‘transitional’ elements could so easily become permanent features. Nor need one be an expert in game theory to appreciate the way in which clause 11 stacks the cards in favour of the centre when negotiating the different design choices with common frameworks.”<sup>201</sup>

258. The External Affairs and Additional Legislation Committee of the National Assembly for Wales explained that, whilst UK-wide frameworks will be necessary in a number of policy areas, “these should be agreed on a parity of esteem basis between the governments and legislatures of the United Kingdom and not imposed by the UK Government, even on a time-limited basis.”<sup>202</sup>

259. Professor Anthony suggested that one way of improving clause 11 “might be to replace it with a series of discrete clauses that deal with common frameworks and which are negotiated in advance of ‘exit day’. The primary advantage here would be that such clauses might (at least partly) democratise the Bill from a devolved perspective. The primary challenge with such an approach would be timelines and the need to work within those presently associated with Brexit.”<sup>203</sup>

260. **The agreement of common frameworks is essential to ensure that those areas that are currently governed by EU law return to the UK in a way that both maintains a common UK approach where needed and respects the principles of the territorial constitution. Securing such agreement will also help assuage concerns over the possible ramifications of clause 11 and may help secure legislative consent to the Bill by the devolved legislatures. It is important that all parties to the negotiations have similar incentives and work constructively to reach an agreement on the approach to common frameworks. We urge the UK Government and the devolved administrations to seek swift and tangible progress towards such frameworks in their negotiations.**

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198 [Q 32](#) (Sir Keir Starmer QC MP)

199 Written evidence from the Department for Exiting the European Union ([EUW0036](#))

200 [Q 52](#) (Robin Walker MP)

201 Written evidence from Professor Richard Rawlings, University College London ([EUW0015](#))

202 National Assembly for Wales External Affairs and Additional Legislation Committee, Letter from the Chair to Welsh MPs on the European Union (Withdrawal) Bill, Annex 1: Objectives explained, 10 October 2017: <http://www.senedd.assembly.wales/documents/s67198/Annex%201%20-%20Objectives%20Explained.pdf> [accessed 24 January 2018]

203 Written evidence from Professor Gordon Anthony, Queen’s University Belfast ([EUW0038](#))

### Inter-governmental relations

261. Effective inter-governmental relations will be crucial in identifying those areas to be released to devolved competence. We have commented in previous reports<sup>204</sup> on the need for more effective inter-governmental relations. In our report on *Inter-governmental relations in the United Kingdom* we concluded, “The operation of the Joint Ministerial Committee (JMC) structure is not well regarded—at least in the eyes of the devolved administrations. The plenary JMC meeting of heads of government is seen as ineffective while its Domestic subcommittee does not appear to serve a useful purpose.”<sup>205</sup>
262. Unlock Democracy and Client Earth commented on the Joint Ministerial Committee. Both suggested that its current operation was inadequate and that new mechanisms for communication, consultation and power-sharing were required.<sup>206</sup> We noted in our *Sessional report 2016–17*<sup>207</sup> that a joint letter from Scottish and Welsh ministers to the UK Government in June 2017 had identified ways to improve the operation of the JMC, such as scheduling regular meetings, agreeing agendas further in advance and ensuring that the devolved administrations could initiate policy proposals.<sup>208</sup>
263. Robin Walker MP told us:

“The initial agreement on the JMC process, on the principles under which some powers would be agreed for shared frameworks and some released so as to increase the competence of the devolved Administrations in this respect, is really important. That process is running alongside this legislation, but, clearly, progress with that will allow us to provide further reassurance. I said to the Scottish Parliament’s committee on delegated legislation that by taking forward the JMC process and the conversation about where frameworks need to be shared and where they do not, where they need to be legislative and where they do not, we can significantly limit the scope of Clause 11 of the Bill, which I think will answer a lot of the questions and concerns that have been raised.”<sup>209</sup>

264. **Effective inter-governmental relations are essential to achieve a smooth transfer of competences from the EU level to the devolved administrations and to agree new common UK frameworks. We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions.**

### Legislative consent and the Sewel convention

265. The UK Parliament, having regard to the Sewel convention, does not normally legislate within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without the

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204 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146); Constitution Committee, *The Union and devolution* (10th Report, Session 2015–16, HL Paper 149)

205 Constitution Committee, *Inter-governmental relations in the United Kingdom* (11th Report, Session 2014–15, HL Paper 146), summary

206 Written evidence from Unlock Democracy (EUW0032) and from Client Earth (EUW0021)

207 Constitution Committee, *Sessional report 2016–17* (1st Report, Session 2017–19, HL Paper 6), para 28

208 Letter from Mark Drakeford AM/AC and Michael Russell MSP to David Davis MP, 15 June 2017: <https://beta.gov.scot/news/scottish-and-welsh-governments-write-to-brexite-secretary-david-davis/> [accessed 24 January 2018]

209 Q 52 (Robin Walker MP)

consent of the relevant legislature. As we have previously explored in other reports, the limits of the Sewel convention are unclear; in particular, it is not clear to what extent the convention also applies to alterations to the powers of these legislatures themselves.<sup>210</sup> The explanatory notes referred to “the practice of the Government to seek the consent of the devolved legislatures for provisions which would alter the competence of those legislatures or of the devolved administrations” and stated that the Government would seek legislative consent for certain provisions in the Bill.<sup>211</sup>

266. In their initial assessments of the Bill, committees of the Scottish Parliament and the National Assembly for Wales did not recommend granting legislative consent.<sup>212</sup> The First Ministers of Scotland and Wales said in a joint statement: “the Scottish and Welsh Governments cannot recommend that legislative consent is given to the Bill as it currently stands.”<sup>213</sup>

267. A number of witnesses addressed the Sewel convention.<sup>214</sup> Professor McMullen noted that the convention applies in ‘normal’ circumstances and said:

“it might be argued that such a step would be justifiable as Brexit constitutes an abnormal situation falling outwith the scope of the Sewel Convention. There is no clear constitutional understanding as to what circumstances are sufficiently abnormal to justify ignoring a refusal of devolved consent as the situation has never arisen before. However, it is at least arguable that, given the seriousness of the constitutional issues at stake, lack of devolved consent should only be overridden in cases of necessity, or ... where a devolved legislature is acting in a manner which constitutes an abuse of its power. Clearly, it is not necessary that the EUW Bill be enacted in its current form in order to secure an orderly Brexit; nor can it reasonably be suggested that the devolved legislatures are abusing their powers by withholding consent to the Bill.”<sup>215</sup>

268. Professor Anthony said that consent could be problematic in relation to Northern Ireland:

“the issue is of course complicated by the absence of a sitting Executive and Assembly, which gives rise to a number of queries. One is whether the consent of the Assembly might in any event be sought, as the Assembly has not been suspended and is, in theory at least, able to reconvene at any moment. Another query concerns what would happen if the Assembly did meet and whether a vote would be carried.”<sup>216</sup>

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210 Constitution Committee, *The Scotland Bill* (6th Report, Session 2015–16, HL Paper 59), para 38

211 *Explanatory Notes to the European Union (Withdrawal) Bill*, paras 71–72

212 Scottish Parliament Finance and Constitution Committee, *European Union (Withdrawal) Bill LCM - Interim Report*, 1st Report, 2018 (Session 5), SP Paper 255, 9 January 2018; National Assembly for Wales Constitutional and Legislative Affairs Committee, *The Welsh Government’s Legislative Consent Memorandum on the European Union (Withdrawal) Bill*, December 2017

213 Scottish Government, ‘EU (Withdrawal) Bill’, 13 July 2017: <https://beta.gov.scot/news/eu-withdrawal-bill/> [accessed 24 January 2018]

214 See, for example, written evidence from Dr Ludivine Petetin and Dr Annegret Engel, Cardiff University (EUW0013) and Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde (EUW0023).

215 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde (EUW0023)

216 Written evidence from Professor Gordon Anthony, Queen’s University Belfast (EUW0038)



269. The UK Supreme Court made clear in *Miller v. Secretary of State for Exiting the European Union* that the Sewel convention is not legally enforceable.<sup>217</sup> However, as we noted in our interim report, “While the legislative consent of the devolved institutions may not be legally required, as the UK Parliament remains sovereign, the political and constitutional consequences of proceeding with the Bill without consent would be significant and potentially damaging.”<sup>218</sup> This view was shared by a number of our witnesses. Professor Paul Craig, University of Oxford, said “if compromise is not reached on this issue then the likely outcome will be legislative override by Westminster to force through changes to the devolution legislation, which the devolved administrations are not willing to accept. The constitutional ramifications of this would be serious; the political consequences unpredictable.”<sup>219</sup> Professor Tom Mullen *et. al.* told us that it would be a “major constitutional step to override a refusal of devolved consent.”<sup>220</sup>

270. However, for the Government Robin Walker MP said:

“It is absolutely our intention to work with the devolved Administrations. I have referred to the JMC process and the agreement on where there are going to be common frameworks and where there are not. We can and will seek consent through that process and I think we can get it. We are committed to the Sewel convention. We as the Government helped to write it into legislation in the Wales Act 2017 and the Scotland Act 2016.”<sup>221</sup>

271. **The constitutional consequences of proceeding with the Bill without legislative consent from the devolved legislatures would be significant and potentially damaging, both to the UK’s withdrawal from the European Union and to the union of the United Kingdom. It is imperative that the Government brings forward amendments to clause 11 and works through the Joint Ministerial Committee to ensure an agreed approach to the return of competences from Brussels and pan-UK agreement on common frameworks.**

### Northern Ireland

272. We heard evidence on the implications of the Bill for Northern Ireland. There has not been a functioning devolved Executive and Assembly in Northern Ireland since January 2017.

273. BrexitLawNI said:

“While it may be agreed that powers can eventually be conferred on Northern Ireland ... the current position does merit the ‘power-grab’ label it has been given in Scotland and Wales. There are also questions raised about whether the Bill sufficiently recognises current levels of constitutional distinctiveness as well as future issues (for example, around proposed ‘special arrangements’) that may arise under the Withdrawal Agreement. There is still a live debate on the island of

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217 *R (Miller) v Secretary of State for Exiting the European Union* [2017] [UKSC 5](#)

218 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), para 76

219 Written evidence from Professor Paul Craig, University of Oxford ([EUW0002](#))

220 Written evidence from Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale, University of Strathclyde, and Professor Aileen McHarg, University of Strathclyde ([EUW0023](#))

221 [Q 52](#) (Robin Walker MP)



Ireland and at EU level on the notion of ‘special status’ or some form of ‘special arrangements’ that reflect the unique circumstances of Northern Ireland. Nothing in this Bill should rule out or prejudice the outcome of those negotiations or those discussions.”<sup>222</sup>

274. Unlock Democracy told us that the implications of the Bill on the Northern Ireland Act 1998 were significant because the “principle of devolution was central to the Northern Ireland peace agreement.”<sup>223</sup> Professor Anthony pointed out that “the House of Lords, in the *Robinson* judgment, described the Northern Ireland Act, as read with the Belfast agreement, as a constitution.”<sup>224</sup>

275. Professor Anthony said that references to the European Union appear throughout the Belfast/Good Friday Agreement and that these may need to be revised:

“joint membership by the Republic of Ireland and the United Kingdom of the European Union was an assumed ongoing reality and determined a lot of the logic of the Belfast Agreement. Fluid notions of sovereignty, of citizenship and of national identity—if those are different from citizenship—all those things defined the Belfast Agreement and took place within a framework of EU membership.”<sup>225</sup>

276. He went on to explain that:

“subject to the terms of any withdrawal agreement, the text of the Belfast Agreement may need to be amended not just in the light of the above inconsistencies but also in the light of whatever is contained in any withdrawal agreement. While it is, again, unclear whether an agreement will be reached, it can be anticipated that, if one is arrived at, particular provision may be made for Northern Ireland. In that circumstance, it may make sense either to amend the wording of the Belfast Agreement or add an addendum on how it is to be read for the purposes of any EU-UK withdrawal accord.”<sup>226</sup>

277. Professor Anthony questioned whether, if significant changes were required, there might need to be consideration of whether it would need to be endorsed again by referendums in Northern Ireland and the Republic of Ireland, as the original agreement had been.<sup>227</sup> He explained:

“On one reading, it might be argued that, if the Belfast Agreement is to be amended in the light of Brexit, the matter is one that should be brought back to the electorates for their approval. While this argument perhaps loses some of its force given that some (minor) aspects of the Belfast Agreement have already been changed by subsequent inter-party agreements—most notably at the time of the St Andrews Agreement of 2006—the implications of Brexit are such that they engage not only the Northern Ireland political parties but also two sovereign states. Any changes to the Belfast Agreement that are foundational may therefore require direct democratic legitimation on both sides of the Irish border.”<sup>228</sup>

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222 Written evidence from BrexitLawNI ([EUW0014](#))

223 Written evidence from Unlock Democracy ([EUW0032](#))

224 [Q 35](#) (Professor Gordon Anthony)

225 [Q 39](#) (Professor Gordon Anthony)

226 Written evidence from Professor Gordon Anthony, Queen’s University Belfast ([EUW0038](#))

227 [Q 39](#) (Professor Gordon Anthony)

228 Written evidence from Professor Gordon Anthony, Queen’s University Belfast ([EUW0038](#))

278. The Bill minister, Robin Walker MP, did not think “anyone is talking about amending the Belfast agreement.”<sup>229</sup> During committee stage in the House of Commons, he confirmed the Government’s support for the principles of the Agreement and said that the Government would work across the House “to ensure that the approach that we take is absolutely in line with the Belfast Agreement”.<sup>230</sup>
279. **The implications of the UK’s departure from the European Union for Northern Ireland, given their complexity and sensitivity, require special and urgent consideration by the Government.**
280. **We recommend that the Government publish an assessment of the effect of the Bill and the UK’s withdrawal from the EU on the Belfast/Good Friday Agreement before the completion of the Bill’s consideration in the House of Lords.**

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229 [Q 52](#) (Robin Walker MP)

230 HC Deb, 6 December 2017, [col 1092](#)

## **SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS**

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### **Repeal of the European Communities Act 1972**

1. The revised definition of “exit day” in the Bill sets appropriate limits on ministerial discretion and provides greater clarity as to the relationship between “exit day” as it applies in domestic law and the date on which the UK will leave the European Union as a matter of international law. It also allows the Government a degree of flexibility to accommodate any change to the date on which EU treaties cease to apply to the UK. (Paragraph 15)

### **Retained EU law**

2. Clause 2 appears significantly broader than it needs to be. (Paragraph 21)
3. It is not constitutionally necessary or appropriate for primary legislation, which will continue in force in any event, to be treated as “retained EU law” by clause 2 and subject to the powers of amendment in clause 7. (Paragraph 22)
4. The implications of the Bill for reciprocal rights remain uncertain, as such rights are inextricably linked to the legal relationship between the UK and the EU post-exit. The full impact of Brexit upon reciprocal rights will not be known until the UK’s future relationship with the EU is determined. This highlights a broader issue that the uncertain environment in which the Bill is being considered makes it difficult fully to assess its likely consequences, including its constitutional implications, at the time of its passage. (Paragraph 37)
5. The ambiguities in the interpretation and effect of clause 4 will inevitably cause legal uncertainty about a fundamental provision of the Bill. This will undermine one of the Government’s main objectives in bringing forward this Bill. The ambiguities need to be resolved. (Paragraph 38)

### **Status of retained EU law**

6. Retained direct EU law will be domestic law. There is no reason why Parliament cannot or should not assign to retained direct EU law a recognisable domestic legal status. The fact that retained EU law began life as something other than domestic law does not prevent Parliament from assigning it a domestic legal status once it becomes domestic law. Nor does the fact that retained direct EU law originated outside the domestic legal system provide any good reason for neglecting to assign it a domestic legal status once it is recognised as domestic law. (Paragraph 44)
7. 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. (Paragraph 51)
8. 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. (Paragraph 52)

9. We consider this approach to be fundamentally problematic. It is incomplete because it addresses the status of retained direct EU law for some purposes but not for others. It jeopardises legal certainty because assigning different statuses to retained EU law for different purposes, while assigning no status to it for some other purposes, is highly likely to cause confusion. The creation of such confusion is undesirable and incompatible with the Bill's objective of securing legal continuity and certainty as the UK leaves the EU. (Paragraph 54)
10. If our recommendation is accepted to assign all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be removed from the Bill, since it will become redundant. (Paragraph 56)
11. If the Bill is not amended so as to assign to all retained direct EU law a single legal status, paragraph 19 of schedule 8 should be amended so that it provides not only for the legal status (for the purposes of the Human Rights Act 1998) of retained direct EU legislation under clause 3, but also for the legal status (for HRA purposes) of the category of retained EU law to which clause 4 gives rise. (Paragraph 57)
12. If our principal recommendation to assign retained direct EU law a single legal status is not implemented, paragraph 3 of schedule 8 should be amended to clarify whether the retained EU law to which clause 4 gives rise is to be treated, for delegated powers purposes, in the same way as retained direct EU legislation under clause 3. (Paragraph 60)
13. We do not consider that it is appropriate to treat all retained direct EU law as secondary legislation for the purpose of determining whether it is subject to delegated powers in legislation other than this Bill. To do so would leave retained direct EU law, as defined by clauses 3 and 4, open to possible revocation by powers within existing Acts of Parliament which may not currently be readily ascertainable. From the perspective of legal certainty this situation is constitutionally unacceptable. (Paragraph 62)
14. As we recommend above (para 52), all retained direct EU law should be treated as domestic primary legislation for all purposes, including for the purpose of determining whether it is subject to the exercise of delegated powers contained in legislation other than this Bill. (Paragraph 64)
15. We recognise that the effect of our proposal is to render even technical and mundane elements of retained direct EU law immune from the use of non-Henry VIII delegated powers. However, we do not consider it possible to lay down in the Bill any formula capable of satisfactorily distinguishing between retained direct EU law that should be treated for this purpose as primary legislation and that which should be treated as secondary legislation. We therefore conclude that on balance, and applying a constitutional precautionary principle, it is preferable to treat all retained direct EU law as primary legislation. This will protect important legal norms and rights from revocation by the use of delegated powers which are not Henry VIII powers and which, as such, are often subject to lesser forms of parliamentary control and scrutiny than are Henry VIII powers (which are usually subject to the affirmative procedure). (Paragraph 65)
16. In addition, our proposed designation of all retained direct EU law as primary legislation would greatly improve legal certainty. Since this designation would exempt retained direct EU law from revocation by secondary law-making

powers other than Henry VIII powers, it should be far easier to identify its vulnerability to change. Henry VIII powers which might be used to amend or repeal this law are a considerably narrower category than the more general and far broader category of secondary legislative powers to which retained direct EU law would otherwise be vulnerable were it designated as secondary legislation. (Paragraph 66)

17. It is constitutionally unacceptable for ministers to have the power to determine something as fundamental as whether a part of our law should be treated as primary or secondary legislation. (Paragraph 69)
18. The “case-by-case” approach favoured by the Government would produce a highly inconsistent tapestry of EU law, with given provisions having a different status for different purposes, and individual provisions having a different status from each other. This is a recipe for confusion and legal uncertainty. (Paragraph 70)

### **The “supremacy principle”**

19. During UK membership of the EU, EU law takes priority over domestic law. This is well-recognised and it would be destabilising if, upon exit, retained EU law’s status radically changed such that pre-exit domestic law could prevail over it. However, while we support the policy aims that underpin clause 5(1) and (2), we consider—for reasons that we explain in the next section—that the way in which those provisions purport to give effect to these aims is conceptually flawed, sits uncomfortably with the doctrine of parliamentary sovereignty and is a potential source of legal confusion. (Paragraph 79)
20. It is constitutionally unacceptable for the Bill to be ambiguous as to what retained EU law the “supremacy principle” will apply. It is insufficient for the Solicitor General to suggest that there is a shared assumption as to what the “supremacy principle” means and that it will therefore function in the Bill as the Government wishes it to. If references to the “supremacy principle” were to be preserved in the Bill, then clause 5 should be amended to set out clearly the intended scope of the principle. (Paragraph 83)
21. If references to the “supremacy principle” were to be preserved in the Bill, then clause 5 would need to be amended to provide courts and others with suitable guidance for the purpose of determining whether a rule of the common law should be taken to have been “made” before or after exit. Providing such guidance is unlikely to be a straightforward matter. However, we do not make any specific proposals about what the form or content of any such guidance should be, because we consider, for reasons set out below, the notion of retaining the “supremacy principle” to be misconceived. (Paragraph 87)
22. We consider that the notion of maintaining the “supremacy principle” following exit amounts to a fundamental flaw at the heart of the Bill. We do not consider that clause 5 clearly operates to bestow “supremacy” on retained EU law once exit day arrives. The “supremacy” of EU law will cease to apply when the UK leaves the EU and Parliament repeals the ECA. Retained EU law, being domestic law, cannot benefit from “the principle of the supremacy of EU law”. (Paragraph 89)
23. The “supremacy principle” is alien to the UK constitutional system: not only did it originate outside that system, it also sits uncomfortably

with established constitutional principles, most notably the doctrine of parliamentary sovereignty. If the cumbersome device of seeking to maintain the “supremacy principle” post-exit were the only means of seeking to give retained EU law priority over pre-exit domestic legislation, then attempting to leverage such an approach might be comprehensible, if not necessarily effective. However, as we set out below, we consider that the requisite status can be given to retained EU law in a way that is more straightforward and which accords with UK constitutional principles. (Paragraph 91)

24. We consider the objective of giving retained direct EU law priority over pre-exit, but not post-exit, domestic law to be a sensible one. However, we regard the means employed by clause 5 in seeking to deliver that object to be fundamentally flawed. In our view, the way to deliver this objective would be to put to one side the concept and language of supremacy, and to focus on the domestic legal status of retained direct EU law. We recommend that retained direct EU law should be made to prevail over pre-exit domestic law by providing in the Bill that retained direct EU legislation under clause 3 and all law that is converted into domestic law by clause 4 is to be treated as having the status of an Act of the UK Parliament enacted on exit day. (Paragraph 93)
25. No equivalent provision needs be made in relation to EU-derived domestic legislation under clause 2: such legislation already has the status of either primary or secondary legislation in domestic law, and already has a domestic date of enactment. Legal continuity will best be served by treating EU-derived domestic legislation as what it has always been: namely, domestic primary or secondary legislation in the ordinary sense. (Paragraph 94)
26. Treating retained EU law saved by clauses 3 and 4 as primary legislation would avoid the need for any “supremacy principle”, and would greatly simplify its constitutional position by ascribing to it a status consistent with the doctrine of parliamentary sovereignty. It would also complete the task of excising EU law from domestic law by making clear that retained direct EU law is, after exit day, domestic rather than EU law, subject only to the doctrines and principles of the UK constitution and not in any way contingent for its status upon the externally-derived constitutional doctrines of the EU. (Paragraph 99)
27. If the “supremacy principle” were to continue to feature in the Bill, clause 5(3) would need to be amended to clarify the extent to which retained EU law can be modified while retaining the benefit of that principle, and to clarify in what circumstances the modification of pre-exit domestic law would be such as to turn it into post-exit domestic law that is no longer vulnerable to the operation of the “supremacy principle”. However, in the light of our principal recommendation, that retained direct EU law should be treated as primary legislation enacted on exit day (para 93), we make no detailed recommendations on these matters. (Paragraph 103)

### **Charter of Fundamental Rights**

28. The primary purpose of this Bill is to maintain legal continuity and promote legal certainty by retaining existing EU law as part of our law, while conferring powers on ministers to amend the retained EU law. If, as the Government suggests, the Charter of Fundamental Rights adds nothing to the content of EU law which is being retained, we do not understand why an exception needs to be made for it. If, however, the Charter does add value, then legal



continuity suggests that the Bill should not make substantive changes to the law which applies immediately after exit day. (Paragraph 119)

29. We recommend that the Government provides the House of Lords with an updated view about the applicability of the *Francovich* principle and any transitional arrangements regarding it. (Paragraph 123)

### **Interpretation of retained EU law**

30. The Bill takes a clear and sensible approach to the applicability of pre-exit case law post-Brexit. (Paragraph 131)
31. The Bill leaves it to judges to decide when it is appropriate to be guided by post-exit CJEU case law—and, when it is, what amount of weight should be ascribed. We are concerned that the Bill leaves courts without proper guidance on this fundamental question of policy and that, by deciding to attach weight or indeed not to attach weight to post-exit CJEU cases, judges may become involved in political controversy (Paragraph 141)
32. We recommend that the Bill should provide that a court or tribunal shall have regard to judgments given by the CJEU on or after exit day which the court or tribunal considers relevant to the proper interpretation of retained EU law. We further recommend that the Bill should state that, in deciding what weight (if any) to give to a post-exit judgment of the CJEU, the court or tribunal should take account of any agreement between the UK and the EU which the court or tribunal considers relevant. (Paragraph 142)
33. We recommend that the Government’s statement accompanying regulations which modify retained EU law (see para 211) should also provide an explanation of the intention of the modification, to guide the courts in applying clause 6(3). (Paragraph 144)
34. The inclusion of “among other things” in clause 6(3) generates unnecessary uncertainty about the provision and should be removed or replaced with specific other factors. (Paragraph 146)
35. Preventing new references to the Court of Justice of the European Union after exit day provides clarity and certainty for new litigation; however it may undermine procedural fairness and access to justice in cases that were already under way, albeit that they had not, by exit day, resulted in a reference to the CJEU. Litigants in cases that began before the notification of withdrawal under Article 50 of the Treaty on European Union, or indeed before the referendum in 2016, will be treated differently in a way that was not reasonably foreseeable when their cases began. We recommend that the Government seek to clarify in any withdrawal or transition agreement whether domestic courts can continue to make references to the CJEU in relation to cases that began before exit day. (Paragraph 150)
36. The Government proposes to provide for the handling of pending cases with the CJEU in the withdrawal agreement and implementation bill. However, in the event that a withdrawal agreement is not reached, a bill would be needed to make provision on pending cases. We recommend that, irrespective of any implementation bill, pending cases are dealt with in the European Union (Withdrawal) Bill. We further recommend that rulings on cases that have been referred to the CJEU before exit day are treated as pre-exit case law—such that they form part of “retained EU case law”—and that the Government publishes, on exit day, a list of all such cases. (Paragraph 153)

37. We recommend that, as with cases that have already commenced (see para 150), the Government seek to clarify in any withdrawal or transition agreement whether domestic courts can make references to the CJEU after exit day in relation to new cases, where the cause of action arose prior to exit day, subject to the normal statute of limitations. (Paragraph 154)
38. If a transition period is agreed, the Government will need to provide for the operation of retained EU case law and its interaction with the CJEU in the withdrawal agreement and implementation bill. (Paragraph 156)

### Delegated powers

39. We do not agree with the minister that the interpretation of “necessary” by the courts would limit the remedies available to address a deficiency in retained EU law; it would require only that a remedy was required. (Paragraph 164)
40. The power of ministers to do what they consider “appropriate” is subjective and inappropriately wide. 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 scrutinised by Parliament. It will also provide a meaningful benchmark against which use of the power may be tested judicially. (Paragraph 167)
41. We are concerned that applying a subjective test of “appropriateness” to a broad term like “deficiency” makes the regulation-making power in clause 7(1) potentially open-ended. However, requiring that ministers set out the “good reasons” to use the power and that it is a “reasonable course of action”, as we recommend above (para 167), would ameliorate the subjective nature of “deficiencies”. (Paragraph 176)
42. Given the wide scope of the powers in clause 7, and the subjectivity with which they may be used, ministerial assurances that the powers will not be used to make “major” or “substantive” policy changes are insufficient. The powers must be more tightly circumscribed on the face of the Bill so that they do not allow for major policy changes to be effected by them. We make a recommendation to this end below (para 211). (Paragraph 184)
43. Clause 7 is an open-ended Henry VIII power, which allows for legal changes that would usually require primary legislation, for example creating public authorities under clause 7(6)(b). This power does not meet the recommendation of our earlier report, that it be “as limited as possible”. (Paragraph 187)
44. We concluded in our interim report, “the Government will require some Henry VIII powers in order to amend primary legislation to facilitate the UK’s withdrawal from the European Union, but they should not be granted lightly, and they must come with commensurate safeguards and levels of scrutiny.” The restrictions in clause 7(7) do little to mitigate the delegation of excessive powers to the Executive. The Henry VIII power in clause 7 is not subject to appropriately significant scrutiny (to which we turn in the next chapter). (Paragraph 188)
45. While the clause 8 power is broad, it may be justified given the degree to which the UK’s international obligations will change as a result of the UK

leaving the European Union. We recommend that the clause be amended, in line with our recommendation for clause 7 (para 167), to provide that power be available only when ministers consider it “appropriate”, can demonstrate that there are “good reasons” for its use and can show that the use of the power is a “reasonable course of action”. (Paragraph 191)

46. It would require the strongest of justifications for ministers to be given a broad power by regulations to alter as they think “appropriate” any existing law, including the Act providing the power, on the basis of the terms of the withdrawal agreement. (Paragraph 196)
47. As the clause 9 power cannot be used until a further Act has been passed—likely to be the withdrawal and implementation bill—we cannot see any justification for the inclusion of the power in this Bill. Parliament will be better placed to scrutinise the appropriateness of such a power, and the restrictions and safeguards it might require, when the terms of the withdrawal agreement are known. We recommend that clause 9 be removed from the Bill. (Paragraph 197)
48. Although we welcome the inclusion of the sunset provisions in clauses 7(8), 8(4) and 9(4), they do not resolve the other problems with these powers. (Paragraph 200)
49. Clause 17 supplements and expands the already broad Henry VIII power in clause 7. There are minimal restrictions on its use and the wide range of purposes for which it might be used are not clearly foreseeable. (Paragraph 205)
50. We agree that the Government may require a power to make “transitional, transitory and saving provisions”. However, we are concerned that the Bill creates a power to make “consequential provisions” which is potentially very broad in scope, has the capacity to go well beyond what are ordinarily understood to be consequential matters and includes a Henry VIII power. If Parliament has approved, subject to detailed and appropriate circumscription, other broad delegated powers for ministers, it would be constitutionally unacceptable to undo these restrictions and protections by conferring a general power on ministers to make “consequential provisions” to alter other enactments. We recommend that the power to make “consequential provisions” in clause 17 is removed. (Paragraph 206)

### **Scrutiny of delegated powers**

51. We welcome the requirements in the Bill for publishing explanatory memoranda for instruments resulting from the Bill. If our earlier recommendation is accepted (para 167), we would expect the memoranda to include a statement from the minister setting out the ‘good reasons’ for the regulations and explaining that this constitutes a ‘reasonable course of action’. We further recommend that explanatory memoranda should include a certification from the minister that the regulation does no more than make technical changes to retained EU law in order for it to work post-exit, and that no policy decisions are being made. Such certification would assist Parliament to identify which instruments need greater scrutiny. (Paragraph 211)
52. We do not consider that it is appropriate for the Henry VIII powers in this Bill to be exercisable by the negative procedure, particularly as they might be

used to make legislation of substantive policy significance. The Government has not offered sufficient justification for the widespread application of the negative procedure in this context, given the constitutional implications for the separation of powers. (Paragraph 215)

53. We are concerned that, despite the broad powers in clauses 7–9 to make changes to retained EU law, only a narrow range of matters are subject to affirmative procedure. The narrowly-circumscribed set of circumstances for which affirmative procedure is required is constitutionally unacceptable. If the regulation-making process is deemed acceptable by Parliament for the use of these powers, the Bill should provide for the application of the affirmative procedure in relation to any measure which involves the making of policy. (Paragraph 219)
54. We reiterate the conclusion of our interim report, that “given the significance of the issues at stake, and the breadth of the powers involved, we are not convinced that urgent procedures are acceptable.” The made affirmative procedure should be far more tightly drawn and controlled in the Bill. (Paragraph 222)
55. We welcome the establishment of a sifting committee in the Commons to consider whether negative instruments resulting from this Bill are subject to the appropriate procedure. The House of Lords will need to adjust its procedures to address this task and may wish to consider whether a joint committee should be established with this function. (Paragraph 226)
56. The Bill does not give the sifting committee(s) power to strengthen the parliamentary control of an instrument, only to recommend that it be strengthened. We recommend that committee(s) should be empowered to decide the appropriate scrutiny procedure for an instrument, subject to the view of the House, in order to provide the necessary degree of parliamentary oversight. (Paragraph 227)
57. In our view, the Bill as drafted proposes scrutiny measures that are inadequate to meet the unique challenge of considering the secondary legislation that the Government will introduce once the Bill is passed. (Paragraph 228)
58. We look forward to the Leader of the House bringing forward proposals for scrutiny in the House of Lords early in the passage of the Bill. Enhanced scrutiny will be essential for the statutory instruments resulting from this Bill, once it has passed, and from other Brexit-related Bills. We welcome the commitment from the Leader of the House to enhance the resources available to the House for this scrutiny. (Paragraph 233)

### **Devolution**

59. Clauses 10 and 11 create an area of joint responsibility. While the Government has clarified aspects of how joint responsibility will operate, there remains significant uncertainty as to how and when these joint powers will be exercised. We are left only with assurances from the Government that it hopes to identify quickly, in consultation with the devolved administrations, which powers can be transferred to the devolved institutions. (Paragraph 249)
60. Clause 11 has significant potential consequences for the devolution settlements if the transfer of powers and competences from the EU level to the devolved administrations does not take place swiftly and smoothly

post-Brexit. We urge the Government to work closely with the devolved authorities to secure agreement on a revised clause 11. (Paragraph 250)

61. The agreement of common frameworks is essential to ensure that those areas that are currently governed by EU law return to the UK in a way that both maintains a common UK approach where needed and respects the principles of the territorial constitution. Securing such agreement will also help assuage concerns over the possible ramifications of clause 11 and may help secure legislative consent to the Bill by the devolved legislatures. It is important that all parties to the negotiations have similar incentives and work constructively to reach an agreement on the approach to common frameworks. We urge the UK Government and the devolved administrations to seek swift and tangible progress towards such frameworks in their negotiations. (Paragraph 260)
62. Effective inter-governmental relations are essential to achieve a smooth transfer of competences from the EU level to the devolved administrations and to agree new common UK frameworks. We urge the Government and the devolved administrations as a matter of urgency to work cooperatively to improve the operation of the Joint Ministerial Committee as the primary forum for these discussions. (Paragraph 264)
63. The constitutional consequences of proceeding with the Bill without legislative consent from the devolved legislatures would be significant and potentially damaging, both to the UK's withdrawal from the European Union and to the union of the United Kingdom. It is imperative that the Government brings forward amendments to clause 11 and works through the Joint Ministerial Committee to ensure an agreed approach to the return of competences from Brussels and pan-UK agreement on common frameworks. (Paragraph 271)
64. The implications of the UK's departure from the European Union for Northern Ireland, given their complexity and sensitivity, require special and urgent consideration by the Government. (Paragraph 279)
65. We recommend that the Government publish an assessment of the effect of the Bill and the UK's withdrawal from the EU on the Belfast/Good Friday Agreement before the completion of the Bill's consideration in the House of Lords. (Paragraph 280)

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Lord Beith  
 Baroness Corston  
 Baroness Drake  
 Lord Dunlop  
 Lord Hunt of Wirral  
 Lord Judge  
 Lord MacLennan of Rogart  
 Lord MacGregor of Pulham Market  
 Lord Morgan  
 Lord Norton of Louth  
 Lord Pannick  
 Baroness Taylor of Bolton (Chairman)

### Declarations of interest

Lord Beith  
*No relevant interests*

Baroness Corston  
*No relevant interests*

Baroness Drake  
*No relevant interests*

Lord Dunlop  
*No relevant interests*

Lord Hunt of Wirral  
*Partner, DAC Beachcroft LLP*  
*Chair, British Insurance Brokers Association*  
*Chair, Cornerstone Mutual Services Limited*  
*Director, Link Scheme Limited*  
*Director, GRP MGA HOLDCO LIMITED*

Lord Judge  
*No relevant interests*

Lord MacGregor of Pulham Market  
*No relevant interests*

Lord MacLennan of Rogart  
*No relevant interests*

Lord Morgan  
*No relevant interests*

Lord Norton of Louth  
*No relevant interests*

Lord Pannick  
*Practising Queen's Counsel specialising in constitutional and administrative law, including EU law. Represented the lead claimant, Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5*

Baroness Taylor of Bolton  
*No relevant interests*



A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

### **Legal Advisers**

Professor Mark Elliott, Professor of Public Law at the University of Cambridge, and Professor Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh, acted as specialist advisers for the inquiry. They both declared no relevant interests.

## APPENDIX 2: LIST OF WITNESSES

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Evidence is published online at <http://www.parliament.uk/hlconstitution-eu-withdrawal-bill> and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \*\* gave both oral evidence and written evidence. Those marked with \* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### Oral evidence in chronological order

- |    |  |                          |
|----|--|--------------------------|
| *  | Rt Hon. Lord Neuberger of Abbotsbury, former President of the Supreme Court                                | <a href="#">QQ 1–11</a>  |
| *  | Richard Gordon QC, Barrister   |                          |
| *  | Rt Hon. Tom Brake MP, Liberal Democrat Spokesperson for Exiting the European Union and International Trade | <a href="#">QQ 12–34</a> |
| *  | Rt Hon. Sir Keir Starmer QC MP, Shadow Secretary of State for Exiting the European Union                   |                          |
| ** | Professor Gordon Anthony, Queen’s University Belfast   | <a href="#">QQ 35–44</a> |
| *  | Steve Baker MP, Parliamentary Under Secretary of State, Department for Exiting the European Union          | <a href="#">QQ 45–54</a> |
| *  | Robin Walker MP, Parliamentary Under Secretary of State, Department for Exiting the European Union         |                          |
| *  | Robert Buckland QC MP, Solicitor General   |                          |
| *  | Rt Hon. Baroness Evans of Bowes Park, Leader of the House of Lords   |                          |

### Alphabetical list of all witnesses

- |    |   |                         |
|----|---|-------------------------|
|    | 38 Degrees  | <a href="#">EUW0028</a> |
|    | Professor Merris Amos   | <a href="#">EUW0006</a> |
| ** | Professor Gordon Anthony, Queen’s University Belfast ( <a href="#">QQ 35–44</a> )   | <a href="#">EUW0038</a> |
|    | Association of British Insurers   | <a href="#">EUW0022</a> |
| *  | Steve Baker MP, Parliamentary Under Secretary of State, Department for Exiting the European Union ( <a href="#">QQ 45–54</a> )          |                         |
|    | Mr Mikolaj Barczentewicz  | <a href="#">EUW0018</a> |
|    | Professor John Bell, University of Cambridge  | <a href="#">EUW0001</a> |
| *  | Rt Hon. Tom Brake MP, Liberal Democrat Spokesperson for Exiting the European Union and International Trade ( <a href="#">QQ 12–34</a> ) |                         |
|    | BrexitLawNI   | <a href="#">EUW0014</a> |

	Brexpat's - Hear our Voice	<a href="#">EUW0005</a>
*	Robert Buckland QC MP, Solicitor General ( <a href="#">QQ 45–54</a> )	
	The Chartered Institute of Taxation	<a href="#">EUW0019</a>
	ClientEarth	<a href="#">EUW0021</a>
	Professor Paul Craig, University of Oxford	<a href="#">EUW0002</a>
	Department for Exiting the European Union	<a href="#">EUW0036</a>
	Environmental Policy Forum	<a href="#">EUW0016</a>
	Equality and Diversity Forum	<a href="#">EUW0037</a>
*	Rt Hon. Baroness Evans of Bowes Park, Leader of the House of Lords ( <a href="#">QQ 45–54</a> )	
	The Faculty of Advocates	<a href="#">EUW0033</a>
	Dr Sam Fowles	<a href="#">EUW0035</a>
*	Richard Gordon QC, Barrister ( <a href="#">QQ 1–11</a> )	
	Mr Richard Greenhill	<a href="#">EUW0025</a>
	Professor Michael Keating, University of Aberdeen and Director of Centre on Constitutional Change	<a href="#">EUW0008</a>
	Dr Antonios Kouroutakis, IE Law Schol	<a href="#">EUW0024</a>
	Dr Klearchos Kyriakide, School of Law, University of Central Lancashire	<a href="#">EUW0026</a>
	Law Society of Scotland	<a href="#">EUW0007</a>
	Learned Society of Wales	<a href="#">EUW0012</a>
	Dr Tobias Lock, Edinburgh Law School	<a href="#">EUW0004</a>
	Professor Tom Mullen, University of Glasgow, Dr Chris McCorkindale and Professor Aileen McHarg, University of Strathclyde	<a href="#">EUW0023</a>
*	Rt Hon. Lord Neuberger of Abbotsbury, former President of the Supreme Court ( <a href="#">QQ 1–11</a> )	
	Dr Ludivine Petetin and Dr Annegret Engel, Cardiff University	<a href="#">EUW0013</a>
	Personal Investment Management & Financial Advice Association (PIMFA)	<a href="#">EUW0020</a>
	Public Law Project	<a href="#">EUW0034</a>
	Professor Richard Rawlings, University College London	<a href="#">EUW0015</a>
	Dr Geoffrey Searle	<a href="#">EUW0011</a>
*	Rt Hon. Sir Keir Starmer QC MP, Shadow Secretary of State for Exiting the European Union ( <a href="#">QQ 12–34</a> )	
	Professor Phil Syrpis, University of Bristol Law School	<a href="#">EUW0009</a>
	Dr Adam Tucker, University of Liverpool	<a href="#">EUW0031</a>

Unlock Democracy

[EUW0032](#)

\*

Robin Walker MP, Parliamentary Under Secretary of  
State, Department for Exiting the European Union  
([QQ 45-54](#))

Professor Alison Young, University of Oxford

[EUW0003](#)

### APPENDIX 3: CALL FOR EVIDENCE

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1. The Constitution Committee is conducting an inquiry on the European Union (Withdrawal) Bill. This follows its report on *The ‘Great Repeal Bill’ and delegated powers* and its follow-up *European Union (Withdrawal) Bill: interim report*.
2. *The ‘Great Repeal Bill’ and delegated powers* report examined the constitutional issues that were likely to arise as a result of legislation repealing the European Communities Act 1972. The Committee noted that the Government faced “a unique challenge in converting the current body of EU law into UK law,” that was “complicated not only by the scale and complexity of the task, but also by the fact that in many areas the final shape of that law will depend on the outcome of the UK’s negotiations with the EU.” The Committee made recommendations about how this task should be approached, particularly in relation to the broad delegated powers the Government was likely to seek and the safeguards and scrutiny processes they should be subject to.
3. The Committee published an interim report in September 2017 examining the Bill by reference to its earlier conclusions and recommendations. The report concluded that “the Bill is highly complex and convoluted in its drafting and structure,” rendering “scrutiny very difficult” and leaving “multiple and fundamental constitutional questions ... unanswered.”
4. The Committee is now seeking evidence on the detailed provisions of the European Union (Withdrawal) Bill and their legal and policy effect. The inquiry will examine the constitutional implications of the Bill across the following three broad themes:
  - (1) The relationship between Parliament and the Executive
    - The delegated powers in the Bill and the Henry VIII clauses
    - The scrutiny of the delegated legislation that will flow from the Bill
    - Sunset clauses for the powers
  - (2) The rule of law and legal certainty
    - The status of retained EU law and the relationship to domestic law
    - The proposals for the interpretation of judgments made by the Court of Justice of the European Union post-exit
    - The legal and practical challenges of producing a copy of retained EU law post-exit
  - (3) The consequences for the UK’s territorial constitution
    - The proposed boundaries between reserved and devolved competence
    - The implications of the Bill for the balance of powers within the Union
    - The consequences for the future of the devolution arrangements
5. The Committee would welcome written submissions on any aspect of these topics and from all interested individuals and organisations.