

# EUROPEAN UNION (WITHDRAWAL) BILL

## EXPLANATORY NOTES ON LORDS AMENDMENTS

### What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on Wednesday 16 May.
- 2 These Explanatory Notes have been prepared by the Department for Exiting the European Union in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords amendments themselves, refer to HL Bill 79, the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords amendments.
- 5 Lords Amendments 6 to 9, 11 to 18, 22 to 23, 26 to 31, 33 to 36, 38, 40 to 42, 44, 46 to 50, 54 to 109, 111 to 124, 126 to 127 and 129 to 196 were tabled in the name of the Minister.
- 6 Lords Amendments 1 and 2 were tabled by Lord Kerr of Kinlochard and were opposed by the Government.
- 7 Lords Amendment 3 was tabled by Lord Krebs and was opposed by the Government.
- 8 Lords Amendment 4 was tabled by Baroness Hayter of Kentish Town and was opposed by the Government.
- 9 Lords Amendments 5 and 53 were tabled by Lord Pannick and were opposed by the Government.
- 10 Lords Amendments 10, 43, 45 and 128 were tabled by Lord Lisvane and were opposed by the Government.
- 11 Lords Amendment 19 was tabled by Viscount Hailsham and was opposed by the Government.
- 12 Lords Amendment 20 was tabled by Lord Monks and was opposed by the Government.
- 13 Lords Amendment 21 was tabled by Lord Lisvane and was supported by the Government.
- 14 Lords Amendment 24 was tabled by Lord Dubs and was opposed by the Government.

- 15 Lords Amendment 25 was tabled by Lord Patten of Barnes and was opposed by the Government.
- 16 Lords Amendment 32 was tabled by the Lord Bishop of Leeds and was opposed by the Government.
- 17 Lords Amendments 37, 39 and 125 were tabled by the Duke of Wellington and were opposed by the Government.
- 18 Lords Amendment 51 was tabled by Lord Alli and was opposed by the Government.
- 19 Lords Amendments 52 and 53 were tabled by Lord Beith and were opposed by the Government.
- 20 Lords Amendment 110 was tabled by Baroness Smith of Basildon and was opposed by the Government.
- 21 In the following commentary, an asterisk(\*) appears in the heading of any paragraph that deals with an amendment not supported by the Government.

## Commentary on Lords amendments

### Lords Amendments to Clause 1: Repeal of the European Communities Act 1972

#### Lords Amendment 1\* and 2\*

- 22 Lords Amendments 1 and 2 would prevent the repeal of the European Communities Act from taking place until the Government has laid a statement before Parliament outlining the steps taken to negotiate, as part of a framework for the UK's future relationship with the European Union (EU), an arrangement to enable the UK to continue to participate in a customs union with the EU.

### Lords Amendments to Clause 3: Incorporation of direct EU legislation

#### Lords Amendment 3\*

- 23 Lords Amendment 3 would require the UK Government to take steps to ensure that environmental protection and improvement is not reduced as a result of leaving the EU. In particular, it would require the UK Government to publish within six months of this Act being passed:
  - a. proposals for primary legislation establishing a duty on public authorities to apply environmental principles after exit day;

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- b. proposals for the establishment before exit day of an independent body to ensure compliance with environmental law; and
- c. a list of statutory functions that can be exercised so as to achieve the objective in subsection (1) (not reducing environmental protection) and a list of functions currently exercised by EU bodies that must be retained or replicated in UK law in order to ensure that environmental protection is not reduced as a result of EU exit.

### Lords Amendment 4\*

- 24 Lords Amendment 4 would limit how delegated powers (including those contained within this Bill) can amend, repeal or revoke retained EU law relating to (a) employment entitlements, rights and protection, (b) equality entitlements, rights and protection, (c) health and safety entitlements, rights and protection, (d) consumer standards, or (e) environmental standards and protection. As these terms are not defined, this amendment could potentially apply to a very broad range of legislation.
- 25 The amendment would require the Government to design an enhanced scrutiny procedure process which any regulations that amend, repeal or revoke this category of legislation would be subject to. This would include requirements for a draft of the regulation to be laid before Parliament and be approved by resolution of both Houses, and include a period of consultation with relevant stakeholders.
- 26 The enhanced scrutiny procedure would also require a Minister of the Crown to produce an explanatory statement under paragraph 22 of Schedule 7 and include a declaration that the regulation does no more than make technical changes to retained EU law in order for it to work following exit.
- 27 The amendment is unclear as to what would qualify as “technical changes to retained EU law in order for it to work following exit”, and so where the Government believed it could be argued that the changes are not “technical”, those changes might instead have to be made through primary legislation.

## Lords Amendments to Clause 5: Exceptions to savings and incorporation

### Lords Amendment 5\*

- 28 Lords Amendment 5 would provide that only the preamble to the Charter of Fundamental Rights (the Charter) and Chapter V (which relates to citizens’ rights) would be excluded from retained EU law under clause 5. This amendment would therefore mean that any directly effective rights contained in the remainder of the Charter would form part of domestic law after exit by virtue of clause 4, to the extent that these would not in any event form part of domestic law under clause 3 or clause 6.

- 29 Claimants would therefore continue to be able to bring legal action grounded on these rights as expressed in the Charter. The outcome of this action could be that domestic legislation which directly implements EU law could continue to be struck down on the basis of incompatibility with Charter rights.

## Lords Amendments to Clause 6: Interpretation of retained EU law

### Lords Amendments 6 to 8

- 30 Lords Amendments 6 to 8 would provide greater clarity that UK courts and tribunals can have regard to anything done by the Court of Justice of the European Union (CJEU), another EU entity or the EU itself, after the UK leaves the EU. They would not change the underlying intent of the clause that, while the UK's domestic courts and tribunals should not be bound by anything done by the EU after exit day, they should be able to take it into account.
- 31 The amendments would remove the words "need not have regard to" and "considers" from clause 6(2). They would also remove the reference to courts having regard where "appropriate" and instead provide that courts may look at post-exit CJEU case law, or things done by an EU entity or the EU, so far as it is relevant to any matter before the court.
- 32 Finally, the amendments would also make clear that clause 6(2) is subject to the rest of clause 6. In particular, this means that courts below the Supreme Court or High Court of Justiciary would continue to be bound by retained EU case law, even if a new decision on the same subject has been taken by the CJEU after the UK's departure from the EU. Those courts would be able to have regard to anything done by the CJEU etc. after exit, but not to the extent that they are no longer bound by retained EU case law.

### Lords Amendments 9

- 33 Lords Amendment 9 would make provision about the status of retained EU law. It would clarify that EU-derived domestic legislation which is saved by clause 2 will continue as legislation of the same type as it was before exit day.
- 34 It would restrict the ways in which retained EU law brought in by clause 3 and 4 can be amended by primary and subordinate legislation. In summary, it would broadly provide that such law can be amended by:
- a. Acts or other primary legislation (such as a Welsh Act);
  - b. powers to make subordinate legislation which explicitly provide that they may amend such law; and
  - c. powers to make subordinate legislation which may amend such law by virtue of the glosses in paragraphs 3A to 3F (existing powers) or 5A to 5C (future powers) of Schedule 8.

- 35 It would signpost provisions about the status of retained EU law in other provisions of the Bill. It also provides the following definitions, which would divide retained direct EU legislation brought in by clause 3 into two categories for the purposes of amendability:
- a. “Retained direct minor EU legislation” would be defined as any retained direct EU legislation which is not a retained direct principal EU legislation. This would broadly cover EU Tertiary legislation and EU decisions (as defined in clause 14(1)); and
  - b. “Retained direct principal EU legislation” would be defined as any EU Regulation which is converted into UK law on or after exit day in accordance with clause 3 and was not EU tertiary legislation. This would broadly cover EU Regulations (which are not also EU tertiary legislation) The definition would also include any Annex to the EEA agreement which refers to or amends EU Regulations.

## **Lords Amendments to Clause 7: Dealing with deficiencies arising from withdrawal**

### **Lords Amendment 10\***

- 36 Lords Amendment 10 would amend clause 7(1) so that a Minister can only make such provision as is necessary to correct deficiencies in retained EU law. The original drafting of the Bill allows Ministers to make such provision they consider appropriate to correct deficiencies in retained EU law.

### **Lords Amendment 11, 12 and 14**

- 37 Lords Amendments 11, 12 and 14 would prevent the deficiencies power from establishing new public authorities in the UK.

### **Lords Amendment 13**

- 38 Lords Amendment 13 would prevent clause 7(1), and the corresponding power for devolved authorities in Schedule 2, from imposing or increasing fees. The power could still be used to repeal fees regimes that are no longer needed, reduce fees and make amendments to pre-exit powers to provide for fees and charges.

### **Lords Amendments 15 and 17**

- 39 Lords Amendments 15 and 17 would prevent the deficiencies power from amending or repealing the Scotland Act 1998 or the Government of Wales Act 2006, except to make amendments that are supplementary, incidental, consequential, transitional, transitory or saving provision as a result of provision made in regulations under the deficiencies power, or to amend any provision in those Acts which modifies another enactment.

### **Lords Amendment 16**

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

- 40 Lords Amendment 16 would prevent the deficiencies power from amending or repealing paragraph 38 of Schedule 3 to the Northern Ireland Act 1998 (the reservation of ‘technical standards and requirements in relation to products in pursuance of an obligation under EU law’). The power is otherwise unable to modify the Northern Act 1998 except to make amendments that are supplementary, incidental, consequential, transitional, transitory or saving provision as a result of provision made in regulations under the deficiencies power, or to amend any provision in that Act which modifies another enactment.

## **Lords Amendments to Clause 8: Complying with international obligations**

### **Lords Amendment 18**

- 41 Lords Amendment 18 would remove clause 8, the international obligations power, from the Bill.

## **Lords Amendments to Clause 9: Implementing the withdrawal agreement**

### **Lords Amendment 19\***

- 42 Lords Amendment 19 would provide that the Government may conclude a withdrawal agreement only if a draft has been (a) approved by a resolution in the House of Commons, and (b) subject to the consideration of a motion in the House of Lords.
- 43 It would also provide that, so far as practicable, a Minister of the Crown must make arrangements for the resolution provided for in the amendment to be debated and voted on before the European Parliament has debated and voted on the draft withdrawal agreement.
- 44 It would also prevent the Government from implementing a withdrawal agreement unless Parliament has approved the withdrawal agreement and any transitional measures agreed within or alongside it by an Act of Parliament.
- 45 If certain conditions are met, the amendment would also give Parliament the power to give binding directions to the Government in relation to negotiations with the EU under Article 50. Those directions must be approved by a resolution of the House of Commons and be subject to the consideration of a motion in the House of Lords.
- 46 The conditions mentioned above would be that (a) the House of Commons has not approved the resolution required under the amendment by 30 November 2018; (b) the Act of Parliament required under the amendment has not received Royal Assent by 31 January 2019; or (c) no withdrawal agreement has been reached between the UK and the EU by 28 February 2019.

47 The term “withdrawal agreement” would also be redefined for the purposes of this clause to mean an agreement (whether or not ratified) between the UK and the EU under Article 50(2) of the Treaty on European Union which sets out the arrangements for the UK’s withdrawal from the EU and the framework for the UK’s future relationship with the EU.

#### Lords Amendment 20\*

48 Lords Amendment 20 would make the use of the power to implement the withdrawal agreement contingent upon Parliamentary approval of a mandate for negotiations on the UK’s future relationship with the EU.

#### Lords Amendment 21

49 Lords Amendment 21 would prevent the power to implement the withdrawal agreement from amending the EU (Withdrawal) Act itself.

#### Lords Amendment 22

50 Lords Amendment 22 would prevent the power to implement the withdrawal agreement from imposing or increasing fees. The power could still be used to repeal fees regimes that are no longer needed, reduce fees and make amendments to pre-exit powers to provide for fees.

#### Lords Amendment 23

51 Lords Amendment 23 would prevent the establishment of public authorities in the UK using the withdrawal agreement power.

#### Lords Amendment 24\*

52 Lords Amendment 24 aims to preserve certain identified aspects of the Dublin III Regulation<sup>1</sup> following the UK’s exit from the EU, specifically those which enable the transfer of asylum seekers to the UK on the basis of a family relationship with someone present in the UK. It would commit the UK to conducting negotiations with the EU with the stated aim of preserving those aspects of the Dublin III Regulation. Additionally, it would commit the Government to report to Parliament every six months on the progress of these negotiations with the EU.

## Lords Amendments to Clause 10: Corresponding powers involving devolved authorities

#### Lords Amendment 25\*

53 Amendment 25 would require Ministers, when exercising the powers in the Bill, to act compatibly with the Northern Ireland Act 1998 and have due regard to the joint report of 8 December 2017 from the negotiators of the EU and the United Kingdom on progress during phase 1 of negotiations under Article 50 of the Treaty on EU.

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<sup>1</sup> Dublin Regulation (Regulation No. 604/2013)

- 54 It would also prevent Ministers from bringing forward regulations which diminish any form of North-South cooperation, or which would introduce any border arrangements (including physical infrastructure or related checks and controls) on the land border between the United Kingdom and the Republic of Ireland.

## **Lords Amendments to Clause 11: Retaining EU restrictions in devolution legislation etc.**

### **Lords Amendments 26 to 31**

- 55 Lords Amendments 26 to 31 would remove the general limit on devolved legislative competence to modify retained EU law, and introduce powers to apply time-limited restrictions in specific areas. These restrictions would be specified in regulations made by a Minister of the Crown, and could only be made where the UK Government has sought to agree the application of the restrictions with the relevant devolved legislature and the regulations have been approved by both Houses of Parliament.
- 56 To achieve this the amendments would remove the requirement in the Scotland Act 1998, the Government of Wales Act 2006 and the Northern Ireland Act 1998 that the devolved legislatures must legislate compatibly with EU law and instead provide that they cannot legislate contrary to restrictions specified by a Minister of the Crown in regulations.
- 57 For example, Subsection (2) would insert a new section 30A into the Scotland Act 1998 that would create a power for a Minister of the Crown to specify by regulations areas in which the Scottish Parliament may not modify, or confer powers to modify, retained EU law. This power could also be used to revoke such regulations. Any restriction applied using the power would not affect the competence of the Scottish Parliament to make any provision that it could have made immediately before exit day.
- 58 Before regulations under the power could be put to the UK Parliament for approval, a Minister of the Crown must provide a copy to the Scottish Ministers and inform the Presiding Officer of the Scottish Parliament, and a decision on consent must have been made by the Scottish Parliament or a 40 day period must have elapsed in which no consent decision has been made. Amendments 92, 98 and 100 to Schedule 3 would deal with requirements for ministers to make explanatory statements when laying draft regulations before Parliament, including specific statements that must be made when consent has not been granted by the devolved legislatures for the draft regulations.
- 59 Equivalent powers would also be inserted into the Government of Wales Act 2006 and the Northern Ireland Act 1998 respectively. In each case the powers would expire two years after exit day and the regulations made under the power would expire five years after coming into force.

60 In addition, the amendments would give effect to new Part 1A of Schedule 3, which contains a number of reporting duties for Ministers in relation to the powers to apply limits to devolved competence in relation to retained EU law. They would also provide a power for a Minister of the Crown by regulations to repeal any of the new powers to apply limits to devolved competence in relation to retained EU law and place a duty on a Minister of the Crown to consider, at a period of every three months, whether to exercise the power to repeal the new powers (or to revoke regulations made under them).

## Lords Amendments to Clause 14: Interpretation

### Lords Amendment 32\*

- 61 Lords Amendment 32 would make clear that nothing in this Bill prevents the United Kingdom from replicating in domestic law any EU law made on or after exit day, or continuing to participate in, or have a formal relationship with, the agencies of the EU after exit day.
- 62 The amendment would be a statement of the law as it currently stands. The Bill does not restrict the United Kingdom in relation to its future relationship with EU law or EU agencies.

### Lords Amendment 33, 34 and 35

- 63 Lords Amendments 33, 34 and 35 would add to the definition of “enactment” in the Bill following amendment 9. This is not an exhaustive definition and so relevant enactments are likely already included but these amendments would make clear that Church Measures, Orders in Council made in exercise of the royal prerogative, and devolved instruments made in exercise of the royal prerogative are included in the definition of “enactment” in the Bill.

### Lords Amendments 36 and 38

- 64 Lords Amendment 36 would provide that “retained direct EU legislation” is not included in the Bill definition of “enactment” for the purposes of Lords Amendment 9. Lords Amendment 38 would provide that any provision made under retained direct EU legislation on or after exit day is not included within the definition of “subordinate legislation” for the purposes of Lords Amendment 9. The application of these definitions is not necessary as subsection (1) of Lords Amendment 9 deals only with domestic law which continues to have effect by virtue of clause 2. Further, subsections (2) to (4) deal with how domestic primary and subordinate legislation can amend retained direct EU legislation.

### Lords Amendments 37\* and 39\*

- 65 Lords Amendments 37 and 39 would change the definition of exit day in the Bill. As introduced to the Lords, references to ‘exit day’ in the Bill refer to 11pm on 29th March 2019. The Lords Amendments would mean that references to ‘exit day’ instead refer to an as yet unappointed day that the Minister may by regulations appoint.

- 66 The Lords Amendments would also remove from the Bill the ability to amend the definition of exit day if the day or time on or at which the EU Treaties are to cease to apply to the UK is different from that specified in the Bill (in which case Ministers are currently permitted to change exit day to the new day or time).

#### Lords Amendment 40

- 67 Lords Amendment 40 would make clear that anything which forms part of retained EU law by virtue of clause 4 includes modifications to that law.

## **Lords Amendments to Clause 15: Index of defined expressions**

#### Lords Amendments 41 and 42

- 68 Lords Amendments 41 and 42 would insert into the index of defined expressions in the Bill certain terms relevant to the provisions of amendment 9.

## **Lords Amendments to Clause 17: Consequential and transitional provision**

#### Lords Amendment 43\*

- 69 Lords Amendment 43 would restrict a Minister of the Crown to making only such provisions that are necessary in consequence of the Bill.

#### Lords Amendment 44

- 70 Lords Amendment 44 would limit the consequential power to 10 years from exit day.

#### Lords Amendment 45\*

- 71 Lords Amendment 45 would restrict a Minister of the Crown to making only such transitional, transitory, or saving provisions that are necessary in connection with the coming into force of any provision of the Bill (including its operation in connection with exit day).

## Lords Amendments to Clause 19: Commencement and short title

### Lords Amendment 46 and 48

- 72 Lords Amendment 46 and 48 would commence on Royal Assent provisions that give the Bill the status of ‘protected enactment’ in the devolution statutes. They would also commence the provisions that impose reporting duties on UK Ministers in relation to the exercise of the new powers under clause 11 and Schedule 3 and the provisions which exempt the Schedule 2 powers from the general EU law limit on devolved competence. These amendments would also ensure some transitional provisions, such as that relating to the definition of “relevant criminal offence”, are commenced on Royal Assent.

### Lords Amendment 47

- 73 Lords Amendment 47 is consequential on Lords Amendment 44 which would limit the consequential power to ten years from exit day. Lords Amendment 47 would commence this provision, along with the other provisions on the power at clause 17(1) to (3), on Royal Assent of the Bill.

### Lords Amendment 49

- 74 Lords Amendment 49 would provide for the commencement of certain provisions of Lords Amendments to clause 11 and Schedule 3.
- 75 The new powers to apply limits on devolved competence in relation to retained EU law and related provision would commence on Royal Assent.

### Lords Amendment 50

- 76 Lords Amendment 50 would clarify that those provisions not commenced under subsection (1) or new subsections (1A) and (1B) will commence at a time specified by a Minister of the Crown and this time may be different for different provisions.

### Lords Amendment 51\*

- 77 Lords Amendment 51 would prevent the Minister from commencing aspects of the Bill until it is a negotiating objective of the Government to ensure that an international agreement has been made which enables the United Kingdom to continue to participate in the European Economic Area after exit day.
- 78 The amendment would also prevent inserted subsection (2B) from being amended by regulations.

## **Lords Amendments to Schedule 1: Further provision about exceptions to savings and incorporation**

### **Lords Amendment 52\***

- 79 Lords Amendment 52 relates to challenges to retained EU law in domestic law after exit on the basis that an EU instrument was invalid.
- 80 This amendment would remove the mechanism under which a Minister of the Crown could specify in regulations the circumstances in which such validity challenges could be available in domestic law. It would also remove the ability for regulations made under this power to provide for a challenge which would have been brought against an EU institution before exit to be brought instead against a public authority in the United Kingdom after exit.
- 81 The amendment would not affect the general exclusion of challenges to retained EU law on validity grounds after exit, provided for under paragraph 1 of Schedule 1.

### **Lords Amendment 53\***

- 82 Lords Amendment 53 would remove from Schedule 1 the general exclusion of rights of action in domestic law based on a failure to comply with the general principles of EU law. Claimants would therefore continue to be able to bring legal action on the basis of incompatibility with the general principles. Courts, tribunals or other public authorities would retain the remedy to disapply or quash legislation and executive actions that is found to be incompatible with the general principles, including UK legislation which is in the scope of EU law that was passed after exit day.

## **Lords Amendments to Schedule 2: Corresponding powers involving devolved authorities**

### **Lords Amendments 54, 57, 60 to 70, 76 and 78**

- 83 Lords Amendments 54, 57, 60 to 70, 76 and 78 would allow devolved authorities, when exercising the powers in Schedule 2 jointly with a Minister of the Crown, to make provision that they could not make when exercising those powers alone.
- 84 This would be achieved by clarifying that the additional restrictions on the Schedule 2 powers, which apply only to those powers and not to the corresponding powers in clause 7(1) and clause 9, only apply to devolved authorities acting alone. This would include the requirement that provisions be within devolved competence.

### **Lords Amendments 55, 74 and 75**

- 85 Lords Amendments 55, 74 and 75 would remove the restrictions on devolved authorities using their powers in Schedule 2 to confer further powers to make legislation in order that they can sub-delegate these powers to other authorities where appropriate.

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

## Lords Amendments 56, 58, 77 and 79

86 Lords Amendments 56, 58, 77 and 79 would clarify how the requirements for regulations made by devolved authorities acting alone under Schedule 2 to be within devolved competence interact with the principle of severance applied by the courts. They would make clear that when a provision within an instrument made by a devolved authority under Schedule 2 is outside of devolved competence, it is only that provision that would be *ultra vires* and not the instrument as a whole.

## Lords Amendments 59 and 81

87 Lords Amendments 59 and 81 would lift the restrictions on devolved authorities using their powers in Schedule 2 to modify retained direct EU legislation, make changes that are inconsistent with UK Ministers' modifications to retained direct EU legislation, or confer functions that correspond to the making of EU tertiary legislation. But they would also provide for such restrictions to be applied to these powers in areas specified by a UK Ministers under their powers in subsections 11(1)-(3C) and Part 1 of Schedule 3 for the purposes of limiting devolved competence in relation to retained EU law generally.

## Lords Amendments 71

88 Lords Amendment 71 would remove the devolved authorities' power to make regulations to comply with international obligations. This is in line with the removal of clause 8 from the Bill by Lords Amendment 18.

## Lords Amendment 72

89 Lords Amendment 72 would prevent the power for devolved authorities to implement the withdrawal agreement from imposing or increasing fees. The power could still be used to repeal fees regimes that are no longer needed, reduce fees and make amendments to pre-exit powers to provide for fees and charges.

## Lords Amendment 73

90 Lords Amendment 73 would prevent the power for devolved authorities to implement the withdrawal agreement from establishing public authorities.

## Lords Amendment 80

91 Lords Amendment 80 would remove reference in Part 3 of Schedule 2 to the definition of devolved competence in Part 2 because those provisions would be removed by amendment 71. It would replace this with reference to the replicated definition of competence that would be introduced by amendment 84.

## Lords Amendments 82 and 83

- 92 Lords Amendments 82 and 83 would replace the requirement for devolved Ministers to have the consent of a Minister of the Crown to use the withdrawal agreement power in Schedule 2 to make provision relating to quotas with a requirement to consult a Minister of the Crown before using the power to make such provision.

#### Lords Amendment 84

- 93 Lords Amendment 84 would insert provisions into Part 3 of Schedule 2 to replicate the definition of devolved competence in Part of Schedule 2, which would be removed by amendment 71 as part of removing the power to make regulations to comply with international obligations.

## Lords Amendments to Schedule 3: Further amendments of devolution legislation

#### Lords Amendments 85 to 87 and 96

- 94 Lords Amendments 85 to 87 and 96 would make equivalent provision in relation to devolved executive competence to that which Lords Amendment 26 would make in relation to devolved legislative competence.
- 95 This would remove the general limit on devolved executive competence to modify retained EU law by subordinate legislation, and introduce powers to apply targeted and time-limited restrictions in specific areas. These restrictions would be specified in regulations made by a Minister of the Crown, and only where the UK Government has sought to agree the application of the restrictions with the relevant devolved legislature and the regulations have been approved by both Houses of Parliament.
- 96 The restrictions on competence would not apply to regulations made by devolved authorities under the powers in Schedule 2 or 4.

#### Lords Amendment 88

- 97 Lords Amendment 88 would create a requirement for a Minister of the Crown to report to Parliament every three months from Royal Assent of the Bill on:
- a. steps taken towards replacing the powers to limit devolved competence in relation to retained EU law and any regulations made under them with future arrangements;
  - b. how the principles agreed at the Joint Ministerial Committee on EU Negotiations in October 2017 have been taken into account;
  - c. regulations made to repeal the powers to limit devolved competence in relation to retained EU law;
  - d. progress that needs to be made before the remaining powers and regulations can be repealed or revoked; and

- e. any other information that the Minister considers to be appropriate to report.
- 98 The Minister would also be required to provide a copy of the report to each of the devolved administrations.

### Lords Amendment 89, 99 and 101

- 99 Lords Amendments 89, 99 and 101 would address the deficiency in the reservation of *'technical standards and requirements in relation to products in pursuance of obligations under EU law'* in the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, which will arise once EU law ceases to have effect in the UK
- 100 The amendments would ensure that the reservation continues to operate correctly after exit day, and that the existing boundaries of devolved competence are preserved when EU law ceases to apply. Those standards subject to the current reservation will continue to be a reserved matter, including as they may be modified from time to time. Areas in which the devolved institutions can legislate in addition to EU technical standards will remain within devolved competence.
- 101 The revised reservations would continue to be subject to the exemptions that apply to the current reservation, for example food, agricultural and horticultural produce will remain exempt.

### Lords Amendments 90 and 91

- 102 Lords Amendments 90 and 91 would remove the provisions inserting scrutiny procedures into the Scotland Act 1998 for the Order in Council procedures that Lords Amendments 26 and 85 would remove from the Bill, and replace them with provisions to insert scrutiny procedures for the new regulation making powers created by those amendments.
- 103 This would mean that the powers to limit Scottish legislative and executive competence in relation to retained EU law would be subject to the affirmative procedure (defined in the Scotland Act 1998 as the 'Type C' procedure), requiring approval of both Houses of Parliament before they can be made.

### Lords Amendments 92, 98 and 100

- 104 Lords Amendments 92, 98 and 100 would require a Minister of the Crown to publish written statements when laying regulations under the powers in subsections 11(2), 11(3A) and 11(3C) and Part 1 of Schedule 3, except where those regulations only relate to the revocation of regulations specifying where a limit on competence will apply.
- 105 In all cases a Minister of the Crown would be required to make a statement explaining the effect of the regulations. In cases where devolved consent for the regulations has not been given, they must also make a statement explaining why it is appropriate to proceed without consent and provide Parliament with any statement provided by the relevant devolved administration giving that administration's opinion why consent has not been given.

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

### Lords Amendment 93 and 94

106 Lords Amendments 93 and 94 would remove redundant references to European parliamentary elections, to the European Parliamentary Elections Act 2002, and to the UK as an EU member state from the Government of Wales Act 2006.

### Lords Amendment 95

107 Lords Amendment 95 would update a cross-reference in the Government of Wales Act 2006 to clarify that restrictions on the powers of Welsh Ministers in addition to those applied by subsection 80(8) of that Act, also apply to the First Minister of Wales and the Counsel General of Wales.

### Lords Amendment 97

108 Lords Amendment 97 would remove a redundant cross-reference in the Government of Wales Act 2006 to a provision of that Act regarding legal references to the European Courts of Justice, which would be removed by the Bill.

## **Lords Amendments to Schedule 4: Powers in connection with fees and charges**

### Lords Amendment 102

109 Lords Amendment 102 would remove the reference to clause 8 and Part 2 of Schedule 2 from the fees and chargers power, consequential on clause 8 being removed by Lords Amendment 18.

### Lords Amendment 103

110 Lords Amendment 103 would provide that the power to provide for new fees and charges will no longer operate at two years after exit day.

111 It would also make clear that, after the powers cease to apply, they can be used to revoke provisions made under the power and to alter them in limited ways such as the amounts of the fees or charges or how they are to be determined. The amendment would also make clear that any regulations made under the power continue in force after the power to make further such provision has ceased.

### Lords Amendment 104

112 Lords Amendment 104 is consequential on the removal of clause 8 by Lords Amendment 18.

### Lords Amendment 105

113 Lords Amendment 105 is consequential on the removal of clause 8 by Lords Amendment 18.

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## Lords Amendments to Schedule 7: Regulations

### Lords Amendments 106 and 116

114 Lords Amendments 106 and 116 are consequential on Lords Amendments 11, 12, 14 and 23 and would remove the procedure attached to provisions that establish public authorities in the UK made under the correcting and withdrawal agreement powers.

### Lords Amendments 107 and 117

115 Lords Amendments 107 and 117 would remove the trigger for the affirmative procedure for SIs which impose fees under the correcting and withdrawal agreement powers. This reflects the removal of the ability to do this which would be provided for by amendments 13 and 22.

### Lords Amendments 108, 111 and 129

116 Lords Amendments 108, 111 and 129 would apply a sifting committee procedure to negative instruments laid by Welsh Ministers under their powers in Schedule 2.

117 It provides that in order to make a negative instrument under those powers, a Welsh Minister must have made a written statement that in their opinion this is the correct procedure and they must have laid the instrument and a memorandum setting out their opinion before the National Assembly for Wales. They must also have received a recommendation on the appropriate procedure from a committee of the Assembly, or the required period for the recommendation to be made must have elapsed.

118 None of these requirements, however, preclude Welsh Ministers from proceeding with the negative procedure, and the requirements are also subject to a general caveat that a Welsh Minister can use another procedure – either the draft affirmative procedure or make a declaration that reasons of urgency mean that it is necessary to make the regulations subject to the made-affirmative procedure.

### Lords Amendments 109, 114, 135 and 169

119 Lords Amendments 109, 114, 135 and 169 would allow for the made-affirmative urgent scrutiny procedure to be followed when devolved authorities make regulations under their powers in Schedule 2.

120 The procedure would operate in the same way that it does for UK Ministers. An instrument under this procedure can be made by the devolved authority without being laid before the relevant devolved legislature in draft, where accompanied by a statement that in the devolved authority's opinion this is necessary as a matter of urgency. The instrument must then be laid before the relevant legislature and will cease to have effect after 28 days unless approved by a vote of the legislature.

### Lords Amendment 110\* and 128\*

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

121 Lords Amendment 110 would provide for an alternative sifting process. It would require that all statutory instruments made under the correcting, withdrawal agreement and consequential powers – as well as negative instruments made under other Acts that have the same purpose – which the Minister proposes to make under the negative procedure, are to be laid in draft before both Houses of Parliament. They must also be accompanied by a memorandum setting out the reasons for the Minister’s opinion that the instrument should be subject to the negative procedure.

122 A committee of each house would then have 10 sitting days to make a recommendation for the affirmative procedure to apply instead. If one or both committees made that recommendation, it would be binding on the Government, unless it was overruled by the House within a further a period of 5 sitting days. Each House also has a 15 day period in which it may also resolve that the affirmative procedure must apply to an instrument, irrespective of the committee making any recommendation.

123 Lords Amendment 128 would remove the sifting committee provisions which applied to powers other than clause 7(1). This is as a consequence of amendment 110 applying a single provision to all the powers. The Bill as introduced to the Lords had two identical provisions for sifting applying, with the same effect, to different selections of powers.

#### Lords Amendments 112, 113, 133 and 134

124 Lord Amendments 112, 113, 133 and 134 would substitute “28 days” for “one month” as the period after which an instrument made under the urgent made-affirmative procedure cease to have effect unless, during that period, the instrument is approved by resolution of each House of Parliament.

#### Lords Amendments 115

125 Lords Amendment 115 is consequential on the removal of clause 8 by Lords Amendment 18. It would remove its scrutiny provisions from the Bill.

#### Lords Amendments 118 and 119

126 Lords Amendments 118 and 119 are consequential on the removal of the power to implement the withdrawal agreement’s ability to amend the EU (Withdrawal) Act itself.

#### Lords Amendment 120

127 Lords Amendment 120 would require that regulations made under the power in new subsection (4B) of clause 11 to repeal the powers to limit devolved competence in relation to retained EU law would be subject to the affirmative procedure, requiring approval by both Houses of Parliament before they can be made.

#### Lords Amendments 121 to 123

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

128 Lords Amendments 121, 122 and 123 would require all statutory instruments containing provisions made under Schedule 4 of the Bill (that do not relate to altering the amount of a fee of charge to reflect changes in the value of money) be subject to the affirmative procedure.

#### Lords Amendment 124

129 Lords Amendment 124 would ensure the changes introduced through amendments 121, 122 and 123 also apply to instruments made by the devolved authorities acting alone and when acting jointly with a UK Minister.

#### Lords Amendment 125\*

130 Lords Amendment 125 would attach an affirmative scrutiny procedure to regulations made under the new power to set exit day. This is consequential on amendment 37.

#### Lords Amendment 126

131 Lords Amendment 126 would allow the consequential power to be subject to the draft affirmative procedure as an alternative to the negative procedure. This would allow negative instruments made under the consequential power to be sifted by the Committees.

#### Lords Amendment 127

132 Lords Amendment 127 would signpost the sifting committee provisions applying to negative statutory instruments made under the consequential power.

#### Lords Amendment 130, 131 and 136

133 Lords Amendments 130, 131 and 136 are consequential on the removal of clause 8 by Lords Amendment 18 and would remove references to clause 8 from provisions about the urgent procedure.

#### Lords Amendment 132

134 Lords Amendment 132 would allow for a statutory instrument containing consequential amendments to be made under the Bill's urgent made-affirmative procedure.

#### Lords Amendment 137

135 Lords Amendment 137 would remove the requirement for sifting by the committees of negative statutory instruments made under the consequential power if the instrument contains a declaration that the Minister is of the opinion that, by reasons of urgency, it is necessary to make the regulations without sifting.

#### Lords Amendment 138

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

136 Lords Amendment 138 would make clear that the powers in the Bill can be exercised before exit day so as to modify retained EU law which will not exist until exit day (retained direct EU law, retained EU law by virtue of clause 4 and any other retained EU law). This amendment would confirm the position that such powers are available prior to exit and is necessary in consequence of making express provision on anticipatory exercise in 159 and 162.

### Lords Amendment 139

137 Lords Amendment 139 is consequential on the removal of clause 8 by Lords Amendment 18.

### Lords Amendment 140

138 Lords Amendment 140 would add the requirement for a number of explanatory statements, as set out in paragraph 22 of Schedule 7, to be produced alongside all statutory instruments made under the consequential power.

### Lords Amendment 141

139 Lords Amendment 141 would clarify that the requirement for a number of explanatory statements, as set out in paragraph 22 of Schedule 7, applies to UK Ministers exercising the powers in Schedule 2 jointly with a devolved authority, just as it would apply to them exercising the clause 7(1) and clause 9 and consequential powers when acting alone.

### Lords Amendment 142 and 148

140 Lords Amendments 142 and 148 are consequential on the extension of sifting to the Lords.

### Lords Amendment 143, 146 and 147

141 Lords Amendments 143, 146 and 147 would require that before an instrument or draft is laid, the relevant Minister must make a written statement as to why, in the Minister's opinion, there are good reasons for the instrument or draft, and the provision made by the instrument or draft is a reasonable course of action.

### Lords Amendment 144

142 Lords Amendment 144 would replace the requirement for the relevant Minister to make a statement explaining the reasons for a statutory instrument with a requirement for a statement explaining the purpose of the instrument. This would provide courts and others with information about what the statutory instrument is intended to do, in the context of the retained EU law it modifies.

## Lords Amendment 145

143 Lords Amendment 145 would require a Minister to make a statement alongside all instruments or draft instruments under the key powers in the Bill which create a criminal offence, explaining why, in the relevant Minister's opinion, there are good reasons for the offence and for the penalty provided in respect of it.

## Lords Amendment 149

144 Lords Amendment 149 would require the Scottish Ministers to make the same explanatory statements when exercising their Schedule 2 powers that UK Ministers are required to make under paragraph 22 of Schedule 7.

145 This would include a statement of the 'good reasons' for the use of the power, and that the use is a reasonable course of action; a statement of what, if any, amendments are being made to equalities legislation and that the Minister has had due regard to the first limb of the Public Sector Equality Duty; a statement explaining the instrument, the relevant law before exit day, the instrument's effect on retained EU law and the purpose of the instrument; and, where exercising the powers in Schedule 2 to create a criminal offence, a statement of the 'good reasons' for creating a criminal offence, and of the sentence attached.

## Lords Amendment 150 and 152

146 Lords Amendments 150 would require a written statement be made by the relevant Minister before an instrument or draft which create a relevant sub-delegated power is laid, explaining why it is appropriate to do so. A relevant sub-delegated power is a power to legislate which is not exercisable by SI (or the devolved equivalent), or is exercisable by someone other than a Minister of the Crown (or devolved administrations). The statement would need to be made in writing and published.

147 If the Minister were to fail to make a statement, a Minister of the Crown would need to make a statement explaining why the relevant Minister has failed to do so.

148 Lords Amendment 152 would require an annual report on how the power has been exercised to be prepared, laid before both Houses of Parliament, provided to a Minister of the Crown and published, by the relevant persons to whom a power is sub-delegated, if that power has been exercised during that same year.

## Lords Amendment 151 and 153

149 Lords Amendments 151 and 153 would require that a written statement be made by the relevant Scottish Minister before an instrument or draft is laid, explaining why it is appropriate to create a relevant sub-delegated power.

150 If the Scottish Minister were to fail to make a statement, they would need to make a statement explaining why they have failed to do so.

151 An annual report on how the power has been exercised would also need to be laid before the Scottish Parliament by the relevant persons to whom a power is sub-delegated if that power has been exercised during the same year.

### Lords Amendment 154

152 Lords Amendment 154 would require a Minister of the Crown to make a written statement explaining the reasons for the Minister's opinion that, by reason of urgency, it is necessary to use the urgent made-affirmative procedure, if they use that procedure.

### Lords Amendment 155

153 Lords Amendment 155 would require a Scottish Minister to make a written statement explaining the reasons for the Minister's opinion that, by reason of urgency, it is necessary to make the regulations without a draft of the instrument containing them being laid before, and approved by a resolution of the Scottish Parliament.

### Lords Amendment 156

154 Lords Amendment 156 would allow for all the Bill's powers to be included in paragraph 24 of Schedule 7. This already provides that a different procedure can be applied to a statutory instrument that revokes, amends or re-enacts regulations made under the Bill, to the one under which it was originally made.

### Lords Amendment 157

155 Lords Amendment 157 would adjust the wording of provisions that allow for the combination of instruments to provide greater clarity as to the legal effect.

### Lords Amendment 158

156 Lords Amendment 158 would clarify that the definition of 'an instrument containing regulations' for the purposes of combining instruments includes both an instrument containing only provisions that are regulations and an instrument containing provisions that are regulations and provisions that are not regulations.

## **Lords Amendments to Schedule 8: Consequential, transitional, transitory and saving provision**

### Lords Amendment 159

157 Lords Amendment 159 would provide glosses on how existing (pre-Royal Assent of this Bill) powers to make, confirm or approve subordinate legislation may operate on retained direct EU legislation and anything which is retained EU law by virtue of clause 4.

- 158 The amendment would broadly provide that existing powers that can amend primary legislation, can amend retained direct principal EU legislation (EU Regulations) and retained EU law by virtue of clause 4 and is subject to scrutiny procedure for amending primary legislation. Existing powers that are not capable of amending primary legislation can amend retained direct minor EU legislation (EU tertiary legislation and decisions), and the scrutiny procedure as if it were amending legislation made under a different power.
- 159 The amendment would also provide that existing powers that are not capable of amending primary legislation can amend retained direct principal EU legislation or anything which is retained EU law by virtue of clause 4 as a connected modifications (modifications which are supplementary, incidental, consequential, transitional, or transitory or saving to another modification retained direct minor EU legislation)) Where a modification is a connected modification the scrutiny procedures for the main provision would apply.
- 160 The amendment would provide that where provision is made under different powers that can amend primary legislation, they may be combined in the same instrument and that if there are different scrutiny procedures then the highest procedure would apply.
- 161 The amendment would also lift, on or after exit day, any implied EU law restriction which might otherwise attach to powers to make, confirm or approve subordinate legislation immediately before exit day.
- 162 The amendment would also allow anticipatory use of powers. This means that existing powers can be exercised before exit day to amend retained EU law if they come into force on or after exit day.

### Lords Amendment 160

- 163 Lords Amendment 160 would provide glosses on how future (post-Royal Assent of this Bill) powers to make, confirm or approve subordinate legislation may operate on retained direct EU legislation and anything which is retained EU law by virtue of clause 4.
- 164 The amendment would provide that future powers to amend subordinate legislation can amend retained direct minor EU legislation.
- 165 The amendment would also provide that future powers to amend subordinate legislation can, context permitting, make connected modifications (modifications which are supplementary, incidental or consequential to the modification of retained direct minor EU legislation) to retained direct principle EU law or anything which is retained EU law by virtue of clause 4.
- 166 The amendment would provide that any power which can amend retained direct principal EU legislation would also be allowed to non-textually modify any retained direct EU legislation or anything that is retained EU law by virtue of clause 4.
- 167 The amendment would also allow anticipatory use of powers in Acts which are passed after and in the same session as this Bill. This means that such powers can be exercised before exit day to amend retained EU law if they come into force on or after exit day.

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018 (Bill 212)

## Lords Amendment 161

168 Lords Amendment 161 would require Ministers and other authorities making statutory instruments under powers outside the Bill after exit day that amend or revoke regulations made under section 2(2) of the European Communities Act 1972 to make a statement explaining the “good reasons” for the amendment or revocation, the law which is relevant to the amendment, and the effect of the amendment or revocation on retained EU law.

## Lords Amendment 162

169 Lords Amendment 162 would require that the Scottish Ministers, when making statutory instruments under powers outside the Bill after exit day, make a statement explaining the “good reasons” for any amendment or revocation of regulations made under section 2(2) of the European Communities Act 1972, the law which is relevant to the amendment or revocation, and the effect of the amendment or revocation on retained EU law.

## Lords Amendments 163 and 164

170 Lords Amendments 163 and 164 would insert into the Interpretation Act 1978 the definitions which would be created by Amendment 9.

## Lords Amendment 165

171 Lords Amendment 165 would amend the numbering of a cross-reference in Schedule 8 in consequence of amendment 26.

## Lords Amendments 166, 167, and 168

172 Lords Amendments 166, 167 and 168 would provide that retained direct principal EU legislation is to be treated as “primary legislation” for the purposes of the Human Rights Act 1998. This would include any amendments made to retained direct principal EU legislation. The amendments would provide that any retained minor EU legislation is to be treated as subordinate legislation except where it amends primary legislation.

## Lords Amendment 170

173 Lords Amendment 170 would delay the prohibition on seeking *Francovich* damages in domestic law (in Schedule 1) for two years after exit day.

174 *Francovich* damages may be awarded in some circumstances where EU member states have to compensate individuals for damage that they suffer as a result of the state’s breach of EU law. EU law confers a right to reparation where <sup>(11)</sup>the rule of law infringed is intended to confer rights on individuals, the breach is ‘sufficiently serious’, which means that the member state has manifestly and gravely disregarded the limits of its discretion, and where there is a direct causal link between the breach and the damage.

175 The Lords Amendment would ensure that, during this time period, the provisions in the Bill would not prevent individuals or businesses from continuing to seek such damages for cases where a breach of EU law occurred before exit day.

### Lords Amendment 171

176 Lords Amendment 171 is consequential to the removal of clause 8 from the Bill by Lords Amendment 18.

### Lords Amendment 172

177 Lords Amendment 172 would ensure the provisions made under the consequential power would not cease to operate along with the power itself and that the regulations continue in force.

### Lords Amendments 173 to 176

178 Lords Amendments 173 to 176 would clarify that the amendments made by clause 11 and Part 1 of Schedule 3 do not affect the validity of devolved primary legislation receiving Royal Assent before exit day, or devolved subordinate legislation made before exit day.

### Lords Amendments 177 to 195

179 Lords Amendments 177 to 195 would disapply the limit on devolved competence to legislate incompatibly with EU law in each of the devolution statutes for any devolved primary legislation that is to receive Royal Assent before exit day but which only comes into force on or after exit day.

180 The EU law limit on competence would also be disapplied for devolved subordinate legislation made, confirmed or approved before exit day but which only comes into force on or after exit day. These amendments would also provide for the restriction to be reapplied to such legislation in areas specified by a UK Minister under their powers in subsections 11(1) to (3C) and Part 1 of Schedule 3 for the purposes of limiting devolved competence in relation to retained EU law generally.

### Lords Amendment 196

181 Lords Amendment 196 would ensure that any consent decisions made by the devolved legislatures before the Bill receives Royal Assent, or in relation to any draft instrument put to the devolved legislatures before that time, would count as a consent decision for the purposes of making regulations under the new powers in clause 11 and Schedule 3 Part 1. It would also allow the statutory 40 day period in those provisions to run from a date before the Bill receives Royal Assent.

# **EUROPEAN UNION (WITHDRAWAL) BILL**

## **EXPLANATORY NOTES ON LORDS AMENDMENTS**

These Explanatory Notes relate to the Lords Amendments to the European Union (Withdrawal) Bill as brought from the House of Lords on 16 May 2018.

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