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Exiting the European Union
Committee

**European Union
(Withdrawal) Bill**

First Report of Session 2017–19

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to the report*

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Exiting the European Union Committee

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Conclusions

Transposition of EU law into domestic law

1. The Government says the principle of the Bill is to provide continuity and certainty at the point of the UK's exit from the European Union. However, the provisions in the Bill responsible for converting and preserving EU law raise a number of significant legal and constitutional questions. There was no consistent view across the evidence we heard as to which laws would be preserved and how they would be treated. Although we support the premise of this Bill in providing for a functioning statute book in the UK once we leave the EU, these ambiguities risk undermining the Bill's ability to supply legal certainty, a fundamental feature of the rule of law. Government needs to provide more clarity and information on the scope and status of retained EU law, including making clear whether it is to be treated by the courts as primary legislation, so that they cannot rule it to be invalid, or secondary. Greater clarity should also be given to assist judges on exactly how they are to apply CJEU decisions issued after exit day. (Paragraph 19)
2. We welcome the Minister's clarification that the precautionary principle will be retained in domestic law where it is included in existing legislation, regulations and case law. However we feel that this protection would be enhanced by also including Article 191 of the Treaty of the Functioning of the European Union in the illustrative list of articles referred to in paragraph 89 of the Government's Explanatory Notes, which lists directly effective rights which would be converted into domestic law as a result of Clause 4. The Government should also consider whether any other principles of EU law should be retained in domestic law. (Paragraph 20)
3. While we note the opportunities that arise out of the UK's withdrawal from the EU to amend retained EU laws to better reflect the UK regulatory and business environment, there will be areas where it will be in the UK's interests to keep pace with changes to laws in the EU. While there is no mechanism in the Bill to provide for retained EU law to keep pace with EU laws, the delegated powers in the Trade Bill and the Nuclear Safeguards Bill to modify retained EU law suggest that, at least in some areas, the Government intends to update retained EU law in accordance with post-exit modifications of EU law. The Government should confirm whether this is their intention and whether granting powers in further primary legislation is the approach they will take to achieve this. (Paragraph 27)
4. The Committee heard evidence for and against the Bill's removal of the Charter of Fundamental Rights from domestic law. The purpose of the Bill is to provide legal certainty for the UK the day after it leaves the EU and not to reshape rights in the UK. It would be helpful if the Government published its memorandum on rights set out in the Charter, as referred to by the Minister, before Clause 5 is considered during the Committee Stage of the Bill. (Paragraph 33)
5. A number of questions have been raised around the appropriateness of the delegation of legislative powers in the Bill. Ensuring that Parliamentary scrutiny of legislative change is not compromised requires Parliament to operate appropriate procedures for the scrutiny of delegated legislation. At the same time, we are mindful of the

absolute necessity of ensuring that the estimated 800 to 1,000 statutory instruments are passed before the relevant exit day. The Procedure Committee has published an interim Report on the scrutiny of delegated legislation under the Bill. We commend that Report's proposals for further consideration by the House during the course of the Committee Stage of the Bill. Whatever method of scrutiny is decided upon by Parliament, it remains the case that uncertainty will only be removed if all the necessary legislative amendments are in place by exit day to ensure that there are no gaps left in the statute book. This will require substantial Parliamentary time and we believe that this must be found even if it results in longer sitting hours or a curtailed Parliamentary recess. (Paragraph 41)

6. The powers in Clause 7 for the Government to transfer regulatory functions from EU institutions to UK regulatory bodies are integral to the Government's approach to transferring the *acquis* into UK law. However, the Government must be alive to the consequences of the loss of EU infringement proceedings (and complementary dispute tribunals such as the Appeal Board of the European Chemicals Agency) and the risk of creating an enforcement gap if regulatory functions are transferred to bodies that do not have the resources, expertise or independence to carry them out effectively. Such a risk could result in important protections being lost and the UK's credibility in negotiating its future regulatory relationship with the EU being undermined. (Paragraph 50)
7. In this respect, the devil will be in the detail of the statutory instruments under Clause 7 that are brought to this House. We note the current provisions that creating a new public authority and transferring functions to a new body require affirmative resolution. However, transferring functions to an existing body could also entail a major policy decision. It is difficult to define on the face of this legislation which decisions will be purely technical and which will require a greater level of scrutiny. This underlines how important it is to ensure that effective procedures are in place to identify which proposals merit further examination in Parliament. As we said in paragraph 41, it is important that the House gets this right and we reiterate our recommendation that the proposals put forward by the Procedure Committee for a new scrutiny committee should be given proper consideration during the Committee Stage of this Bill. (Paragraph 51)
8. It will also be important that the Government publish details of how they will ensure that regulatory agencies in the UK have the resources and enforcement powers to do their job effectively. The relationship between consumers, industry and regulatory agencies not only provides legal redress but also product and standards approval which is vital for buyer confidence and access to markets. It will be important to avoid any unnecessary duplication of regulatory functions or any reduction in confidence in UK products or services. We welcome the Environment Secretary's commitment to the establishment of a new agency to fill the "governance gap" and to ensure that the UK's environmental standards and enforcement are as good as or even better than at present. We intend to return to the important question of the UK's continuing relationship with EU agencies, including seeking clarification from Ministers about how sufficient institutional capacity can be created if and when functions are repatriated. (Paragraph 52)

Devolution

9. Whilst the Government has said that it plans to work with the devolved administrations to reach agreements on UK common frameworks, the devolved administrations have insufficient trust in the process for agreeing these future relationships and have, accordingly, indicated that they will withhold legislative consent from the Bill. The Government must improve engagement with the devolved administrations to resolve this deadlock. It must reach an agreement with the devolved administrations, which might result in changes to the Bill, setting out how and when reserved competencies will be devolved. (Paragraph 77)
10. Our predecessor Committee heard evidence that the JMC (EN) meetings had not been effective from the point of view of the devolved administrations. The future arrangements for the UK after leaving the EU will only be successful if they work for the whole of the UK. This will only be possible if there is mutual trust and cooperative, participative mechanisms for joint working between the UK Government and the devolved administrations. These mechanisms will be required not just to resolve issues relating to the repatriation of EU competencies, but also in the long term to ensure that devolved interests are properly considered when developing new international agreements. (Paragraph 78)
11. We recommend that the JMC (EN) meets much more regularly and that it addresses the concerns expressed by the devolved administrations about the effectiveness of its operations. Government should also set out whether it is considering formal structures for inter-governmental relations, and its proposed arbitration system for disputes, so that the views of the devolved governments can be heard, including in any future trade agreements. (Paragraph 79)

Implementing the withdrawal agreement

12. We welcome the Government's commitment to introduce a Withdrawal Agreement and Implementation Bill. However, if the Clause 9 powers remain in the European Union (Withdrawal) Bill then they could be used to implement parts of the withdrawal agreement by secondary legislation before the Withdrawal Agreement and Implementation Bill is considered by Parliament. The Government should now justify the purpose of Clause 9 given its announcement that there will be a separate Withdrawal Agreement and Implementation Bill. (Paragraph 85)
13. The Government has proposed that the withdrawal agreement be incorporated fully into UK law as a means to provide greater reassurance and protection for citizens' rights. We support the position put to us by Ministers that this will be done through separate primary legislation rather than using the powers in this Bill. (Paragraph 91)
14. Identifying mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be a central part of the agreement itself. The Government has suggested various alternative dispute resolution mechanisms but should be clearer as to which mechanisms it considers appropriate for which types of dispute. While a continuing role for the CJEU and its case-law cannot be ruled out in areas where there may be continued partnership or convergence of standards and

regulations, it is not appropriate that the CJEU would continue to have jurisdiction in the UK to enforce citizens' rights after the UK has left the EU. This should be done by a body representing both parties to the agreement. (Paragraph 97)

15. Clause 14 as drafted places it within the hands of Ministers to decide which exit day will apply to which provisions in the Bill. This would have implications for when the European Communities Act is repealed, the point at which a snapshot of EU law is taken and transposed into UK law, and when the Henry VIII powers granted to Ministers in this Bill will expire. The flexibility to set multiple exit days was described to us as a tool for setting different commencement dates for different provisions and providing for possible transitional arrangements. The Government's latest amendments will however, if agreed by the House, remove this flexibility by setting the exit day in the Bill as 29 March 2019 at 11.00 pm. This would create significant difficulties if, as the Secretary of State suggested to us in evidence, the negotiations went down to the 59th minute of the 11th hour. (Paragraph 101)

Introduction

1. In her speech to the Conservative Party Conference in October 2016, the Prime Minister proposed a Great Repeal Bill to repeal the European Communities Act 1972 (ECA) to end the authority of EU law in the UK, and to convert the *acquis communautaire* into British law in order to provide certainty as the UK leaves the European Union.¹ She reaffirmed this commitment in her speech at Lancaster House on 17 January 2017.²

2. Our predecessor Committee reported in the last Parliament that the “importance and complexity of ensuring legal certainty in the UK on the day after Brexit must not be underestimated”³ and urged the Government to publish the “Great Repeal Bill” in draft to enable the “fullest scrutiny” of its provisions to take place before formal consideration in Parliament.⁴ We remain of the view that this would have been desirable.

3. The European Union (Withdrawal) Bill was introduced to Parliament on 13 July 2017. As a result of the time taken to reconstitute this Committee after the General Election, the Bill had its Second Reading on 7 and 11 September 2017 before we were able to begin this inquiry. This has consequently been a short inquiry to examine aspects of the Bill and seek to inform Committee and Report Stages as far as possible.

4. We agreed the Terms of Reference on 13 September 2017, calling for evidence on:

- Whether the Bill adequately addresses the challenges of converting the *acquis* into UK law and provides for legal certainty on the day that the UK leaves the EU;
- What provision is made for non-legislative elements of the *acquis*, such as Court of Justice of the European Union (CJEU) case law and regulatory rulings of the EU agencies;
- What powers are delegated to Ministers to ensure that the transposition of EU law keeps pace with negotiations on the UK’s exit and its future relationship with the EU and whether limitations on those powers are sufficient;
- What implications the EU (Withdrawal) Bill has for the devolution settlements in Scotland, Wales and Northern Ireland;
- What implications the EU (Withdrawal) Bill has for the UK’s future relations with EU agencies and future participation in Europe-wide agreements; and
- What implications the EU (Withdrawal) Bill has for rights protected under EU law.

5. Since its introduction, much commentary, debate and analysis on the Bill has focussed on its proposed delegated powers and the parliamentary scrutiny to which they will be

1 Speech given by Theresa May, [Britain after Brexit: a vision of a Global Britain](#), 2 October 2016

2 Speech given by Theresa May [The Government’s negotiating objectives for exiting the EU](#), Lancaster House, 17 January 2017

3 Third Report of Session 2016–17, [The Government’s negotiating objectives: the White Paper](#), HC 1125, para 3

4 First Report of Session 2016–17, [The process for exiting the European Union and the Government’s negotiating objectives](#), HC 815, para 71

subject. The Commons' Procedure Committee⁵, the Lords' Constitution Committee⁶ and the Lords' Delegated Powers and Regulatory Reform Committee⁷ have all launched inquiries and already published Reports on this matter.

6. We have therefore focussed on the Bill's provisions for converting the *acquis communautaire*, its implications for the devolution settlements and on the powers to implement the withdrawal agreement.

7. We received 19 memoranda in the course of the inquiry. We held three oral evidence sessions looking at the legal and constitutional implications of the Bill; the provisions on devolution; and the implications for rights, regulations and enforcement. These were followed by oral evidence from the Parliamentary Under-Secretaries of State for the Department for Exiting the European Union, Mr Steve Baker MP and Mr Robin Walker MP. We are grateful to all those who have given evidence to this inquiry.

5 Procedure Committee, First Report of Session 2017–19, [Scrutiny of delegated legislation under the European Union \(Withdrawal\) Bill: interim report](#), HC 386

6 House of Lords Constitution Committee, Third Report of Session 2017–19, [European Union \(Withdrawal\) Bill: interim report](#), HL 19

7 House of Lords Delegated Powers and Regulatory Reform Committee Third Report of Session 2017–19, [European Union \(Withdrawal\) Bill](#), HL 22

1 Transposition of EU law into domestic law

1.1 Converting EU laws

8. The purpose of the European Union (Withdrawal) Bill (the Bill) is to “provide a functioning statute book on the day the UK leaves the EU.”⁸ The Parliamentary Under-Secretary of State for the Department on Exiting the European Union, Mr Steve Baker MP told us:

there is a great deal of consensus around this Bill. There is consensus around the idea that we need to convert EU law into UK law, and I think there is a developing consensus that, in order to meet the imperative of delivering by exit day, there is a place for using statutory instruments to do so.⁹

9. The Bill seeks to do this by creating a new category of domestic law: “retained EU law”. Retained EU law has three parts:

- a) Clause 2 retains domestic legislation that gives effect to EU law obligations (“EU-derived domestic legislation”);
- b) Clause 3 converts existing EU law that applies in the UK into domestic law (“direct EU legislation”);
- c) Clause 4 saves rights and obligations in EU law that take effect through section 2(1) ECA and that are not converted by Clause 3.

Clause 7 of the Bill, which we explore further in section 1.4, creates a power to enable Ministers to use secondary legislation to correct retained EU law in order to deal with any deficiencies arising from withdrawal.

10. Witnesses who gave evidence suggested that the provisions for retained EU law in the Bill do not provide sufficient clarity as to the scope of this new category of law. Dr Charlotte O’Brien, York Law School, told us that Clause 2 was drafted very broadly, bringing a large swathe of legislation “within the ambit” of Clause 7, meaning potentially that pieces of primary legislation that implement EU directives (but still made sense as standalone legislation) could be amended under Clause 7 powers:

This means that there are very few protections and very little that is actually sacrosanct in terms of protection from policy [...] The common denominator among all the commentary that I have read is confusion here. There is quite a bit of confusion over things like whether the Equality Act could be affected.¹⁰

11. Sir Stephen Laws, former First Parliamentary Counsel, suggested that primary legislation, which would exist anyway, would not fall within the definition of retained EU

8 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) [Bill 5 (2017–19) – EN], para 10

9 Q164 (Steve Baker)

10 Q5 (Dr Charlotte O’Brien)

law.¹¹ The Lords' Constitution Committee has also suggested that standalone legislation like the Equality Act would not fall within the ambit of the Clause 7 correcting power as it would not exist by virtue of Clause 2.¹² Professor Richard Ekins, University of Oxford, did not agree with these points, telling us that:

the Bill is intended to sweep quite broadly. Even though strictly you would not need Clause 2 to save primary acts, the point is to capture them. It might not be clear enough, and one should spell out whether it is intended to capture them in the definition of retained EU law such that Clause 7 comes to bear.¹³

12. Questions were also raised with us as to how directly applicable laws, converted through Clause 3, would be applied and interpreted as many of these regulations are addressed to Member States. As Dr O'Brien explained:

If you read it literally, and the UK is not a member state, then you can say, "That applies but it is not applicable. It has nothing to do with us". Are they supposed to have a literal reading or are they supposed to read it "as if", and what is the "as if"? What is the connecting point? What is the tool of interpretation? Is it as if the UK is still a member or is it as if "member states" refers to UK? In that case, you then have all sorts of other questions about: what about those provisions that the UK has no control over because they are in the gift of other member states, whether it is in Clause 3 or Clause 4 in particular, dealing with treaty rights, like non-discrimination in other member states. That is not the gift of the UK to award, so how is that supposed to be read? [...] There is a whole raft of extra interpretation required and there is no guidance given on how that is supposed to work.¹⁴

An alternative approach was suggested by Sir Stephen Laws. The operation of directly applicable EU law would be governed by new rules of UK law similar to those which govern the situation where foreign law is relevant to an issue before a UK court, i.e. as questions of fact rather than law.¹⁵ He told us that this would remove a lot of the conceptual problems that arise from the Bill's approach.¹⁶

13. A further area of uncertainty we noted was the exclusion of the precautionary principle,¹⁷ found in Article 191 of the Treaty on the Functioning of the EU, from the list in the Explanatory Notes of articles containing the directly effective rights captured by Clause 4.¹⁸ When we asked Steve Baker on 26 October 2017 whether the precautionary

11 Q4 (Sir Stephen Laws)

12 HL Committee on the Constitution, 3rd Report of Session 2017–19 [European Union \(Withdrawal\) Bill: interim report](#), HL Paper 19, para 26. In subsequent evidence to that Committee Richard Gordon QC commented ""The problem with that analysis is that the clear legislative intention must have been to subject all pre-exit day EU law to the modification regime". Lord Neuberger agreed that this was "probably right". (Evidence of 1 November 2017 Q10)

13 Q5 (Prof Richard Ekins)

14 Q36 (Dr Charlotte O'Brien)

15 Sir Stephen Laws ([EUB0004](#)) para 37 and 38

16 Q36 (Sir Stephen Laws)

17 The precautionary principle aims at ensuring a higher level of environmental and human health protection through preventative decision-taking in the case of risk, where scientific understanding is yet incomplete.

18 HM Government, [European Union \(Withdrawal\) Bill Explanatory Notes](#), pp 24–5

principle will be retained in UK law, he replied that that was his expectation but undertook to write to us to explain its exclusion from the Explanatory Notes.¹⁹ In his letter of 13 November 2017, Steve Baker explained that:

the Bill, through Clauses 3 and 4, will preserve the precautionary principle where it is included in existing EU directly applicable environmental legislation regulations and case law. For example, the precautionary principle is included in the REACH Regulation (1907/2006), the Deliberate Release of GMOs Directive (2001/18/EC) and the Invasive Alien Species Regulation (1143/2014) and so will be preserved by the Bill. Similarly, EU case law on chemicals, waste and habitats, for example, includes judgments on the application of the precautionary principle to those areas. This will likewise be preserved by the Bill.²⁰

14. There has also been debate on the constitutional status of retained EU law. Is it primary legislation, secondary legislation or in a *sui generis* category? This has practical effect in that primary legislation cannot be ruled invalid by domestic courts. Also the status of retained EU law could be important in resolving its relationship with other legislation, for example if conflicts arise. The House of Commons Library briefing paper on the Bill²¹ notes for example that a statute considered to be “constitutional” by the courts is not subject to the doctrine of implied repeal whereby “irreducibly inconsistent provisions” in statutes are resolved in favour of the one which is later in time.²² It is also the case that later subordinate legislation cannot impliedly repeal an earlier statute. The briefing paper argues that the indicators in the Bill as to the status of retained EU law are ambiguous.²³

15. In its recent evidence to the House of Lords Constitution Committee concerning the status of retained EU law, the Department for Exiting the European Union described direct EU legislation (which forms part of retained EU law) as “part of a unique and new category of domestic law” which “will operate in a different way to both primary and secondary legislation”. It would have been desirable if such a fundamental innovation in the structure of domestic law had been mentioned in previous Government documents or statements before it appeared in the Bill. The Department indicated that the Government did not consider it appropriate to assign a single status to retained direct EU legislation for all purposes and pointed to various other provisions in the Bill which provide for the status of such legislation, and which may assist in resolving the issues identified in the previous paragraph.²⁴

16. These issues are also partially addressed by other provisions in the Bill referred to in the Department’s evidence to the Constitution Committee. For example, Clause 5 of

19 Q208–9 (Steve Baker)

20 Letter from Steve Baker MP to Rt Hon Hilary Benn MP on [European Union \(Withdrawal\) Bill](#) dated 13 November 2017

21 House of Commons Library briefing paper 8079, [European Union \(Withdrawal\) Bill](#), 1 September 2017, p11

22 The doctrine of implied repeal also applies where a later statutory instrument is in conflict with an earlier one. The latter provision impliedly repeals the earlier one provided it has the power to do so”.

23 The provision in Schedule 1 paragraph 1 allowing subordinate legislation to determine the grounds for challenging the validity of retained EU law is an indicator that retained EU law should be regarded as akin to secondary legislation whilst the provision in Schedule 8 paragraph 19 that direct EU legislation should be treated as primary legislation for the purposes of the Human Rights Act 1998 points in the other direction.

24 Paragraph 19 of schedule 9 sets out that for the purposes of the Human Rights Act 1998 it is treated as primary legislation; paragraph 3 of schedule 8 provides that pre-exit powers to make subordinate legislation may be exercised to modify retained direct EU legislation; and paragraph 11 of schedule 8 amends the Interpretation Act 1978 so that after exit day the word “enactment” extends to retained direct EU legislation.

the Bill removes the principle of the supremacy of EU law so that domestic courts will no longer be bound to follow the judgments of the CJEU handed down after exit day. The Government's Explanatory Notes on the Bill explain that as a consequence retained EU law would continue to take precedence over pre-exit domestic legislation.²⁵ Furthermore paragraph 1 of Schedule 1 precludes the possibility of challenging the validity of any retained EU law in domestic courts on the usual judicial review grounds. However, the evidence of the Department concerning these various different provisions of the Bill does not clearly resolve all the uncertainty associated with the status of EU law, particularly if there were to be a conflict between retained EU law and post exit legislation.

17. Clause 6 provides that UK courts will not be bound by principles laid down, or decisions made, by the European Court on or after exit day, but that UK courts may have regard to anything done after exit day by that court (or another EU entity) if they consider it appropriate to do so. It will also allow the Supreme Court (and in some criminal cases the Scottish High Court of justiciary) to depart from principles laid down by and decisions of the European Court before exit day (applying the same test as would apply in deciding whether to depart from their own case law).

18. Clauses 5 and 6 are intended to ensure that Parliament and domestic courts, rather than the EU's institutions, will decide on the content and meaning of the law post-exit. Both Lord Neuberger, former President of the Supreme Court, and his successor Baroness Hale have called for greater clarity for judges on how to take account of CJEU judgements after exit.²⁶ Sir Konrad Schiemann, former UK judge at the CJEU, told us that judges would prefer not but nonetheless would have to deal with "something that will create enormous political controversy":

it would be very nice for the judge if the Bill set out every possible thing, but it cannot be done. There are too many obscurities. There is a trade-off between giving Ministers sufficient flexibility to cater for the unknown and setting things out. The judges just have to do the best that they can [...] I can see entirely Lord Neuberger's point: he wants to put the umbrella up for the judges when they are attacked by the politicians, as they not infrequently are.²⁷

Both Sir Stephen Laws and Professor Ekins questioned the inclusion of guidance to the courts, pointing to the existing principle under which the courts will look at foreign judgments and treat them as persuasive but not binding.²⁸ Professor Ekins noted that "you could delete the clause and I think the judges would, properly, do the same thing."²⁹

19. The Government says the principle of the Bill is to provide continuity and certainty at the point of the UK's exit from the European Union. However, the provisions in the Bill responsible for converting and preserving EU law raise a number of significant legal and constitutional questions. There was no consistent view across the evidence we heard as to which laws would be preserved and how they would be treated. Although we support the premise of this Bill in providing for a functioning statute book in the UK

25 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) [Bill 5 (2017–19) – EN], para 96.

26 See BBC News, [UK judges need clarity after Brexit – Lord Neuberger](#), 8 August 2017 and "[UK's new supreme court chief calls for clarity on ECJ after Brexit](#)", Guardian, 5 October 2017

27 Q1–2 (Sir Konrad Schiemann)

28 Q1 (Sir Stephen Laws)

29 Q1 (Prof Richard Ekins)

once we leave the EU, these ambiguities risk undermining the Bill's ability to supply legal certainty, a fundamental feature of the rule of law. Government needs to provide more clarity and information on the scope and status of retained EU law, including making clear whether it is to be treated by the courts as primary legislation, so that they cannot rule it to be invalid, or secondary. Greater clarity should also be given to assist judges on exactly how they are to apply CJEU decisions issued after exit day.

20. We welcome the Minister's clarification that the precautionary principle will be retained in domestic law where it is included in existing legislation, regulations and case law. However we feel that this protection would be enhanced by also including Article 191 of the Treaty of the Functioning of the European Union in the illustrative list of articles referred to in paragraph 89 of the Government's Explanatory Notes, which lists directly effective rights which would be converted into domestic law as a result of Clause 4. The Government should also consider whether any other principles of EU law should be retained in domestic law.

1.2 Retained EU law after withdrawal

21. Once the UK leaves the EU, retained EU law will, over time and without correction, diverge from EU laws, as the latter evolves. As Steve Baker told us, the Bill "is intended to take law as it stands [...] the day before we exit, and make it work for the day after, but it does not include 'keep pace' powers, and we do not intend that it should."³⁰ The extent to which UK laws will 'keep pace' with EU laws will depend on the future relationship negotiated with the EU.

22. Sir Stephen Laws argued that protecting a snapshot of EU law would, over time, lead to a lack of clarity in the law:

As EU law diverges from what it was immediately before exit day and expertise on EU law in the UK becomes less relevant to day to day legal problems, the practical task of finding the law retained by the Bill is going to become more and more difficult. All new legal structures are built on the law that went before, but experience with those that rely for their meaning on the retention of a complete understanding of how the law worked before shows that, in those cases, the accessibility, certainty and clarity of the new law always degrades over time.³¹

23. Dr O'Brien shared these concerns, contending that "it would be slightly perverse if, as a result of this Bill, the UK was wedded to an entrenched version of that law, which was not being followed by the other Member States of the EU."³² This is a particular concern for environmental law, as Andrew Bryce from the UK Environmental Law Association told us:

The problem we have is that [EU environmental] directives will change very rapidly. There will be constant changes in those directives. Within a few months of roll-over there will be changes. We will have to have either a mechanism for incorporating those changes, or go through a whole

30 Q215 (Steve Baker)

31 Sir Stephen Laws ([EUB0004](#)) para 33

32 Q2 (Dr Charlotte O'Brien)

parliamentary process to incorporate or not incorporate. We have a choice, but the legislation we have done by reference will be out of date pretty rapidly. We then have to make a choice as to whether we wish to adopt the changes.³³

24. Steve Elliott from the Chemical Industries Association suggested that most companies will manufacture to EU standards anyway as they do not “have the luxury” to operate differing manufacturing regimes and the EU regulation REACH sets the “global bar” which businesses will have to abide by.³⁴ However, the Bill provides for no mechanisms to keep UK laws in step with EU laws in those areas where the UK may seek to maintain regulatory convergence.³⁵

25. The powers in this Bill to amend retained EU law are limited to modifications arising out of the UK’s withdrawal from the EU. The clause expressly prevents the power being used to update retained EU law.³⁶ If the Government wished to update retained EU law by statutory instrument, this would likely require a power granted in separate primary legislation. For example, the delegated power in Clause 2 of the Trade Bill provides for regulations which may modify primary legislation that is retained EU law. The Nuclear Safeguards Bill also creates a power to modify retained EU law.³⁷ This gives an indication that the Government intends to create powers to update retained EU law and that it will use other primary legislation as the vehicle for this.

26. There will also be areas in which the UK may not wish to ‘keep pace’ with EU laws after we leave the EU. In so far as is compatible with any agreement on its future relationship, the UK Government will be able to amend retained EU law to meet its own policy objectives. We heard about the opportunities to diverge from EU rules after we leave, and those areas where improvements could be made to the laws we retain. Caroline Normand from Which? told us that “across the piece there are many small pieces of legislation where, with a free hand, we could see ways in which we could help make the situation and the rules better for consumers,” for example, by amending VAT on energy which is set at 5% by the EU.³⁸ Steve Elliott also told us how elements of REACH could be improved to better reflect the needs of UK industry:

In the area of the Industrial Emissions Directive, this is one of those Clause 2 elements. It is EU derived domestic legislation that has already been transposed into UK law in the environmental permitting regulations. As we work the latest level of negotiation on this, still within the European Union, there is a significant danger, I believe, that we will end up with standards that go above and beyond what is required, because those standards tend to reflect where some other European countries’ chemical industries are in the state of their capital equipment [...] standards that are out of kilter

33 Q132 (Andrew Bryce)

34 Q135–6 (Steve Elliott)

35 See Kenneth Armstrong, John Bell, Paul Daly and Mark Elliot, [Implementing transition: how would it work?](#) CELS/CPL Working Paper, October 2017, p12

36 [European Union \(Withdrawal\) Bill](#), Clause 7(3) [Bill 5 (2017-19)]

37 [Trade Bill](#), Clause 2, sub-section 6(a) [Bill 122 (2017-19)]. Also see the [Nuclear Safeguards Bill](#), Clause 76A, sub-section 6 [Bill 109 (2017-19)].

38 Q133 (Caroline Normand)

with current UK capability [...] There is an opportunity, working with our environmental regulator in particular, just to better reflect where our current standards are.³⁹

27. While we note the opportunities that arise out of the UK’s withdrawal from the EU to amend retained EU laws to better reflect the UK regulatory and business environment, there will be areas where it will be in the UK’s interests to keep pace with changes to laws in the EU. While there is no mechanism in the Bill to provide for retained EU law to keep pace with EU laws, the delegated powers in the Trade Bill and the Nuclear Safeguards Bill to modify retained EU law suggest that, at least in some areas, the Government intends to update retained EU law in accordance with post-exit modifications of EU law. The Government should confirm whether this is their intention and whether granting powers in further primary legislation is the approach they will take to achieve this.

1.3 Charter of Fundamental Rights

28. Clause 5(4) exempts the Charter of Fundamental Rights from being converted into domestic law. The Charter is one of the few specified substantive exceptions to the Bill’s aim of continuity of EU law. Clause 5(5) states that references to the Charter in the pre-exit case law of either the CJEU or UK courts are to be read as if they were references to the corresponding “fundamental rights or principles” that are considered to exist irrespective of the Charter. Many Charter rights and principles form part of the “general principles of EU law”. Those general principles which have been recognised as such by the CJEU are to be retained by Clause 6(7) and Schedule 1 — but only for the purposes of interpreting retained EU law.

29. The Government considers that the Charter would not be “relevant” after the UK leaves the EU, because it applies to the UK only when acting “within the scope” of EU law; and asserts that no substantive rights will be lost as a result of not retaining it.⁴⁰ Sir Stephen Laws suggested that something would be lost by removing the Charter, but it was unclear what (and there was, therefore, something to be gained from removing it):

It seems to me, if there is a legal advantage to be had from leaving the EU, it is that EU law is not renowned for its accessibility, comprehensibility or clarity, and that retaining provisions that are unclear is not going to be helpful. I also come from a tradition that says, if you get the detail right, you do not need to supplement it with vague general propositions [...] Preserving inconsistencies in the law between general principles and detail does not seem to be desirable and, given the choice, I will choose the detail.⁴¹

Professor Ekins also argued that the Charter was problematic, in that it was “vague and uncertain, and creates a ground for open-ended challenges and litigation” and should be removed.⁴² On the other hand, Dr O’Brien said that the Charter was embedded in what would become retained EU law, especially in data protection, where it had been decisive

39 Q149 (Steve Elliott)

40 Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#), Cm 9446, March 2017, para 2.23

41 Q23–4 (Sir Stephen Laws)

42 Q22 (Prof Richard Ekins)

in a number of cases. She noted that there is no equivalent to Article 8 of the Charter, the protection of personal data, in the European Convention on Human Rights. She also questioned how pre-exit case law in which the Charter had been decisive would be read:

For better or worse, it will make a difference if it is not there, so there are big question marks over what we are supposed to do with that gap and how the courts are meant to read these cases [...] it is not just cases; it is legislation as well. In the body of retained EU law, a number of instruments make explicit reference to the Charter.⁴³

Dr O'Brien also told us that Article 24, stipulating that “in all actions relating to children [...] the child’s best interests must be a primary consideration”, has tipped the balance in a number of Supreme Court cases.⁴⁴

30. Caroline Normand stated that the Charter had been important in supporting consumer rights, referring to judicial review proceedings brought by large tobacco companies challenging the standardised packaging of tobacco products regulations, which had been dismissed in the High Court in reference to the public health and other rights in the Charter.⁴⁵ Although Professor Alan Neal, University of Warwick, said he would not “lose sleep” over the removal of the Charter,⁴⁶ he noted that although the general principles of EU law were to be retained by the Bill, there would be no right of action on the basis of them, leaving them “somewhat weak”, though not “toothless”.⁴⁷

31. Asked to comment on potential practical difficulties that could arise if the Charter was no longer in UK law, Steve Baker told us that “For cases going forward, we believe that there are domestic causes of action that can be relied upon in place of the Charter: in particular, the Human Rights Act.”⁴⁸ In his letter of 13 November 2017, he further explained that “an EU legal source exists for each right, and many of the rights expressed in the Charter can be traced to multiple EU legal sources. Under the current position set out in the EU (Withdrawal) Bill, judges will be required to look at the underlying source law on rights when considering cases post-exit, rather than the Charter.”⁴⁹ He confirmed that he was in the possession of a draft document setting out how every article of the Charter is reflected in existing UK law, or UK law after withdrawal, and undertook to make it available to the Committee when it is “in the right state”.⁵⁰ He also drew the Committee’s attention to the European Scrutiny Committee’s 2014 Report on the application of the Charter of Fundamental Rights in the UK which concluded that “whilst the Charter has made fundamental rights more visible [...] it has made their application more complex, and question[ed] whether this defeats its primary purpose.”⁵¹ Steve Baker was asked “whose rights or interests would be damaged if Parliament agreed to amend the Bill so that the Charter was left as part of domestic law?”. In reply he did not give any specific

43 Q19 (Dr Charlotte O'Brien)

44 Q21 (Dr Charlotte O'Brien)

45 Q116 (Caroline Normand)

46 Q120 (Prof Alan Neal)

47 Q121 (Prof Alan Neal)

48 Q203 (Steve Baker)

49 Letter from Steve Baker MP to Rt Hon Hilary Benn MP on [European Union \(Withdrawal\) Bill](#) dated 13 November 2017

50 Q251 (Steve Baker)

51 European Scrutiny Committee, Forty-third Report of Session 2013–14, [The application of the EU Charter of Fundamental Rights in the UK: a state of confusion](#), HC 979, summary

examples but said “the current human rights framework has areas of confusion, and this is an opportunity to ensure that we protect human rights while simplifying those areas of confusion.”⁵²

32. Dr O’Brien thought that replacing references to the Charter in domestic law with references to corresponding retained fundamental rights or principles, upon which there would be no right of action after exit day,⁵³ would not meet the EU’s requirements for a future decision on or agreement with the EU on data adequacy.⁵⁴ Asked about the implications of removing the Charter for the EU’s assessment of the UK’s data protection legislation, Steve Baker said:

it is in both sides’ mutual interests to have a data adequacy agreement. As I am sure you know, we will be implementing the relevant directive in UK law before we leave, beginning from a position of having implemented EU law on data protection. Given that it is in all of our interests to secure data adequacy, I would have thought that we would be able to proceed quickly, in our mutual interests, to secure a data adequacy agreement.⁵⁵

Mr Robin Walker MP, Parliamentary Under-Secretary of State for the Department for Exiting the European Union, added:

The data paper that we published over the summer made very clear that this is an area where we feel there is huge mutual interest in discussing it [...] This is certainly something where we see there being a very strong interest from both sides of the table in reaching a sensible conclusion. Along with the approach that this Bill takes to writing European law into place, it will allow the jurisprudence to be taken into account up until the point of exit, which partly addresses your point on data.⁵⁶

33. The Committee heard evidence for and against the Bill’s removal of the Charter of Fundamental Rights from domestic law. The purpose of the Bill is to provide legal certainty for the UK the day after it leaves the EU and not to reshape rights in the UK. It would be helpful if the Government published its memorandum on rights set out in the Charter, as referred to by the Minister, before Clause 5 is considered during the Committee Stage of the Bill.

1.4 Clause 7 power to correct deficiencies

34. Clause 7 allows Ministers to make regulations to prevent, remedy or mitigate deficiencies in retained EU law that would otherwise arise as a result of the UK’s withdrawal from the EU. The Government does not currently know all the changes that will be needed to ensure that retained EU law functions effectively after withdrawal. Although the powers to amend retained EU law with secondary legislation are very significant, Steve Baker told us that Clause 7 “requires us only to correct deficiencies that arise as a result of our withdrawal, so that is a very clear restraint on what we may do.”⁵⁷ He then confirmed

52 Q186 (Steve Baker)

53 [European Union \(Withdrawal\) Bill](#), [Bill 5 (2017–19)], see Clause 5(5) and schedule 1(3)

54 Q31 (Dr Charlotte O’Brien)

55 Q204 (Steve Baker)

56 Q205 (Robin Walker)

57 Q166 (Steve Baker)

that it would be the Government who would decide whether any “deficiency” had “arisen from our withdrawal.”⁵⁸ Sir Stephen Laws agreed that the trigger for the Clause 7 power is technical — that it has to arise out of withdrawal. However, once triggered, it could give rise to policy issues, while noting that whether the policy is going to be of political importance or not is a matter for Parliament.⁵⁹

35. Professor Ekins said that Clause 7 is “deliberately framed quite broadly” given the policy making choices involved in exit, noting that “one person’s technical change could be another person’s more substantive policy point.”⁶⁰ He added:

There is a good reason for the breadth of the power, although it might not be a conclusive reason. If you place too many particular restrictions on the scope of the power, those restrictions are capable of being challenged in court. If you say this is a power for making technical changes, then you are making the question whether it is technical, policy or substantive.⁶¹

36. Professor Neal suggested that concerns around the use of the Clause 7 power comes down to a matter of trust. He noted the fear that this power could somehow be used as a shield for substantial policy shifts; a fear which he stated had existed in the employment field since before the EU and would continue after it. He also reiterated the point made by Sir Stephen Laws that the words “arising from the withdrawal” represented an appropriate limitation to the Clause 7 power, while noting that there is a need for some sort of scrutiny.⁶²

37. We asked Ministers, given that the Bill gives the Government powers to amend any Act, what would prevent a UK Minister from using those powers to overturn a decision of one of the devolved Governments, and who would decide what came within the Clause 7 scope of “arising from withdrawal from the EU”. Robin Walker said that there was “no question of existing powers being taken away as part of this, or interference in the laws that exist already under a shared framework”.⁶³ Steve Baker said that whilst the UK Government would determine what fell within the scope of the Clause 7 power, it would be held accountable for those decisions, and any statutory instruments would come before Parliament for scrutiny. He also said that:

I think the existing frameworks of devolution are respected by the Bill. It does not intrude on those areas where the Scottish Parliament has already been able to take decisions, and, in that respect, I would not see any change as a result of the design of this legislation.⁶⁴

38. We also asked Ministers why there was specific protection from change by statutory instruments for the Northern Ireland Act in Clause 7(6), but no similar protection for the Scotland Act or the Wales Act. Robin Walker told us that:

[The Bill] maintains a correcting power for the Wales Act and the Scotland Act, which is limited to only correcting deficiencies and is provided as a contingency arrangement to prevent gaps appearing in the statute books.

58 Q181 (Steve Baker)

59 Q7 (Sir Stephen Laws)

60 Q5 (Prof Richard Ekins)

61 Q6 (Prof Richard Ekins)

62 Qq144–5 (Prof Alan Neal)

63 Q181 (Robin Walker)

64 Q182 (Steve Baker)

Because the Northern Ireland Act is the main statutory manifestation of the Belfast agreement, and agreed by the UK Government and the Irish Government, on that basis, should the Act require further correction, it would have to be by primary legislation.⁶⁵

39. In his letter of 13 November 2017, Steve Baker emphasises that “any amendments to the devolution statutes that are needed as a result of our exit from the EU should be made in a way that does not otherwise alter the underlying settlement and does not substantively shift the boundaries of devolved competence. However, it is necessary for the key delegated powers in the Bill to be able to amend the Scotland Act 1996 and Government of Wales Act 2006.”⁶⁶ He reiterated that any amendments would be limited to deficiencies in the law arising from withdrawal.

40. As we said in the introduction to this Report, it was not our intention to examine the scrutiny of delegated legislation in this Inquiry. Rather, we note that on 6 November 2017, the Commons’ Procedure Committee published its interim Report on scrutiny of delegated legislation under the Bill in which it concludes on the procedures for Parliamentary scrutiny of the statutory instruments that will be brought forward using powers set out in the Bill that:

the Government’s proposals for Parliamentary scrutiny, resting as they do entirely on existing procedures do not go far enough. The task for the House is unique and unprecedented and requires a scrutiny mechanism to suit.⁶⁷

In the Report, the Procedure Committee outlines a system to examine and authorise the exercise by Government of the powers it has claimed in the Bill to change existing law by regulations. The Committee recommends that this could best be achieved through the creation of a new committee of the House which could adapt the working methods of the European Scrutiny Committee for examining legislative proposals and determining which are of sufficient political and/or legal importance to merit further examination.⁶⁸

41. A number of questions have been raised around the appropriateness of the delegation of legislative powers in the Bill. Ensuring that Parliamentary scrutiny of legislative change is not compromised requires Parliament to operate appropriate procedures for the scrutiny of delegated legislation. At the same time, we are mindful of the absolute necessity of ensuring that the estimated 800 to 1,000 statutory instruments are passed before the relevant exit day. The Procedure Committee has published an interim Report on the scrutiny of delegated legislation under the Bill. We commend that Report’s proposals for further consideration by the House during the course of the Committee Stage of the Bill. Whatever method of scrutiny is decided upon by Parliament, it remains the case that uncertainty will only be removed if all the necessary legislative amendments are in place by exit day to ensure that there are no gaps left in the statute book. This will require substantial Parliamentary time and we believe that this must be found even if it results in longer sitting hours or a curtailed Parliamentary recess.

65 Q194 (Robin Walker)

66 Letter from Steve Baker MP to Rt Hon Hilary Benn MP on [European Union \(Withdrawal\) Bill](#) dated 13 November 2017

67 Procedure Committee, First Report of Session 2017–19, [Scrutiny of delegated legislation under the European Union \(Withdrawal\) Bill: interim report](#), HC 386, summary

68 *Ibid*, paras 21 – 23

1.5 Clause 7 power to transfer functions to UK bodies

42. We heard evidence of the risk that transposing EU laws into UK law could leave a governance gap,⁶⁹ particularly in environmental law which is embedded in an EU governance and enforcement structure.⁷⁰ Steve Elliott told us that there are many aspects of chemicals regulation that depend on the involvement of EU institutions:

With REACH, it is [the European Chemicals Agency] ECHA in Finland. With the biocidal products directive, it is the Commission, and then they all have supporting structures and committees that look at socioeconomic analysis, and there is the Committee for Risk Assessment. The big question there is if the onus will be on the Health and Safety Executive to look at carrying out all of the current ECHA or Commission functions.⁷¹

43. The Government has argued that existing regulatory bodies, Parliamentary scrutiny and the use of judicial review will be sufficient to hold Ministers to account and enforce environmental standards after we have left the EU.⁷² We heard from Ministers that they had begun discussions with the Secretary of State for Environment, Food and Rural Affairs on enforcement mechanisms,⁷³ while also noting that judicial review is “one of the remedies that is available”.⁷⁴ In a letter to the Environmental Audit Committee, the Under-Secretary of State for the Department for the Environment, Food and Rural Affairs, Thérèse Coffey MP stated:

Our legislative framework already includes provisions for regulators to enforce existing environmental regulations, and our system of judicial review and its body of public law enables any interested party to challenge the decisions and actions of the Government through the UK courts.⁷⁵

44. Andrew Bryce called for more thought from Government in terms of the enforcement of environmental law, pointing out that relying on judicial review was not an appropriate mechanism for holding Government to account:

We have expressed a view that in terms of the existing arrangements for the Commission to exercise a regulatory role, as they do through infraction proceedings, a lot of informal mediation type processes and a citizen complaints system, we are suggesting, will leave a gap when we leave the EU. We are suggesting that judicial review, which is put forward as the answer by the Government currently, is not the answer for a whole series of reasons that I am more than happy to go into. Cost, ability and accessibility are some of the factors involved in the fact that judicial review is not a regulatory tool; it is something to deal with shortcomings that occur in the system.

69 Q140 (Andrew Bryce)

70 House of Lords EU Energy and Environment Sub-Committee, 12th Report of Session 2016–17 [Brexit: environment and climate change](#), HL Paper 109, 14 February 2017, para 45

71 Q138 (Steve Elliott)

72 Department for Exiting the European Union, 8 September 2017, [Factsheet 8: Environmental Protections](#)

73 Q213 (Steve Baker)

74 Q220 (Steve Baker)

75 Environmental Audit Committee, Sixth Special Report of Session 2016–17, [The Future of the Natural Environment after the EU Referendum: Government Response to the Committee’s Sixth Report](#) HC 257, pp.6–7

We have suggested that, going forward, there is a good argument for having a body in the UK that has some oversight of Government and public body conduct, in terms of carrying out its obligations as they exist in legislation. We are up for discussion on that body.⁷⁶

45. A key feature of the Clause 7 power is to transfer functions from the Commission and EU agencies to UK competent authorities. As the Delegated Powers Memorandum explains, many services which enable markets to function and provide protection to individuals are currently provided at an EU level and must be repatriated to the UK for those services to continue.⁷⁷ The memorandum gives the examples of the Competition and Markets Authority taking functions from the Commission, the Civil Aviation Authority replacing the European Air Safety Authority, and a UK government body taking on the functions of assessing chemical substances under the REACH regulation.⁷⁸ Steve Baker explained how the Clause 7 power could be used to amend retained EU laws to reflect the new regulatory requirements:

I will put on the record a couple of examples in the delegated powers memorandum, selecting them at random: “In paragraph 2, for ‘Commission’ substitute ‘Secretary of State’, and (b) in paragraphs”—several numbers—“for ‘Agency’ substitute ‘Executive’”. These are the sorts of things that we envisage, which would be largely technical changes.

Of course, [...] in some areas where a function is repatriated, there is space for debate about where it goes, and we, in the course of the Committee stage, will set out how we believe we can reassure colleagues on some of these points.⁷⁹

46. The UK Environmental Law Association has underlined that a key challenge in replicating EU functions in the UK will be “establishing the requisite domestic expertise and regulatory capacity to administer any local regime (or securing access to EU bodies or expertise)”.⁸⁰ These concerns were repeated to us by Caroline Normand who, considering consumer protection, gave this example:

If you just take food standards, the European Food Safety Authority and the role that they have in understanding the science behind food and new foods, the risk assessments that they make, the standards that they set, the early warning systems that they have in place for when food is found on the market that does not meet those standards and some of EFSA enforcement all need to be replicated in order to have a sound and solid food safety regime in the UK.

[...] It is one thing to have the institution ready with plans. It is another to actually create the scientific community, the committees and the culture as well, and then link that back in internationally, so there is a huge job.⁸¹

76 Q138 (Andrew Bryce)

77 HM Government, [European Union \(withdrawal\) Bill: memorandum concerning the delegated powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 18

78 Ibid, paras 16, 19 and 20.

79 Q224 (Steve Baker)

80 Written evidence to the Environmental Audit Committee on The Future of Chemicals Regulation After the EU Referendum, [ECR0062](#)

81 Q139 (Caroline Normand). Also see paper by the Food Standards Authority on its [Preparations for the UK’s exit from the European Union](#), 20 September 2017

47. Steve Elliott told us that transferring the REACH functions to UK authorities would require a minimum of two years, adding that it was difficult to give clear timelines as it remained unclear what would need to be brought over.⁸² As an illustration of the potential costs to the chemicals industry, Steve Elliott told us that:

In 2016, there was an estimate that, in the worst case, if we were to reregister everything because of exiting from the European Union and the need to do that, that cost would be about £350 million. The UK happens to be the second highest registrant in terms of countries around Europe, so that is a huge sunk cost and potential cost.⁸³

It was highlighted that the UK's Health and Safety Executive, the enforcing arm for REACH in the UK, has been exemplary and certainly has the technical professional expertise. However, the problem could lie in the size of the task, the timing and the resources available.⁸⁴

48. We were told by Ministers that the fundamental principle of this Bill is “to ensure that the statute book and the agencies that implement it continue to function in the way the people would expect the day after we leave the European Union [...] and departments are working through ensuring that we are able to deliver that.”⁸⁵ This will have implications not just for the UK statute book but also for the negotiations, as where the UK decides it wishes to retain regulatory alignment with the EU, the UK will need to show that enforcement is effective and that it will not end up undercutting the EU through a failure to enforce standards.

49. We note that the Environment Secretary has indicated that the Government is planning a new environmental watchdog, independent of government and with clear legal authority, to deliver a “green Brexit”.⁸⁶ This is a step in the right direction towards enforcing environmental regulations once we leave the EU and ensuring that Government and other UK authorities are held to account, and we await more detail on the powers and resources available to this body.

50. The powers in Clause 7 for the Government to transfer regulatory functions from EU institutions to UK regulatory bodies are integral to the Government's approach to transferring the acquis into UK law. However, the Government must be alive to the consequences of the loss of EU infringement proceedings (and complementary dispute tribunals such as the Appeal Board of the European Chemicals Agency) and the risk of creating an enforcement gap if regulatory functions are transferred to bodies that do not have the resources, expertise or independence to carry them out effectively. Such a risk could result in important protections being lost and the UK's credibility in negotiating its future regulatory relationship with the EU being undermined.

51. In this respect, the devil will be in the detail of the statutory instruments under Clause 7 that are brought to this House. We note the current provisions that creating a new public authority and transferring functions to a new body require affirmative

82 Q137 (Steve Elliott)

83 Q149 (Steve Elliott)

84 Q138 (Prof Alan Neal and Steve Elliott)

85 Q222 (Steve Baker)

86 [“Outside the EU, we will become the world-leading curator of the most precious asset of all: our planet”](#), Michael Gove, The Telegraph, 11 November 2017

resolution. However, transferring functions to an existing body could also entail a major policy decision. It is difficult to define on the face of this legislation which decisions will be purely technical and which will require a greater level of scrutiny. This underlines how important it is to ensure that effective procedures are in place to identify which proposals merit further examination in Parliament. As we said in paragraph 41, it is important that the House gets this right and we reiterate our recommendation that the proposals put forward by the Procedure Committee for a new scrutiny committee should be given proper consideration during the Committee Stage of this Bill.

52. It will also be important that the Government publish details of how they will ensure that regulatory agencies in the UK have the resources and enforcement powers to do their job effectively. The relationship between consumers, industry and regulatory agencies not only provides legal redress but also product and standards approval which is vital for buyer confidence and access to markets. It will be important to avoid any unnecessary duplication of regulatory functions or any reduction in confidence in UK products or services. We welcome the Environment Secretary's commitment to the establishment of a new agency to fill the "governance gap" and to ensure that the UK's environmental standards and enforcement are as good as or even better than at present. We intend to return to the important question of the UK's continuing relationship with EU agencies, including seeking clarification from Ministers about how sufficient institutional capacity can be created if and when functions are repatriated.

2 Devolution

2.1 The aims of the Bill

53. One of the four main functions performed by the Bill is to maintain the current scope of devolved decision-making powers in areas currently governed by EU law.⁸⁷ The Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006 all set out that devolved competence must be exercised compatibly with EU law. The effect of this is that, in a devolved policy area such as agriculture, devolved administrations currently only have the power to legislate and determine policies within the framework provided by the EU.

54. Under the provisions of Clause 11, devolved legislatures and executives will remain bound by retained EU law unless or until the UK Parliament agrees to them gaining power to modify it. The Government states that the Bill maintains “the current parameters of devolved competence as regards retained EU law.”⁸⁸ In its White Paper on the then Great Repeal Bill the Government argued that common frameworks would be necessary in some policy areas in order to protect the UK market:

our guiding principle will be to ensure that – as we leave the EU – no new barriers to living and doing business within our own Union are created. We will maintain the necessary common standards and frameworks for our own domestic market, empowering the UK as an open, trading nation to strike the best trade deals around the world and protecting our common resources.⁸⁹

55. The Government has said that the provisions in Clause 11 represent a transitional arrangement until policy frameworks have been agreed.⁹⁰ The devolved governments of Scotland and Wales have objected to the UK Government’s approach, and have said that they will refuse to pass Legislative Consent Motions. Following the publication of the Bill, the First Minister of Scotland, Nicola Sturgeon, and the First Minister of Wales, Carwyn Jones, issued a statement in which they referred to the Bill as “a naked power-grab, an attack on the founding principles of devolution.”⁹¹ They recognised the need for common frameworks to replace EU laws in some areas but questioned the UK Government’s approach:

the way to achieve these aims is through negotiation and agreement, not imposition. It must be done in a way which respects the hard-won devolution settlements. The European Union (Withdrawal) Bill does not return powers from the EU to the devolved administrations, as promised. It returns them solely to the UK Government and Parliament, and imposes new restrictions

87 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) [Bill 5 (2017–19) – EN] p5

88 [Ibid](#) p11

89 Department for Exiting the European Union, [Legislating for the United Kingdom’s withdrawal from the European Union](#), Cm 9446, March 2017, paras 3.4–3.7

90 Rt Hon David Mundell MP, Secretary of State for Scotland, Q10, [Oral evidence to Scottish Affairs Committee](#), 24.10.17

91 Joint statement by the First Ministers for Scotland and Wales on the [European Union \(Withdrawal\) Bill](#), 13 July 2017. Note Northern Ireland has not had a functioning Executive since January 2017.

on the Scottish Parliament and National Assembly for Wales. On that basis, the Scottish and Welsh Governments cannot recommend that legislative consent is given to the Bill as it currently stands.

56. Witnesses suggested that the proposed arrangements did not respect the existing basis of devolved powers. Laura Dunlop QC, Convenor, Faculty of Advocates Law Reform Committee, pointed out that the basis on which the Scottish Parliament was established in 1999 was that everything that was not specifically reserved was devolved but that this fundamental principle was not being maintained.⁹² In terms of Wales, Dr Jo Hunt, School of Law and Politics, Cardiff University, said that:

In Wales, next year, when the [Wales] Act comes into force, we are moving to a reserved powers model, so we have a coming into line across the UK. However, this piece of legislation [the Bill] essentially moves us back to a conferred powers model: these things are taken back to the centre and then handed down piecemeal.⁹³

It should be noted that the devolved administration of Northern Ireland has been suspended since January 2017.

2.2 Legislative consent

57. Although the UK Parliament retains power in each of the devolution statutes to legislate in relation to devolved matters, the Sewel Convention requires that it should normally do so only with the consent of the relevant devolved legislature. The Sewel Convention was given statutory form in the Scotland Act 2016 and the Wales Act 2017, but the Supreme Court held in the Miller case on 24 January 2017 that the Sewel Convention did not give rise to a legally enforceable obligation and that the devolved legislatures did not have a veto on the UK's decision to withdraw from the UK and on the process of triggering Article 50.⁹⁴ The Supreme Court noted that the UK Parliament did not normally exercise its right to legislate with regard to devolved matters without the agreement of the devolved legislatures, but stated that the policing of the scope and operation of the Sewel Convention was not within the constitutional remit of the courts. The judgment noted that it was the expectation of the devolved administrations that the UK Government will need to secure legislative consent from them before implementing the legal process of withdrawal. The judgment also emphasised that the Sewel Convention has an important role in facilitating harmonious relationships between the UK Parliament and the devolved legislatures.⁹⁵

58. In April 2017, Plaid Cymru AMs called for a Continuation Bill to be passed to protect EU laws in Wales.⁹⁶ When asked whether continuation legislation of this sort could be used by the devolved legislatures to produce their own legislation on devolved matters formerly the province of EU law, Laura Dunlop QC said that it was technically possible, and would be one resort if there were “a near emergency situation at that point and some continuity has to be maintained.”⁹⁷

92 Q71 (Laura Dunlop QC)

93 Q79 (Dr Jo Hunt)

94 [R \(Miller\) v Secretary of State for Exiting the European Union](#) [2017] UKSC 5 para 50

95 *Ibid*, para 151

96 [“Brexit: AMs call for bill to protect EU laws in Wales”](#), BBC, 4 April 2017

97 Q85 (Laura Dunlop QC)

59. Dr Hunt said that if the UK Government went ahead with the Bill without a Legislative Consent Motion, it would be “a continuation of the quite confrontational approach” to the devolved administrations.⁹⁸ She said that the fact that continuity legislation was even being considered was “unsatisfactory for the state of our constitution” and added that:

We have been talking about trust; if that is where this ends up, it is a particularly sorry reflection on the state of the UK constitution.⁹⁹

60. Robin Walker confirmed that the Government was seeking legislative consent, and said that “we recognise that this legislation touches on areas of devolved power, and we want to be very clear that we are seeking to work with the devolved administrations on this.”¹⁰⁰

2.3 Common frameworks

61. Witnesses agreed that common frameworks would be required for some policy areas. Dr Kamala Dawar, UK Trade Policy Observatory, said that there was a real concern for “fragmentation of the economy with devolution” and “that international competitiveness could be compromised by a non-harmonised UK position.”¹⁰¹

62. The Faculty of Advocates in Scotland pointed out that 111 areas had been listed as potentially requiring a common policy framework, and said that the list was too long, its content too broadly drawn and some of the 111 areas listed were so imprecise “as to be incapable of meaningful understanding”. It suggested that the proposed approach “threatens to encroach on matters that are already devolved and legislated on by Holyrood under the current settlement.”¹⁰²

63. Rt Hon David Mundell MP, Secretary of State for Scotland, told the Scottish Affairs Committee that there had been significant progress made in terms of how powers and responsibilities currently exercised in Brussels would be returned to the United Kingdom and on to Scotland. This had been discussed in both bilateral meetings and at the JMC (EN). He explained that an exercise was going ahead to examine how different policy areas would be dealt with after the UK had left the EU, and that once that evaluation was complete, the aim was “to press ahead as expeditiously as possible [...] in terms of determining which of the 111 responsibilities [...] would go directly to the Scottish Parliament and which will be the subject of discussion for a UK-wide framework.”¹⁰³ He explained that for those policies where UK frameworks were deemed necessary, they would be developed with the devolved administrations, saying that “a UK framework is not a framework that the UK Government impose; it is a framework that is agreed across the United Kingdom.”¹⁰⁴

64. Robin Walker told us that the Government wanted to have a constructive conversation with the devolved administrations to discuss where shared frameworks would need to be maintained (as they exist at the moment in the European structure), and where they

98 Q83 (Dr Jo Hunt)

99 Q85 (Dr Jo Hunt)

100 Q201 (Robin Walker)

101 Q69 (Dr Kamala Dawar)

102 The Faculty of Advocates ([EUW0033](#)), para 25. See also Q80 (Laura Dunlop QC)

103 Oral evidence taken before the Scottish Affairs Committee on 24 October 2017, HC (2017-19) 376, [Q3](#) [Rt Hon David Mundell MP]

104 *Ibid*, [Q24](#)

would not be necessary, so that those powers would be able to be passed on to the devolved administrations. He explained that this work would proceed alongside the Bill, and that the intention of the Bill was “to increase the power of each of the devolved administrations.”¹⁰⁵

2.4 Mechanism for releasing powers to devolved administrations

65. Witnesses raised the need for a mechanism for releasing powers to the devolved administrations. Laura Dunlop QC suggested that “there would probably be a need to draw on several different tools in order to achieve an agreed position.”¹⁰⁶ She referred to proposals published by Mark Lazarowicz on the Scottish Centre on European Relations website.¹⁰⁷ Mr Lazarowicz’s options were not mutually exclusive, and in summary were:

- It could be specified that the powers which the bill gives to UK ministers to modify ‘retained EU law’ can be only exercised, when they concern devolved competence, if the Scottish ministers give their consent.
- It could be specified in the Bill that certain powers over ‘retained EU law’ will be devolved by the bill itself, rather than waiting for them to be subsequently ‘released’ from reserved competence by ministerial decision and secondary legislation.
- The Scottish Parliament could be given the power in the EU (Withdrawal Bill) to legislate on retained EU law where it would have otherwise been transferred to the Scottish Parliament automatically, but with the qualification that any item of such legislation by the Scottish parliament could be vetoed by the UK government if it considered that it was inconsistent with its UK-wide approach to powers which were being returned from the EU.
- A ‘reverse sunset clause’ could be put into the Bill. The bill currently includes ‘sunset clause’ provisions to limit the powers of ministers to make changes through secondary legislation, so that they expire two years after the UK’s final exit from the EU. At that stage, unless those powers are extended, or replaced by similar mechanisms, it will therefore only be the UK parliament that can make further decisions about repeal or amendment of retained EU law.¹⁰⁸

66. Dr Hunt pointed out that there were already mechanisms which provided an opportunity for intervention if any devolved legislative action looked as if it might put the UK outside its obligations in international law. She suggested that Clause 11 “could simply be removed, as has been suggested by the Governments in Scotland and Wales” and that:

There could be an understanding—given this idea of trust that the UK Government is asking for—that, similarly, there is trust that the four nations together would work in such a way for the continued betterment of the United Kingdom. Why would there be an impetus to diverge?¹⁰⁹

105 Q193 (Robin Walker)

106 Q76 (Laura Dunlop QC)

107 Qq 94–95 (Laura Dunlop QC)

108 Scottish Centre on European Relations, [Devolution after Brexit: ‘Power Grab’ or a ‘Significant Increase in Decision-making Power’?](#) Mark Lazarowicz, 20 September 2017

109 Q69 (Dr Jo Hunt)

67. When we asked Ministers whether they had considered including a sunset clause, Robin Walker said that the Government aimed to reach agreement on framework issues very soon and so a sunset clause would not prove necessary:

I would draw your attention to the fact that the timetable on which we envisage reaching agreement on these things is much faster than any of the existing sunset clauses within this Bill. It is something that we would like to make rapid progress with. We have had a meeting of the JMC, in which common, shared principles have been agreed. There is technical work now going on to take that forward and look at the areas where they may not be necessary. I would hope that we can deliver on that in a timescale that will mean this debate about sunset clauses will be irrelevant.¹¹⁰

2.5 Preserving devolved interests in international trade deals

68. In its Third Report, our predecessor Committee pointed to the need for a mechanism through which the devolved administrations could seek to influence UK Government decisions, such as international trade deals, which related to devolved policy areas or had a particular impact on their nations. When asked about this issue, Laura Dunlop QC said that:

At the moment, there is a sense of a double-whammy: that the international arrangements, whatever they are going to be, will be negotiated by the UK Government, and then the UK Government will be telling the devolveds what they have to do to comply with them. The participation is minimal.¹¹¹

69. Dr Dawar explained that it was difficult in practice to separate devolved interests from international responsibilities.¹¹² She referred to the example of government procurement which is already devolved, and questioned how the Government could, for example, enter negotiations to go into the Government Procurement Agreement, an ambition stated in the Trade White Paper, without having previously set up some body to take account of the different interests of the devolved nations. She explained that:

One of the problems that I see, from an international perspective, is that the UK Government are still responsible for international relations and treaty-making. For example, in the WTO, the UK Government are going to have to do those negotiations. When you look at complying with international obligations under Clause 8, the sequencing is not clear. For example, the Government might put in place a mechanism whereby they could be first among equals, or some sort of acceptable way of discussing these issues with the devolved regions before they make these international agreements and negotiations. At the moment, it is not really clear whether the UK Government are going to make these international negotiations on issues that touch on the devolveds.¹¹³

110 Q202 (Robin Walker)

111 Q75 (Laura Dunlop QC)

112 Q74 (Dr Kamala Dawar)

113 Q71 (Dr Kamala Dawar)

70. During its visit to Swansea, Professor Brian Morgan explained the possible problems if the UK Government were to negotiate trade deals with new partners such as Australia, New Zealand and the United States:

I see that as a big problem area, because as we move towards free trade, we will be negotiating across different sectors, and if we want people to open up their markets to our cars, for example, we might well be—erroneously, in my view—agreeing to open up our market to their agricultural produce. That type of increased competition in the short run would be devastating for Welsh farmers.¹¹⁴

2.6 Consultation processes

71. The Government established a Joint Ministerial Committee for EU Negotiations (JMC (EN)) for consulting the devolved administrations on their priorities for Brexit. The role of the Committee is “to seek to agree a UK approach to, and objectives for, negotiations, and to consider proposals put forward by the devolved administrations.”¹¹⁵ The Committee met on 9 November and 7 December 2016 and on 19 January and 8 February and 15 October 2017. We note that the JMC (EN) has met only once since Article 50 was triggered over seven months ago. Our predecessor Committee considered the effectiveness of the JMC (EN) in its Third Report, and concluded in March 2017 that the evidence suggested that these meetings had not been effective from the point of view of the devolved administrations. It recommended that the Government establish a more effective process for engaging the devolved administrations.¹¹⁶

72. Witnesses stressed the need for effective mechanisms to support co-operation among the four nations. Dr Hunt said that:

The existing informal structures that we have, around JMCs and the memorandum of understanding, work fine when relations are fine, but we need the institutional structures for when things get difficult. That is missing here at the moment.¹¹⁷

73. Dr Hunt pointed to the suggestion from the Welsh Government’s First Minister of a UK Council of Ministers, which would include, as in the EU structures, the representatives of the devolved Governments. She explained that:

It exists in different formations; there is not just one Council of Ministers. It meets together to discuss issues on agriculture, on environment, on fisheries and on social matters. There could be that meeting of ministers, which we have to some extent with JMC, but made into a decision-making body. There are suggestions too about giving that a statutory basis, so there would be an Act of Parliament to settle those structures.¹¹⁸

114 Oral evidence taken on 2 March 2017, HC (2016-17) 815, [Q1261](#) [Prof Brian Morgan]

115 HM Government, [The United Kingdom’s exit from and new partnership with the European Union](#), Cm 9417, p 17

116 Third Report of Session 2016–17, [The Government’s negotiating objectives: the White Paper](#), HC 1125, para 74

117 Q79 (Dr Jo Hunt)

118 Q103 (Dr Jo Hunt)

74. Dr Hunt was positive about the progress on common frameworks which was announced in the JMC (EN) communique from the October 2017 meeting,¹¹⁹ but pointed out that it was important “to reaffirm the idea that there is space for diversity and difference”. She compared the operation of a future UK framework to the way in which the EU single market operates using a variety of instruments to maintain conformity. She explained that:

Yesterday we had the JMC. There looks to be something of a breakthrough coming there, and some of that is an acknowledgement that when we are talking about common frameworks it is not necessarily a top-down imposition of one uniform legal rule for the whole UK. It is looking to the sorts of things that we have seen for decades from the EU, and looking at the space there for flexibility and diversity. There are all sorts of ways that you can bring a market together. There are legal and extra-legal techniques that can be used to create a common market.¹²⁰

75. Laura Dunlop QC said that it was important to distinguish between the mechanisms required for the two distinct stages of negotiating common frameworks and then implementing them. There would also be a need for an independent dispute resolution mechanism, such as the Supreme Court or a bespoke arbitration mechanism. She said that the first stage of negotiating frameworks required negotiation and agreement, and that the JMC (EN), perhaps strengthened in some way, could be the forum in which that kind of negotiation could take place and agreement could be reached.¹²¹

76. The Institute for Government has suggested that one way to handle negotiations in respect of international trade deals in future would be to create a JMC specifically for international trade. Dr Dawar said that such a body “would definitely be helpful” in terms of developing a common understanding on complex trade issues.¹²²

77. Whilst the Government has said that it plans to work with the devolved administrations to reach agreements on UK common frameworks, the devolved administrations have insufficient trust in the process for agreeing these future relationships and have, accordingly, indicated that they will withhold legislative consent from the Bill. The Government must improve engagement with the devolved administrations to resolve this deadlock. It must reach an agreement with the devolved administrations, which might result in changes to the Bill, setting out how and when reserved competencies will be devolved.

78. Our predecessor Committee heard evidence that the JMC (EN) meetings had not been effective from the point of view of the devolved administrations. The future arrangements for the UK after leaving the EU will only be successful if they work for the whole of the UK. This will only be possible if there is mutual trust and cooperative, participative mechanisms for joint working between the UK Government and the devolved administrations. These mechanisms will be required not just to resolve issues relating to the repatriation of EU competencies, but also in the long term to ensure that devolved interests are properly considered when developing new international agreements.

119 [“Joint Ministerial Committee \(EU Negotiations\) Communique”](#), 16 October 2017

120 Q80 (Dr Jo Hunt)

121 Q80 (Laura Dunlop QC)

122 Q107 (Dr Kamala Dawar)

79. We recommend that the JMC (EN) meets much more regularly and that it addresses the concerns expressed by the devolved administrations about the effectiveness of its operations. Government should also set out whether it is considering formal structures for inter-governmental relations, and its proposed arbitration system for disputes, so that the views of the devolved governments can be heard, including in any future trade agreements.

3 Implementing the withdrawal agreement

3.1 Clause 9 power to implement the withdrawal agreement

80. Clause 9 delegates powers to Ministers to bring forward secondary legislation in order to implement the withdrawal agreement. Clause 9(2) is particularly wide, including the provision that secondary legislation could modify the EU (Withdrawal) Bill itself once enacted. The term ‘modify’ is defined in Clause 14 to include amendment and repeal. The withdrawal agreement is defined in Clause 14 as an agreement, whether or not ratified, agreed with the European Union under Article 50(2) TEU; the Clause 9 power could therefore be used before the agreement is ratified. The power expires on “exit day” (as defined in Clause 14).

81. As the Government’s delegated powers memorandum points out, the “exact use of the power will of course depend on the contents of the withdrawal agreement”¹²³ which will likely require changes to citizens’ rights, Irish border issues, dispute resolution and transitional arrangements. The Government argues that the breadth of the Clause 9 power is needed in order to be “sufficiently flexible”¹²⁴ to give effect to whatever is in the final agreement.

82. Witnesses did not find the breadth of the Clause 9 power problematic, noting that the power will be limited to dealing only with our “final obligation to the EU to implement the deal by which we leave” and can only be exercised “at great speed, because we know the deal is not going to be known until the last minute.”¹²⁵ However, reservations were expressed regarding the power to modify the Act itself, with Professor Ekins telling us that changes to such a “significant constitutional measure” as this Act should be made by primary legislation.¹²⁶ We heard from Steve Baker that the decision to use secondary legislation to implement the agreement was due to considerations of time:

It is about the imperative to deliver by exit day, so it is a matter of being able to deliver the certainty that the statute book will be in the right shape by exit day.¹²⁷

However, by using delegated legislation, the Government risks exposing the withdrawal agreement to challenge in the courts. In his note to the Committee, Sir Stephen Laws explained that the powers in the Act consequently need to be drawn widely to mitigate that risk:

Limiting the powers in the Bill in a way that would create extra opportunities for statutory instruments to be challenged in the courts would undermine the rule of law entitlement of those who are going to need to rely on the predictability of the new law to manage their affairs.¹²⁸

123 HM Government, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 62

124 *Ibid*, para 62

125 Q50 (Sir Stephen Laws)

126 Q50 (Prof Richard Ekins)

127 Q160 (Steve Baker)

128 Sir Stephen Laws, [\(EUB0004\)](#) para 67

83. It has also been argued that an Act of Parliament would be needed to give legal effect to the withdrawal agreement, given the fundamental changes in the law and legal rights that would result¹²⁹ and as a means to prevent legal challenges to the agreement.¹³⁰ We also heard from Dr O'Brien that citizens' rights within the withdrawal agreement should be a "primary-law right" as, even though they would not be made inviolable, they could "at least be granted greater protection than being effected in secondary law."¹³¹

84. The Prime Minister said in her Florence speech that the UK would "incorporate our agreement fully into UK law and make sure the UK courts can refer directly to it."¹³² Ministers told us that the implementation period, which will also be agreed under Article 50,¹³³ would be implemented by separate primary legislation¹³⁴ and, when asked, did not rule out primary legislation to implement the entire withdrawal agreement.¹³⁵ The Secretary of State has since confirmed that a Withdrawal Agreement and Implementation Bill will enshrine both the withdrawal agreement and the implementation period in UK law. He told the House that "this confirms that the major policies set out in the withdrawal agreement will be directly implemented into UK law by primary legislation, and not by secondary legislation under the [EU] Withdrawal Bill." He added that the Bill is "expected to cover the contents of the Withdrawal Agreement, including issues such as an agreement on citizens' rights, any financial settlement and the details of an implementation period agreed between both sides."¹³⁶ Although asked on three occasions subsequently whether this announcement meant that Clause 9 would be removed from the EU (Withdrawal) Bill, the Secretary of State did not provide an answer.¹³⁷

85. We welcome the Government's commitment to introduce a Withdrawal Agreement and Implementation Bill. However, if the Clause 9 powers remain in the European Union (Withdrawal) Bill then they could be used to implement parts of the withdrawal agreement by secondary legislation before the Withdrawal Agreement and Implementation Bill is considered by Parliament. The Government should now justify the purpose of Clause 9 given its announcement that there will be a separate Withdrawal Agreement and Implementation Bill.

3.2 Citizens' rights

86. The Secretary of State told the House in October 2017 that the negotiations had "explored ways in which we can fully implement the withdrawal treaty into UK law, giving confidence to European citizens living in the UK that they will be able to directly enforce their rights, as set out in the agreement, in UK courts."¹³⁸ This was something he had

129 Legal Opinion, [In the matter of Article 50 of the Treaty on European Union](#), Sir David Edward KCMG PC QC, Sir Francis Jacobs KCMG PC QC, Sir Jeremy Lever KCMG QC (Retired), Helen Mountfield QC, Gerry Facenna QC, see paras 2(ii) and (iii)

130 "[Interview: Dominic Grieve. Brexit is an "unBritish" revolution – and how he will work to improve the EU Withdrawal Bill](#)", Conservative Home, 20 September 2017

131 Q32 (Dr Charlotte O'Brien)

132 Speech given by the Prime Minister, [A new era of cooperation and partnership between the UK and the EU](#), Florence, 22 September 2017

133 The Prime Minister said in her [Florence speech](#) that the framework for the implementation period "can be agreed under Article 50".

134 Q187 (Steve Baker)

135 Q188 (Steve Baker)

136 HC Deb, 13 November 2017, [col 37](#), [Commons Chamber]

137 Ibid, see questions from Keir Starmer in col 39, Yvette Cooper in col 43, and Dominic Grieve in col 44

138 HC Deb, 17 October 2017, [col 731](#) [Commons Chamber]

previously referred to as “direct effect if you like.”¹³⁹ The Government’s Technical Note on Implementing the Withdrawal Agreement explains that the EU Treaties are “unique in requiring parties to implement them by incorporating the concept of direct effect into their domestic legal orders” which was achieved in the UK through Clause 2(1) of the ECA.¹⁴⁰ It also contends that that “it would be inapt to require the UK to maintain [direct effect] in its domestic law when it is no longer part of the legal order of which direct effect is a corollary,” adding that it would be “both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law.”¹⁴¹

87. It is unclear how rights within the withdrawal agreement would be given direct effect. In his written evidence, Professor Phil Syrpis from the University of Bristol suggested that “even if the rights stemming from the agreement are actionable at the suit of individuals in national courts, those rights will count for little without effective remedies (in which context the exclusion of Francovich damages¹⁴² [in Schedule 1] is likely to be problematic).”¹⁴³ Sir Stephen Laws proposed using a mechanism similar to Clause 2(1) of the ECA:

The agreement will have to be given effect to in UK law. The agreement is going to be an international agreement, just as the treaties are an international agreement, and the treaties given direct effect in UK law at the moment by Clause 2(1) of the European Communities Act. You could achieve the same in the exit agreement, the deal, or whatever it is.

[...] I can see that you can imagine a case where you treat the exit deal in the same way that the European Communities Act treats the treaties at the moment, and that may be what is being proposed. I do not see any objection to that. If that is what the deal requires, that is what you do.¹⁴⁴

88. We were told that there was no way to make rights granted in the withdrawal agreement inviolable as no Parliament can bind its successor.¹⁴⁵ Dr O’Brien was concerned about maintaining rights for EU citizens through Clause 9 regulations:

That is where I suspect it would be problematic for any withdrawal agreement that incorporates EU citizens’ rights to simply be a matter of secondary legislation or a matter of ministerial power, because it is important that the people who might fall through the gaps are protected or at least offered some kind of scrutiny of what their rights are going to be.¹⁴⁶

139 Speech given by David Davis, [Closing remarks at the end of the fourth round of EU exit negotiations](#), Brussels, 28 September 2017

140 HM Government, [Technical Note: Implementing the Withdrawal Agreement](#), para 9

141 HM Government, [Technical Note: Implementing the Withdrawal Agreement](#), para 9

142 the Francovich principle, which provided that the damages for a state’s failure to implement EU law should be available before national courts, and that state liability on the basis of the failure to implement a directive could be established in certain circumstances, is expressly excluded under provisions in Schedule 1

143 Prof Phil Syrpis ([EUB0005](#)) para 13

144 Q8 (Sir Stephen Laws)

145 Q32

146 Q32 (Dr Charlotte O’Brien)

She underlined that it would likely be the most vulnerable citizens – “children, women, including victims of domestic abuse who have had to be relocated” and “women who have been the family member of a UK national rather than of an EU national” whose rights to reside would fall outside Directive 2004/38 and outside the ambit of Clause 9.¹⁴⁷

89. The explanatory note to the Bill identifies EU citizens’ rights as one of the potential areas where the power to correct deficiencies arising from withdrawal (under Clause 7) might be used:

The power to deal with deficiencies can therefore modify, limit or remove the rights which domestic law presently grants to EU nationals, in circumstances where there has been no agreement and EU member states are providing no such rights to UK nationals.¹⁴⁸

Witnesses told us that, even though this power would exist, if there was an agreement with the EU to guarantee citizens’ rights the Government would not use it as “the UK would be bound in international law to preserve those rights, and the UK Government has a practice of complying with its international obligations.”¹⁴⁹ A point also made in the Government’s Technical Note:

[...] if the Withdrawal Agreement requires the UK to give citizens specified rights, and the UK enacts domestic legislation whose effect is to bestow those rights. Not only will EU citizens be able to enforce those rights through the UK’s domestic legal system, but the UK’s compliance with its international obligations can also be enforced using whatever mechanisms the agreement includes for the resolution of disputes.¹⁵⁰

90. We were told by Ministers that legislation to reassure the EU27 that citizens’ rights would be protected and directly effective, would not be “something that is likely to be dealt with under the powers that we are discussing today in this Bill” but would be “very likely to be a primary, rather than a secondary, process.”¹⁵¹

91. The Government has proposed that the withdrawal agreement be incorporated fully into UK law as a means to provide greater reassurance and protection for citizens’ rights. We support the position put to us by Ministers that this will be done through separate primary legislation rather than using the powers in this Bill.

3.3 Dispute resolution

92. The mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be crucial to the whole agreement, and could themselves be one of the major areas of dispute. The key question will be what role, if any, the CJEU will have in the enforcement of the agreement, interpreting its provisions, and how its rulings will be taken into account.

147 Ibid

148 [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) [Bill 5 (2017-19) -EN] p 10

149 Q33 (Sir Stephen Laws)

150 HM Government, [Technical Note: Implementing the Withdrawal Agreement](#), para 3

151 Qq252–5 (Steve Baker and Robin Walker)

93. The EU27 have proposed the establishment of a Joint Committee comprising representatives of both the EU and the UK. However, owing to their concerns that rights specified in UK domestic legislation could be altered by subsequent UK domestic legislation, the EU27 have called for a separate regime for the enforcement of the provisions on citizens' rights, requiring that "the Court of Justice has jurisdiction corresponding to the duration of the protection of citizen's rights in the Withdrawal Agreement."¹⁵²

94. The UK Government has argued that leaving the EU "will bring an end to the direct jurisdiction of the CJEU."¹⁵³ As the Secretary of State told us, by the end of any implementation period, we would "want to be under alternative administration arrangements in terms of international arbitration."¹⁵⁴ The Government questioned the rationale for a continued role for the CJEU in its future partnership paper on enforcement and dispute resolution, saying that:

it does not follow that the CJEU must be given the power to enforce and interpret international agreements between the EU and third countries, even where they utilise terms or concepts found in EU law. Nor is it a required means of resolving disputes between the EU and third countries on the interpretation or implementation of an agreement. The EU is able to (and does) agree to a wide range of approaches to dispute resolution under international agreements, including by political negotiation and binding third party arbitration.¹⁵⁵

95. We heard that the role proposed by the EU27 for the CJEU to enforce citizens' rights in the UK was "unprecedented and was remarkable."¹⁵⁶ Professor Ekins told us that it was a "basic problem of fairness":

No sovereign state, at least in international practice, is going to commit itself to the jurisdiction of a tribunal that is a part of the body with whom it is in dispute. When I said "remarkable", I meant "outrageous", I should add.¹⁵⁷

96. The Government set out various alternative models to the CJEU for enforcement and dispute resolution in its future partnership paper, without saying which it prefers. This could mean that different mechanisms are considered appropriate for different issues. These include a Joint Committee and a special international court, similar to the EFTA Court, while the paper also recognises the value of a continuing relationship between national courts and the CJEU particularly in situations where there is a "shared interest in reducing or eliminating divergence", for example in data protection.¹⁵⁸

97. Identifying mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be a central part of the agreement itself. The Government has suggested various alternative dispute resolution mechanisms but should be clearer as to which mechanisms it considers appropriate for which types of dispute. While a continuing role for the CJEU and its case-law cannot be ruled out in areas where there

152 European Commission, [Position Paper on Governance](#), TF50 (2017) 4, 12 July 2017, p3

153 HM Government, [Enforcement and dispute resolution: a future partnership paper](#), para 1

154 Oral evidence taken on 25 October 2017, HC (2017-19) 372, [Q10](#) [David Davis]

155 HM Government, [Enforcement and dispute resolution: a future partnership paper](#), para 19

156 Q58 (Prof Richard Ekins)

157 Q61 (Prof Richard Ekins)

158 HM Government, [Enforcement and dispute resolution: a future partnership paper](#), para 51

may be continued partnership or convergence of standards and regulations, it is not appropriate that the CJEU would continue to have jurisdiction in the UK to enforce citizens' rights after the UK has left the EU. This should be done by a body representing both parties to the agreement.

3.4 Exit day

98. The Bill as drafted includes a number of references to “exit day” which will determine, among other provisions, when the ECA is repealed, the point at which retained EU law is captured, and the length of the sunset clauses applicable to the powers in Clauses 7, 8 and 9. “Exit day” is currently defined in Clause 14 as “such day as a Minister of the Crown may by regulations appoint.” The House of Lords Committee on the Constitution explains:

The Bill contains no express provisions that constrain the scope of ministerial discretion to define “exit day” or that otherwise set criteria by which “exit day” is to be determined. Indeed, the Bill leaves open the possibility that Ministers may provide through regulations that “exit day” is to be taken to mean one thing for one purpose and something else for another purpose. For instance, it may be possible for Ministers to provide that for the purpose of Clause 1 (repeal of the ECA) “exit day” is to be taken to be 29 March 2019, but that for the purpose of the Clause 7 amendment powers (which lapse, through a sunset clause, two years after “exit day”) “exit day” is to be taken to be some later date.¹⁵⁹

99. Sir Stephen Laws was not concerned by the power in the Bill to appoint different exit days for different purposes. He told us that flexibility in the designation of commencement days is a common provision in legislation, allowing for different provisions to be brought into force on appointed days.¹⁶⁰ Professor Ekins suggested that the flexibility given to the Government could allow provisions to be delayed or extended over a transitional period.¹⁶¹ Steve Baker confirmed that the interpretation that different exit days could be set for different purposes was indeed the correct interpretation of the provisions in the Bill.¹⁶²

100. Sir Stephen Laws emphasised that the provision of different exit days would not change the day when the UK actually exits the European Union which will be, in accordance with Article 50, the day on which the Treaties of the EU cease to apply to the UK.¹⁶³ However, the Government has tabled amendments to the Bill to make references to “exit day” the same as the date the UK actually exits the EU by setting “exit day” for all purposes in the Bill as 29 March 2019 at 11.00 pm.¹⁶⁴ This would appear to remove the option to defer the commencement of certain provisions during an implementation period, however; Ministers told us there would be separate primary legislation providing for an implementation period.

159 House of Lords Constitution Committee, [Third Report of Session 2017–19, European Union \(Withdrawal\) Bill: interim report](#), HL 19, para 20

160 Q17 (Sir Stephen Laws)

161 Q12 (Prof Richard Ekins)

162 Q162 (Steve Baker)

163 Q17 (Sir Stephen Laws)

164 See amendments 381, 382 and 383

101. Clause 14 as drafted places it within the hands of Ministers to decide which exit day will apply to which provisions in the Bill. This would have implications for when the European Communities Act is repealed, the point at which a snapshot of EU law is taken and transposed into UK law, and when the Henry VIII powers granted to Ministers in this Bill will expire. The flexibility to set multiple exit days was described to us as a tool for setting different commencement dates for different provisions and providing for possible transitional arrangements. The Government's latest amendments will however, if agreed by the House, remove this flexibility by setting the exit day in the Bill as 29 March 2019 at 11.00 pm. This would create significant difficulties if, as the Secretary of State suggested to us in evidence, the negotiations went down to the 59th minute of the 11th hour.¹⁶⁵

Formal Minutes

Wednesday 15 November 2017

Members present:

Hilary Benn, in the Chair

Mr Peter Bone	Mr Pat McFadden
Joanna Cherry	Craig Mackinlay
Mr Christopher Chope	Seema Malhotra
Stephen Crabb	Mr Jacob Rees-Mogg
Mr Jonathan Djanogly	Stephen Timms
Peter Grant	Mr John Whittingdale
Wera Hobhouse	Hywel Williams
Stephen Kinnock	Sammy Wilson
Jeremy Lefroy	

Draft Report (*European Union (Withdrawal) Bill*), proposed by the Chair, brought up and read.

Question put, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 15 agreed to.

Paragraph 16 read.

Amendment proposed, to leave out from “grounds.” to the end of the paragraph –
(*Mr Jacob Rees-Mogg*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 6

Mr Peter Bone
Mr Christopher Chope
Craig Mackinlay
Mr Jacob Rees-Mogg
Mr John Whittingdale
Sammy Wilson

Noes, 11

Joanna Cherry
Stephen Crabb
Mr Jonathan Djanogly
Peter Grant
Wera Hobhouse
Stephen Kinnock
Jeremy Lefroy
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Hywel Williams

Question accordingly negated.

Paragraph agreed to.

Paragraphs 17 and 18 agreed to.

Paragraph 19 read.

Amendment proposed, to leave out from “questions.” to the end of the paragraph and insert the words “There is no reason to suppose that these will not be settled in the courts in the normal way. After all, there was no concept of a constitutional statute prior to the 1972 European Communities Act.” – (*Mr Jacob Rees-Mogg*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 7

Mr Peter Bone
Mr Christopher Chope
Stephen Crabb
Craig Mackinlay
Mr Jacob Rees-Mogg
Mr John Whittingdale
Sammy Wilson

Noes, 10

Joanna Cherry
Mr Jonathan Djanogly
Peter Grant
Wera Hobhouse
Stephen Kinnock
Jeremy Lefroy
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Hywel Williams

Question accordingly negated.

Paragraph agreed to.

Paragraphs 20 to 47 agreed to.

Paragraph 48 read, as follows

“Caroline Normand told us that there were already concerns about the UK’s consumer enforcement regime, which she described as “pretty much strained to breaking point”. She noted the 56% reduction in Trading Standards officers since 2009 and the recent incidents of fire and deaths linked to faulty kitchen products, adding that “if you add to that what will fall on the shoulders of consumer enforcement agencies post-EU exit [...] The weight is going to come and the system is currently not fit for purpose.”

Motion made, and Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 8

Joanna Cherry
Peter Grant
Wera Hobhouse
Stephen Kinnock
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Hywel Williams

Noes, 9

Mr Peter Bone
Mr Christopher Chope
Stephen Crabb
Mr Jonathan Djanogly
Jeremy Lefroy
Craig Mackinlay
Mr Jacob Rees-Mogg
Mr John Whittingdale
Sammy Wilson

Paragraph accordingly negatived.

Paragraphs 49 to 63 (now 48 to 62) agreed to.

Paragraph 64 (now 63) read.

Amendment proposed, at end, to add

“The Rt Hon David Mundell MP, Secretary of State for Scotland, advised on 13 July 2017 that there would be a “power bonanza for the Scottish Parliament”. The Committee notes that to date no single “power or responsibility” has been confirmed as being returned to Scotland.”

The Committee divided.

Ayes, 8

Joanna Cherry
Peter Grant
Wera Hobhouse
Stephen Kinnock
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Hywel Williams

Noes, 9

Mr Peter Bone
Mr Christopher Chope
Stephen Crabb
Mr Jonathan Djanogly
Jeremy Lefroy
Craig Mackinlay
Mr Jacob Rees-Mogg
Mr John Whittingdale
Sammy Wilson

Question accordingly negatived.

Paragraph agreed to.

Paragraphs 65 to 97 (now 64 to 96) agreed to.

Paragraph 98 (now 97) read.

Amendment proposed to leave out from second “mechanisms” to “it is” in line 6 –
(*Mr Jacob Rees-Mogg*)

The Committee divided.

Ayes, 6

Mr Peter Bone
Mr Christopher Chope
Craig Mackinlay
Mr Jacob Rees-Mogg
Mr John Whittingdale
Sammy Wilson

Noes, 11

Joanna Cherry
Stephen Crabb
Mr Jonathan Djanogly
Peter Grant
Wera Hobhouse
Stephen Kinnock
Jeremy Lefroy
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Hywel Williams

Question accordingly negatived.

Motion made, and Question put, That the paragraph stand part of the Report.

The Committee divided.

Ayes, 11

Joanna Cherry
 Stephen Crabb
 Mr Jonathan Djanogly
 Peter Grant
 Wera Hobhouse
 Stephen Kinnock
 Jeremy Lefroy
 Mr Pat McFadden
 Seema Malhotra
 Stephen Timms
 Hywel Williams

Noes, 6

Mr Peter Bone
 Mr Christopher Chope
 Craig Mackinlay
 Mr Jacob Rees-Mogg
 Mr John Whittingdale
 Sammy Wilson

Paragraph accordingly agreed to.

Paragraphs 99 to 101 (now 98 to 100) agreed to.

Paragraph 102 (now 101) read.

Amendment proposed to leave out the words “The Government’s amendments to remove that flexibility by setting the exit day in the Bill as 29 March 2019 at 11.00p.m. reinforces the evidence we heard that this Bill will be superseded or complemented by other primary legislation that provides for an implementation period agreed as part of the withdrawal agreement.” And insert

“The Government’s latest amendments will, however, if agreed by the House, remove this flexibility by setting the exit day in the Bill as 29 March 2019 at 11.00p.m. This would create significant difficulties if, as the Secretary of State suggested to us in evidence, the negotiations went down to the 59th minute of the 11th hour.” – (*The Chair*)

The Committee divided.

Ayes, 12

Joanna Cherry
Stephen Crabb
Mr Jonathan Djanogly
Peter Grant
Wera Hobhouse
Stephen Kinnock
Jeremy Lefroy
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Mr John Whittingdale
Hywel Williams

Noes, 5

Mr Peter Bone
Mr Christopher Chope
Craig Mackinlay
Mr Jacob Rees-Mogg
Sammy Wilson

Amendment agreed to.

Paragraph 102 (now 101), as amended, agreed to.

Question put, That the Report be the First Report of the Committee to the House.

The Committee divided:

Ayes, 12

Joanna Cherry
Stephen Crabb
Mr Jonathan Djanogly
Peter Grant
Wera Hobhouse
Stephen Kinnock
Jeremy Lefroy
Mr Pat McFadden
Seema Malhotra
Stephen Timms
Mr John Whittingdale
Hywel Williams

Noes, 5

Mr Peter Bone
Mr Christopher Chope
Craig Mackinlay
Mr Jacob Rees-Mogg
Sammy Wilson

Question accordingly agreed to.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available (*Standing Order No. 134*).

[Adjourned till Tuesday 21 November at 9.30 a.m.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 11 October 2017

Question number

Sir Stephen Laws, former First Parliamentary Counsel; **Sir Konrad Schiemann**, former UK judge at the CJEU and Court of Appeal; **Professor Richard Ekins**, Associate Professor of Law, University of Oxford, and Head of Judicial Power Project, Policy Exchange; **Dr Charlotte O'Brien**, Senior Lecturer, York Law School

[Q1–68](#)

Tuesday 17 October 2017

Laura Dunlop QC, Convenor, Faculty of Advocates Law Reform Committee; **Dr Jo Hunt**, School of Law and Politics, Cardiff University; **Dr Kamala Dawar**, UK Trade Policy Observatory

[Q69–109](#)

Wednesday 18 October 2017

Andrew Bryce, Co-Chair Brexit Task Force, UK Environmental Law Association; **Professor Alan Neal**, University of Warwick; **Steve Elliot**, Chief Executive, Chemical Industries Association; **Caroline Normand**, Director of Policy, Which?

[Q110–156](#)

Thursday 26 October 2017

Mr Steve Baker MP, Parliamentary Under Secretary of State, Department for Exiting the European Union; **Mr Robin Walker MP**, Parliamentary Under Secretary of State, Department for Exiting the European Union

[Q157–257](#)

Published written evidence

The following written evidence was received and can be viewed on the [inquiry publications page](#) of the Committee's website.

EUB numbers are generated by the evidence processing system and so may not be complete.

- 1 38 Degrees ([EUB0012](#))
- 2 City of London Corporation ([EUB0017](#))
- 3 Compassion in World Farming ([EUB0009](#))
- 4 Co-operatives UK ([EUB0010](#))
- 5 Dr Ludivine Petetin ([EUB0015](#))
- 6 Dr Sam Fowles ([EUB0008](#))
- 7 Law Society of Scotland ([EUB0002](#))
- 8 Mr Mark Ryan ([EUB0006](#))
- 9 Mr Mikolaj Barczentewicz ([EUB0013](#))
- 10 Open Britain ([EUB0014](#))
- 11 Professor Phil Syrpis ([EUB0005](#))
- 12 Professor Richard Ekins, Associate Professor of Law, University of Oxford, and Head of Judicial Power Project, Policy Exchange ([EUB0019](#))
- 13 Rail Delivery Group ([EUB0001](#))
- 14 Sir Konrad Schiemann ([EUB0011](#))
- 15 Sir Stephen Laws KCB, QC ([EUB0004](#))
- 16 UK Finance ([EUB0007](#))
- 17 Which? ([EUB0018](#))
- 18 Which? ([EUB0003](#))
- 19 Dr Charlotte O'Brien, Senior Lecturer at York Law School ([EUB0016](#))