



House of Commons
Exiting the European Union
Committee

**European Union
(Withdrawal) Bill:
Government Response
to the Committee's
First Report**

First Special Report of Session 2017–19

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Exiting the European Union Committee

The Exiting the European Union Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Exiting the European Union and related matters falling within the responsibilities of associated public bodies.

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The Committee is one of the departmental select committees; its powers are set out under a Temporary Standing Order of 4 July 2017.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/exeucom and in print by Order of the House.

Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

Committee staff

The current staff of the Committee are James Rhys (Committee Clerk), Claire Cozens (Second Clerk), Dr Ariella Huff (Senior Committee Specialist), Shakera Ali (Committee Specialist), Duma Langton (Committee Specialist), Judy Goodall (Committee Specialist), Adrian Hitchins (Committee Specialist), Julian Mazowiecki (Committee Specialist), Eoin Martin (Committee Specialist), Jamie Mordue (Senior Committee Assistant), Leo Olivera (Senior Committee Assistant), Henry Ayi-Hyde (Committee Assistant), Estelle Currie (Senior Media Officer) and Ben Shave (Media and Communications Officer).

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First Special Report

The Committee on Exiting the European Union published its First Report of Session 2017–18, [European Union \(Withdrawal\) Bill](#) (HC 373), on 17 November 2017. On 15 January 2018, the Committee received the Government response to the Report. It is appended below.

Appendix: Government response

Transposition of EU law into domestic law

Recommendation 1) “Government needs to provide more clarity and information on the scope and status of retained EU law.”

1. The EU (Withdrawal) Bill currently contains several provisions which relate to the status of retained EU law. EU-related domestic legislation, which is preserved through clause 2 of the Bill, will continue to hold the same status after exit day as it did beforehand (i.e. primary or secondary legislation).

2. Direct EU legislation, which is retained through clause 3 of the Bill, will be converted into domestic law, and become a new and unique category of law. Due to the unique way in which retained direct EU legislation is converted into UK law, it is not appropriate to provide a single “default” status of either primary or secondary legislation to this new body of law for all purposes. Such an approach might lead to inconsistencies within the domestic statute book, creating confusion and uncertainty within UK law.

3. The Bill contains several provisions relating to the status of retained direct EU legislation in specific circumstances, to provide clarity to UK courts, as well as individuals and businesses, in these particular areas. These include:

- Paragraph 3 of schedule 8, which provides that pre-exit powers to make subordinate legislation may be exercised, so far as the context permits or requires, to modify retained direct EU legislation.
- Paragraph 11 of schedule 8, which amends the definition of “enactment” in Schedule 1 to the Interpretation Act 1978 (words and expressions defined) so that it includes retained direct EU legislation. That will mean that where other legislation relies on the Interpretation Act definition of ‘enactment’, the meaning of enactment for the purposes of that piece of legislation will be widened as from exit day to include retained direct EU legislation.
- Paragraph 19 of schedule 8, which sets out that, for the purposes of the Human Rights Act, retained direct EU legislation is to be treated as primary legislation.

4. Whether converted law is to be treated as primary or secondary legislation for the purpose of other statutes will be set out in further legislation or in regulations made under clause 17(1) of the Bill as necessary. This approach will maximise legal certainty across our domestic statute book.

Recommendation 2) “Greater clarity should also be given to assist judges on exactly how they are to apply CJEU decisions issued after exit day.”

5. The Government has set out a clear position for UK courts within the EU (Withdrawal) Bill regarding how post-exit CJEU decisions should be interpreted following exit day. UK courts will be able to take these post-exit CJEU judgments, as well as decisions made by the EU itself and its other institutions, into account where they consider it appropriate to do so within their decision-making. However they are not bound to take such decisions into account. This position reflects the independence and expertise of UK domestic courts, as well as their existing approach to judgments made by overseas courts, such as Canada and New Zealand.

6. However, we are taking very seriously the concerns that have been expressed about clause 6(2) of the Bill, including by the Committee.

Recommendation 3) (regarding the precautionary principle): “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.... The Government should also consider whether any other principles of EU law should be retained in domestic law.”

7. Clause 4 of the EU (Withdrawal) Bill retains in domestic law directly effective EU treaty rights (and powers, liabilities, obligations, restrictions, remedies, and procedures) that are not retained through other parts of the Bill, as far as is possible. To be considered a directly effective treaty right a given provision would need to be sufficiently clear, precise and unconditional to confer rights directly on individuals.

8. While an illustrative list of directly effective EU treaty rights which meet the above criteria and which may be retained has been provided within the Bill’s Explanatory Notes, this does not seek to limit or restrict what will be preserved by clause 4. No single comprehensive list of these directly effective EU treaty rights exists, and to try to create one, even within statute or guidance, would risk inadvertently omitting certain rights, increasing the possibility of holes emerging within our statute book following exit day.

9. As has already been confirmed, the precautionary principle will be retained where relevant through existing directly applicable EU regulations and case law. Article 191 does not have direct effect and so does not of itself create rights or obligations in domestic law. It concerns the creation of EU policy on the environment, taking into account the diversity of situations in the various regions of the EU, and so it is not clear how it would be possible to carry over Article 191 directly into UK law as it stands.

10. The Bill is intended to take a ‘snapshot’ of EU law as it exists and applies in the UK on exit day. Therefore, so far as relevant, after exit day retained EU law will be interpreted in accordance with those existing general principles of EU law - as they have been recognised by the European Court before exit day.

Recommendation 4) “The Government should confirm whether [updating retained EU law in accordance with post-exit modifications of EU law] is their intention and whether granting powers in further primary legislation is the approach they will take to achieve this.”

11. The EU (Withdrawal) Bill will provide businesses and stakeholders with maximum certainty as we leave the European Union by ensuring that, wherever practical, the same rules and laws apply after exit. This gives certainty to individuals and businesses about their legal rights and obligations and provides the basis for a smooth and orderly withdrawal, whatever the outcome of the negotiations.

12. In parallel with this, we are seeking to negotiate a new partnership with the EU. We will of course bring forward further legislation if it is required to give effect to this partnership, including any new regulatory relationship with the EU. Any such future changes will be for Parliament and, where appropriate, the devolved administrations to make.

Recommendation 5) “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.”

13. The Parliamentary Under-Secretary of State (Steve Baker MP), committed to publishing this analysis whilst providing evidence to the Committee on 26 October. At Commons Committee stage of the Bill, the Minister of State (Dominic Raab MP) confirmed that the Government would publish this memorandum on 5 December. The Government has met this commitment and published a memorandum setting out how each substantive right found in the Charter will be reflected in the domestic law of the UK. It looks at how the right flows through retained EU law and how it is otherwise protected by existing domestic law after exit.

Recommendation 6) “We commend that Report’s [The Procedure Committee] proposals for further consideration by the House during the course of the Committee Stage of the Bill.”

Recommendation 8) “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.”

14. The Government is mindful of the need to strike the right balance between scrutiny and speed to address deficiencies in retained EU law in time for exit day so that we leave the EU with the maximum possible legal certainty and continuity.

15. As such the Government was pleased to accept the amendments tabled by the Chair of the Procedure Committee to establish a sifting committee. For any instrument which a Minister considers should be made as a negative SI under one of the three principal powers in the Bill (clauses 7, 8 and 9), the sifting committee would be able to recommend that it should instead be debated and voted upon according to the affirmative procedure.

16. The sifting committee that will be introduced, based on the proposal by the Procedure Committee, will ensure any negative instruments transferring functions to an existing UK body which the committee believes warrant further examination in Parliament will be identified, and the committee will be able to recommend that they should instead be debated and voted upon according to the affirmative procedure.

17. The Government believes this will provide an adequate means of holding ministers to account on the choice of procedure. This will provide the transparency and scrutiny that the House has asked for.

Recommendation 7) “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.”

18. The Government agrees that we should ensure no important functions are lost as the UK leaves the EU, and the clause 7 power allows explicitly for the transfer of functions to new and existing UK public authorities. The EU (Withdrawal) Bill will ensure that, wherever practical, the same rules and laws apply after exit. The UK already has strong domestic routes to challenge the actions of Government and other public authorities and these will continue to apply after exit as before.

19. Nevertheless the Government is alive to the potential, in some areas, for our withdrawal from the EU to create gaps in the governance of some areas of policy in the UK. Where there is a risk of such gaps emerging we will consider how best to tackle them on a case by case basis. For example on 12 November the Secretary of State for the Environment, Food and Rural Affairs announced plans to consult on a new, independent body to hold the Government to account on environmental commitments once the UK has left the EU.

Recommendation 9) “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.”

20. The Government is approaching the EU exit negotiations anticipating success; on 15 December the European Council formally confirmed that sufficient progress had been made to move onto the second phase of negotiations, an important step on the road to delivering a smooth and orderly Brexit and forging a new, deep and special partnership. The Government does not want or expect to leave without a deal, but while seeking a new partnership, we are planning for a range of outcomes, as is the responsible thing to do. To support the preparations, nearly £700 million of additional funding has been provided to date. Details of additional departmental funding in 2017–18 will be set out as part of the 2017–18 Supplementary Estimates process in the usual way.

21. In the Autumn Budget 2017 the Chancellor set aside a further £3 billion to ensure that the government can continue to prepare effectively for EU exit. £1.5 billion of additional funding will be made available in each of 2018–19 and 2019–20.

22. Departmental allocations for preparing for EU exit in 2018–19 will be agreed in early 2018. Ahead of these allocations, government departments will continue to refine their 2018–19 plans with the support of HM Treasury and the Department for Exiting the European Union. Details of additional departmental funding will be set out as part of the 2018–19 Supplementary Estimates process in the usual way. Departmental allocations for 2019–20 will be agreed later in 2018–19, when there is more certainty on the status of our future relationship with the EU.

Devolution

Recommendation 10) “The Government must improve engagement with the devolved administrations to resolve this deadlock.”

23. The Government has been clear from the outset that meaningful engagement with the devolved administrations and legislatures is of paramount importance, both for the Bill itself and for the frameworks process. We are committed to ensuring that EU exit delivers the right outcomes for all parts of the UK, and the role of the devolved institutions in supporting this endeavour is critical, which is why the Committee is right to highlight the need to engage on legislative consent. The UK Government has supported this process through official engagement with the devolved legislatures. Ministers have also provided evidence to the National Assembly for Wales and the Scottish Parliament as they provide important scrutiny on the Bill. This is an essential Bill in the national interest and we would like all parts of the UK to come together in support of this legislation. We must also recognise that the purpose of clause 11 is to provide the certainty that our communities and businesses need while we determine where frameworks will or will not be needed, and we will not accept changes to the Bill that would undermine that certainty.

24. The process for considering our future frameworks has been built around the need to work through these questions alongside the devolved administrations. Regular engagement continues to take place at ministerial level both bilaterally and through the multilateral forum of the Joint Ministerial Committee for European Negotiations (JMC(EN)), which had its most recent meeting on 12 December. At official level we have built on initial department to department engagement, and have now progressed to a series of subject matter technical policy workshops (‘deep dives’) through which we believe real progress is being made. This is important to building trust in the process and, by making progress, can provide reassurance that clause 11 is only a temporary measure and that the outcome will be a significant increase in powers for the devolved administrations.

25. We have also held discussions at official level on the Bill to better understand the devolved administrations’ concerns and the amendments that they proposed for Committee Stage, and on 9 January we brought forward our own amendments to clause 10 to address some of those concerns at Report Stage. We have also said that we would look to improve clause 11 and we have been working with the Scottish and Welsh Government on what this might look like, with a view to bringing forward changes to reflect those ongoing discussions in the House of Lords. We have always been clear that the Government stands ready to listen to those with sincere suggestions for improving the Bill, but also that we will not accept changes that risk creating new barriers to living and doing business across the UK.

Recommendation 11) “There [must be] mutual trust and cooperative, participative mechanisms for joint working between the UK Government and the devolved administrations.”

26. As we leave the EU, we are committed to securing a deal that works for the entire United Kingdom. Important progress has already been made in engaging the devolved administrations, including in agreeing the principles for the establishment of common frameworks at the meeting of JMC(EN) in October.

27. The Government intends to build upon this momentum as we jointly work through the detail of areas in which we share mutual interest. There are already numerous mechanisms for joint working between the UK Government and the devolved administrations, including not only the different formats of JMC but also our programme of bilateral engagement. This supplements the formal multilateral structures, continuing to build trust and understanding between the governments of the UK.

28. We recognise the importance of maintaining transparent and open relationships with the respective governments and legislatures. UK Government ministers have given evidence to committees of the devolved legislatures on a variety of matters relating to EU exit, including the EU (Withdrawal) Bill. Ministers and officials have provided briefings on the Bill to multiple MPs across a number of parties. Officials have also engaged with their counterparts in the devolved administrations and provided technical briefings to officials within the devolved legislatures. As well as the devolved administrations we are also engaging with stakeholders right across Scotland, Wales and Northern Ireland about where powers should sit after our exit from the EU.

Recommendation 12) “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”

29. The Government notes the recommendations of the Committee. The JMC(EN) met on 16 October and 12 December, and is expected to meet again early this year. The Prime Minister is also planning for the JMC(Plenary) to meet early in the new year and we are seeking to confirm a date between the administrations. Important progress was made in the meeting on 16 October in agreeing the set of principles to underpin the work on frameworks and discussion on priorities for the devolved administrations continued at the meeting on 12 December.

30. We are also committed to ensuring JMC(EN) is as constructive a space as possible. We have noted recommendations from Committees and the devolved administrations on the management of the forum and taken action to improve its efficacy, for example reducing the number of attendees to ensure closer discussions between members. Regular bilateral engagement at ministerial level and extensive bilateral engagement at official level have allowed for significant progress between meetings of JMC(EN). We will continue to use these meetings to work constructively and closely with colleagues in each of the devolved administrations, always working towards a solution that delivers for the United Kingdom as a whole.

31. Relations between the UK Government and devolved administrations are underpinned by the Memorandum of Understanding (MoU). The Government recognises the need to review the MoU not least in the light of the UK's exit from the EU. But this is not a decision for the Government alone and must be taken with the agreement of the other participating administrations - the Scottish Government, Welsh Government and Northern Ireland Executive. We will continue to work together to identify the most appropriate time to do so.

Implementing the Withdrawal Agreement

Recommendation 13) “The Government should now justify the purpose of Clause 9 given its announcement that there will be a separate Withdrawal Agreement and Implementation Bill.”

32. We have been clear that the most important measures to implement the Withdrawal Agreement will be done through the Withdrawal Agreement and Implementation Bill, including citizens’ rights, the implementation period, and the financial settlement. But there are likely to be a number of more technical changes which will be better suited to secondary legislation, and it would not be practical to account for these in primary legislation. These could be made through Clause 9.

33. A number of policy areas which might be more appropriate for secondary legislation were highlighted during the Clause 9 debate on day seven of Committee. Examples include the privileges and immunities of EU bodies and officials in the UK, ongoing administrative procedures such as approvals of mergers, or the position of UK cases before the CJEU. After the divisions on day seven of Committee, the use of Clause 9 is now subject to the prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union.

Recommendation 14) “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.”

34. In the interests of consistent interpretation of citizens’ rights, the UK has agreed that it will be possible to refer issues to the CJEU for an interpretation where existing case law is insufficient. This will ensure a consistent interpretation of the citizen’s rights provisions in both the UK and EU. This referral mechanism will be voluntary. In practical terms, the CJEU will have a very limited role: our courts currently only refer two or three of this kind of case to the CJEU every year. There is a sunset clause in any case – after eight years even this option of voluntary reference to the CJEU will come to an end.

Recommendation 15) “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.”

35. We are very clear that we will be leaving the EU on 29 March 2019 at 11pm. The EU (Withdrawal) Bill does not determine that the UK leaves the EU; that is part of the Article 50 process and a matter of international law. It is important that we have the same position legally as the European Union, which is why the Government accepted the amendments tabled at Committee Stage to allow a power to modify that date in domestic law if it had already been modified in international law. But we are clear that we would use that power only in exceptional circumstances for the shortest possible time, and that an affirmative motion would be brought to the House in such a circumstance.