HOUSE OF LORDS

Delegated Powers and Regulatory Reform Committee

12th Report of Session 2017–19

# European Union (Withdrawal) Bill

Ordered to be printed 31 January 2018 and published 1 February 2018

Published by the Authority of the House of Lords

HL Paper 73

## *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,

(b) section 7(2) or section 19 of the Localism Act 2011, or

(c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

(a) section 85 of the Northern Ireland Act 1998,

(b) section 17 of the Local Government Act 1999,

(c) section 9 of the Local Government Act 2000,

(d) section 98 of the Local Government Act 2003, or

(e) section 102 of the Local Transport Act 2008.

## *Membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Lord Blencathra (Chairman)
Baroness Dean of Thornton-le-Fylde
Lord Flight
Lord Jones
Lord Lisvane
Lord Moynihan
Lord Rowlands
Lord Thomas of Gresford
Lord Thurlow
Lord Tyler

## *Registered Interests*

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/. The Register may also be inspected in the Parliamentary Archives.

## *Publications*

The Committee's reports are published by Order of the House in hard copy and on the internet at www.parliament.uk/hldprrcpublications.

## *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at http://www.parliament.uk/business/lords/.

## *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is hldelegatedpowers@parliament.uk.

## *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

## SUMMARY

The European Union (Withdrawal) Bill gives excessively wide law-making powers to Ministers.[1] The Bill even allows Ministers to make regulations that amend or repeal the European Union (Withdrawal) Act itself.[2]

The Bill contains insufficient parliamentary scrutiny of many of the law-making powers given to Ministers.[3]

Parliament should be given a greater say on the procedure applicable to regulations made by Ministers under the Bill.[4]

The Government should bring forward separate Bills to confer on the devolved institutions competences repatriated from the EU.[5]

Ministers should not have power to impose taxation by statutory instrument.[6]

Many of the time-limits and other restrictions on Ministers can be circumvented by so-called tertiary legislation, which is law made under powers conferred by secondary legislation.[7]

1 Paragraphs 6 to 12, and 20.
2 Paragraph 22.
3 Paragraphs 50 to 52.
4 Paragraph 56.
5 Paragraph 35.
6 Paragraph 45.
7 Paragraphs 13-16, 20(b) and 46.

# Twelfth Report

## EUROPEAN UNION (WITHDRAWAL) BILL

### Introduction

1. The European Union (Withdrawal) Bill, which completed its passage in the House of Commons on 17 January 2018, was given a second reading in the House of Lords on 31 January. The Bill has exceptional constitutional significance. At its heart is the distribution of power between Parliament and Government, in particular the power of Ministers to amend or repeal Acts of Parliament by statutory instrument in an unprecedented number of areas, without in most cases the need for any prior debate in either House of Parliament.

2. The European Union (Withdrawal) Bill:

   - Repeals the European Communities Act 1972 Act ("the 1972 Act"), which is the legal underpinning of the United Kingdom's membership of the EU.
   - Retains the large body of EU-derived law that would otherwise disappear upon repeal of the 1972 Act.
   - Gives unprecedented powers to Ministers and other public bodies to make changes to EU law otherwise retained by the Bill.

3. We published an initial report on 28 September 2017 so that Members of Parliament could consider it during the Bill's passage in the House of Commons.[8] Earlier in 2017, we had set out our expectations for the delegated powers in this Bill.[9]

   - Ministers must not have unfettered delegated powers, nor the power to choose whichever procedure they like for statutory instruments made under the Bill.
   - Significant powers given to Ministers to amend or repeal Acts of Parliament by statutory instrument ("Henry VIII powers") must be fully explained and justified.
   - The Bill should not enable major changes to policy or establish new frameworks save where it is necessary to ensure that UK law continues to work properly on exit day.[10]
   - Any time-limited delegated powers would need careful examination to see that they worked properly.

4. The Bill does not meet our expectations on any of these matters.

---

8 Delegated Powers and Regulatory Reform Committee (3rd Report, Session 2017–19, HL Paper 22)

9 In our 23rd Report, Session 2016–17 (HL Paper 143) and our 30th Report, Session 2016–17 (HL Paper 164).

10 A commitment given in the Government's White Paper, *Legislating for the United Kingdom's Withdrawal from the European Union* (Cm 9446), March 2017, paragraph 1.21.

- The law-making powers of Ministers are subject to little parliamentary scrutiny. Apart from the small number of cases where statutory instruments must adopt the affirmative procedure, the Government have an unfettered choice as to which procedure to adopt. This is a radical departure from the norm and one that we regard as wholly unacceptable.

- The Bill confers on Ministers wider Henry VIII powers than we have ever seen.

- Ministers have powers to alter 60+ years of EU law as applied in the United Kingdom[11] if they consider it appropriate to deal with deficiencies arising from the United Kingdom's withdrawal from the EU. This goes much wider than the Government's White Paper commitment not to make major changes to policy beyond those that are necessary to ensure UK law continues to function properly from exit day.

- Although time-limits apply to secondary legislation made by Ministers under clauses 7 to 9, they do not apply to secondary legislation made under other powers contained in the Bill, or to legislation made pursuant to secondary legislation (so-called tertiary legislation).[12]

## Our remit

5. Our remit confines us to reporting on what we regard as an inappropriate delegation of power or an inappropriate parliamentary procedure attaching to the exercise of that power. We do not comment on the merits or otherwise of the United Kingdom's withdrawal from the EU. To assist us in our scrutiny of the Bill, the Department for Exiting the European Union has provided a delegated powers memorandum.[13]

## Clause 7—dealing with deficiencies arising from withdrawal

### *The appropriateness test*

6. Clause 7 allows Ministers by regulations to make such provision as they consider appropriate to prevent, remedy or mitigate (a) any failure of retained EU law[14] to operate effectively, or (b) any other deficiency[15] in retained EU law, arising from withdrawal of the United Kingdom from the EU.[16]

7. Clause 7 is notable for its width, novelty and uncertainty.

- Regulations under clause 7 may do anything that an Act of Parliament can do, apart from six listed matters that include taxation, retrospective legislation, creation of offences punishable by more than 2 years'

11 Going as far back as 1957 when the EEC was formed, including law inherited by the United Kingdom when it joined the EEC on 1 January 1973.
12 See paragraph 13 below.
13 Department for Exiting the European Union, European Union (Withdrawal) Bill Delegated Powers Memorandum
14 The body of EU law that continues to form part of domestic law by virtue of clauses 2 to 4 of the Bill.
15 Clause 7(2) and (3)(a) includes an exhaustive definition of "deficiencies in retained EU law" (for example, substantially redundant provisions, provisions that confer functions on EU entities which need transferring to a national body, and inappropriate legislative references) subject to a power in clause 7(3)(b) for Ministers by affirmative statutory instrument to elaborate on the definition.
16 Schedule 2 confers corresponding powers on Scottish Ministers, Welsh Ministers and Northern Ireland Departments to make regulations for the same purposes within their respective areas of legislative competence.

imprisonment and changes to the Human Rights Act 1998 and the Northern Ireland Act 1998.

- Ministers can make regulations to prevent, remedy or mitigate "any failure of retained EU law to operate effectively" arising from the UK's withdrawal from the EU.

- The Government's White Paper[17] said that the Bill would not aim to make major changes to policy or establish new legal frameworks in the United Kingdom beyond those which are "necessary" to ensure the law continues to function properly from exit day. Clause 7 is drafted in much wider terms. Instead of a test based on objective necessity, the test is based on the subjective judgment of the Minister as to what he or she considers to be "appropriate". There is nothing to suggest that the judgment of appropriateness is confined to technical matters or purely mechanistic changes. There is scope for Ministers to make regulations arising from EU withdrawal with an extensive policy content across the whole of retained EU law. The Committee has previously drawn attention to loosely-drawn powers based on the subjective judgment of the Minister and has argued for their being restricted by an objective test of necessity.[18]

8. We understand that one concern in Government with a test based on necessity is that it might unduly limit the Government's options. Take the hypothetical example[19] of regulations under clause 7 altering a legal duty to send information to an EU body, on the ground that the EU body will no longer accept the information once the United Kingdom leaves the EU. Policy questions arise as to what would become of such an information requirement. Should the information go instead to an existing UK body? Should it go to a newly-created body? Should the requirement be scrapped altogether? Should more or less information be sent to some other body? None of these solutions is strictly necessary and the Government prefer the flexibility to do what Ministers regard as appropriate.

9. Our view is that regulations under clause 7 should depend on:

   (a) there being a failure/deficiency in retained EU law arising from the United Kingdom leaving the EU, and

   (b) it being necessary to prevent, remedy or mitigate it.

10. Once this necessity threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions. A requirement to collect and send information that will no longer be accepted by the EU is clearly a deficiency that it is necessary to remove from the statute book: it cannot be right to retain a redundant legal duty that amounts to a waste of time, effort and public money. Having passed this hurdle, Ministers would not be stopped from acting merely because the proposed solution was one of several that might have been devised. The operative test in clause 7 should be whether it is necessary to deal with the problem, not whether only one solution follows inexorably.

---

17 Paragraphs 1.21 and 3.7.

18 Delegated Powers and Regulatory Reform Committee (15th Report, Session 2016–17, HL Paper 104), paragraph 55, in the context of the Neighbourhood Planning Act 2017.

19 Case Study 3 at page 21 of the White Paper.

11. If Ministers take the view that the concept of what is necessary needs elaboration, the Bill could do so—along the lines of clause 7(2), which defines what is meant by deficiencies in retained EU law.

12. Clause 7, in allowing Ministers to make regulations where they consider it appropriate, allows for substantial policy changes that ought to be made only in primary legislation. **The subjective "appropriateness" test in clause 7 should be circumscribed in favour of a test based on objective necessity.**[20]

*Tertiary legislation*

13. Clause 7(5) allows regulations made by Ministers to do anything that can be done by an Act of Parliament, save for the six matters listed in clause 7(7). One of the things that Ministers can do in secondary legislation, in addition to making law themselves, is to confer power on others to make law. The process is as follows. The Bill as enacted (primary legislation) confers powers on Ministers to make law by regulations (secondary legislation). This secondary legislation can do anything that Parliament can do (six matters excepted) including allowing people or bodies, and Ministers themselves, to make further subordinate legislation (tertiary legislation) without there having to be any parliamentary procedure or any requirement for the tertiary legislation to be made by statutory instrument.[21] Where tertiary legislation is not made by statutory instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. Despite its greater inaccessibility, tertiary legislation is still the law.

14. The delegated powers memorandum[22] suggests that the power to make tertiary legislation is intended to be used sparingly, where it is appropriate for powers to be conferred independently of political control, for example, conferring powers on a regulator to set standards. However, there is nothing in the Bill that limits the power in this way. It could be used for any purpose for which regulations may be made under clause 7. It could, for example, be used to create new bodies with wide powers to legislate in one of the many areas currently governed by EU law, including aviation, banking, investment services, chemicals, agriculture, fisheries and medicines. The regulations might also contain only skeleton provisions in relation to a particular activity, leaving the detailed regime to be set out in tertiary legislation made not by Parliament, or even by Ministers, but by one of the new bodies so created.

15. Although regulations made under clause 7 cannot be made after the period of two years following exit day, the restriction does not apply to tertiary legislation under clause 7 (and under clauses 8 and 9). The words in brackets in paragraph 28 of Schedule 8 mean that the restriction on making regulations under section 7 does not apply to such tertiary legislation, meaning that it can continue to be made after the two-year period elapses.

---

20 An amendment to clause 7 might read: "Clause 7, page 5, line 3, leave out "the Minister considers appropriate" and insert "is necessary"".

21 Paragraph 15 of Schedule 7 says that regulations made by Ministers must be made by statutory instrument. This would not catch other forms of subordinate legislation apart from regulations. It would not cover tertiary legislation made by non-Ministers. Arguably it does not catch tertiary regulations at all, on the basis that they are not made under the Act but are made under secondary legislation which is itself made under the Act.

22 Paragraph 36.

16. **Tertiary legislation should be subject to the same parliamentary control and time-limits as are applicable to secondary legislation.**[23]

### Clause 8—complying with international obligations

17. Clause 8 allows Ministers, within two years following exit day, to make such regulations as they consider appropriate to prevent or remedy any breach of the United Kingdom's international obligations arising from its withdrawal from the EU. Like clause 7(5), clause 8(2) contains a Henry VIII power allowing the regulations to do anything that an Act of Parliament can do, which would include amending or repealing any Act of Parliament ever passed. This power is subject to fewer exceptions than are found in clause 7. For example, under clause 8, the regulations can impose or increase taxation.[24]

18. The House may wish to invite the Minister to explain the following matters.

    (a) Precisely which international obligations they have in mind under clause 8, apart from the example about trans-frontier television given at paragraph 72 of their delegated powers memorandum.

    (b) Why regulations under clause 8 (unlike regulations made under clauses 7 and 9) may impose or increase taxation, allowing the supremacy of the House of Commons in financial matters to give way to taxation by statutory instrument.[25]

    (c) Why, unlike in clause 7, the power to make regulations in clause 8 relates to preventing or remedying breaches but does not extend to mitigating such breaches.

19. As with clause 7:

    (a) The appropriateness test in clause 8 gives Ministers greater scope to act than if the test were one based on necessity.

    (b) Tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit applicable to secondary legislation. Nothing is said in the delegated powers memorandum to explain why a power to make tertiary legislation is needed in the context of clause 8. This is surprising given the unusual nature of the power.

20. **Clause 8 involves an inappropriately wide delegation of power.**

---

23 An amendment to clause 7 might read: "Page 6, line 27, at end insert—"Where regulations under subsection (1) confer power to legislate by subordinate instrument, the instrument is subject to the same parliamentary control and the same time limit in subsection (8) as are the regulations." A further amendment might remove the words in brackets in paragraph 28 of Schedule 8: "Schedule 8, page 64, line 33, leave out from first "time" to end of line 34".

24 This can be inferred from the absence of a provision in clause 8 corresponding to clause 7(7)(a) or 9(3)(a).

25 At committee stage in the House of Commons, the Parliamentary Under-Secretary of State for Exiting the European Union (Mr Robin Walker) indicated that the power to tax by statutory instrument in clause 8 was needed because the power was not available under clause 7; furthermore, taxation might be needed to "comply with international arrangements". The question which remains unanswered is why taxation by Ministers in statutory instruments is an acceptable alternative to taxation by Parliament in primary legislation. See HC Debs, 13 December 2017, col 557.

(a) **As with clause 7, the "appropriateness" test in clause 8 should be circumscribed in favour of a test based on necessity.**[26]

(b) **Even if the Government can demonstrate a convincing case for requiring the power to make tertiary legislation under clause 8, it is unsatisfactory (for the reasons given in relation to clause 7) that tertiary legislation made under clause 8 escapes both parliamentary control and the two-year time limit in clause 8(4) applicable to secondary legislation.**[27]

(c) **The Government should demonstrate a convincing case (if one exists) before the supremacy of the House of Commons in financial matters gives way to taxation by statutory instrument.**[28]

### Clause 9—implementing the withdrawal agreement

21. Clause 9 allows Ministers to make such regulations before exit day as they consider appropriate for the purposes of implementing the withdrawal agreement. Clause 9 allows for important matters in the withdrawal agreement (for example, the rights of EU citizens resident in the UK) to be implemented in domestic law by negative procedure regulations, even if this requires extensive changes to primary legislation (for example, the Immigration Acts).

22. Although clauses 7 and 8 contain wide Henry VIII powers, regulations under clause 9 go further, allowing Ministers by regulations not only to amend or repeal any Act of Parliament whenever passed but also to repeal the European Union (Withdrawal) Act itself.[29] Even though such an instrument would have to adopt the affirmative procedure,[30] this power is wholly unacceptable. By way of example, to implement the withdrawal agreement Ministers could by statutory instrument:

(a) repeal the restrictions in clauses 7 to 9 that time-limit the making of regulations;

(b) amend clauses 3 and 4 to alter the scope of "retained EU law" so that in certain areas it includes EU legislation passed after exit day;

(c) amend clause 5 so that the supremacy of EU law is retained for certain purposes or for certain areas of law;

(d) amend clause 6 so that in certain areas the courts have to follow decisions of the Court of Justice of the EU made after exit day;

(e) widen the scope of clause 7 to allow regulations to make major policy changes, to the extent that they cannot already.

---

26 An amendment to clause 8 might read: "Clause 8, page 6, line 34, leave out "the Minister considers appropriate" and insert "is necessary"".

27 An amendment to clause 8 might read: "Page 7, line 2, at end insert – "Where regulations under subsection (1) confer power to legislate by subordinate instrument, the instrument is subject to the same parliamentary control and the same time limit in subsection (4) as are the regulations."

28 In the absence of such a justification, an amendment to clause 8(3) might insert a new paragraph: "Page 6, line 40, at end insert—"( ) impose or increase taxation,"" bringing clause 8 into line with clauses 7(7)(a) and 9(3)(a).

29 Although clause 9(2) is expressed as a power to "modify" the Act, "modify" is defined in clause 14(1) to include amendment and repeal. The power to amend and repeal the Act does not appear in clauses 7 and 8 and is therefore implicitly excluded from those clauses.

30 Schedule 7, paragraph 7(1) and (2)(g).

23. It is no answer for the Government to say that they would never use a statutory instrument for these purposes. Clause 9 is wide enough for Ministers to do so. We judge powers not on how the Government say that they will use them but on how any Government might use them. **The power in clause 9(2) for Ministers to amend or repeal the European Union (Withdrawal) Act by regulations is wholly unacceptable.** [31]

24. The delegated powers memorandum justifies the extraordinary width of this Henry VIII power because the "exact use of the power will of course depend on the contents of the withdrawal agreement"[32] and the "nature and scale of the legislative changes required are as yet unknown".[33] However, following an amendment tabled by Dominic Grieve QC MP in the House of Commons at committee stage, regulations under clause 9(1) may not be made before the prior enactment of an Act of Parliament approving the final terms of withdrawal of the United Kingdom from the European Union. If, before exit day, regulation-making powers are needed to give effect to the withdrawal agreement, they can be included in the future Act of Parliament to which the Government have committed and which is contemplated by clause 9. **Following its amendment in the House of Commons, clause 9 as a whole is no longer necessary and should be removed from the Bill.**

### Clause 11 and Schedule 3—retaining EU restrictions in devolution legislation etc.

25. The existing devolution settlements prevent the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales and Scottish Ministers, Welsh Ministers and Northern Ireland Departments from legislating incompatibly with EU law.[34]

26. Clause 11 and Schedule 3 would, however, amend those settlements so that none of the devolved institutions can modify retained EU law unless the modification would have been within their legislative competence immediately before exit day. This means that EU withdrawal will not result in any new competences being conferred on the devolved institutions, even in subject areas that are already devolved (for example, agriculture, fisheries, the environment). It will therefore, at least initially, be for the UK Government and Parliament to legislate on matters that fall within those areas but could not previously be changed by devolved institutions due to their incapacity to legislate incompatibly with EU law. This provision, which the Scottish and Welsh Governments have declared unacceptable,[35] concerns the devolution settlements rather than delegated powers and is therefore outside this Committee's remit.

27. However clause 11 and Schedule 3 also contain delegated powers that do fall within our remit. These allow for an Order in Council to confer on the devolved institutions the power to alter retained EU law. The affirmative

---

31 An amendment to remove this power might read: "Clause 9, page 7, line 11, leave out "(including modifying this Act)"".

32 Paragraph 84.

33 Paragraph 82.

34 See sections 29 and 57 of the Scotland Act 1998, sections 6 and 24 of the Northern Ireland Act 1998, and sections 80 and 108A of the Government of Wales Act 2006 (as amended by the Wales Act 2017).

35 See their Legislative Consent Memoranda http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf [accessed 1 February 2018] and http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf [accessed 1 February 2018].

procedure would apply in both Houses of Parliament and the relevant devolved legislature.

28. The delegated powers memorandum[36] explains that:

(a) the purpose of the Order in Council power is to provide an appropriate mechanism to broaden the parameters of devolved competence in respect of retained EU law;

(b) it adopts a similar approach to established procedure within the devolution legislation for devolving new powers (for example section 30 orders in the Scotland Act 1998);

(c) without the power it would be necessary for the UK Parliament to pass primary legislation (having sought Legislative Consent Motions from the relevant devolved legislatures) in order to release areas from the new competence limit.

29. We doubt whether the powers in clause 11 and Schedule 3 are fully analogous to existing procedures in the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006. In the case of the Scotland Act, Schedule 5 sets out relatively clearly which matters Parliament considers should be reserved to Westminster (for example, defence, foreign affairs and company law).[37] This is supplemented by a power in section 30 to allow existing reservations, by Order in Council, to be removed from the list or new ones to be added.[38]

30. In contrast, the effect of clause 11 and Schedule 3 is to reserve to Westminster *all* competences returning from the EU *unless* the position is changed by Order in Council.

31. Moreover the lists of reserved matters in the devolution enactments are, for the most part, relatively straightforward. This is not the case with the concept of retained EU law which is defined in clause 6 to mean:

> "anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) [of clause 6] (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time)".

32. This is complex and something of a moving target given the words in brackets at the end of the definition.

33. The Government appear to envisage that the Order in Council procedure will distribute competences returned from the EU to the devolved institutions, following negotiations with them.[39] Revisions to the three devolution settlements in light of EU withdrawal will be of considerable constitutional significance. We anticipate that both Houses of Parliament would wish closely to scrutinise proposed legislation amending the settlements, and to have the opportunity to amend it.

---

36 Paragraph 91.

37 See also Schedules 2 and 3 to the Northern Ireland Act 1998 and Schedule 7A to the Government of Wales Act 2006 (inserted by the Wales Act 2017).

38 The power in section 30 of the Scotland Act was used in 2013 so as to confer competence on the Scottish Parliament to legislate for the Scottish independence referendum.

39 Department for Exiting the European Union, European Union (Withdrawal) Bill Delegated Powers Memorandum, paragraph 90.

34. On an issue as important as this, we regard it as unacceptable for Parliament to be presented with a draft Order in Council and given a simple choice of "take it or leave it". The Government should instead bring forward a separate Bill.

35. **The Order in Council powers in clause 11 and Schedule 3 are inappropriate and should be removed. Separate Bills should be introduced in Parliament to provide for the conferral on devolved institutions of competences repatriated from the EU.**

### Clause 17—consequential and transitional provision

36. Clause 17(1) allows Ministers to make regulations containing such provision as they consider appropriate in consequence of the Bill. Clause 17(2) and (3) allows Ministers to repeal or amend any Act of Parliament passed from earliest times until the end of the current Session. Unlike the regulation-making powers in clauses 7 to 9, there is no time-limit on the making of regulations under clause 17. Furthermore, regulations under clause 17(1) are subject to the negative procedure, including where those regulations amend or repeal primary legislation.

37. In our report on what became the Neighbourhood Planning Act 2017,[40] we considered a similar regulation-making power which allowed the Minister to make such provision as the Minister considered "appropriate". In that case we expressed concern about such widely-drawn powers and recommended a restriction based on an objective test of necessity rather than leaving this to the subjective judgment of the Minister. We have similar concerns here. The delegated powers memorandum does not explain the need for such widely-drawn powers. It states that regulations under clause 17(1) are limited to making amendments consequential to the contents of the Bill and not to consequences of withdrawal from the EU that are addressed by other powers (for example, under clauses 7 to 9). We are not convinced, given that the substantive effect of the Bill is to provide for the repeal of the 1972 Act, with all that this entails. **The powers to make consequential provision conferred by clause 17(1) should be restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister as to what is appropriate.**

38. Established practice in other legislation has been to require the affirmative procedure for consequential amendments to primary legislation. For Henry VIII powers to be routinely exercised by negative procedure instruments represents a significant departure from what Government and Parliament have hitherto regarded as acceptable. Paragraph 100 of the delegated powers memorandum justifies this on the ground that a large number of "fairly straightforward and insignificant changes, including to primary legislation, will be needed in consequence of this Bill". But that does not explain why it is appropriate for the negative procedure to apply in *all* cases including those which are not "fairly straightforward". **Where regulations under clause 17(1) amend or repeal primary legislation, the affirmative procedure should apply in accordance with established practice.**

40 Delegated Powers and Regulatory Reform Committee (15th Report, Session 2016–17, HL Paper 104), paragraph 55

39. **Regulations under clause 17(1) and (5), other than those which amend or repeal primary legislation and which should be affirmative, should be subject to a sifting mechanism.**[41]

### Schedule 4—fees and other charges

40. Schedule 4 confers a power on UK Ministers or (within their areas of competence) Ministers in the devolved administrations to make regulations providing for a public authority to impose "fees or other charges" in respect of functions it is given by regulations under clauses 7 to 9. For example, regulations under clause 7 may establish a new public body to assume the functions of the European Medicines Agency as regards the United Kingdom. Schedule 4 would allow Ministers to make further regulations allowing the body to levy charges on UK pharmaceutical companies, or even on the general public, in connection with the cost of the new UK regulatory regime for medicines.

41. The delegated powers memorandum indicates that Schedule 4 is designed to allow "flexibility" in how new Government functions are funded, enabling the creation and modification of fees or other charges so that the costs of Government services do not always have to fall on the taxpayer.[42] Schedule 4 also contains a power for Ministers to confer on public authorities the same powers to make fee regulations as Ministers have, save that (where the public authorities make the regulations) the regulations do not have to be subject to parliamentary scrutiny or be made by statutory instrument.[43]

42. The powers in Schedule 4 are very wide. The delegated powers memorandum notes that they would enable:

> "the creation of **tax-like charges** [our emphasis], which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body".[44]

43. Ensuring that the general taxpayer does not pay the cost of specialist services is a legitimate aim, but permitting organisations full cost recovery for their services without parliamentary scrutiny allows them to gold plate the services they offer. Parliamentary scrutiny is accordingly important, even where the fees do not overtly involve a tax or a tax-like charge.

44. A "tax-like charge" means a tax. Although regulations under clauses 7 and 9 cannot impose or increase taxation,[45] regulations under Schedule 4 may do so. Not only can Ministers tax, Ministers can confer powers on public authorities to tax. Indeed, they can do so in tertiary legislation that has no parliamentary scrutiny whatsoever.

45. **Taxation, including "tax-like charges", should not be possible in fees and charges regulations made under Schedule 4. Fees and charges for services or functions should operate on no more than a full**

---

41 See paragraph 56. An amendment to Schedule 7 might read: "Schedule 7, page 48, line 26, after "is" insert "(if a draft of the instrument has not been laid before and approved by a resolution of each House of Parliament)"".

42 Paragraph 113.

43 Paragraph 1(3)(c) of Schedule 4 and paragraph 8 of Schedule 7.

44 Paragraph 111.

45 Clauses 7(7)(a) and 9(3)(a).

**cost-recovery basis. Taxation should be a matter for Parliament, a principle enshrined in Article 4 of the Bill of Rights 1688.**[46]

46. **Furthermore, Schedule 4 should not permit fees or charges to be levied by tertiary legislation.**[47] **All regulations imposing a fee or charge under Schedule 4 should be made by statutory instrument either by UK Government Ministers or by Ministers in a devolved administration.**

47. The affirmative procedure applies to secondary legislation under Schedule 4, made by UK Ministers or Ministers in devolved administrations, which imposes a new fee or charge. But only the negative procedure applies to subsequent regulations modifying those fees.[48] This is open to abuse, allowing an initially very small fee to be set by affirmative regulations, with a subsequent increase accomplished by negative regulations. The delegated powers memorandum recognises that the decision to charge is a policy issue warranting affirmative scrutiny, but suggests that the negative procedure suffices where a department amends the amount.[49] In our view such an amendment equally involves a policy issue. Indeed the initial decision to charge (say) a £10 fee arguably involves less policy than trebling or quadrupling the fee, or increasing a fee by 13,000%—which the Government recently proposed for probate fees.[50] **The affirmative procedure should apply to all regulations relating to fees and charges made under Schedule 4, either in both Houses of Parliament or in the relevant devolved legislature.**[51]

### Schedule 5—publication and rules of evidence

48. Paragraph 1 of Schedule 5 sets out the statutory duty of the Queen's printer in relation to the publication of retained EU law. Paragraph 2 of Schedule 5 allows a Minister of the Crown to amend the scope of this duty, not by a statutory instrument but by a direction.

49. Amending the law by direction—with no statutory instrument and no parliamentary procedure—is highly unusual. The delegated powers memorandum justifies this on the ground that it is a "limited administrative power". Even so, to allow Ministers to amend the law by a mere direction, with no associated parliamentary procedure, sets an ominous precedent.[52] Such a direction is what Henry VIII might have called a proclamation. The Statute of Proclamations 1539, which gave proclamations the force of statute law and later gave rise to the term "Henry VIII power", was repealed in 1547 after the King's death. **The direction-making power in Schedule 5**

46 An amendment to Schedule 4 might read: "Page 35, line 28, at end insert—"(4) Regulations under this paragraph may not impose or increase taxation.""

47 An amendment to Schedule 4 might read: "Page 35, line 26, leave out paragraph (c)."

48 Paragraph 8(2)(a) of Schedule 7.

49 Paragraph 118.

50 The draft Non-Contentious Probate Fees Order 2017 and the 26th Report of the Joint Committee on Statutory Instruments, Session 2016–17 (HL 152, HC 93 – xxvi).

51 An amendment to Schedule 7 might read: "Page 48, line 2, leave out from "authority" to ", or" in line 4."

52 It is a precedent taken much further in the Taxation (Cross-border Trade) Bill, currently before Parliament. This Bill not only confers on Ministers of the Crown more than 150 powers to tax by subordinate instrument but also relies heavily on the concept of making law by "public notice", a modern form of ruling by proclamation, without any opportunity for scrutiny by Parliament whatsoever. See our 11th Report, Session 2017–19 (HL Paper 65).

**should be replaced by a requirement that any changes to the scope of the statutory duties of the Queen's printer be made by regulations.**[53]

### Schedule 7—Regulations

50. Schedule 7 sets out the parliamentary scrutiny procedures for regulations made under the Bill. In the case of regulations made under clauses 7 to 9, the draft affirmative procedure[54] applies only to a small number of miscellaneous matters: establishing a public authority in the United Kingdom; transferring an EU function to a public authority established by regulations under clauses 7 to 9 or Schedule 2; transferring an EU legislative function to a public authority in the United Kingdom; imposing fees; creating or widening the scope of certain criminal offences; creating or amending a power to legislate; and, in the case of regulations made under clause 9, amending the European Union (Withdrawal) Act.

51. If an exercise of powers does not fall within one of these matters, Ministers are free to choose whether the affirmative or negative procedure should apply.

52. The range of matters which must be contained in affirmative regulations under clauses 7 to 9 is too narrow. For example, paragraph 1(2)(b) of Schedule 7 requires the affirmative procedure where regulations provide for any function of an EU body to be exercisable instead by a newly-established body under clauses 7 to 9. However, where regulations transfer such functions to an existing body the negative procedure can apply. The delegated powers memorandum justifies the higher level of scrutiny where functions are transferred to a newly-established body because of the cost implications of setting up the new body. But there will be cost implications arising from the transfer of functions, and how those functions are configured, whether it is a new or old body that is given the functions. In any case the Government's argument is an unduly narrow basis for determining whether the affirmative procedure should apply. **The affirmative procedure should apply to regulations that transfer EU functions to a UK body under clauses 7 to 9, irrespective of whether or not the body is newly established.**[55]

#### *Henry VIII powers*

53. The power in clauses 7(5), 8(2), 9(2) and 17(2) for regulations to do anything that an Act of Parliament can do involves a significant Henry VIII power. Except in the narrow cases mentioned at paragraph 50 above, where regulations must be affirmative, the Government are free to exercise these Henry VIII powers under the negative procedure.[56] This is a significant departure from long-established practice whereby the Government have

53 An amendment to Schedule 5 might read: "Page 39, line 18, leave out sub-paragraph (3) and insert—"(3) Any direction given under this paragraph must be contained in regulations."

54 "Draft affirmative" regulations are laid in draft and cannot be made unless the draft is approved following debates in both Houses. "Negative" regulations are made without a need for any debates, but can subsequently be annulled following an adverse vote in either House. "Made affirmative" regulations are made and come into force but cannot remain in force unless approved by both Houses within a certain period of time (for example 28 days) beginning with their being made.

55 In relation to clause 7, an amendment to Schedule 7 might read: "Page 42, line 1, leave out from "Kingdom" to end of line 2." Corresponding amendments might be made in relation to clauses 8 and 9: see Schedule 7, paragraphs 6(2)(b) and 7(2)(b). Thus: "Schedule 7, page 46, line 31, leave out from "Kingdom" to end of line 32." "Schedule 7, page 47, line 17, leave out from "Kingdom" to end of line 18".

56 See Schedule 7, paragraphs 1(3), 6(3) and 7(3).

accepted the Committee's position that powers to amend primary legislation should be exercised in affirmative instruments save in exceptional cases for which a full justification must be provided. We have not seen any such justification. Accordingly, **the affirmative procedure should apply to regulations under clauses 7, 8, 9 and 17 that amend or repeal primary legislation.**

*Our recommended sifting mechanism*

54. The Government have not explained why it is Ministers rather than Parliament who should have the final say on the appropriate level of Parliamentary scrutiny in those cases where either the affirmative or negative procedure is capable of applying.

55. There are recent important examples of legislation where the final decision on the level of scrutiny is given to Parliament: the Legislative and Regulatory Reform Act 2006, the Public Bodies Act 2011 and the Localism Act 2011. A similar mechanism could be included in this Bill, albeit with shorter time-periods in view of the large amount of legislation that has to be in place before exit from the EU.

56. **We recommend the following sifting mechanism in both Houses for all regulations made under clauses 7, 8 and 9 where the Government currently have a choice of the negative or the affirmative procedure**.

(a) Each statutory instrument is laid in draft before both Houses, the Minister proposing the affirmative or the negative procedure.

(b) Where the Minister proposes the affirmative procedure, that procedure will apply.

(c) A Minister proposing the negative procedure must justify it in writing to Parliament. A committee of each House then has 10 sitting days in which to accept the Minister's proposal or recommend the affirmative procedure. If no recommendation is made in the 10-day period, the statutory instrument is subject to the negative procedure.

(d) If a committee in either House recommends the affirmative procedure, that level of scrutiny applies unless the relevant House resolves to reject the committee's recommendation within a further period of 5 sitting days.

As under section 16(3) of the Legislative and Regulatory Reform Act 2006, there is no need for both Houses to agree on the necessary level of scrutiny. A recommendation from either House is sufficient to increase the level of parliamentary scrutiny. The position is analogous to that under the Statutory Instruments Act 1946, where a successful prayer in *either* House against a negative procedure statutory instrument is sufficient to lead to its annulment even if the other House has taken no action.

(e) Once the relevant periods have expired:

- Where the negative procedure applies, the Minister may make the statutory instrument although it could still be annulled if prayed against in either House within the usual 40-day period.

- Where the affirmative procedure applies, the Minister may make the statutory instrument once the draft has been approved by both Houses.

(f) In urgent cases where the Minister considers it necessary for a proposed negative instrument to come into force immediately, the Minister makes the instrument before laying it. The relevant committee of either House would still have 10 days in which to recommend that the affirmative procedure should apply instead. If such a recommendation were made, and was not rejected by the relevant House, the instrument would cease to remain in force unless approved by both Houses within one month of laying.[57] If no recommendation is made, the instrument continues to have effect like any other negative instrument, subject to the usual 40-day praying period.

57. Parliamentary control of delegated legislation should ultimately be a matter for Parliament. All the same, our proposed sifting mechanism strikes a balance between the scrutiny requirements of Parliament and the business needs of Government. So far as the level of applicable scrutiny is concerned, our proposal would allow for every instrument to be judged rapidly on its merits. In our view, it incorporates realistic timeframes that will allow the Government to have a functioning statute book when the UK leaves the EU. Since many of the regulations to be made under the Bill may end up being laid before Parliament towards the end of the negotiation process, it is all the more important that Members of both Houses have an opportunity to sift the purely mechanistic ones from those which they consider deserve fuller scrutiny. The sifting process permits Parliament to make rapid decisions on those regulations which it wants to scrutinise more closely.

*The Bill's current sifting mechanism*

58. Schedule 7[58] currently contains a sifting mechanism for regulations made under clauses 7 to 9. However, the sifting mechanism only applies in the House of Commons and, in any event, it lacks teeth. The Minister can ignore with impunity any recommendation from the relevant committee. Even if the committee makes the strongest possible recommendation that the instrument be affirmative, the Minister can go ahead and use the negative procedure.[59] It is striking that the strongest possible recommendation of a sifting committee in favour of the affirmative procedure becomes the legal trigger allowing the Minister to use the negative procedure. This strange result is avoided by our proposal. **A recommendation from a sifting committee of either House to upgrade the negative procedure to the affirmative procedure should be determinative save where the recommendation is rejected by a resolution of that House.** Not only does this mechanism have teeth but it accords with the legislation mentioned at paragraph 55, including section 16(5) of the Legislative and Regulatory Reform Act 2006.[60]

57 See Schedule 7, paragraphs 4 and 14.
58 Paragraphs 3 and 13.
59 This is the result of paragraphs 3(4) and 13(4) of Schedule 7. Providing that the Minister has laid all the correct documentation before Parliament (paragraphs 3(3) and 13(3) of Schedule 7) and the Committee has reported within 10 sitting days of the laying of the draft instrument (paragraphs 3(5) and 13(5)), the Minister may go ahead and use the negative procedure where the committee has "made a recommendation" (paragraphs 3(4) and 13(4)): that is, any recommendation, including a recommendation that the affirmative procedure be adopted.
60 See Appendix 1 for suggested amendments giving effect to our sifting recommendation.

## Summary of our recommendations

*Clause 7 (deficiencies arising from withdrawal)*

59. The subjective "appropriateness" test in clause 7 should be circumscribed in favour of a test based on objective necessity.[61]

60. Tertiary legislation should be subject to the same parliamentary control and time-limits as are applicable to secondary legislation.[62]

*Clause 8 (complying with international obligations)*

61. Clause 8 involves an inappropriately wide delegation of power.[63]

*Clause 9 (implementing the withdrawal agreement)*

62. The power in clause 9 for Ministers to amend or repeal the European Union (Withdrawal) Act by regulations is wholly unacceptable.[64] Indeed, following its amendment in the House of Commons, clause 9 as a whole is no longer necessary and should be removed from the Bill.[65]

*Clause 11 (devolution)*

63. The Order in Council powers in clause 11 and Schedule 3 are inappropriate and should be removed. Separate Bills should be introduced in Parliament to provide for the conferral on devolved institutions of competences repatriated from the EU.[66]

*Clause 17 (consequential and transitional provision)*

64. The powers to make consequential provision conferred by clause 17(1) should be restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister as to what is appropriate.[67]

65. Where regulations under clause 17(1) amend or repeal primary legislation, the affirmative procedure should apply in accordance with established practice.[68]

66. Regulations under clause 17(1) and (5), other than those which amend or repeal primary legislation and which should be affirmative, should be subject to a sifting mechanism.[69]

*Schedule 4 (fees and charges)*

67. Taxation, including "tax-like charges", should not be possible in fees and charges regulations made under Schedule 4. Fees and charges for services or functions should operate on no more than a full cost-recovery basis. Taxation should be a matter for Parliament, a principle enshrined in Article 4 of the Bill of Rights 1688.[70]

---

61 Paragraph 12.
62 Paragraph 16.
63 Paragraph 20.
64 Paragraph 23.
65 Paragraph 24.
66 Paragraph 35.
67 Paragraph 37.
68 Paragraph 38.
69 Paragraph 39.
70 Paragraph 45.

68. Schedule 4 should not permit fees or charges to be levied by tertiary legislation. All regulations imposing a fee or charge under Schedule 4 should be made by statutory instrument either by UK Government Ministers or by Ministers in a devolved administration, using the affirmative procedure.[71]

*Schedule 5 (duties of the Queen's printer to publish retained direct EU legislation)*

69. In Schedule 5, the direction-making power of Ministers should be replaced by a requirement that any changes to the scope of the statutory duties of the Queen's printer be made by regulations.[72]

*Schedule 7 (regulations)*

70. The affirmative procedure should apply to regulations that transfer EU functions to a UK body under clauses 7 to 9, irrespective of whether or not the body is newly established.[73]

71. The affirmative procedure should apply to regulations under clauses 7, 8, 9 and 17 that amend or repeal primary legislation.[74]

72. There should be a sifting mechanism in both Houses for all regulations made under clauses 7, 8 and 9 where the Government currently have a choice of the negative or the affirmative procedure. A recommendation from a sifting committee of either House to upgrade the negative procedure to the affirmative procedure should be determinative save where the recommendation is rejected by a resolution of that House.[75]

71 Paragraphs 46 and 47.
72 Paragraph 49.
73 Paragraph 52.
74 Paragraph 53.
75 Paragraphs 56 and 58.

## APPENDIX 1: SOME SUGGESTED AMENDMENTS TO GIVE EFFECT TO OUR RECOMMENDATIONS

### Clause 7

Clause 7, page 5, line 3, leave out "the Minister considers appropriate" and insert "is necessary"[76]

Clause 7, page 6, line 27, at end insert—

> "( ) Where regulations under subsection (1) confer power to legislate by subordinate instrument, the instrument is subject to the same parliamentary control and the same time limit in subsection (8) as are the regulations."[77]

Schedule 8, page 64, line 33, leave out from first "time" to end of line 34[78]

### Clause 8

Clause 8, page 6, line 34, leave out "the Minister considers appropriate" and insert "is necessary"[79]

Clause 8, page 6, line 40, at end insert—

> "( ) impose or increase taxation,"[80]

Clause 8, page 7, line 2, at end insert—

> "(5) Where regulations under subsection (1) confer power to legislate by subordinate instrument, the instrument is subject to the same parliamentary control and the same time limit in subsection (4) as are the regulations."[81]

### Clause 9

Clause 9, page 7, line 11, leave out "(including modifying this Act)"[82]

### Schedule 4

Page 35, line 26, leave out paragraph (c)[83]

Page 35, line 28, at end insert—

> "(4) Regulations under this paragraph may not impose or increase taxation."[84]

76 Paragraph 12.
77 Paragraph 16.
78 Paragraph 16.
79 Paragraph 20(a).
80 Paragraph 20(c).
81 Paragraph 20(b).
82 Paragraph 23.
83 Paragraph 46.
84 Paragraph 45.

### Schedule 5

Page 39, line 18, leave out sub-paragraph (3) and insert—

> "(3) Any direction given under this paragraph must be contained in regulations."[85]

### Schedule 7

Schedule 7, page 42, line 1, leave out from "Kingdom" to end of line 2[86]

Schedule 7, page 46, line 31, leave out from "Kingdom" to end of line 32[87]

Schedule 7, page 47, line 17, leave out from "Kingdom" to end of line 18[88]

### The sifting mechanism

Schedule 7, page 44, line 34, at end insert—

> "*Parliamentary committees to sift regulations made under section 7, 8, 9 or 17*
>
> 2A (1) This paragraph applies if a Minister of the Crown—
>
> (a) proposes to make a statutory instrument to which paragraph 1(3), 6(3), 7(3) or 11 applies, and
>
> (b) is of the opinion that the instrument should be subject to annulment in pursuance of a resolution of either House of Parliament ("the negative procedure").
>
> (2) Before making the instrument, the Minister must lay before both Houses of Parliament a draft of the instrument together with a memorandum setting out the reasons for the Minister's opinion that the instrument should be subject to the negative procedure.
>
> (3) The negative procedure applies unless within the relevant period either House of Parliament requires the affirmative procedure to apply, in which case the affirmative procedure applies.
>
> (4) A House of Parliament is taken to have required the affirmative procedure to apply within the relevant period if—
>
> (a) a committee of that House charged with reporting on the instrument has recommended, within the period of 10 sitting days beginning with the first sitting day after the day on which the draft instrument was laid before that House, that the affirmative procedure should apply, and
>
> (b) that House has not by resolution rejected the recommendation within a period of 5 sitting days beginning with the first sitting day after the day on which the recommendation is made.

---

85 Paragraph 49.
86 Paragraph 52.
87 Paragraph 52.
88 Paragraph 52.

(5) For the purposes of this paragraph—

(a) where an instrument is subject to the affirmative procedure, it may not be made unless the draft of the instrument laid under sub-paragraph (2) has been approved by a resolution of each House of Parliament,

(b) "sitting day" means, in respect of either House, a day on which that House sits.

(6) Nothing in this paragraph prevents a Minister of the Crown from deciding, at any time before a statutory instrument mentioned in sub-paragraph (1)(a) is made, that another procedure should apply in relation to the instrument.[89]

(7) Section 6(1) of the Statutory Instruments Act 1946 (alternative procedure for certain instruments laid in draft before Parliament) does not apply in relation to any statutory instrument to which this paragraph applies."[90]

Schedule 7, page 48, line 2, leave out from "authority" to ", or" in line 4[91]

Schedule 7, page 48, line 26, after "is" insert "(if a draft of the instrument has not been laid before and approved by a resolution of each House of Parliament)"[92]

89 This would allow a Minister, who had laid a draft instrument and proposed the negative procedure, to withdraw from the process and opt for the affirmative procedure.
90 Paragraph 56.
91 Paragraph 47.
92 Paragraph 39.

## APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

Committee Members' registered interests may be examined in the online Register of Lords' Interests at http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/. The Register may also be inspected in the Parliamentary Archives.

For the business taken at the meeting on 31 January 2018 Members declared no interests.

### Attendance

The meeting on the 31 January 2018 was attended by Lord Blencathra, Baroness Dean of Thornton-le-Fylde, Lord Flight, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Rowlands, Lord Thomas of Gresford, Lord Thurlow and Lord Tyler.