

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 2, page 1, line 12

After “passed” insert “and commenced”.

#### Effect

This is a probing amendment to ascertain the precise meaning of the word “passed” as it is used in Clause 2.

#### Reason

Clause 14 defines “enactment” as meaning an “enactment whenever passed or made and includes...

- (b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament.”

The definition of EU-derived domestic legislation in Clause 2 appears to include any enactment which has effect in domestic law immediately before exit day (i.e. any pre exit enactment) but, in view of the reference in Clause 2(2)(b) to any enactment “passed or made”, what happens about:

- i. any bill for an Act of the Scottish Parliament (ASP) which has been passed but not yet enacted i.e. received the Royal Assent before exit day? It is assumed that it is only intended to refer to enactments which are enacted or made but this provision appears to assume that Acts are enacted as soon as they are passed. This is the case with UK Acts but it is not the case with ASPs. It is therefore suggested that the reference to “passed” in Clause 2(2)(b) needs clarification.
- ii. an enactment which has been enacted or made before that day but not yet commenced? In view of the fact that Clause 2(1) refers to “*EU-derived legislation as it has effect in domestic law immediately before the exit day*”, it is assumed that it may only be intended to refer to enactments which have been commenced and taken effect but this should also be clarified; and,
- iii. an enactment which is in force before exit day but which is stated to apply after that day? Clause 2(1) suggests that it may only be intended to refer to an enactment as it is operative before exit day. However, in view of the fact that this is expressly spelt out in the definition of “direct EU legislation” in Clause 3(3)(a) and not in Clause 2, this should be clarified.

Paragraph 96 of the explanatory notes (referring to similar phraseology in Clause 5 states that an Act is passed when it receives the Royal Assent. However this is not the case for ASPs. An ASP is passed by the Scottish Parliament if it is approved at the end of its final stage but then normally 4 weeks have to elapse before it can be

submitted by the Presiding Officer for Royal Assent during which time the bill can be referred by the Advocate General, the Lord Advocate or the Attorney General to the Supreme Court and to the European Court. It is only enacted when it receives Royal Assent – see sections 28, 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. The Scotland Act 1998 S 28(3) details that “a bill receives Royal Assent at the beginning of the day on which Letters Patent under the Scottish seal signed with Her Majesty’s own hand signing Her Assent are recorded in the Register of the Great Seal”. As worded it is therefore suggested that it should be clarified whether it is intended only to apply to ASPs which have been enacted before the exit day and not just passed before that day.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 2, page 1, line 19

Add at end –

“(3) for the purposes of this Act, any EU derived domestic legislation has effect in domestic law immediately before exit day if –

(a) in the case of anything which comes into force at a particular time and is stated to apply from a later time it is in force and it applies immediately before exit day,

(b) in any other case, it has been commenced and is in force immediately before exit day”.

Effect

This amendment is designed to probe the meaning of Clause 2(1) and is consequential on the preceding amendment – see point iii.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 4, page 2, line 46

After “continue “insert “subject to the terms of Schedule 1”.

Effect

This amendment clarifies the meaning of Clause 4(1).

Reason

We question how effective the continued enforcement of the rights referred to in Clause 4 (1) will be in view of paragraph 3 of Schedule 1 which provides:

*“3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of general principles of EU law.*

*(2) No court or tribunal or other public authority may, on or after exit day—*

*(a) disapply or quash any enactment or other rule of law, or*

*(b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.”*

Ministers should explain how the rights which are referred to in Clause 4 relate to the general principles of EU law and, to the extent that they consist of, or fall within, those general principles, how it is envisaged that those rights will be available and able to be enforced in domestic law.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 5, page 3, line 11

Leave out Subsection (1) and insert -

“(1) An enactment or rule of law passed or made on or after exit day will not be subject to the principle of the supremacy of EU law”.

#### Effect

Clause 5 (1) states “The principle of the supremacy of EU law does not apply to any enactment or rule of law passed or made or after exit day”. This is unclear in its meaning and the amendment is designed to simplify Clause 5 (1).

#### Reason

We are concerned about the approach taken in Clause 5(1) which states that: *The principle of the supremacy of EU Law does not apply to any enactment or rule of law passed or made on or after exit day.* What is the actual intended effect of this provision? Is it merely a declaratory sub-section or does it simply pave the way for the retention of the principle in Clause 5(2).

In our view there is a particular difficulty with the application of this principle to retained EU law because it is difficult to interpret to what law the principle in fact applies. Clause 5.2 states that the principle of the supremacy of EU law continues to apply.....to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. The relationship between the supremacy of EU law and retained EU law under the bill is not clear as Professor Mark Elliott has identified “if retained EU law is domestic law, can it inherit the “supremacy” of EU law?”. Questions may also be asked as to whether it applies to all retained EU law or only some retained EU law. How does this supremacy principle apply to EU derived domestic legislation under Clause 2(2) when that domestic legislation has not benefited from supremacy? Does retained EU law under Clauses 3 and 4 benefit from the supremacy of EU law as provided for in Clause 5(2)?

## The European Union (Withdrawal) Bill

### Amendments to be moved in Committee

Clause 5, page 3, line 19 add at end -

“(4) Subsections (1), (2) and (3) shall cease to have effect after the end of the period of ten years beginning with exit day”.

#### Effect

This amendment is designed to provide a limitation on the effect of Subsections (1), (2) and (3) to a period of 10 years beginning with exit day.

#### Reason

We recognise that Clause 5 (1), (2) and (3) are intended to preserve the principle of the supremacy of EU law so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day. However the Clause is currently unlimited in terms of the length of time when it will be effective. This sunset Clause places a limit of 10 years on Clause 5 (1), (2) and (3). This will provide an incentive to Government to ensure that EU law which is subject to the principle of supremacy is transposed into UK law within 10 years of exit day and in so doing simplify the law which applies after that point.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 5, page 3, line 20

Leave out Subsections (4) and (5).

#### Effect

This amendment deletes the Subsections which remove the Charter of Fundamental Rights from domestic law.

#### Reason

Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 99 and 100 of the explanatory notes argue that it is unnecessary to include it as part of retained EU law because the Charter merely codifies rights and principles already inherent in EU law and would therefore form part of that law when it becomes retained EU law. However even if this was the case (and this is arguable), it would then make no difference if the Charter did form part of the retained EU law. This does not, therefore, appear to be a sufficient reason for excluding the Charter from forming part of retained EU law in the same way as other pre exit EU law.

It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. It is therefore suggested that the Government should reconsider its decision not to include the Charter as part of retained EU law which would then form part of domestic law on and after exit day. It would at least be helpful to our domestic courts to rely upon its terms when determining the validity, meaning and effect of retained EU law. Although some might argue for the Charter to form part of domestic law for all purposes and quite separate from retained EU law. This might create complications with its relationship to the rights under the ECHR and the Human Rights Act 1998.

Clause 5(5) provides that Clause 5(4) does not affect the retention in domestic law of any EU fundamental rights or principles which exist irrespective of the Charter. These fundamental rights or principles are not defined nor identified:-

It would be helpful if the Government could identify what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of “retained general principles of EU law” in Clause 6(7). Clause 6(7) defines the “retained general principles of EU law” as –

*The general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –*

*(a) Relate to anything to which section 2, 3 or 4 applies, and*

*(b) Are not excluded by section 5 or Schedule 1,*

This is not a clear or helpful definition.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 6, page 3, line 33

After “matter” insert “(other than a pending matter)”.

#### Effect

This amendment ensures that Court cases pending before exit day can be referred to the CJEU.

#### Reason

There is no provision in this Clause which expressly deals with the situation where there are pending cases before the domestic courts on exit day. But, given that Clause 6(1)(b) appears to be quite absolute in its terms, it could be argued that it would apply to such pending cases and prevent such a court from referring a matter to the ECJ on or after that day even although it could have done so on the previous day. However, it is thought that such a construction might be objectionable on the grounds that it is retrospective if it applies to pending cases.

There is also no provision in this Clause which deals with the issue of cases pending before the European Court on exit day. The nature of retained EU law is such that it affects economic and governance rules across the spectrum. We have the following questions:

- Whether all cases, or only some selection of those cases, which are pending before the ECJ on exit day should continue to be dealt with by the ECJ? or
- Whether it should be possible in any case, which is pending before the Scottish courts on exit day and which raises an EU question, to refer that question to the ECJ on and after exit day?

We note that this is an issue which is the subject of negotiation between the UK and the EU. Both parties have produced negotiating positions which we have observed do not adequately take into the rule of law or the interests of justice. We urge both the UK and the EU to come to an agreement which respects the rule of law, the proper administration of justice and is in the interests of litigants.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 6, page 3, line 34

leave out Subsection (2) and insert –

“(2) A court or tribunal may regard the decisions of the European Court made on or after exit day to be persuasive”.

#### Effect

This amendment enables UK Courts and Tribunals to consider the decisions of the European Court to be persuasive.

#### Reason

We believe that Clause 6 should be made clearer. Lord Neuberger, the former president of the UK Supreme Court, in an interview with the BBC, said that "If [the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best." It would be "unfair", he said, "to blame judges for making the law when Parliament has failed to do so". The judiciary would "hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in a statute". Lord Neuberger seemed to focus on Clause 6(2), as this is the Clause on which the status of future ECJ case law depends.

Clause 6(2) leaves much to judicial discretion. Clause 6 (2) states: "*A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so*".

We believe that it would provide better guidance for the courts were they to be allowed to consider CJEU decisions as persuasive.

That is because 'persuasive authority' is a recognised aspect of the doctrine of stare decisis or precedent. Persuasive decisions are not technically binding but the courts can pay special attention to them. Legal sources that currently have persuasive authority include:

- (a) Decisions of the Judicial Committee of the Privy Council.
- (b) Decisions of higher level foreign courts especially in Commonwealth and other similar jurisdictions;

(c) Decisions of the European Court of Human Rights which under the Human Rights Act 1998 must be taken into account by a UK court.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 6, page 4, line 20

Add at end –

““pending matter” means any litigation which has been commenced in any court or tribunal in the United Kingdom and which is not finally determined at exit date”.

Effect

This amendment provides a definition of pending cases for the purposes of Clause 6.

Reason

Consequential amendment.

European Union (Withdrawal) Bill  
Amendment to be moved in Committee

Clause 6, page 4, line 20

Leave out Subsection (7).

Effect

This amendment deletes Clause 6(7) as a prelude to the insertion of its content in Clause 14.

Reason

Paving amendment.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 7, page 5, line 4

Leave out “appropriate” and insert “necessary”.

#### Effect

This amendment ensures that Ministers can only bring forward regulations under Clause 7 when it is necessary to do so.

#### Reason

We recognise that it is necessary (a) to adapt retained EU law to enable it to work appropriately in the UK on and after exit day and (b) given the scale of the amendments required and the limited time in which to do it, to confer wide ranging powers, including Henry VIII powers to amend Acts and ASPs, on the UK Government and devolved Governments to do so by regulations.

However, as the House of Lords Select Committee on the Constitution pointed out, in its Report on “the Great Repeal bill and Delegated Powers” (9<sup>th</sup> Report, Session 2016-17), the challenge is how to grant such:

*relatively wide delegated powers for the purpose of converting EU law into UK law, while ensuring that they cannot also be used simply to implement new policies desired by the Government in areas which were formerly within EU competence.... We consider that Parliament should address this challenge in two distinct ways. First, by limiting the scope of the delegated powers granted under the Great Repeal bill, and second, by putting in place processes to ensure that Parliament has on-going control over the exercise of those powers...*

We endorse this approach by commenting, firstly, upon the scope of the regulation making powers in Clause 7 and, then upon the provisions for the scrutiny of those regulations in Part 1 of Schedule 7 below.

So far as the scope of the regulation making powers is concerned, the House of Lords Committee considered there should be an express provision that the powers should be used only “so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework”. The bill does not contain any such express provision and the powers conferred are not as restricted as the Committee suggested.

The powers conferred by Clause 7 are limited to make provision: *to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU* but

- what constitutes a failure in the retained EU law to operate effectively is not clear and could be open to argument or subjective opinion (despite the examples of deficiencies in Clause 7(2)) because the deficiencies in Clause 7 (2) are not exhaustive nor limited to deficiencies of the same kind.
- what provision is made “to prevent, remedy or mitigate” such deficiencies would be whatever the Minister considered appropriate which could be quite wide ranging.

The Government should consider limiting these powers by amending the bill in line with the suggestions by the House of Lords Select Committee, such as to doing what is necessary to ensure that the retained EU law can operate in the domestic law.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 7, page 6, line 18

Add at end –  
“(g) amend or repeal the Scotland  
Act 1998”.

Effect

This amendment ensures that the Scotland Act 1998 cannot be amended or repealed by a regulation made under the powers in Clause 7.

Reason

Clause 7(6)(f) provides that the regulations made under Clause 7 cannot amend or repeal the Northern Ireland Act 1998. We believe this provision should also ensure that regulations cannot amend or repeal the Scotland Act 1998 and the Wales Act 2017. This will bring this Clause into conformity with the Scotland Act 1998 section 63A which provides for the permanence of the Scottish Parliament.

A similar amendment providing for inclusion of the National Assembly for Wales (which brings the bill into conformity with Section 1 of the Wales Act 2017) follows.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 7, page 6, line 18

Add at end –  
“(h) amend or repeal the Wales Act  
2017”.

Effect

This amendment ensures that the Wales Act 2017 cannot be amended or repealed by a regulation made under the powers in Clause 7.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 8, page 6, line 28

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 9, page 6, line 43

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 11, page 8, line 28 add at end –

“(4) this section only applies to

(a) an Act of the Scottish Parliament,

(b) an Act of the National Assembly for Wales; and

(c) an Act of the Northern Ireland Assembly.

which was introduced to the Parliament or Assembly as the case may be after exit day”.

#### Effect

This amendment clarifies the devolved legislation to which Clause 11 applies.

#### Reason

At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an ASP is “not law” if it is incompatible with, among other things, EU law. The new provision does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be required to legislate in conformity with retained EU law. What it does is to prohibit the Scottish Parliament from modifying or conferring power by subordinate legislation to modify retained EU law. In our view, repealing the requirement to legislate compatibly with EU law is not the same as legislating in such a way as to modify that law. In our view, it is also not clear what are the ASPs to which this provision will apply. It appears that it is not intended to be retrospective and that it will only apply to post exit ASPs but what is a post exit ASP? Arguably it is an ASP which is enacted on and after the exit day. But this would mean that the bill for such an ASP would require to comply with the terms of Clause 11, even if the bill was introduced months before exit day and maybe even before the EU (Withdrawal) bill is enacted and possibly if it had been passed by the Scottish Parliament before exit day. There is an argument that such legislation might be regarded as retrospective. This amendment seeks to clarify what the ASPs are to which this new provision will apply.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 11, page 8, line 31 add at end – “(5) This section and Part 1 of Schedule 3 will cease to have effect after the end of the period of two years beginning with exit day”.

#### Effect

This amendment places a time limit on the effectiveness of Clause 11 and Part 1 of Schedule 3.

#### Reason

As currently drafted Clause 11 has no time limit or sunset provision. The lack of a sunset provision means that Clause 11 could be in effect until such time as it is amended or repealed.

We believe that the approach adopted in Clause 11 makes it more difficult to identify the limits to devolved competence and highlights the need for agreement between the UK Government and the devolved authorities about issues which will be returned from the EU on exit day and which do not fall into the reserved provisions of the Scotland Act 1998.

Such discussions between the UK and Scottish Governments could be lengthy but we have suggested a period of 2 years for them to take place but at the end of the sunset period Clause 11 will cease to have effect.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Clause 14, page 10, line 57 add at end – “retained case law” means –  
(a) retained domestic case law, and  
(b) retained EU case law,””

#### Effect

This amendment relocates the interpretation provision from Clause 6 into Clause 14.

#### Reason

This enables all definitions in the bill to be found in one location. This will aid interpretation and make the bill more user friendly.

European Union (Withdrawal) Bill

Amendments to be moved in Committee

Clause 14, page 11, line 2 add at end -

““retained domestic case law” means any principles laid down by, and any decisions of, a court or tribunal in the United Kingdom, as they have effect immediately before exit day and so far as they -

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time);

“retained EU case law” means any principles laid down by, and any decisions of, the European Court, as they have effect in EU law immediately before exit day and so far as they -

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1, (as those principles and decisions are modified by or under this Act or by other domestic law from time to time); “retained EU law” means 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) above  
(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);

“retained general principles of  
EU law” means the general  
principles of EU law, as they  
have effect in EU law  
immediately before exit day so  
far as they –

(a) relate to anything to which  
section 2, 3 or 4 applies, and

(b) are not excluded by  
section 5 or Schedule 1, (as  
those principles are modified  
by or under this Act or by  
other domestic law from time  
to time)”.

## Effect

Consequential Amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 17, page 13, line 35

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 17, page 14, line 7

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Schedule 1, page 15, line11

Leave out “of a kind described or provided for in regulations”.

#### Effect

This amendment requires the ground for challenge of an EU instrument to be on the face of the bill.

#### Reason

Schedule 1, paragraph 1(3) provides that Regulations may provide for court challenges which would otherwise have been against an EU institution to be against a public authority in the UK. However this is only an example of the kind of challenge which can be brought under regulations made by Ministers under Schedule 1 1 (2) (b). We believe that the reason for such challenges, for example that the instrument is invalid, should for clarity's sake be on the face of the bill and a subsequent amendment makes such provision.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 1, page 15, line 12 add at end – “on the basis that the instrument is in the Minister’s view invalid”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill  
Amendment to be moved in Committee

Schedule 1, page 15, line13

Leave out paragraph 1(3).

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 1, page 15, line 16

leave out lines 16 to 26.

Effect

This amendment deletes Schedule 1 paragraphs 2 and 3 from the bill.

Reason

Schedule 1 paragraphs 2 and 3 provides that:

*“2 No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day (whether or not as an essential part of the decision in the case).*

*3(1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.*

*(2) No court or tribunal or other public authority may, on or after exit day—*

*(a) disapply or quash any enactment or other rule of law, or*

*(b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law”.*

This amendment is necessary as a corollary of removing Clauses 5 and 6. It will allow the general principles of EU law to remain in place and to continue to be actionable. There is no value in proposing to preserve principles or fundamental rights, as the bill currently provides in Clause 5, if they cannot be enforced.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 16, line 13

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 16, line 18

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill  
Amendment to be moved in Committee

Schedule 2, page 17, line 1

leave out paragraph 3.

Effect

This amendment deletes Schedule 2 paragraph 3.

Reason

Consequential Amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 21, line 39

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 21, line 43

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 24, line 12

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 24, line 16

Leave out “appropriate” and insert  
“necessary”.

Effect

Consequential amendment.

## European Union (Withdrawal) Bill

### Amendment to be moved in Committee

Schedule 7, page 39, line 14

after “unless” insert

“(a) the Minister laying the instrument has made a declaration that the instrument does no more than necessary to prevent remedy or mitigate –

(i) any failure of retained EU Law to operate effectively, or

(ii) any other deficiency in retained EU Law arising from the withdrawal of the United Kingdom from the EU,

(b)”

#### Effect

This amendment requires a Ministerial declaration to be made before the regulation making power under Schedule 7 is involved.

#### Reason

In its Report on “the Great Repeal bill and Delegated Powers” (9<sup>th</sup> Report, Session 2016-17), the House of Lords Select Committee on the Constitution made various recommendations about the content of the Explanatory Memorandum which accompanies each SI amending the retained EU law. For example, they recommended

- that the Minister making the regulations should sign a declaration stating that “the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the [withdrawal agreement]”.
- that the Explanatory Memorandum should set out clearly what the pre-exit EU did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary; and
- that the Minister should indicate in its Memorandum what level of scrutiny the Minister considered appropriate for each instrument.

We consider that it would be helpful if these recommendations were given effect to in the bill or, if not, if the Government could give commitments to comply with them. We also consider that these recommendations should also be followed by Scottish Ministers when they make regulations under Part 1 of Schedule 2.

The House of Lords Committee considered that a parliamentary committee should consider, and decide, what level of scrutiny was appropriate for each instrument and that an instrument which “amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure”. They did not, however, define what this strengthened scrutiny procedure should be but they did recognise that “existing models for strengthened scrutiny can prove resource intensive and time consuming” However they thought an essential element of any strengthened scrutiny procedure should provide an opportunity for the instrument to be revised in the light of the parliamentary debate.

We appreciate that it may not be practical, or there may not be sufficient time, to allow a parliamentary committee to determine what scrutiny each instrument should be subject to. However it is considered

- i. that the Committee were correct to suggest that there should be a strengthened scrutiny procedure for certain instruments which met certain criteria;
- ii. that the procedure should provide an opportunity for the instrument to be revised by the Minister in the light of the parliamentary debate;
- iii. that the existing criteria in paragraph 1(2) of Schedule 7 are too narrowly drawn and that they should be expanded to contain something along the lines of what the Committee suggested; and
- iv. that the Minister should have to explain in the Explanatory Memorandum what were the reasons for considering that the level of scrutiny chosen was appropriate and that there should be an opportunity for the Parliament to determine that the level of scrutiny chosen by the Government was not appropriate in any particular case.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 7, page 39, line 16

Add at end – “and each House of Parliament may require that the Minister withdraw an instrument laid and represent it for approval under an alternative procedure”.

Effect

This amendment provides that either House of Parliament can require that a Minister withdraw a regulation and represent it under another parliamentary procedure.

Reason

Consequential amendment.