

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 100 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)?

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 subsections (4) and (5) which remove the Charter of Fundamental Rights from domestic law and provide for the retention in domestic law of fundamental rights and principles which exist irrespective of the charter.

Reason

Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 103 and 104 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. Our researches have identified that the following Fundamental Principles in EU law are generally recognised:

Proportionality

Like the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the European Union (EU). It seeks to set actions taken by EU institutions within specified bounds. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.

The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

Laboratoires Pharmaceutiques Bergaderm SA v Commission of the European Communities Case C-352/98 P. (2000).

For contractual or non-contractual damages claims under Articles 268 and 340 TFEU, there must be an infringement of rights, which is sufficiently serious, and causes loss.

Heidi Hautala v. Council of the European Union Case T 14/98 [1999] ECR II-2463 (Court of First Instance).

The applicant contended that the Council had illegitimately refused to grant access to documents that were not covered by the exemption on public interest. The Court held that the principle of proportionality required the Council to consider partial disclosure. Derogation from the right of access must be limited to what is appropriate and necessary.

Subsidiarity

The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.

Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.

Federal Republic of Germany v European Parliament and Council of the European Union.

Compliance with the principle of subsidiarity was one of the conditions covered by the requirement to state the reasons for Union acts, under Article 296 TFEU.

Philip Morris Brands SARL and Others v Secretary of State for Health.

Judicial review of compliance with the principle of subsidiarity requires a determination of whether the Union legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level.

Legal certainty

The concept of legal certainty has been recognised as one of the general principles of European Union law by the European Court of Justice since the 1960s. It is an important general principle of international and public law, which predates European Union law. The principle enforces the requirement that the law must be certain, clear and precise. The legal implications of a particular law must be foreseeable, especially when applied to financial obligations. Laws adopted within the EU must have a proper legal basis. Legislation in member states must be worded so that it is clearly understandable by those who are subject to the law.

Regina (Drax Power Ltd and another) v HM Treasury and another.

The claimant's request for judicial review was dismissed on the grounds that the exemption in question fell within the scope of European Union law; its removal was justified in the public interest and came within the appropriate margin of discretion.

Bank Austria Creditanstalt AG v Commission of the European Communities Case T-198/03.

Secondary legislation which prohibits disclosure of information to the public must be regarded as covered by professional secrecy. Conversely, where the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by professional secrecy.

Equality before the law

Article 19 TFEU confers power to the EU institutions in order to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Additionally, Article 20 of the EU Charter of Fundamental Rights states that 'everyone is equal before the law.' Further provisions and directives set out that equality must be ensured in specific areas, such as equal treatment of men and women in the workplace. Gender equality has been a key principle of the EU ever since the Treaty of Rome introduced the principle of equal pay for men and women in 1957. Using the legal basis provided by the Treaties, the Union has adopted thirteen directives on gender equality since the 1970s.

Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung Case C-313/04.

The case considered the validity of a Commission regulation with regards to the duty not to discriminate between producers or consumers within the Community.

'Private Equity Insurance Group' SIA v Swedbank AS Case C 156/15.

The principle of equality before the law requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion.

It should be noted that most of these cases relate to actions against the EU institutions and the validity of secondary legislation.

European Union (Withdrawal) Bill

Amendment to be moved on Committee

Clause 6, page 3, line 33

After "cannot" insert "subject to
subsection 1(c)"

Paving amendment

European Union (Withdrawal) Bill

Amendment to be moved on Committee

Clause 6, page 3 line 33

Add at end –

"(c) may however refer a matter concerning citizens' rights to the European Court after exit day if –

(i) it has had regard to the relevant case law including anything done by the European Court after exit day; and

(ii) it considers that in order to give a judgement in the matter it is necessary to refer the matter to the European Court; and

(iii) the matter has been brought before the court or tribunal after exit day."

Effect

This amendment ensures that UK Courts and Tribunals can refer matters to the CJEU as agreed between the EU/UK negotiators in December 2017.

Reason

The joint negotiators' report confirms that the CJEU will jurisdiction over referrals from UK Courts and Tribunals regarding citizens' rights (paragraph 38).

"...the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This

mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part”.

It is important that this agreement is reflected in the bill. This amendment will achieve that objective.

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*".

Whilst we approve of the judges having wide discretion, 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 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” (9th 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 25

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.

Both Acts contain internal mechanisms for amendment by regulation including changes to the competence of the Scottish Parliament and for other purposes. Accordingly there is no need for the powers under Clause 7 to be applied to these two significant constitutional measures.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 7, page 6, line 25

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 35

Leave out “appropriate” and insert
“necessary”.

Effect

See our reasons for the same amendment to clause 7.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 9, page 7, line 5

Leave out “appropriate” and insert
“necessary”.

Effect

See our reasons for the same amendment to clause 7.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 11, page 8, line 38

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 Act of Scottish Parliament (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 41

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 legal and policy 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.

Discussions between the UK and Scottish Governments in the JMC (EN) have been taking place over 2016/17. Further discussions are clearly necessary to resolve the issues which Clause 11 presents. We have suggested a period of 2 years for the discussions to take place but at the end of the sunset period Clause 11 would cease to have effect.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 17, page 14, line 15

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Clause 17, page 14, line 22

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

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

Schedule 1, page 16, line 21

Leave out paragraph 3.

Effect

This amendment deletes Schedule 1 paragraph 3

Reason

Schedule 1 paragraph 3 provides that:

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 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.

Schedule 1, paragraph 3(1) would not allow any challenge to be made on and after exit day, or allow any court to quash, any enactment or rule of law on the grounds that it does not comply with the general principles of EU law. It would be helpful if the Government could explain and clarify:

- i. the reasons for this provision;
- ii. whether this provision is intended to apply to any pre-exit enactment and, if so, whether this provision would prevent any challenge being made to any pre-exit Act of the Scottish Parliament ASP on the grounds that it is outwith the legislative competence of the Scottish Parliament because it is incompatible with those general principles but not on the grounds that it is incompatible with any other pre-exit EU law.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 17, line 13

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 17, line 18

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 23, line 18

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 23, line 22

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 26, line 15

Leave out “appropriate” and insert
“necessary”

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 2, page 26, line 19

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved in Committee

Schedule 7, page 41, line 37

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* (9th 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]” and 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.

Accordingly we believe that this amendment is necessary.

We note that some of the Constitution Committee recommendations have, following the House of Commons Procedure Committee Report *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report* (HC386) been given effect to in the bill by amendments to Schedule 7 paragraphs 3 and 13. However, these amendments (welcome though they are) do not implement in full the

recommendations of either the Procedure Committee or of the Constitution Committee.

In particular the Constitution Committee considered that an instrument which "amends EU law in a manner that determines matters of significant interest or principle should undergo a strengthened scrutiny procedure" and that there should be an opportunity for the SI to be revised by the Minister in the light of the parliamentary debate.

The Procedure Committee also highlighted the need for a route for stakeholders to express to the Sift Committee their views on the political importance and/or drafting of the instrument and that there should be provision for the Committee to challenge the Government on the content or the drafting of an instrument and where necessary to recommend amendments.

We hope that the Government will respond positively to these recommendations during the passage of the bill.

The Procedure Committee made no recommendations regarding the House of Lords, given that it has its own structures for consideration of delegated legislation, but we echo the view that whatever structures are created by the two Houses should work constructively together.