

European Union (Withdrawal) Bill

Amendment to be moved on Report

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.

Lord Wallace of Tankerness QC moved this amendment in Committee on 28 February 2018 (Hansard, vol 789 cols 676-678). Lord Wallace said that this was “very much a probing amendment” and explained that “Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent”. So there are two stages—passed by the Parliament and then receiving Royal Assent...There is an argument that it should be an enactment when it is passed by the Scottish Parliament or the Welsh Assembly. I took the view that it was preferable to make it after Royal Assent because there are some reasons why between being passed by the Scottish Parliament and receiving Royal Assent it could be derailed.”

Lord Wallace confirmed that the Advocate-General for Scotland “has powers under Section 33 of the Scotland Act to refer to the Supreme Court a Bill or any provision of a Bill which he believes may not be within the legislative competence of the Scottish Parliament within four weeks of a Bill being passed by the Scottish Parliament, and then it would be a matter for the Supreme Court as to how long it took. A piece of legislation which has been passed may go to the Supreme Court and the Supreme Court may strike it down, so it may never actually become law. That is why he took the view that, in trying to determine when an enactment becomes an enactment, it should be in the case of Acts of the Scottish Parliament when it receives Royal Assent”.

Lord Keen of Elie QC responding for the Government to Amendment 16 said that he was “grateful for the opportunity to clarify any uncertainty that there may be here. Clause 2(2) states that, “EU-derived domestic legislation’ means any enactment” that is described in that subsection. Clause 14 defines the term “enactment” to include an enactment contained in an Act of the Scottish Parliament. An Act of the Scottish Parliament must have received Royal Assent; until that time, it is a Bill. Section 28(2) of the Scotland Act 1998 provides for this. So an Act of the Scottish Parliament that has only been passed and not received Royal Assent does not fall within this definition, and would not be categorised as EU-derived domestic legislation for the purposes of this Bill. I believe that the noble and learned Lord rather suspected that this might be the case; his concern seemed to be one of certainty as regards the drafting. The same applies in relation to Acts of the UK Parliament. The reference to “passed” in Clause 2(2)(b) is therefore a reference to the purpose for which the enactment was passed, not whether it was passed.” Lord Keen took the view that amendment 16 was unnecessary.

Lord Wallace replied that in his view Lord Keen got “the point that it is for clarity; in Section 28 of the Scotland Act, there is a distinction made between being passed and Royal Assent. It is the word “passed” that appears in Clause 14(1) and the noble and learned Lord knows as well as anyone that, when statute uses the same word, it may—not unreasonably—have the same interpretation. Yet, a Bill “passed” by the Scottish Parliament is not the same as “enacted”. Simply, does it really go to the heart of this Bill that the Government could not bring forward an amendment just to make it clear beyond doubt and, therefore, not allow unnecessary litigation at some stage in the future?”

Lord Keen then stated that he did “not have any red lines so far as Clause 2 is concerned in this context. It appears to me that if there is concern about a lack of certainty, we can take that into consideration, and we will do so in time for Report. I do not indicate that we will bring forward any amendment in regard to this; it seems to me, as the noble and learned Lord will appreciate, that context is everything. We have to read the provision and the use of “passed” in Clause 14 in the context of what is said in Clause 2(2), but I hear what he says. I am not seeking to strike it down, as it were, at this stage; I am merely seeking to explain the approach that we have taken to this issue and why we consider that, on the face of it, Amendments 16 and 342 are unnecessary...As I say, we are listening and we will consider further the point made by the noble and learned Lord and by the noble Lord, Lord Foulkes.”

Lord Wallace acknowledged that Lord Keen was going to look at the point again “I am very grateful to the noble and learned Lord for his response and his willingness to look at this and take on board the comments made. A simple amendment could be made that in no way detracts from the purpose of this Bill; if anything, it would add to that purpose in terms of legal certainty. Using the word “passed”, which, from what the noble and learned Lord said, has a different meaning in two Acts, is not helpful. I do not think the amendment in any way departs from or mitigates what the Bill seeks to achieve and I therefore strongly encourage the noble and learned Lord and his colleagues to bring forward a simple amendment to provide legal certainty.”

This amendment therefore reiterates the concerns expressed at Committee Stage. We hope that the Government will bring forward its own amendment to deal with the point raised.

European Union (Withdrawal) Bill

Amendment to be moved on Report

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.

There was extensive debate during the committee stage about the provisions of clause 5 relating to the EU Charter of Fundamental Rights.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Clause 6, page 3, line 34

Leave out Subsection (2) and insert –

“(2) A court or tribunal may where it considers them relevant 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.

In Committee this amendment was numbered 55 and was tabled in the names of Lord Foulkes and Lord Adonis. After contributions from Lord Pannick Lord Neuberger, Lord Adonis Lord Hope. ECJ could be regarded as persuasive or it could be provided that UK courts must. Lord Hope of Craighead then commented that “We are all trying to find the best way of expressing in clear and simple language, in statutory form, the guidance that the courts and tribunals will need about the interpretation of retained EU law. In particular, Clause 3 is about direct EU legislation which we will be receiving in the language of the directives and regulations to which this clause refers. I think that we have to do something to give the guidance for which they are looking”. Lord Foulkes of Cumnock asked Lord Hope the direct question “Would Amendment 55 tabled in my name and that of my noble friend Lord Adonis not deal with the noble and learned Lord’s points? “Lord Hope responded that he was “very grateful to the noble Lord and I apologise for not having paid due regard to that formula because the wording is exactly what I am looking for, but I am trying to fit it into the opening words of Clause 6(2). However, it is certainly right; I respectfully suggest that “may” is the right word to use. It is better to add in the bit about, “where it considers it relevant”, which is what comes from the noble Lord, Lord Pannick. So one is putting together bits and pieces of thought from various attempts to produce a formula.”

Lord Hope then suggested a form of words for an amendment to clause 6: “A court or tribunal need not have regard to a judgment or decision given by the European Court on or after exit day, but it may have regard to it where it considers this relevant for the proper interpretation of retained EU law”.

Lord Keen of Elie, responding for the Government recognised the “force of the points that have been made. They have come from beyond this House as well because, as noble Lords will be aware, the Constitution Committee also made some recommendations about this... Of course, that which was recommended by the Law Society of Scotland has the merit of some simplicity and embraces the same point. At this stage I would add only that the Bingham Centre looked at the current recommendations of the Constitution Committee that lie behind the amendment in the name of the noble Lord, Lord Pannick, and raised concerns about a number of aspects of the formulation put forward by the committee. However, I make it clear that we greatly appreciate the contributions that have been made to this part of the Committee’s debate. We will go away and consider the various formulations, and I believe it would be sensible for the Government to engage with various interested parties once we have come to a view about how we can properly express what we all understand is necessary policy guidance in the context of this exceptional step. Against that background, I invite noble Lords to consider not pressing their amendments at this stage”. On this basis amendment 55 was withdrawn.

We have tried to retain the simplicity of our original amendment whilst respecting the logic of Lord Hope's suggested change to the amendment which was considered in Committee. We hope that the Government will adopt this or a similar wording.

European Union (Withdrawal) Bill

Amendment to be moved on Report

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.

Lord Callanan responding to the debate in Committee on clause 7 regarding the group which included this amendment which was then numbered amendment 71 (see Hansard 7 March 2018 vol 789 cols 1179-1201) thanked Peers “for what has been an excellent debate. I use the word “debate” but only one point of view has been expressed and I have heard the message from all sides... I think that the main issue is the number of limitations on the exercise of that power. The power is time limited and clearly limited in what it can be used for. It may only prevent, remedy or mitigate deficiencies in EU law, and of course secondary legislation is subject to well-established parliamentary procedures. Where legislative powers are sub-delegated to public authorities, this will always be subject to the affirmative procedure. The Minister went on to say that “The Government are looking very closely at how the powers in the Bill are drawn and how they will be exercised, particularly in the light of the committee recommendations and developments in other pieces of legislation... As the Constitution Committee notes, comparable arguments were made during the passage of the sanctions Bill through this House and a mutually agreeable position was found in that instance. That has clearly informed the committee’s recommendation and we are receptive to the arguments made in its report. I am confident that a mutually agreeable position will be found. However, we would very much like to talk to noble Lords following the debate, with an eye to coming back to this issue on Report”.

Lord Callanan also stated “In case there is some misunderstanding here, let me be clear: “appropriate” in Clause 7 does not give Ministers unrestricted discretion to correct anything that they may wish or like. Corrections must not be appropriate per se; they must be appropriate to correct the particular deficiency they are addressing. The threshold for ministerial decisions is set firmly within the context of those purposes. He also said that “I appreciate that there is a degree of subjectivity to these tests—but that is true of almost all tests, and it is important to acknowledge that there are limitations on the power. Parliament polices the Government’s interpretation of its vires to act through the mechanism of the Joint Committee on Statutory Instruments, which I have no doubt will take a keen interest in instruments under this Bill; and ultimately, as a number of noble Lords have pointed out, these tests are litigable in the courts. So we cannot responsibly remove “appropriate” from the Bill”.

“...Amendments 74, 117 and 139, tabled by my noble friend Lord Hailsham, seek to write into the Bill that Ministers’ consideration of the appropriateness of any exercise

of the delegated powers must be made on reasonable grounds. This is the right type of approach in not altering the fundamental scope of the powers. However, I am conscious of the need for transparency in this process and we will look to see how, in line with developments and other legislation, we can ensure that ministerial decision-making about the appropriate exercise of the powers is more transparent to the Committee”.

Lord Wilson stated in reply: “The Minister has clearly heard the voices of so many noble Lords in favour of some change to Clause 7(1). I say respectfully that he seemed to be speaking with two voices. One was a clear, fierce defence of “appropriate”. I have to confess that I found some of it surprising... However, I will study what the Minister said with interest. On the one hand he spoke with a fierce voice defending the present drafting. On the other, he referred three or four times to the need to discuss before Report. At one point, he said that he was sure that a mutually agreeable position would be found. We need to study exactly what he said. Against that background, I beg leave to withdraw my amendment”.

We believe that the Government’s approach does not address the issues raised in the debate and we hope that the Government will adopt this amendment. The suggestion that the Government would bring forward an amendment similar to clause 2 of the Sanctions and Anti-Money Laundering bill whilst welcome is not sufficiently robust. Clause 2 of that bill still provides Ministers with a significant discretion. We believe that discretion ought to be more restricted along the lines of this amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

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 on Report

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 on report

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.

This amendment was numbered 311 in Committee (Hansard 26 March 2018 vol 790 cols 630-634) and had been tabled by Lord Foulkes and spoken to by Lord Wallace of Tankerness. In moving the amendment Lord Wallace said:

“My Lords, at the request and with the consent of the noble Lord, Lord Foulkes of Cumnock, I shall move Amendment 311I shall be brief in moving Amendment 311 because a number of amendments were grouped for our wider debate on Brexit and devolution issues last Wednesday that related to sunset clauses, and this is another example. It appears that here, as in a number of other areas of the Bill, particularly when powers are to be conferred on United Kingdom Ministers, a sunset clause is attached to them. However, for those in relation to devolution and the exercise of powers by UK Ministers in respect of making orders on the devolved settlement, there is no such sunset clause. As has been said by others, not only in regard to this

Bill but on other occasions, there is nothing as permanent as a transitory provision. Although this is intended to be just a temporary move pending the solution of the arrangement between the powers that will go directly to Cardiff, Edinburgh and Belfast and those where we may wish to follow up on what was debated last week with regard to the UK frameworks, it nevertheless appears that there should be some incentive to get on with it and have a time limit.

We debated these issues last week, particularly whether the period should be two, three, four or five years, which is a matter for further discussion, and it is fair to say that this is more about the principle of having a sunset clause. When we debated it last week, the noble and learned Lord, Lord Keen of Elie, helpfully indicated in his reply that the Government's mind was not closed on this matter and there could be an opportunity to put in some form of sunset clause in relation to this and the other amendments that we look forward to seeing on Report. I hope this amendment allows the Government to give further thought to what was said in our debate last week, and I would certainly encourage that positive thinking with regard to a sunset clause. I beg to move.

Baroness Goldie in responding on behalf of the Government said "I thank noble Lords for their contributions to the debate. I also thank the noble and learned Lord, Lord Wallace of Tankerness, for speaking to the amendments tabled by the noble Lord, Lord Foulkes. I appreciate the intention behind the noble Lord's Amendment 311 in seeking to apply a "sunset" to the Clause 11 arrangements. I recognise the aim to provide a clear guarantee that those areas in which frameworks are not needed will pass into devolved competence. In fact, the effect of Amendment 311 would no longer be required if we take the kind of approach adopted in the amendments to Clause 11 that we debated last week. The noble and learned Lord, Lord Wallace, was good enough to acknowledge that.

As we indicated on our amendments, we think it preferable that those areas where we know that frameworks are not required will never be subject to the constraint at all. I hope your Lordships will also be reassured by the proposal of a power to repeal the effects of Clause 11 to make clear that it is a temporary means to limit competence where we are considering the need for a framework, not an ongoing mechanism for altering that devolved competence. We have proposed an obligation to report to Parliament every three months on the progress we had made towards repealing the restrictions and implementing the new arrangements where needed. As has been acknowledged, this will increase the impetus behind the frameworks processes. Following last week's debate on Clause 11 and the extent to which this interconnects and relates, I urge the noble and learned Lord not to press Amendment 311.

Lord Wallace of Tankerness replied to Lady Goldie. He said "On the proposed sunset clause to which I spoke on behalf of the noble Lord, Lord Foulkes, the Minister seemed to suggest that, once the new proposals come through, this might not be necessary. I tabled a very similar amendment last week, which I had thought of attaching to the amendment brought forward by the noble Lord, Lord Callanan. When I discussed it, I was assured that it was not necessary because, due to the way in which the Bill was set out, it would not have been superseded by pre-emption even if the noble Lord's amendment had been accepted, so such a clause is still

pertinent. It is important that some time limit be set, even for establishing the frameworks. The noble and learned Lord, Lord Mackay, made some interesting and constructive proposals as to how the frameworks might be achieved. While the return of many of the powers at the so-called intersects would be pretty imminent on exit day, a number would still have to be resolved. Therefore, I encourage some positive thinking with regard to a timeframe within which that might be done. On that basis, I beg leave to withdraw the amendment”.

Amendment 311 was consequently withdrawn. We still believe that a sunset clause is necessary pending the tabling of the Government’s amendments to clause 11.

European Union (Withdrawal) Bill
Amendment to be moved on Report

Clause 17, page 14, line 15

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Clause 17, page 14, line 22

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on

Schedule 2, page 17, line 13

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill
Amendment to be moved on Report

Schedule 2, page 17, line 18

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Schedule 2, page 23, line 18

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Schedule 2, page 23, line 22

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Schedule 2, page 26, line 15

Leave out “appropriate” and insert
“necessary”

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

Schedule 2, page 26, line 19

Leave out “appropriate” and insert
“necessary”.

Effect

Consequential amendment.

European Union (Withdrawal) Bill

Amendment to be moved on Report

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.

This amendment, numbered 229 in the Committee Marshalled List was not moved.