EUROPEAN UNION (WITHDRAWAL) BILL

Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee

CONTENTS

1. **SHORT SUMMARY OF POWERS**
2. **DELEGATED POWERS MEMORANDUM**
    a. **INTRODUCTION**
    b. **CONTEXT AND PURPOSE**
    c. **ANALYSIS OF DELEGATED POWERS BY CLAUSE**

1. SHORT SUMMARY OF POWERS

The European Union (Withdrawal) Bill will repeal the European Communities Act 1972 (ECA) on the day we leave the EU. It will convert EU law as it applies in the UK into domestic law so that wherever practical and sensible, the same laws and rules will apply after we leave the EU as they did before.

POWER	JUSTIFICATION	SCRUTINY
Clause 7(1)/Schedule 2 Part 1 - Powers to deal with deficiencies in retained EU law	Retained EU law will contain thousands of failures and deficiencies. This power enables UK ministers and the devolved authorities to make corrections in time for exit to ensure a functioning statute book.	Affirmative Procedure must be used for: - Establishing a new public authority - Transferring functions to a newly created public authority - Transferring EU legislative functions to a public authority in the UK - Provision relating to fees - Creating or widening the scope of a criminal offence - Creating or amending a power to legislate make subordinate legislation Otherwise negative procedure can be used. Negative procedure SIs are subject to the conditions of the sifting process in the House of Commons.
Clause 7(3) - Power to describe or provide for additional kinds of deficiencies.	Additional sorts of deficiency might be identified after the passage of the Bill. This power allows a Minister of the Crown to make	Affirmative procedure.

	regulations to provide for deficiencies of a sort which are not included at clause 7(2).	
Clause 8/Schedule 2 Part 2 - Powers to comply with international obligations	The UK's withdrawal from the EU could lead to unintended breaches of our international obligations. This power allows regulations to be made by the UK Government and devolved administrations to prevent or remedy such breaches.	Affirmative Procedure must be used for: - Establishing a new public authority - Transferring functions to a newly created public authority - Transferring EU legislative functions to a public authority in the UK - Provision relating to fees or charges - Creating or widening the scope of a criminal offence - Creating or amending a power to legislate make subordinate legislation Otherwise negative procedure can be used. Negative procedure SIs are subject to the conditions of the sifting process in the House of Commons.
Clause 9/Schedule 2 Part 3 - Powers to implement the withdrawal agreement	This power allows for the UK Government and devolved administrations to implement a withdrawal agreement reached with the EU.	Affirmative Procedure must be used for: - Establishing a new public authority - Transferring functions to a newly created public authority - Transferring EU legislative functions to a public authority in the UK - Provision relating to fees - Creating or widening the scope of a criminal offence

		- Creating or amending a power to legislate - Amendments to the Bill itself. Otherwise negative procedure can be used. Negative procedure SIs are subject to the conditions of the sifting process in the House of Commons.
Clause 11/Schedule 3 - Power to make exceptions to limit on devolved competence to modify retained EU law	These powers allow for exceptions to be introduced to the updated limit on devolved legislative or executive competence that is created by the Bill.	Order in Council Requires approval by resolution of both Houses of Parliament and the relevant devolved legislature
Clause 14(4) - Power to amend 'exit day'	This power enables a Minister of the Crown to alter the definition of exit day in the Bill if the EU Treaties cease to apply to the UK on a different date to that set out in clause 14(1).	Affirmative procedure
Clause 17(1) - Power to make consequential provision	This power enables a Minister of the Crown to make consequential provision in consequence of this Bill.	Negative procedure
Clause 17(5) - Power to make transitional, transitory or saving provision	This is a standard power for a Minister of the Crown to make transitional, transitory or saving provision in connection with the coming into force of any provision of the Bill (including its operation in connection with exit day)	Negative, affirmative or no procedure
Clause 19 - Power to make commencement provisions	This is a standard power for a Minister of the Crown to bring provisions of the Bill into force by commencement regulations	No procedure
Schedule 1 - Power to provide for a right of	Domestic courts currently have no jurisdiction to	Affirmative procedure

challenge to the validity of retained EU law	declare an EU measure invalid**.** This power would enable a Minister of the Crown to provide in domestic law for a right of challenge to the validity of retained EU law**.**	
Schedule 4 Part 1 - Powers to provide for fees and charges in connection with new functions	The Bill enables functions to be given to Government, UK bodies or devolved bodies, for example functions previously performed by the EU. This power enables, where appropriate, the costs of providing government services to be charged to those individuals or industries who received them, rather than the general taxpayer.	Affirmative procedure for creation of fees or charges and subdelegation, otherwise negative procedure
Schedule 4 Part 1 - Power to disapply consent requirements or prescribe additional functions in relation to which the devolved authorities can exercise the fees and charges power	This power enables a Minister of the Crown to prescribe additional circumstances where devolved authorities can exercise the power in Schedule 4 paragraph 1, and to disapply consent requirements	Negative procedure
Schedule 4 Part 2 - Power to modify pre-exit fees and charges	This power enables fees and charges made under section 2(2) of the European Communities Act 1972 and section 56 of the Finance Act 1973 to be modified or removed, despite the repeal of the 1972 Act, and the amendment of section 56 of the 1973 Act, by the Bill.	Negative procedure
Schedule 5 - Power to make exceptions from duty to publish retained EU law	This power enables a minister to give a direction to the Queen's printer that an instrument need not be published	None (power to give direction)
Schedule 5 - Power to make provision about judicial	This power enables a Minister of the Crown to	Affirmative procedure

notice and admissibility	make provision as to judicial notice and evidential rules on EU law, the EEA agreement, and retained EU law.	

2. DELEGATED POWERS MEMORANDUM

A. INTRODUCTION

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the European Union (Withdrawal) Bill ("the Bill"). This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected. This memorandum reflects the Bill as brought from the House of Commons on 18th January 2018.

B. CONTEXT AND PURPOSE

2. The Government's approach is to provide as much certainty as possible as we move through the process of exiting the European Union (EU). The Bill is an essential part of this and will ensure that, wherever possible, the same rules and laws apply on the day after we leave the EU as before. This will enable the UK to leave the EU in a smooth and orderly way, minimising uncertainty for business, workers and consumers. The Bill will:

- Repeal the European Communities Act 1972 and return power to UK institutions.
- Convert the body of existing EU law as it stands at the moment of exit into domestic law, before we leave the EU, subject to some exceptions. This allows businesses to continue operating knowing the rules have not changed significantly overnight. After this it will be up to Parliament and, where a matter is within their competence, the devolved legislatures to amend, repeal or improve any piece of what will then be UK law at the appropriate time once we have left the EU.
- Give powers that enable our law to continue to function sensibly outside the EU and to enable the withdrawal agreement to be implemented as appropriate.

3. In the analysis of each power it is specified whether it is conferred on the devolved authorities. Where the Bill confers powers on the devolved authorities, such as the power to deal with deficiencies in retained EU law, their use is limited to domestic legislation within areas of devolved competence until areas are released from the temporary clause 11 competence arrangement by Order in Council at which point they can also be used to amend retained direct EU legislation insofar as it is within devolved competence. Limited specific consultation and consent requirements apply to the exercise of individual powers by the devolved authorities in certain circumstances.

Examples in this Memorandum

4. This memorandum includes as many examples as possible of how the powers might be used. However, one of the reasons for taking delegated powers is that this Bill will be before Parliament at the same time as negotiations with the European Union are taking place. As a result the solutions might change, and we also need to protect the UK's negotiating position, so we cannot make public all the details of the secondary legislation that we expect might be made under these powers. There are also other reasons why, in particular policy areas, decisions might not yet have been taken as to how the powers in this Bill will be exercised. This inability to set out in advance how the powers will be used is part of the reason why we have chosen to constrain the powers in a number of ways, to reassure Parliament that these powers will only be used for the purpose for which they were designed.

5. Therefore any examples used in this paper are illustrative of the way the powers could be used and do not represent actual plans at this stage. In no way should the examples be taken to signify areas in which the Government does or does not expect to reach an agreement with the EU. The United Kingdom wants to agree with the EU a deep and special partnership. However, we cannot know the precise shape of that partnership in advance and so in areas potentially affected by the negotiations it is not possible to provide definite examples of the use of the various delegated powers at this stage. In some cases, it is not possible to provide specific examples at all.

6. In addition to the examples published in this Memorandum the Government has published a number of further examples of how the powers in the Bill might be used. These can be found on the GOV.UK website[1].

[1] Equalities - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665442/171206_Equalities_SI_summary_FINAL_.pdf, Cover note on employment law - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666440/Employment_SIs_Cover_Note_.pdf, Draft *Employment Rights (Amendment) (EU Exit) Regulations 2018* - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666442/The_Employment_Rights__Amendment___EU_Exit__Regulations_2018_and_The_Employment_Rights_.pdf, Draft *Employment Rights*

C. ANALYSIS OF DELEGATED POWERS BY CLAUSE

Clause 7(1) and Schedule 2, Part 1: Power to deal with deficiencies arising from withdrawal

This is the correcting power that enables UK ministers or devolved authorities to make corrections to law, with Parliament's (or the relevant legislatures') consent, to make it work appropriately after the UK has left the EU.

Power conferred on:

(a) a Minister of the Crown[2],

(b) a devolved authority, or

(c) a Minister of the Crown acting jointly with one or more devolved authorities

Power exercised by: *regulations made by statutory instrument*

Parliamentary Procedure: *negative (subject to the conditions of the sifting process in the House of Commons) or affirmative*

Context and purpose

7. The core of the Bill is the power to make sure the UK's statute book functions on exit when the European Communities Act 1972 (ECA) has been repealed. The Bill replaces the framework of the ECA with a new framework - of "retained EU law" - which provides a basis from which the UK Parliament and the Devolved Legislatures can make their own laws.

8. The "retained EU law" is comprised of:

(Amendment) (EU Exit) (No. 2) Regulations 2018 - https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/666448/The_Employment_Rights__Amendment___EU_Exit___No._2__Regulations_2018.pdf

[2] For the purposes of the Bill, Minister of the Crown includes the Commissioners for Her Majesty's Revenue and Customs

- Converted legislation (which is direct EU legislation (EU regulations, EU decisions, EU tertiary legislation) and direct EU legislation as it applies with adaptations to the EEA);
- Preserved legislation (which includes regulations made under section 2(2) or paragraph 1A of Schedule 2 to the ECA, other primary and secondary legislation with the same purpose as regulations under section 2(2) ECA, other domestic legislation relating to those things or to converted legislation, and legislation which otherwise relates to the EU or EEA);
- Any other rights or obligations which are recognised and available in domestic law through section 2(1) ECA (for example, directly effective rights contained in the EU treaties); and
- Historic relevant CJEU and domestic case law (that will be given the same binding or precedent status in our courts as decisions of our own Supreme Court).

9. The conversion of directly applicable EU law and the savings provided by the Bill will not be sufficient to ensure a functioning statute book. On our withdrawal from the EU, there will be some areas of law which will not be operable or which will not operate properly; these deficiencies will arise because we are no longer a member of the EU. Failures to operate effectively and other deficiencies may take several forms, as set out below.

10. The correcting power will, therefore, allow a Minister of the Crown or a devolved authority to make regulations to prevent, remedy or mitigate deficiencies that would otherwise arise as a result of the UK's withdrawal from the EU. The power also allows regulations to be made where a deficiency would arise from withdrawal taken together with a provision, or provisions, of the Bill. This corrective action will be able to be taken in advance of exit day, so that from the day we leave the EU our statute book, including the legislation converted and preserved by this Bill, functions properly.

Devolution

11. Similar issues will also exist in legislation that is the responsibility of the devolved authorities. Therefore an equivalent power will also be exercisable by the devolved authorities to allow them to deal with deficiencies in domestic legislation within devolved competence. The examples given below are illustrative and **should not be read as actual plans as to whether the power in any particular case would be exercised by a UK Minister of the Crown or a devolved authority.**

12. The devolved authorities will also be able to amend retained direct EU legislation using the correcting power, where such an amendment would be exempt from the restriction on devolved legislative competence in clause 11 by virtue of an Order in Council made under a power conferred by that clause.

13. The devolved authorities will only be able to make corrections within their areas of devolved competence. Devolved competence is defined in paragraphs 9 to 12 of Schedule 2 to the Bill. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration and we have committed to consult the relevant devolved administration before using the power to modify retained direct EU law in areas that are otherwise devolved.

Justification

14. The Government understands that there will be concerns on the breadth of the correcting power and the level of Parliamentary scrutiny. There are three principal reasons why this approach has been chosen:

i. Time: The two year timetable for exit is provided for in Article 50 of the Treaty on the European Union. Therefore, the UK needs to be in a position to control its own laws from March 2019, which is why the UK Government and devolved administrations need to take a power so they can act quickly and flexibly to provide a functioning statute book. The complexity of identifying and making appropriate amendments to the converted and preserved body of law should not be underestimated. There is over 40 years of EU law to consider and amend to ensure that our statute book functions properly on our exit from the EU. According to EUR-Lex, the EU's legal database, there are currently nearly 12,000 EU regulations and over 6,000 EU directives in force across the EU.[3] We are not yet in a position to set out in primary legislation how each failure and deficiency should be addressed, nor would it be practical to do so. As the Delegated Powers and Regulatory Reform Committee stated, shortly after it was established:

> *"The need to change detailed provisions from time to time would place impossible burdens on Parliament if the changes always required the introduction of new legislation."*[4]

The unique circumstances of withdrawing from the EU make this problem even more acute. The Government has already identified a number of other key Bills that

[3] EUR-Lex search run on 10 January 2018 May 2017, http://eurlex.europa.eu/search.html?qid=1490700962298&VV=true&DB_TYPE_OF_ACT=allRegulation&DTC=false&DTS_DOM=EU_LAW&typeOfActStatus=ALL_REGULATION&type=advanced&lang=en&SUBDOM_INIT=LEGISLATION& DTS_SUBDOM=LEGISLATION and http://eurlex.europa.eu/search.html?qid=1495788221421&DB_TYPE_OF_ACT=directive&CASE_LAW_SUMMARY=false&DTS_DOM=ALL&excConsLeg=true&typeOfActStatus=DIRECTIVE&type=advanced&SUBDOM_INIT=ALL_ALL&D TS_SUBDOM=ALL_ALL&FM_CODED=DIR

[4] 1st Report, Session 1992-93 (HL. Paper 57), paragraph 1.

will be needed to ensure a smooth and orderly exit and these are in addition to other planned Bills which will deliver the Government's wider agenda.

ii. Practicality: The power will be exercised by UK ministers and the devolved authorities, enabling them to make the necessary corrections to the statute book required to make the law function effectively in their own field of expertise and competence. Making all corrections on the face of the Bill, at this stage, would not be practical.

iii. Flexibility: Many of the potential deficiencies or failures in law arise in areas in which the UK is considering pursuing a negotiated outcome with the EU. The UK must be ready to respond to all eventualities as we negotiate with the EU. Whatever the outcome, the UK Government and devolved administrations, with the appropriate scrutiny by Parliament and the devolved legislatures, must be able to deliver a functioning statute book for day one post-exit.

15. In its report on the Bill and delegated powers[5], the House of Lords Select Committee on the Constitution noted the complexities of the issues which the Government would need to address and concluded that in the circumstances it would be unrealistic to limit tightly the power needed to adapt retained EU law. The Select Committee said that:

> *"it will be difficult tightly to define, in advance, the limits of the delegated powers granted under the Bill without potentially hobbling the Government's ability to adapt EU law to fit the UK's circumstances following Brexit. We do not think it is realistic to assume that the Government will have worked out, in advance of the Bill being considered by Parliament, what amendments will be needed to the corpus of EU law. That being the case, it is unrealistic to assume that Parliament will be able tightly to limit the delegated powers granted*

[5] The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-17

under the Bill—because it will not be clear what, exactly, they will be required to do"[6].

16. It is essential that the power is broad enough to capture all of the corrections which it is appropriate to make. If the full range of deficiencies is not addressed there will be consequences for individuals, businesses, and other organisations. The work across government has identified the main failures and deficiencies that would need correcting, subject to the negotiations, and these have been used to form the list of the types of deficiencies which can be corrected in subsection (2). Some of these are outlined in more detail below.

17. The scope of the power is intended to match the sorts of deficiencies which have been, or might be, identified in retained EU law. The list of sorts of deficiency in subsection (2) is therefore an exhaustive list of the things which can be a deficiency and dealt with using the power.

18. To ensure the scope of the clause properly captures all the deficiencies arising from withdrawal which the Government has identified in retained EU law, clause 7(3) includes a 'sweeper' provision which applies to this list with an effect akin to that of the legal principle of *ejusdem generis*[7]. This will ensure that deficiencies not on the list in subsection (2) but which are of a similar kind to those on the list are recognised as being deficiencies. For example, subsection (2)(g) refers to "EU references" and the application of the 'sweeper' means that EEA references would also be deficiencies for the purposes of clause 7; this is because EEA references are "of a similar kind " to EU references.

i. Removing redundant provisions:

[6] The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-17, page 16

[7] This rule of statutory interpretation provides that where general words follow specific words, the general words should be interpreted as confined to things of the same kind as those specifically listed. For example, if legislation referred to "cats, dogs and other animals" the phrase "other animals" would have to be read in the context of "cats and dogs", so it would only cover domesticated animals such as hamsters and not non-domesticated animals such as wolves.

19. Without corrections to the law, on exiting the EU the UK would still have certain obligations to the EU or be bound by EU decisions when it is no longer a member state - these are redundant provisions. For example, the Competition and Markets Authority and UK courts would continue to be required to decide UK antitrust cases in line with the decisions of the European Courts on competition matters on corresponding questions, and to have regard to relevant decisions or statements by the European Commission as well.

20. Depending on the negotiations, this might no longer be appropriate, and therefore people in the UK would expect the Competition and Markets Authority and UK courts to be able to make independent decisions on competition issues in the UK. The power would be used to amend primary and secondary legislation to remove the EU elements of competition law but to leave domestic UK competition regime intact. This would ensure the continued effective operation of the existing UK competition regime.

21. Legislation providing for elections to the European Parliament (the European Parliamentary Elections Act 2002 and the European Parliament (Representation) Act 2003) will be repealed on the face of the Bill, because this legislation is intrinsically related to membership of the EU and its repeal is an inevitable outcome of exiting the EU. Other provisions relating references to European Parliamentary elections will be similarly redundant and are expected to be removed using the correcting power where they are contained in the body of retained EU law, or the power to make consequential provision. There will be other similar, limited cases where secondary legislation under the correcting power may need to be able to (at least at face value) remove rights from UK citizens. In practice, this is removing redundant provision that no longer makes sense when the UK is no longer part of the European Union; these SIs will simply be reflecting the outcome in international law.

ii. Transferring Functions

22. Many UK businesses and citizens depend on services, currently provided at an EU level, that enable markets to function and provide protection for individuals. It is essential that we are able to repatriate functions from the EU to the UK, including the devolved administrations, if essential services are to continue.

23. For example, Regulation (EC) No 216/2008 sets up the European Air Safety Authority (EASA). If the UK ceases to be a member of EASA, the UK's Civil Aviation Authority would need to exercise many of the functions of EASA for the UK to ensure proper air safety. Without this correction, the Civil Aviation Authority would not have sufficient legal authority to regulate aviation safety. The power will enable such changes. A statutory instrument would amend Regulation (EC) No 216/2008 to remove redundant text and to amend references.

24. In certain scenarios, a UK body may need to start evaluating and authorising chemicals in the UK taking over functions currently performed at a EU level. The European Chemicals Agency currently conducts evaluation and authorisation of chemicals under the REACH regulation (Regulation (EC) No 1907/2006). This function may need to be transferred so that consumers can continue to have confidence in the safety of certain chemicals and their proper regulation and international markets have sufficient confidence in the UK's products so that UK businesses can continue exporting. In the event of no deal in this area, a UK government body would take on the functions of assessing chemical substances under the REACH regulation. Some sample drafting is at **Annex A**.

25. Some functions are essential if the UK is to maintain its international relationships. Without a robust and recognised data collection and reporting method the UK may be in breach of international agreements and its produce may not be acceptable in the EU and other markets having a major impact on the industry.

26. For example, the EU Common Fisheries Policy requires the UK to carry out research, data collection and reporting in order to provide evidence to the EU and international bodies - this meets a wider international obligation on reporting. The

UK's future position within the data collection framework will be subject to negotiations but should the UK not continue to be part of the EU framework we would need to transfer these functions to appropriate domestic bodies. It is essential that data collection, research and reporting can be carried out because, as a coastal state with a significant level of waters under its control, the UK must be able to evidence that fishing in its waters meets international obligations. Without a robust and recognised data collection and reporting method the UK may be in breach of international agreements and its produce may not be acceptable in the EU and other markets having a major impact on the industry.

27. Without a correction to the law, the UK would not have the powers to control the production and use of Fluorinated Greenhouse Gases (F Gases). If we do not comply with the United Nations Montreal Protocol, UK businesses would be excluded from global trade in these products. EU Fluorinated Greenhouse Gases (F-Gases) Regulation (EU) No 517/2014 requires a staged phase-down of F-Gases. In doing so it also implements a large part of an international commitment the UK (and EU) recently agreed to under the United Nations Montreal Protocol. The Regulation set up a system to phase down F-Gases across the EU by controlling use and sales of F-gases in the EU, including by granting quota to companies to allow them to place F-gases on the EU market. In the event of no agreement in this area, these quota provisions would be inoperable in the UK on exit. A correction would be required to create an operable UK mechanism to replace the EU quota system.

iii. Removing reciprocal or other arrangements

28. A key element of EU law is reciprocal arrangements between States and with the Commission.

29. The Bill preserves and converts law which on its face provides for reciprocal arrangements but it cannot require anything on the part of EU member states. In any areas where it is agreed with the EU that reciprocal provision should continue, then the law can remain in place as it is (unless the relevant law is deficient for

some other reason). However, where there is no agreement in an area or the agreement is to no longer maintain reciprocal arrangements, then the effect of the Bill on its face could be to provide for domestic law to continue to offer benefits to EU member states and their citizens which would not be reciprocally available to the UK and its citizens in those member states. Dependent on what is appropriate and in the national interest in the particular context, the power can be used to modify, limit or remove such arrangements and resolve the imbalance.

30. Reciprocal arrangements cover a wide range of issues. As a member of the EU, the UK is obligated to provide certain benefits to citizens of other EU member states, and those member states are obligated to provide corresponding benefits to UK citizens. For example if the UK has sought but not secured reciprocal rights for UK citizens, the power can also be used to remove rights from EU citizens in the UK. These rights are based on the UK's membership of the EU; without that membership, or an alternative deal, they become deficient by incurring a disadvantage on the UK.

31. There are also reciprocal arrangements for other areas such as unlawful exports. For example, the UK has a reciprocal arrangement with other EU member states on the restitution of stolen cultural property. Any EU country can require, in the member state where the object is being held, court orders, including search and entry powers, to recover objects unlawfully exported to other countries. In the event that there was no provision in an agreement with the EU to retain the current arrangements, EU member states would still be able to require court orders to recover objects unlawfully exported to the UK, but the UK would lack the equivalent right in the EU. It would also mean that post-exit, owners whose objects are recovered by an EU state in this way would not receive compensation from that state, even if they performed appropriate due diligence. The power would allow the UK to remove the benefits offered to EU states and nationals in the absence of reciprocal benefits for UK nationals. Some sample drafting for this example is included at **Annex A**.

32. Reciprocal arrangements also exist with countries outside the EU under some of the EU Treaties. The analysis above applies equally to these agreements: there is the potential for deficiencies to arise in these agreements and for the correcting power to be used to prevent imbalances in domestic law.

33. Before a devolved authority uses the power to unwind a reciprocal arrangement they must first consult the Secretary of State.

iv. Amending inappropriate references:

34. This is the largest category of the changes required, based on our current assessment which we continue to refine: early estimates suggest up to half the corrections that might be required fall into this category. Incorrect references can make the law inoperable or make it operate in a manner which was not intended.

35. For example, the impact of not making such changes would include inadvertently removing environmental protections. The Town and Country Planning (Environmental Impact Assessment) Regulations 2017 require an environmental impact assessment of certain applications for planning permission. They refer to "other EEA States" in a number of places, mainly in the context of development likely to have significant transboundary environmental effects. A correction amending the references to "other EEA States" to "EEA States", would make it clear that the requirement on transboundary consultation continues to function on exit as it does now. This would remove uncertainty and help ensure that an important piece of environmental protection law continues to operate effectively.

v. Other changes

36. A statutory instrument made under this power by a Minister of the Crown can sub-delegate the power where appropriate: for example, if a regulator such as the Bank of England or the Financial Conduct Authority needed to make a substantial number of technical corrections to rules such as the Binding Technical Standards which fill out the technical detail of how requirements set in EU legislation relating to financial services are to be met. The Government is clear that it would only take this

approach where existing constitutional arrangements mean that it is more appropriate for the power to be exercised independent of political control. Such an instrument will have to be debated and approved by Parliament (affirmative procedure).

37. The Government appreciates that the power is wide, but this reflects the wide-ranging and diverse number of areas in which failures and deficiencies will arise.

38. The purpose of the power is carefully described. It is limited to addressing failures of EU law to operate effectively or any other deficiencies which arise from withdrawal; it avoids an attempt at defining 'necessary' changes. There are some changes that might not strictly be necessary for the law to remain functional but will resolve clear deficiencies. Depending on the nature of any agreement with the EU, and other factors, the UK might wish to retain some reciprocal arrangements and not others; it might choose to continue sharing some functions with EU institutions and repatriate others. This power, combined with the power to implement the withdrawal agreement, allows flexibility based on the outcome of the negotiations on which Parliament will have a vote.

Amending Primary Legislation

39. The power needs to be broad enough to allow for corrections to be made to both primary and secondary legislation and this means that the power must be a 'Henry VIII' power. In its report on the Bill and delegated powers, the House of Lords Select Committee on the Constitution noted that:

> *"the distinction between Henry VIII and other delegated powers is not in this exceptional context a reliable guide to the constitutional significance of such powers, and should not be taken by Parliament to be such".*[8]

[8] The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-17, page 16

40. The Government agrees. A large number of fairly straightforward and insignificant changes will be needed to primary legislation in readiness for exit day. For example, it may be desirable to make simple and non-substantive amendments to references in the Public Passenger Vehicles Act 1981, as without changes they will not make sense after the UK ceases to be an EU member State. There are references to "*in another member State*" in section 21(1); "*of the other member State*" in section 21(3)(b); and "*by another member State*" – Schedule 3, paragraph 7(c)."

Limiting the Power

41. The unique circumstances of this Bill necessitate a broad power, but it must be limited in purpose to achieving a smooth and orderly exit. Proper scrutiny of the use of the power is, as ever, essential. The Government agrees with the House of Lords Select Committee on the Constitution that *"Ministers must not be handed virtually untrammelled power*". Therefore the power has a number of limitations on it, recognising, as also the Committee does, that powers cannot be too tightly limited.

i. It is not a power to keep pace with EU law

42. The UK leaving the EU is a one-off legislative process. Therefore, the power is designed to correct, in a finite period, a finite number of deficiencies. Government cannot use clause 7 as a substitute for section 2(2) of the ECA. Subsection (4) makes it clear that law cannot be considered deficient simply because it is no longer in line with developments in EU law. This means that divergence in the law post-exit is not in itself sufficient to trigger the power in clause 7.

43. If, however, an EU institution's rule-making powers have been transferred, under clause 7, to a UK institution, there is nothing to prevent that UK institution from choosing to make regulations that correspond to future EU legislation if that is in the UK's interest. Any statutory instrument granting a public authority a new

function will need to ensure there is proper oversight and scrutiny built into the exercise of that function.

ii. The power cannot be used to impose taxes, amend the Human Rights Act, amend parts of the Northern Ireland Act 1998, create some criminal offences, make retrospective provision or for the purpose of implementing the withdrawal agreement.

44. Subsection (7) contains restrictions on the use of the power to ensure that it cannot be used to make certain changes. The circumstances of the Bill mean the power is necessarily broad, but these restrictions will ensure it cannot be exercised beyond its purpose to correct law that would fail to operate effectively or be otherwise deficient on exit. It is appropriate to constrain government and the devolved administrations so that the power cannot be exercised in certain ways. The restriction on amending the Northern Ireland Act 1998 (with one small exception in relation technical standards) is because that Act is the main statutory manifestation of the Belfast Agreement and it would not, therefore, generally be appropriate for a power with this breadth of scope to be capable of amending that Act.

45. Any corrections to the law that could not be made because of these restrictions would therefore need to be made by primary legislation, unless Parliament has delegated powers that allow such provisions in existing Acts.

46. There is a restriction on creating criminal offences: the power cannot be used to create offences punishable by sentences of more than two years. However it could be necessary to create or modify the scope of some criminal offences. For example, if it is an offence currently to fail to notify an EU institution of something and the UK no longer has a relationship with that institution, this would be a deficiency. It might be appropriate instead for the offence to be changed to a failure to notify the equivalent UK public authority that now exercises the same functions.

iii. The power can only be exercised for a limited time (sunset provision)

47. The House of Lords Select Committee on the Constitution said:

> *"the 'Great Repeal Bill' will be an exceptional piece of legislation, necessitated by the extraordinary circumstances of Brexit: while the Government may make a case for a wide array of discretionary powers, this should in no way be taken as a precedent when considering the appropriate bounds of delegated powers in future."*[9]

48. In recognising its exceptional nature, the Committee went on to recognise that a sunset provision might be one way to restrict the power. The correcting power is therefore curtailed by a sunset provision in subsection (8). Although the power is wide, it is time limited and cannot be used more than two years after we leave the EU. Government is seeking a time-limited power to deal with a unique set of circumstances: it is designed to allow corrections to the statute book so that it functions effectively and appropriately; it is not designed to provide government with long-term flexibility, or to set a precedent. The sunset provision reflects this.

[9] Page 29

Scrutiny

49. The proposed scrutiny procedures for all the powers are set out in Schedule 7, Parts 1 and 2. For clarity, this memorandum explains the scrutiny procedures as they apply to each power alongside the explanation of the power.

50. The Delegated Powers and Regulatory Reform Committee observed that *"getting the balance right will be crucial*" between achieving the substantial legislative task in the time available whilst ensuring "*appropriate provision is made for full and effective scrutiny of the relevant secondary legislation."*[10] The Government wants to ensure there is proper scrutiny of the use of the powers, proportionate to public interest and the task at hand. Affirmative and negative procedures will apply to regulations made in the UK Parliament when the power is exercised by the UK Government and to regulations made in the devolved legislatures when the power is exercised by the devolved administrations.

51. For those areas that are principally mechanistic, such as amending references, the negative procedure (or the equivalent in the devolved legislatures) can be used. We have taken the same approach to changes to either primary or secondary legislation: some changes to primary can be mechanistic and minor. Adopting the affirmative procedure for small corrections to primary legislation would produce impractical results. Instead, the requirement for affirmative procedures is based on the type of correction rather than where the correction is being made. Schedule 7 sets out the criteria that will trigger the use of the affirmative procedures for statutory instruments made under the Bill. For clause 7(1), these are:

a. **Establishing a new public authority.** This will involve setting up new systems and spending public money both for set-up and ongoing expenses; Parliament or the relevant devolved legislature should scrutinise the creation of the body and debate Government or the relevant devolved

[10] Delegated Powers and Reform Committee, Second Submission to the House of Commons Procedure Committee
https://www.publications.parliament.uk/pa/ld201617/ldselect/lddelreg/164/16404.htm

administration's choices to understand why an existing body could not do the job.

b. **Transferring functions to newly created public authorities**. As follows the point above, Parliament or the relevant legislature should debate any functions being given to a new public authority.

c. **Transferring EU legislative powers (i.e. powers to make delegated or implementing acts) to a UK body.** Relevant legislatures must debate the delegation of legislative power and Government's choices about who can exercise it and how.

d. **Relates to fees.** The Government recognises that the decision whether to charge for a particular function or service is a choice with impact on industry or individuals.

e. **Creating or amending criminal offences.** This has important implications for citizens.

f. **Creating or amending (but not revoking) a power to legislate.** This involves sub-delegation. Parliament must debate the delegation of legislative power and choices about where it is held. Where a power to legislate is being revoked, this is not subject to the affirmative procedure.

52. The made affirmative procedure will be available as a contingency for urgent cases. Urgent cases could include, for example, where an SI needs to come into force because of a lead-in time required to allow systems to be changed or put in place before exit or, where due to the progress of negotiations SIs are made close to exit day.

53. The risk that statutory instruments made under the made affirmative procedure could be overturned must be balanced with the need to have a

functioning statute book on exit day. The House of Lords Constitution Committee, whilst urging restraint, accepted that *'in a very limited number of circumstances there may be grounds for seeking to fast-track parliamentary procedure of draft affirmative instruments'.*[11] The Government believes that the exceptional circumstances of withdrawing from the EU might necessitate the use of the made affirmative procedure so the Bill allows for this as a contingency.

Sifting committee

54. Paragraphs 3 and 13 of Schedule 7 require Ministers of the Crown to lay statutory instruments which they are proposing to make under the negative under the three principal powers in the Bill (those contained in clauses 7(1), 8 and 9) procedure before the House of Commons. These instruments are laid so they may be considered by a committee for sifting.

55. This committee will have 10 sitting days to make a recommendation as to the appropriate procedure for the instrument. After receiving a recommendation, or after 10 sitting days have passed without a recommendation, a Minister may proceed with making a negative instrument or make an affirmative instrument if they now consider that appropriate. The detail of how the Committee will operate is currently included in draft House of Commons Standing Orders (published in the House of Commons' Order Paper[12]).

56. In urgent cases Ministers can make negative regulations without going through the sifting procedure (see paragraph 4(8) of Schedule 7). As mentioned above, urgent cases could include, for example, where an SI needs to come into force because of a lead-in time required to allow systems to be changed or put in place before exit or, where, due to the progress of negotiations, SIs are made close to exit day.

[11] The House of Lords Constitution Committee fifteenth report ' Fast-track Legislation: Constitutional Implications and Safeguards'
https://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/116/11607.htm
[12] Draft standing orders - https://publications.parliament.uk/pa/cm201719/cmagenda/OP171212.pdf

Explanatory Memoranda

57. Paragraph 22 of Schedule 7 requires that instruments made under the delegated powers in clauses 7(1), 8 and 9 must be accompanied by publication of statements previously made by a Minister in writing:

- indicating whether the draft legislation amends/repeals/revokes equalities legislation (the Equality Act 2010, the Equality Act 2006 or any secondary legislation made under either of those Acts) – and if so, how;
- indicating that the Minister has had due regard under equalities legislation to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by or under the Equality Act 2010;
- explaining the instrument or draft and the reasons for it;
- explaining what any relevant law did before exit day and how it is being changed; and,
- that the minister considers that the instrument does no more than is appropriate.

58. These requirements apply only to instruments made solely by UK Ministers. It is for the devolved authorities to decide what explanatory information they wish to publish alongside any instruments they make.

59. These requirements for UK Ministers will be reflected in the Explanatory Memorandum template so there is one accompanying explanatory document for EU (Withdrawal) Bill SIs.

60. The Government has decided that the explanatory memoranda accompanying statutory instruments made by Ministers of the Crown under powers in the Bill must and to which the requirement in paragraph 22 of Schedule 7 does not apply, where relevant, include the following (in addition to the usual requirements for the contents of an explanatory memorandum):

- an explanation what any relevant EU law did before exit day,
- an explanation what is being changed or done and why, and,
- a statement that the minister considers that the instrument does no more than what is appropriate. This builds on a suggestion of the House of Lords Constitution Committee.[13]

[13] The 'Great Repeal Bill' and delegated powers, 9th Report of Session 2016-17

Clause 7(3)(b): Power to provide for additional sorts of deficiencies arising from withdrawal

This power enables UK ministers to provide for, or describe, with Parliament's consent, further sorts of deficiencies in retained EU law arising from the UK's withdrawal from the EU.

Power conferred on: *a Minister of the Crown,*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *affirmative*

Context and purpose

61. The correcting powers in clause 7(1) and Schedule 2, part 1 may only be used to prevent, remedy or mitigate deficiencies in retained EU law arising from the UK's withdrawal from the EU. The Bill defines what constitutes a deficiency in a list at clause 7(2) and a sweeper provision at clause 7(3)(a) (which captures deficiencies of a similar kind to those listed in subsection (2)).

62. As negotiations between the UK and the EU progress and legal analysis by the UK and Devolved Governments continues further sorts of deficiencies may become apparent. It is important that the Government can ensure that the correcting power in clause 7(1) (and the correcting power conferred on the devolved administrations in Part 1 of Schedule 2) can be used for their intended purpose, to correct deficiencies in the law arising from our withdrawal from the EU.

Justification

63. The Government believes taking a power to specify additional sorts of deficiency is the act of a responsible Government. The Government cannot guarantee now that the Bill provides a comprehensive list of all of the different sorts of deficiencies which will arise in our statute book as we leave the EU.

Devolution

64. The list of sorts of deficiency is a matter of legal analysis and it is important that there is consistency between the jurisdictions of the UK. The power to provide for additional definitions of deficiencies is only available to UK Ministers. Given the need for consistency and as the list of the sorts of deficiencies lies in UK legislation, it would not be appropriate for the Devolved Ministers to amend this.

65. The UK Government will consider closely any suggestions for additional definitions of deficiencies from the devolved administrations on the basis of their own legal analysis. The Government would normally expect to accept any proposals for additional sorts of deficiency from the devolved administrations in line with the goal of ensuring that the power to correct deficiencies can function appropriately for all the jurisdictions in the UK.

Scrutiny

66. The affirmative procedure applies to this power (see paragraph 1(5) of Schedule 7). The content of these regulations will expand the scope of the power in clause 7(1) and Part 1 of Schedule 2 for the devolved administrations. The Government believes that a debate and vote in both Houses of Parliament is therefore appropriate.

Clause 8 and Schedule 2, Part 2: Complying with international obligations

Power conferred on: *Minister of the Crown and Devolved Authorities*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *negative (subject to the conditions of the sifting process in the House of Commons) or affirmative*

Context and Purpose

67. This power enables the UK to continue complying with its international obligations. The UK's withdrawal from the EU could, without remedial action, lead to unintended breaches of our international obligations. This arises notwithstanding the conversion of directly applicable EU law and the preservation provided by the Bill; in fact, elements of the conversion and preservation could place the UK unintentionally in breach of our international obligations.

Devolution

68. The devolved administrations have responsibility for implementing our international obligations where these fall within areas of devolved competence. Therefore an equivalent power will also be exercisable by the devolved authorities to allow them to amend domestic legislation within devolved competence to ensure ongoing compliance with our international obligations.

69. The devolved authorities will also be able to amend retained direct EU law using this power, where such an amendment would be exempt from the restriction on devolved legislative competence in clause 11 by virtue of an Order in Council made under that clause.

70. The devolved authorities will only be able to make corrections within their areas of devolved competence. Devolved competence for the purpose of this power is defined in paragraphs 18 to 20 of Schedule 2 to the Bill. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration, and we have committed to consult the relevant devolved administration before using the power to modify direct retained EU law in areas that are otherwise devolved.

Justification

71. Any unintended breaches of international law which might arise from our withdrawal from the EU are similar to the failures and deficiencies which the correcting power in clause 7(1) will be used to correct. However, the power in clause 7 may only be used where there is a failure or deficiency in "retained EU law". The Government considers that it is prudent to take a separate power on international obligations in order to deal with any potential breaches of our international obligations which might arise other than in "retained EU law". This power will, though, only be exercisable where the breach of our international obligations arises from the UK's withdrawal from the EU.

72. For example, the UK is a party to the Council of Europe Convention on Transfrontier Television. However, a break clause (Article. 27) says that EU member states are to implement EU law instead - which is Directive 2010/13/EU (known as the Audiovisual Media Services Directive ("AVMSD")). On this basis, the UK has never actually implemented the Convention, but implemented the AVMSD instead. Once we leave the EU, potentially even if we were to negotiate ongoing participation in the framework of AVMSD, we would regardless no longer benefit from the exemption in the Convention, as we would not be a member state. We could then be in breach of our international law obligations by not having implemented the Convention. We could use this power in clause 8 to implement it, which could involve changes other than to retained EU law.

73. The restrictions which constrain the scope of the power in clause 7(1) also apply to this power. The only exception is that it can impose taxation, but only where that is an appropriate way of preventing or remedying a breach. Additional restrictions apply to the use of the power by a devolved authority.

74. As with the correcting power in clause 7(1), breaches here could arise in areas in which the UK is considering pursuing a negotiated outcome with the EU. It would be unwise to legislate in primary legislation to provide for the implementation of our preferred negotiated outcome and thereby 'show our hand' to those with whom we are negotiating in the EU.

Scrutiny

75. The procedures here mirror, as appropriate, the scrutiny procedures for the correcting power in clause 7(1), this includes that negative instruments made under this power will be subject to the conditions of the sifting process in the House of Commons.

Clause 9 and Schedule 2, Part 3: Power to implement withdrawal agreement

Power conferred on: *Minister of the Crown and Devolved Authorities*
Power exercised by: *regulations by statutory instrument*
Parliamentary Procedure: *negative (subject to the conditions of the sifting process in the House of Commons) or affirmative*

Context and purpose

76. On 29 March 2017, the Prime Minister wrote to the President of the European Council notifying our intention to leave the EU. Under the terms of Article 50, the UK intends to negotiate and conclude a withdrawal agreement with the EU.

77. Once a withdrawal agreement is reached, it is likely that parts of it will require legislative changes to implement it in domestic law. To ensure that the UK is in a position to fulfil its obligations under the agreement, it is essential that this implementing legislation is in place before the withdrawal agreement comes into force on exit day. The Bill provides a limited power to enable the withdrawal agreement to be implemented as appropriate. This is a separate process from that by which the Government will ask Parliament to approve the agreement and from the ratification of that agreement.

78. The Government has already committed to introducing a number of other Bills during the course of the next two years to give effect to our exit. These are intended to implement significant policy changes and Parliament will have the fullest possible opportunity to scrutinise this legislation. This includes the Withdrawal Agreement and Implementation Bill, which will implement the major elements of the Withdrawal Agreement that need to be reflected in domestic legislation.

Devolution

79. The withdrawal agreement affects the whole of the UK and the implementing power will be conferred on the devolved authorities in relation to domestic legislation within areas of devolved competence.

80. The devolved authorities will also be able to amend retained direct EU law using the withdrawal agreement power, where such an amendment would be exempt from the restriction on devolved legislative competence in clause 11 by virtue of an Order in Council made under a power conferred by that clause.

81. The devolved authorities will only be able to make amendments within their areas of devolved competence. Devolved competence for the purpose of this power is defined in paragraphs 18 to 20 of Schedule 2 to the Bill. The UK Government will not normally use the power in clause 9 to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administrations and we have committed to consult the relevant devolved administration before using the power to modify retained direct EU law in areas that are otherwise devolved.

Justification

82. It is essential that the UK is in a position to fulfil its obligations under a withdrawal agreement by exit day. Any necessary legislative changes will therefore need to have been made before exit day. Whilst the nature and scale of the legislative changes required are as yet unknown, it is important that we are in a position to start preparing the statute book soon after a deal with the EU is reached. We note that the Lords Select Committee on the Constitution recognised that the Bill might include a delegated power to implement the result of the UK's negotiations with the EU.

83. To get us ready for exit day, this power enables Government and, where it is within their competence, the devolved administrations to make legislative changes appropriate for the purposes of implementing the withdrawal agreement. To ensure

that a range of negotiated outcomes can be catered for, the power will enable the Government and devolved administrations to do what an Act of Parliament can do, subject to certain restrictions. The power can repeal, alter or replace the law, including retained EU law. Depending on the final agreement and subject to the passage of the Bill, Government might also need to subsequently amend the Bill itself in order to reflect the outcome of negotiations.

84. The exact use of the power will of course depend on the contents of the withdrawal agreement. The power needs, however, to be sufficiently flexible to enable the agreed arrangements to be properly implemented in domestic law. It could, for example, be used to legislate for the position of ongoing administrative proceedings when we leave the EU, such as proceedings on competition and antitrust under Regulation 1/2003. Depending on what is agreed, it could also legislate for any agreement we reach on the privileges and immunities afforded by the UK to the EU, its institutions, bodies and staff post-exit. It might also be used to clarify how ongoing UK cases at the CJEU should be handled and how UK courts should treat the resulting judgments, or to legislate for the status of goods that have been placed on the UK market at the time of our withdrawal, subject to what is agreed with the Commission on the matter.

85. The power will, however, be limited to making provisions that should be in place for day one of exit in order to ensure an orderly withdrawal from the EU.

Limiting the Power

86. As indicated above, the power is inherently constrained by the terms of the withdrawal agreement and by what provision the minister considers should be in place on or before exit day. In addition, the use of the power in clause 9 by Ministers of the Crown is subject to the enactment of a statute approving the final terms of withdrawal of the UK from the EU. As with the correcting power in Clause 7(1), this power cannot be used to impose or increase taxation, to create criminal

offences subject to a term of imprisonment of more than two years, amend or repeal the Human Rights Act, or make retrospective provision.

87. The power is subject to a sunset clause and it can only be used up to exit day: it is not an ongoing power but one designed to implement parts of a withdrawal agreement (which has been approved by Parliament) that should be in place on or before exit day.

Scrutiny

88. Regulations made under the power to implement the withdrawal agreement will be subject to an affirmative or negative procedure and the scrutiny procedures are based on those for the correcting power in clause 7(1), with similar triggers for the affirmative procedure and the sifting procedure for negative instruments. Regulations modifying the Act itself would also be subject to the affirmative procedure.

Clause 11/Schedule 3, Part 1: Powers to make exceptions to limit on devolved competence to modify retained EU law

Power conferred on: *Minister of the Crown and a devolved authority acting jointly*
Power exercised by: *Order in Council*
Parliamentary Procedure: *double affirmative*

Context and Purpose

89. Clause 11 contains powers to introduce exceptions to the tests for legislative competence in relation to retained EU law that the Bill applies to the Scottish Parliament, Northern Ireland Assembly and National Assembly for Wales. Schedule 3 Part 1 contains equivalent powers in respect of the new tests for executive competence that apply to Scottish Ministers, Welsh Ministers, and Northern Irish Ministers and departments.

90. The Bill will replicate the common UK frameworks created by EU law in UK law, and maintain the scope of devolved decision making powers immediately after exit. This will be a transitional arrangement to provide certainty after exit and allow intensive discussion and consultation with devolved authorities on where lasting common frameworks are needed.

Justification

91. The purpose of the power is to provide an appropriate mechanism to broaden the parameters of devolved competence in respect of retained EU law. It therefore adopts a similar approach to the established procedure within the devolution legislation for devolving new powers (e.g. s.30 orders in the Scotland Act 1998). Without the power it would be necessary for the UK Parliament to pass primary legislation (having sought Legislative Consent Motions from the relevant devolved legislatures) in order to release areas from the new competence limit.

Scrutiny

92. The power will be exercisable by Order in Council and it will require the approval of both Houses of Parliament and the relevant devolved legislature.

Clause 14: Power to amend 'exit day'

Power conferred on: *Minister of the Crown*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *affirmative procedure*

Context and Purpose

93. Exit day is defined as 11.00 p.m. on 29 March 2019. This is in line with the calculation of time in EU law, as well as the EU's negotiating directives, which indicate that the UK will leave the EU at 00:00 on 30 March Brussels time, corresponding to 11pm on 29 March UK time.

94. Article 50(3) of the Treaty on European Union provides that, by agreement between a withdrawing state and the European Council, the default two year period between notification of a Member State's intention to withdraw and the Treaties ceasing to apply can be changed. This power allows a Minister of the Crown to make regulations to amend the definition of exit day in this Bill to ensure that it is the same as the time at which the Treaties cease to apply to the UK.

Scrutiny

95. Any change to the date at which the Treaties apply to the UK will be as a result of the negotiations between the UK and the EU. The Government believes that Parliament should be given time to debate and scrutinise the legislation implementing the final agreement we strike with the EU and, in line with this that it is appropriate for Parliament to scrutinise and vote on any changes to the definition of exit day in the Bill. As a result, regulations made under this clause would be subject to the affirmative procedure (see paragraph 10 of Schedule 7).

Clause 17(1): Power to make consequential provision

Power conferred on: *Minister of the Crown*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *negative procedure*

Context and Purpose

96. This clause contains a power to make such consequential provision as is considered appropriate in consequence of this Bill.

Justification

97. The powers conferred by this clause are wide, but there are various precedents for such provisions including section 92 of the Immigration Act 2016, section 213 of the Housing and Planning Act 2016, section 115 of the Protection of Freedoms Act 2012, section 59 of the Crime and Courts Act 2013 and section 73(2) of the Immigration Act 2014.

98. This Bill creates a substantial change to the legal framework of the UK. The Government is unable to identify, at this early stage, all the possible consequential provisions required. In the circumstances, it would be prudent for the Bill to contain a power to deal with consequential provisions by secondary legislation. The power is limited to making amendments consequential to the contents of the Bill itself, and not to consequences of withdrawal from the EU which are addressed by powers already discussed.

99. A statutory instrument made under this power could, for example, make provision on whether retained direct EU legislation should be treated as primary or subordinate legislation for the purposes of another specified enactment.

Scrutiny

100. We anticipate a large number of fairly straightforward and insignificant changes, including to primary legislation, will be needed in consequence of this Bill. The negative procedure would apply to a statutory instrument made under this power. It is naturally constrained to consequences coming out of the wider Bill, which Parliament is able to scrutinise in full.

Clause 17(5): Power to make transitional, transitory or saving provision

Power conferred on: *Minister of the Crown*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *affirmative or negative or no procedure*

Context and Purpose

101. This clause contains a standard power for a Minister of the Crown to make transitional, transitory or saving provision in connection with the coming into force of any of the provisions of the Bill (including its operation in connection with exit day).

Justification

102. By repealing the ECA 1972 and converting applicable EU law into UK law, the Bill will create a substantial change in the UK's statute book. This is unprecedented and, as such, it is prudent to enable provisions that allow for a smooth commencement of the Bill's provisions. For example, the Bill removes the UK from the jurisdiction of the European Court of Justice but the UK will remain subject to its jurisdiction up until the very moment of exit. The power could make transitional provision for court cases still ongoing on exit day. It could also be used to to save section 2(3) of the ECA, which authorises payments to the EU, in respect of liabilities incurred whilst the UK was a member state. This could include outstanding transfers of customs duties and sugar levy payments collected by the UK on behalf of the EU up until exit day.

Scrutiny

103. The negative, affirmative or no procedure can be used for statutory instruments made under this power. See paragraph 12 of Schedule 7. Where the Minister making regulations under this power considers that to do so with no

Parliamentary procedure would be inappropriate and either the draft affirmative or the negative procedure would be appropriate, then that procedure must apply. This reflects that while the commonly accepted approach is to have no procedure for such statutory instruments, the unique circumstances of the Bill warrant a different approach. The Government thinks it proper that uses of the power such as that given above - saving provision enabling payments to the EU should be subject to a scrutiny procedure.

Clause 19: Power to make commencement provisions

Power conferred on: *Minister of the Crown*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *no procedure*

Context and Purpose

104. This clause contains a standard power for a Minister of the Crown to bring provisions of the Bill into force by commencement regulations.

Justification

105. As is usual, it may be sensible for parts of the Bill to commence at different times, where the commencement is not already stated. This power enables that.

Scrutiny

106. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

Schedule 1 Paragraph 1(2)(b) and 3: Challenges to validity of retained EU law

Power conferred on: *Minister of the Crown*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *affirmative*

Context and Purpose

107. The Bill provides at paragraph 1(1) of Schedule 1 that on or after exit day there will be no right in domestic law to bring a challenge to retained EU law on the basis that, immediately before EU exit, an EU instrument was invalid. However, this is subject to an exception in paragraph 1(2)(b) which sets out that a Minister of the Crown may by regulations specify or describe kinds of challenges that may be made to the validity of EU instruments.

108. Paragraph 1(3) sets out that the regulations may also provide that a challenge which would have been brought against an EU institution can instead be brought against a public authority in the United Kingdom.

Justification

109. Currently the European Court of Justice can declare an EU instrument invalid. However, the domestic courts have no jurisdiction to declare such an instrument to be invalid. The power in paragraph 1(2)(b) will enable a Minister of the Crown to specify or describe the kinds of challenges that may be made to the validity of EU instruments. This will ensure that instruments which are converted on exit can be still be challenged post exit on the grounds that they are invalid. Paragraph 1(3) will enable the minister to provide that the relevant challenge can be brought against a domestic public authority.

Scrutiny

110. Paragraph 5 of Schedule 7 provides that regulations made under paragraph 1(2)(b) of Schedule 1 will be subject to the draft affirmative procedure (or made affirmative as a contingency). Regulations made pursuant to this power can provide for new categories of challenges in our domestic justice system. The power can only be used to confer rights to challenge EU instruments that have been converted through the Bill. The Government considers that any change of this kind should be subject to the affirmative scrutiny procedure.

Schedule 4, Part 1: Charging in connection with certain new functions

Power conferred on: *Minister of the Crown and Devolved Authorities*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *negative or affirmative*

Context and Purpose

111. This power can mitigate the burden on the general taxpayer to pick up the cost of all functions transferred from the EU to the UK, or new functions created to deal with deficiencies or breaches of international obligations, or to implement the withdrawal agreement. It enables UK ministers and devolved authorities to create fees and charges in connection with functions that public bodies in the UK take on exit, where appropriate, and also modify them in future. Whilst this power will not be used in connection with every function being repatriated, it ensures ministers have the flexibility to ensure the burden of specific industry-related costs does not fall onto the general taxpayer (including in cases where EU institutions currently charge). It should be noted that this could include the creation of tax-like charges, which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body, or to lower regulatory costs for small or medium sized enterprises.

112. This power is capable of being used to confer a power on public authorities to create their own fees and charges schemes. Some public authorities already have this ability in connection with their existing domestic functions, for example the Financial Conduct Authority and the Prudential Regulation Authority. The procedural requirements that are set out in the regulations conferring that power would allow it to be used in a restricted way. The regulations conferring such a power on a public authority would themselves be subject to Treasury consent and the affirmative procedure.

Justification

113. This power is designed to allow flexibility in how new Government functions are funded. It enables the creation and modification of fees or other charges so the costs of Government services do not have to always fall on the taxpayer.

114. The powers in clauses 7(1), 8 and 9 can be used to provide for some fees, but they do not allow for the level of a fee to be amended on an ongoing basis in the future (e.g. to be uprated in line with inflation annually, or to be reduced because the cost of delivering the function has fallen).

115. In addition, because of the restriction on using the powers in clauses 7 and 9 to create taxes, they do not allow for the creation of fees and charges that cross-subsidise (as is the case with various other UK fees and charges), or to cover the costs of the broader rule-making and compliance functions of a regulator. For example UK banks pay a levy, limited in scope to UK-incorporated firms, to provide deposit protection to their customers, whilst EEA banks are covered by the home State, (some of which charge and some of which subsidise this service via general taxation); this power could be used to create a levy on these firms operating in the UK if appropriate.

Limitations on the use of the power

116. The power can also only be used to create a new fee or charge in connection with functions given to ministers or bodies under powers in any of clauses 7(1), 8 and 9 (those powers are time limited and connected to withdrawal); there will, therefore, be a finite number of new functions to which fees or charges can be attached, connected to the UK's withdrawal from the EU. If the UK government or devolved administrations set up a new regime under new primary legislation after exit (even if it is in an area formerly governed by EU law), any new fees or charges would need to be established as part of that new primary legislation.

117. In addition, for the UK Government, Treasury consent is required for the creation of a new fee or charge, further ensuring departments justify their case. This constraint does not apply to the devolved administrations, in accordance with standard practice around financial arrangements for devolution (although devolved administrations could of course impose their own similar constraints administratively to mirror the requirement for Treasury consent). Devolved authorities will only be able to exercise the power in relation to functions of Ministers of the Crown or functions of bodies that operate outside of the relevant territory with the consent of a Minister of the Crown.

Scrutiny

118. An affirmative scrutiny procedure would apply in the UK Parliament or the devolved legislatures, depending where the regulations are made, where departments provide for the charging of new fees or charges. The Government recognises that the decision whether to charge for a particular function or not is a policy choice with impact on industry or individuals so believes a higher level of scrutiny is warranted. However the negative procedure would apply where a department later amends the amount of those fees or charges. The affirmative scrutiny procedure would also apply where a Minister sub-delegates the power in paragraph 1 of Schedule 4. The Government anticipates that Parliament and devolved legislatures will want full assurance that legislative sub-delegation is done in an appropriate manner.

Schedule 4, Part 1: Power to set further circumstances in which devolved authorities may exercise the charging power

Power conferred on: *Minister of the Crown*

Power exercised by: *regulations made by statutory instrument*

Parliamentary Procedure: *negative*

Context and Purpose

119. The devolved authorities can use the fees or charges power, without seeking Minister of the Crown consent, in connection with functions that are either (a) conferred on a devolved minister or department or (b) are matters within the devolved authority's legislative competence (or are matters which have been transferred by the relevant devolved authority) and are being conferred on a body that only operates within the relevant territory. Devolved authorities will also be able to set fees or charges in other circumstances if the function is within their legislative competence or if they conferred the function the fee or charge relates to under the powers in the Bill and if they have consent from a Minister of the Crown.

120. There may, however, be other circumstances where it would be more appropriate for the devolved administration to set the fees than the Minister of the Crown (or for them to do so without Minister of the Crown consent). The Bill therefore provides a power for Ministers of the Crown to specify (a) additional circumstances where devolved authorities can use the power or (b) where consent requirements should be disapplied.

Justification

121. There will be some additional circumstances where it may be appropriate for devolved authorities to be able to set fees or charges (or to do so without needing Minister of the Crown consent). For example, some bodies might operate across different territories. There is no single approach to defining the particular additional

circumstances and particular additional bodies which should be treated as devolved for the purposes of exercising the power.

122. In some cases, bodies operating across more than one territory are funded by both the UK Government and the devolved administrations. Different administrations might have different approaches to charging: for example one devolved administration may want to charge for the function and the other to fund it themselves. In addition, where fees are set on a cost-recovery basis, a devolved administration that is responsible for funding the body within its territory would likely wish to have responsibility for updating relevant fees as they will be responsible making up any shortfall if the level is set too low.

123. We also need to be able to account for circumstances where, for example, a function is conferred on a UK body but is only undertaken in a devolved territory. In such circumstances it might be appropriate for the devolved administration to take on responsibility for fees and charges.

Limitation

124. The power is naturally limited by the scope of the charging power itself. It can only prescribe circumstances in which devolved authorities have competence to use the power.

Scrutiny

125. The negative scrutiny procedure would apply.

Schedule 4, Part 2: Power to modify pre-exit fees and charges

Power conferred on: *Minister of the Crown and Devolved Authorities*
Power exercised by: *regulations made by statutory instrument*
Parliamentary Procedure: *negative*

Context and Purpose

126. Over the past 40 years, numerous fees and charges have been made under section 2(2) of the European Communities Act or section 56 of the Finance Act 1973 in connection with EU obligations. This power ensures that where Government continues to provide the service post-exit, those fees and charges continue to be amendable post-exit in the same way as they were pre-exit, even though the powers under which they were created will have gone. This includes making modifications to the amount, methodology or structure of the charges, or revoking them. (However it would not allow charging for new things.) For example, as the cost of animal health inspection fees varies in line with inflation, this power would allow the Government to ensure that these fees are uprated to allow the agency to continue to cover its costs and prevent a drain on the public finances.

Justification

127. This is, in effect, keeping the current powers for limited purposes. Where a public body continues to exercise a function it is already charging for, it should be able to continue or revoke or adjust fees to the same extent as is currently possible.

Limitations

128. This power is only exercisable in relation to existing fees and charges, it cannot be used to set up new schemes. Moreover it cannot be used to amend primary legislation. This power is modelled on these two pre-exit powers. So where it is used to modify legislation created through the ECA, it cannot impose or increase taxation, in line with the constraint at paragraph 1(1)(a) of the ECA. And a

Minister of the Crown needs Treasury consent to make certain kinds of provision, in line with section 56 of the Finance Act.

Scrutiny

129. The negative procedure would apply in the UK Parliament and devolved legislatures, reflecting the procedure under the current powers. This power only allows existing fees or charges to be amended up or down, or altered in other ways such as being split into two parts (for example an annual charge and a daily one, or a one-off fee for an application and an annual charge). Where the power is exercised by UK ministers there are detailed directions within Managing Public Money setting out how a fee or charge should be calculated.

Schedule 5, Part 1: Power to make exceptions on duty to publish retained EU law

***Power conferred on*:** *Minister of the Crown*

Power exercised by: *direction*

Parliamentary Procedure: *none*

Context and Purpose

130. Publishing all UK legislation is a core part of the remit of Her Majesty's Stationery Office (HMSO), part of The National Archives, and the Office of the Queen's Printer for Scotland. Retained EU law needs to be accessible after exit day. The Queen's Printer will therefore have a duty to publish EU instruments that could form part of the law converted by the Bill. There is also a duty to publish particular key Treaties, and the Queen's Printer will have the ability to publish other EU instruments and documents which may be relevant to our law or useful going forward.

131. It is not considered appropriate to define the Queen's Printer's duty by reference to "retained direct EU legislation" (which is defined in clause 14 of the Bill), as this could involve the Queen's Printer having to determine the effect of the provisions in the Bill. However, not all instruments caught by the duty will be relevant after we have left the EU - for example, many Justice and Home Affairs measures will be "exempt EU instruments" not converted by the Bill - and it may not be helpful to require that all of them be published. This power enables a minister to give a direction to the Queen's Printer that they do not consider particular documents to be retained direct EU legislation, and the Queen's Printer will not need to publish these documents.

Justification

132. The power is a practical solution to prevent unnecessary publication by the Queen's Printer, helping save resources and time and minimise the risk of confusion caused by printing irrelevant documents. The power does not give ministers the ability to determine what is and is not retained direct EU legislation, and any directions must be published.

Scrutiny

133. Given this is a limited, administrative power, there is no parliamentary scrutiny procedure attached. Any direction must be published, so there will be complete transparency as to the use of the power.

Schedule 5, Part 2: Power to make provision about judicial notice and admissibility.

***Power conferred on*:** *Minister of the Crown*

Power exercised by: *regulations made under statutory instrument*

Parliamentary Procedure: *affirmative*

Context and Purpose

134. The power enables ministers to make provisions on judicial notice and evidential rules on EU law, the EEA agreement, and retained EU law.

Justification

135. The ECA contains provisions requiring that judicial notice be taken of certain aspects of EU law (such as the EU Treaties), and determining how evidence of EU instruments may be given in domestic courts. Notwithstanding the repeal of the ECA, these provisions would in any event need to be supplemented to take into account the change in our legal landscape following exit. This is similar to the approach used for the civil and criminal procedure rules. These are dealt with by secondary legislation made by the respective Rules Committees.

Scrutiny

136. The affirmative procedure applies to this power. The content of these regulations will deal with matters that are currently set out in the ECA and may be of particular interest to Parliament.

ANNEX A - SAMPLE DRAFTING

Set out below are two sample draft provisions for statutory instruments that illustrate two of the corresponding examples above. These illustrate how corrections **might** look in a statutory instrument but, as with the narrative examples, should not be taken as an indication of actual Government policy or the UK's preferred position in the negotiations with the EU. Equally, different approaches might be taken in drafting.

More sample draft statutory instruments will become available to Parliament during the course of the Bill's passage.

The draft regulations below show how a reciprocal arrangement might be revoked.

The Return of Cultural Objects (Revocation) (EU Exit) Regulations 2018

The Secretary of State, in exercise of the powers conferred by section 7 of the European Union (Withdrawal) Act 2018([a]), makes the following Regulations.

Citation and commencement

1.These Regulations may be cited as the Return of Cultural Objects (Revocation) (EU Exit) Regulations 2018 and come into force on [exit day].

Revocation

2. The following Regulations are revoked—

(a) The Return of Cultural Objects Regulations 1994([b]); and

(b) The Return of Cultural Objects (Amendment) Regulations 2015([c]).

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made in exercise of the power in section 7 of the European Union (Withdrawal) Act 2018 in order to address a deficiency arising from the withdrawal of the United Kingdom from the European Union. They revoke the Return of Cultural Objects Regulations 1994 and the Return of Cultural Objects (Amendment) Regulations 2015, which made provision for reciprocal arrangements between the United Kingdom and EU member States.

([a])

([b]) S.I. 1994/501, amended by S.I. 2015/1926.

([c]) S.I. 2015/1926.

The draft regulations below show how various corrections might be necessary to transfer functions.

The Chemicals (Amendment) (EU Exit) Regulations 2018

The Secretary of State, in exercise of the powers conferred by section 7 of the European Union (Withdrawal) Act 2018([a]), makes the following Regulations.

Citation and Commencement

1. These Regulations may be cited as the Chemicals (Amendment) (EU Exit) Regulations 2018 and come into force on exit day.

Interpretation

2. In these Regulations, "exit day" means …

PART 1

Amendment of Subordinate Legislation

Amendment of the Biocidal Products and Chemicals (Appointment of Authorities and Enforcement) Regulations 2013

3.—(1) The Biocidal Products and Chemicals (Appointment of Authorities and Enforcement) Regulations 2013([b]) are amended as follows.

(2) In Regulation x,…

PART 2

Amendment of Biocidal Product Regulation

Amendment of the Biocidal Products Regulation (EU) 528/2012

4.—(1) The Biocidal Products Regulation (EU) 528/2012([c]) is amended as follows.

PART 3

Amendment of CLP Regulation

Amendment of the Classification, Labelling and Packaging Regulation (EC) 1272/2008

5. The Classification, Labelling and Packaging Regulation (EC) 1272/2008([d]) is amended as follows.

Amendment of Article 1 (Purpose and Scope)

6.—(1) In Article 1(1)—

(a) in the opening words, omit "as well as the free movement of substances, mixtures and articles, as referred to in Article 4(8)";

(b) in point (a), for "harmonising" substitute "establishing";

(c) in point (c), for "the Agency" substitute "the Executive";

(d) point (d) is omitted;

(e) in point (e) , for "points (c) and (d)" substitute "point (c) ".

(2) In Article 1(2), in point (d), omit "Community".

(3) Omit Article 1(4).

Amendment of Article 2 (Definitions)

7. In Article 2—

(a) for paragraph 23 substitute—

"23. the Executive" means the Health and Safety Executive;";

(b) for paragraph 24, substitute

["24. competent authority" means the authority or authorities or bodies established by the Secretary of State to carry out the obligations arising from this Regulation;".]

Amendment of Article 4 (General obligations to classify, label and package)

8. In Article 4(3), omit "harmonised".

Amendment of Article 10 (Concentration limits and M factors)

9. In Article 10—

(a) in paragraph 4, omit "harmonised"; and

(b) in paragraph 7, for "Agency" substitute "Executive".

Amendment of Article 16 (Classification of substances included in the inventory)

10. In Article 16—

(a) in paragraph 1, for "Agency" substitute "Executive"; and

(b) in paragraph 2, omit "harmonised".

Amendment of Article 17 (General rules (hazard labelling))

11. In Article 17, for paragraph 2 substitute—

"2. The label must be written in English.".

Amendment of Article 23 (Derogations from labelling requirements for special cases)

12. In the heading to Article 23, omit "Derogations from".

Amendment of Article 24 (Request for use of an alternative chemical name)

13. In Article 24—

(a) in paragraph 2, for "Commission" substitute "Secretary of State", and

(b) in paragraphs 3, 4, 5 and 6, for Agency" substitute "Executive".

Amendment of Article 29 (Exemptions from labelling and packaging requirements)

14. In Article 29—

(a) in paragraph 1, omit "in the languages of the Member State in which the substance or mixture is placed on the market"; and

(b) in paragraph 5, for "Commission" substitute "Secretary of State" and for "Agency" substitute "Executive".

Revocation of Article 34 (Report on communication on safe use of chemicals)

15. Omit Article 34.

Amendment of Article 36 (Harmonisation of classification and labelling of substances)

16.—(1) In the heading to Article 36, omit "Harmonisation of".

(2) In Article 36—

(a) in paragraph 1, omit "harmonised";

(b) in paragraph 2, omit "harmonised"; and

(c) in paragraph 3, omit "harmonised" and "at Community level".

Amendment of Article 37 (Procedure for harmonisation of classification and labelling of substances)

17.—(1) In the heading to Article 37, omit "harmonisation of".

(2) In Article 37—

(a) in paragraph 1—

(i) for "Agency" substitute "Executive";and

(ii) omit "harmonised";

(b) in paragraph 2—

(i) for "Agency" substitute "Executive"; and

(ii) omit "harmonised";

(c) in paragraph 3—

(i) for "Commission" substitute "Secretary of State"; and

(ii) omit "harmonised".

(d) in paragraph 4—

(i) for the words from "Committee" to "Regulation EC no 1907/2006" substitute "Executive",

(ii) for "Agency" substitute "Executive", and

(iii) for "Commission" substitute "Secretary of State";

(e) in paragraph 5—

(i) for "Commission", in both places it appears, substitute "Secretary of State",

(ii) omit "harmonisation of", and

(iii) for "Agency" substitute "Executive";

(f) in paragraph 6, omit "harmonised" and the words after "competent authority ".

Amendment of heading to Article 38 (content of opinions etc)

18. In the heading to Article 38, omit "harmonised".

Amendment to Article 40 (Obligation to notify the Agency)

19.—(1) In the heading to Article 40, for "Agency" substitute "Executive".

(2) In Article 40, for "Agency", in each place it appears, substitute "Executive".

Amendment to Article 41 (Agreed entries)

20. In Article 41, for "Agency" substitute "Executive".

Amendment to Article 42 (The classification and labelling inventory)

21. In Article 42—

(a) for "Agency", in each place it appears, substitute "Executive";

(b) in paragraph 3, in point (a), omit "harmonised" and "at Community level".

Amendment to Article 43 (Appointment of authorities etc)

22. For Article 43 substitute—

"43. The Secretary of State [must/may] appoint the competent authority or authorities responsible for proposals for classification and labelling and responsible for enforcement of the obligations set out in this Regulation.".

Amendment to Article 44 (Helpdesk)

23. In Article 44, for "Member States shall establish national helpdesks" substitute "The Secretary of State [must/may] establish a helpdesk".

Amendment to Article 45 (Bodies responsible for receiving information)

24. In Article 45—

(a) in paragraph 1, for "Member States" substitute "The Secretary of State" and for "Agency" substitute "Executive";

(b) in paragraph 2, for "Member State" substitute "Secretary of State";

(c) omit paragraph 4.

Omission of Article 46 (Enforcement and Reporting)

25. Omit Article 46.

Omission of Article 47 (Penalties for non-compliance)

26. Omit Article 47.

Amendment of Article 49 (Obligation to maintain information and requests for information)

27. In Article 49(3)—

(a) for "Agency", in each place it appears, substitute "Executive";

(b) omit "or the enforcement authorities of a member State in which the supplier is established".

Amendment of Article 50

28. In Article 50—

(a) omit paragraph 1;

(b) in paragraph 2, in point (a), for "Agency" substitute "Executive";

(c) in -paragraph 2, in point (b), for the words from "helpdesks established t" to the end substitute "helpdesk established under Article 44".

Omission of Article 51

29. Omit Article 51.

PART 4

Amendment of the Export and Import of Hazardous Chemicals Regulation

Amendment of the Export and Import of Hazardous Chemicals Regulation (EU) 649/2012

30.—g) The Export and Import of Hazardous Chemicals Regulation (EU) 649/2012([e]) is amended as follows.

([a])

([b]) S.I. 2013/1506.

([c]) OJ No L …2012, p xx

([d]) OJ L 353, 31.12.2008, p1.

([e]) OJ No L xxx, 2012, p x.

Department for Exiting the European Union

18th January 2018