

Meeting 5: Scope of Delegated Powers

DISCUSSION PAPER*

27 November 2017

Chair: The Rt Hon Dominic Grieve QC MP

Summary

This paper has been prepared to assist the fifth meeting of the Expert Working Group which focuses on rule of law issues in the EU (Withdrawal) Bill concerning the **scope of delegated powers**.

In relation to the delegated powers granted by the Bill this paper considers the following matters:

- **Substantive scope of delegated powers:** The key powers of UK Ministers in Clauses 7, 8, 9 and 17(1) have been questioned for granting Ministers power to make legal changes where 'appropriate', a subjective judgement, and for the breadth and vagueness of the conditions for triggering these powers, such as a 'deficiency' in retained EU law. The paper examines whether the powers can be circumscribed to enhance legal certainty, and whether their reach should be reduced, possibly by way of a proportionality-based test or by adding to the lists of existing laws that they may not be used to amend.
- **Temporal limits on powers:** The concept of 'exit day' in the Bill is central both to the definition of 'retained EU law', and to the time limits placed on the powers in Clauses 7, 8 and 9. The present Bill allows Ministers to set different 'exit days' for different purposes, and does not require the setting of dates to be scrutinised in Parliament. The paper examines proposals to specify exit day on the face of the Bill, to ensure that the same date is selected for all purposes, and to give Parliament a greater say in the setting of exit day(s).
- **Sub-delegation and the making of tertiary legislation:** The Bill currently allows Ministers to sub-delegate legislative power to public authorities or Ministers themselves. As such tertiary legislation need not necessarily be made by statutory instrument, it may be relatively inaccessible and escape parliamentary scrutiny. Moreover, the sub-delegated powers endure beyond the sunset clauses applicable to delegated powers under the Bill. The paper examines how these rule of law problems could be addressed.
- **Delegated powers in the context of devolution:** The powers of UK Ministers under the Bill have potentially very significant implications for devolution, while at the same time the Bill also grants devolved authorities powers corresponding to the Clause 7-9 powers at UK level. The paper concentrates on the implications of these corresponding powers for legal certainty, highlighting

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the problems that may arise from the additional constraints that are applicable at the devolved level.

In addition to this paper, a list of [resources](#) on various aspects of the Bill has been distributed to Group members. It includes a section on delegated powers listing publications and commentary on this aspect of the Bill.

Introduction – Delegated Powers and the Rule of Law

It is important to emphasise, as was done in previous discussion papers, that the focus of the Working Group is the rule of law issues raised by the EU (Withdrawal) Bill. This note uses the analytical framework of the Venice Commission Rule of Law Checklist, which was recently endorsed by the Parliamentary Assembly of the Council of Europe, and develops the rule of law principles identified by Lord Bingham.¹ The rule of law elements that are most relevant to delegated powers appear under three headings in the Venice Commission Checklist:

- **Legality:** The Venice Commission observes that: ‘Unlimited powers of the executive are, *de jure* or *de facto*, a central feature of absolutist and dictatorial systems. Modern constitutionalism has been built against such systems and therefore ensures supremacy of the legislature.’² The Venice Commission emphasises the virtues of parliamentary law-making processes that are ‘transparent, accountable, inclusive and democratic’.³ While not ruling out the delegation of legislative power, the Checklist asks: ‘When legislative power is delegated by Parliament to the executive, are the objectives, contents, and scope of the delegation of power explicitly defined in a legislative act?’⁴
- **Legal Certainty:** legislation should be accessible,⁵ its effects foreseeable⁶ and its contents stable ‘to the extent that they are changed only with fair warning’.⁷ These requirements apply equally to delegated legislation.
- **Prevention of abuse of powers:** There should be ‘clear legal restrictions to discretionary power’, and ‘mechanisms to prevent, correct and sanction abuse of discretionary powers’, including judicial review.⁸ Mechanisms for challenging the exercise of such powers are essential for achieving the rule of law benchmarks of equality before the law and non-discrimination,⁹ and access to justice, including the ability to challenge violations of fundamental rights.¹⁰

The delegated powers included in the Bill have already been examined by several parliamentary committees which have produced reports that are considered in this paper:

¹ Council of Europe, European Commission on Democracy through Law, ‘The Rule of Law Checklist’ (March 2016), available at:

http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf. The Checklist was officially adopted by the Parliamentary Assembly of the Council of Europe in Resolution 2187 (2017) on 11 October 2017 and is available at: <http://bit.ly/2z68orN> (shortened link).

² *ibid* para 49.

³ *ibid* para 50.

⁴ *ibid* para 49.

⁵ *ibid* para 57.

⁶ *ibid* para 58-59.

⁷ *ibid* para 60.

⁸ *ibid* para 64.

⁹ *ibid* section II.D.

¹⁰ *ibid* section II.E.

- The House of Lords Select Committee on the Constitution (HL Constitution Committee) published an interim report on the Bill in September,¹¹ following its report on delegated powers and the Great Repeal Bill in March.¹²
- The House of Lords Delegated Powers and Regulatory Reform Committee (HL Delegated Powers Committee) published a report on the Bill in September.¹³
- The House of Commons Procedure Committee (HC Procedure Committee) published an interim report on 1 November,¹⁴ focusing particularly on MPs' scrutiny of delegated legislation under the Bill.
- The House of Commons Committee on Exiting the European Union (HC ExEU Committee) published a report on the Bill on 17 November.¹⁵

From the start, it has been generally recognised that Brexit would require the granting of relatively wide delegated powers, as the HL Constitution Committee acknowledged in its March 2017 report:

[T]he degree of uncertainty as to what exactly the process of converting EU law into UK law will involve—and, in particular, the unknown outcomes of the UK's ongoing Article 50 negotiations with the EU—will almost certainly necessitate the granting of relatively wide delegated powers to amend existing EU law and to legislate for new arrangements following Brexit where necessary.¹⁶

As the question seems to be not whether the Bill will grant wide powers of delegated law-making but rather just how wide those powers will be, one response has been to focus on improving parliamentary scrutiny of delegated legislation made by Ministers. The fourth meeting of this Expert Working Group focused on that subject. Appropriately, the discussion was not confined to how Parliament should scrutinise delegated legislation made under the Withdrawal Bill, but also examined the possibility that Ministers might use powers under other legislation to amend 'retained EU law'. Schedule 8 para 3 expressly provides that existing statutory powers can be used to amend retained direct EU legislation.

The present paper returns to examining the scope of the powers that the Bill would grant. This is important from a rule of law perspective for several reasons. The scope of powers – substantive and temporal – will determine how much law-making is done in this way, and the nature of the legal uncertainty or problems of legality or abuse of powers could arise. From the perspective of parliamentarians, the scope of powers will determine how much law-making power can be exercised by the Executive as opposed to Parliament. Through the framing of delegated powers, the Bill will also provide legal standards for parliamentary scrutiny (although parliamentarians can of course apply wider policy grounds). The paper also deals with the

¹¹ Third Report of Session 2017-19 HL Paper 19: European Union (Withdrawal) Bill: Interim Report (7 September 2017).

¹² Ninth Report of Session 2016-17 HL Paper 123: The 'Great Repeal Bill' and Delegated Powers (7 March 2017).

¹³ Third Report of Session 2017-19 HL Paper 22: European Union (Withdrawal) Bill (28 September 2017).

¹⁴ First Report of Session 2017-19 HC 386: Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report (6 November 2017).

¹⁵ First Report of Session 2017-19 HC 373 European Union (Withdrawal) Bill (17 November 2017).

¹⁶ HL Constitution Committee (n 11) para 46.

specific issue of sub-delegation of legislative powers under the Bill. The paper examines concerns about how recipients of sub-delegated powers (public authorities or Ministers themselves) could exercise those powers and how Parliament could scrutinise the tertiary legislation they would be making.

The paper focuses on those powers within the Bill that have given rise to the most serious rule of law concerns: Clauses 7-9 and the corresponding powers of devolved authorities under Schedule 2, Clause 11, and Clause 17(1). The HL Delegated Powers Committee has also identified concerns about other powers in the Bill, including important matters such as the imposition of taxation by delegated legislation under Schedule 4,¹⁷ but these are beyond the scope of the present discussion.

1. Substantive Scope of Delegated Powers: Clauses 7-9 and 17(1)

When examining the substantive scope of the delegated powers in the Bill, it is useful to distinguish between:

- the 'trigger' of a power, i.e. the condition(s) that have to be met for a Minister to exercise it, and
- the 'reach' of a power, being the legal changes which the power may be used to make.

Most of the delegated powers in the Bill have seen objections raised, and amendments proposed, concerning both of these aspects. Clause 7 has received the most attention and will therefore be discussed first.

Substantive Scope of Clause 7

Clause 7 may be triggered when a Minister considers it 'appropriate' to 'prevent, remedy or mitigate' a 'failure of retained EU law to operate effectively' or 'any other deficiency in retained EU law' and the failure or deficiency is 'arising from the withdrawal of the United Kingdom from the EU'.¹⁸ A non-exhaustive list of types of situation in which there could be said to be a 'deficiency' is also provided.¹⁹ The broad and subjective nature of the terms used to frame this trigger have attracted considerable attention.

The reach of Clause 7 is extensive. Far from being confined to the amendment of retained EU law, it is a Henry VIII clause which enables Ministers to make 'any provision that could be made by an Act of Parliament',²⁰ subject to specified restrictions.²¹ From a rule of law perspective, the reach of Clause 7 heightens concerns about the impact of allowing Ministers to exercise this power.

Returning to the trigger for Clause 7 in more detail, the following aspects have been called into question:

¹⁷ HL Delegated Powers Committee (n 13) para 83-91.

¹⁸ Clause 7(1).

¹⁹ Clause 7(2).

²⁰ Clause 7(4).

²¹ Clause 7(6).

- The need to clarify what kinds of EU-derived domestic legislation (Clause 2) count as 'retained EU law' capable of triggering the power. The Bill defines 'retained EU law' as 'anything which, on or after exit day continues to be, or forms part of, domestic law by virtue of' Clauses 2, 3, 4 or 6(3)-(5).²² Arguably this definition does not apply to UK primary legislation which has some connection with EU law that brings it within the scope of Clause 2, but would survive the repeal of the European Communities Act 1972 and so is not preserved 'by virtue of' Clause 2. As cl 14(3) makes clear, clause 2 incorporates primary UK legislation that implements EU law into the category of 'retained EU law' as well as subsidiary UK legislation. The HL Constitution Committee recommended that a clarifying amendment to confirm that Clause 7 can only be triggered in connection with domestic legislation which depends on the Bill for its continuation.²³ The contrary view is that Clause 2 of the Bill is designed to 'sweep quite broadly' and 'capture' primary legislation for purposes of Clause 7 and other powers of amendment, with the result that any clarification should be to the effect that all EU-derived domestic legislation, including primary legislation, is capable of serving as a trigger.²⁴
- An important debate concerns whether the test of what a Minister considers 'appropriate' should be replaced by a more objective test based on necessity. This is the recommendation of both the HL Constitution Committee and the HL Delegated Powers Committee.²⁵ Several amendments have been proposed along these lines.²⁶ The contrary view is that the test of 'appropriate' is more conducive to legal certainty as reduces the room for doubt, argument and potential judicial invalidation of the exercise of powers. Sir Stephen Laws has advanced this view, noting that the term 'necessary' would be problematic in this context:

It may, in the cases where it is proposed to use the Bill powers, be possible to determine that there are circumstances that make it necessary "to do something". However, as a matter of pure logic, it is never going to be possible for the detail of what it is decided to do in such circumstances to itself be objectively necessary if there is more than one option available.²⁷

The HL Delegated Powers Committee's proposal for modifying Clause 7 is that the trigger should be that '(a) there is a deficiency in retained EU law arising from the UK leaving the EU, and (b) it is necessary to prevent, remedy or mitigate it', i.e. some legal change is necessary. In the Committee's view, 'Once this necessity threshold is met, Ministers may choose whichever solution most commends itself even if it is one of several possible solutions.'²⁸

- Other debates about the trigger for Clause 7 involve revisiting what counts as a 'failure to operate effectively' or a 'deficiency' in respect of retained EU law arising from

²² Clause 6(7), emphasis added.

²³ HL Constitution Committee (n 11) para 26.

²⁴ Professor Richard Ekins, oral evidence to HC ExEU Committee (11 October 2017), 6.

²⁵ HL Constitution Committee (n 11) para 40, HL Delegated Powers Committee (n 13) para 31.

²⁶ Amendment 65 would replace the word 'appropriate' with 'necessary'. Amendment 49 would introduce a more global 'so far as necessary' test by inserting a new paragraph (1A) in Clause 7: 'Regulations under subsection (1) may be made so far as necessary to adapt the body of EU law to fit the UK's domestic legal framework.'

²⁷ Sir Stephen Laws, Written Evidence to the House of Commons Select Committee on Exiting the European Union (EUB0004), para 70.

²⁸ HL Delegated Powers Committee (n 13) para 26.

withdrawal. An amendment has been tabled that would require a Minister to make regulations that define a 'failure to operate effectively'.²⁹ As regards 'deficiencies' it has been proposed to amend Clause 7(2) to provide that it is a closed list.³⁰ At present, the Bill specifies that retained EU law will not be regarded as deficient 'merely because it does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day'.³¹ This restriction appears to be designed not so much to clarify the meaning of 'deficiency' as to prevent the amending power being used by Ministers who wish to keep UK law consistent with EU law. However, the HC ExEU Committee has questioned the absence of a power to maintain consistency with EU law since 'there will be areas where it will be in the UK's interests to keep pace with changes to laws in the EU'.³²

The reach of Clause 7 has also been criticised. In the view of the HL Constitution Committee, the problem is not confined to the Henry VIII aspects of this power, as using the power to amend retained secondary legislation or direct EU legislation could also enable Ministers to make far-reaching policy choices.³³ The HL Constitution Committee's more fundamental concern is that the Bill does not provide an effective way of guarding against the use of Clause 7 to make legal changes 'in significant policy areas' and not merely of a technical nature.³⁴ Amendments intended to curtail the reach of Clause 7 including the following:

- Proposals to add to the list of Acts that cannot be amended using the powers in Clause 7. One of these is the Equality Act 2010.³⁵ Others include protecting the devolution statutes, which are considered later in this discussion paper.
- A proposal that the Clause 7 power should only be capable of being exercised if it satisfies a proportionality-based test similar to that which is established by the Legislative and Regulatory Reform Act 2006.³⁶ **Amendment 2** would require a Minister who wished to exercise the power to be satisfied that:
 - (a) the policy objective intended to be secured by the provision could not be secured by non-legislative means;
 - (b) the effect of the provision is proportionate to the policy objective;
 - (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
 - (d) the provision does not remove any necessary protection;
 - (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
 - (f) the provision is not of constitutional significance.

²⁹ Amendment 264.

³⁰ Amendment 1 and Amendment 56.

³¹ Clause 7(3).

³² HC ExEU Committee (n 15) para 27.

³³ HL Constitution Committee (n 11) para 46-47.

³⁴ HL Constitution Committee (n 11) para 39; HL Delegated Powers Committee (n 13) para 31.

³⁵ Amendments 25, 52, 266 would all add the Equality Act 2010 to the list in Clause 7(6) of Acts that Ministers are not empowered to alter.

³⁶ Legislative and Regulatory Reform Act 2006, s 3.

The Hansard Society has drawn attention to this test as a possible model for constraining Clause 7, but acknowledges that it may not be entirely suitable in a Brexit context as Government may require provisions that do permit the removal of some legal protections, for example those currently granted to EU citizens.³⁷

Substantive Scope of Clauses 8, 9 and 17(1)

In the light of this discussion of Clause 7, the debate about the other key powers of delegated legislation in the Bill can be more briefly summarised. These are the power in Clause 8 to remedy or prevent a breach of the UK's international obligations, the power in Clause 9 to implement a withdrawal agreement, and the power in Clause 17(1) to make legal changes 'in consequence of this Act' (consequential provision).

- The term 'appropriate' forms part of the trigger in these Clauses as it does in Clause 7. This usage has been criticised for being vague and subjective and for creating uncertainty over the circumstances in which the powers could be triggered. Amendments have been proposed to replace 'appropriate' with 'necessary'.³⁸
- Amendments have also been proposed to limit the reach of these powers. As in the case of Clause 7, these include protecting the Equality Act 2010 from modification.³⁹ It has also been proposed that the Clause 8 and 9 powers should be made subject to a proportionality-based test of the kind suggested for Clause 7.⁴⁰

Some of the concerns that have been raised are specific to only one power. For instance, the sweeping reach of the Clause 9 power to implement a withdrawal agreement has been queried. Currently, Clause 9 would grant Ministers the power to amend any Act of Parliament passed before the session in which the Withdrawal Act is passed, including the Withdrawal Act itself.⁴¹ The HL Delegated Powers Committee has described this as 'inappropriate delegation of power'.⁴² One of the reasons why it is 'wholly unacceptable'⁴³ in the Committee's view for such a power to be granted is that it would enable Ministers to remove or modify the safeguards currently applicable to the various delegated powers under the Bill. **Amendment 18** to the Bill proposes that Ministers should be precluded from using the Clause 9 power to modify the Withdrawal Act, the Parliament Acts 1911 and 1949, and any Act passed after or during the session of Parliament in which the Withdrawal Act is passed.

More recently, the HC ExEU Committee has questioned whether there is any need for Clause 9 to remain in the Bill in the light of the commitment made by the government that a Withdrawal Agreement and Implementation Bill will be brought before Parliament.⁴⁴ **Amendment 7** would make the availability of the Clause 9 power conditional on the 'prior enactment of a statute by Parliament approving the final terms of withdrawal of the United Kingdom from the European Union'.

³⁷ Hansard Society, *Taking Back Control for Brexit and Beyond: Delegated Legislation, Parliamentary Scrutiny and the European Union (Withdrawal) Bill* (September 2017) 21.

³⁸ Amendment 205 (Clause 8), Amendment 206 (Clause 9) and Amendment 207 (Clause 17(1)).

³⁹ Amendment 26, 267 (Clause 8), Amendment 27, 268 (Clause 9).

⁴⁰ Amendment 12 (Clause 8), Amendment 13 (Clause 9).

⁴¹ Clause 9(2).

⁴² HL Delegated Powers Committee (n 13) para 48.

⁴³ HL Delegated Powers Committee (n 13) para 45.

⁴⁴ HC ExEU Committee (n 15) para 85.

With regard to the power to make consequential provision under Clause 17(1), the HL Delegated Powers Committee has argued that this power should not extend to modifying retained EU law, as such a power would duplicate the power in Clause 7 and might be used after the expiry of the time limit of two years post-exit which applies to that Clause.⁴⁵

Suggested Questions for Discussion

- 1.1 Should the trigger conditions for any of the delegated powers in the Bill be amended, and if so how?
- Clauses 7, 8, 9
- should the term ‘appropriate’ be replaced with ‘necessary’, or with another test designed to confine use of the power to technical changes?
- Clause 7
- should ‘retained EU law’ include primary legislation that is recognised as ‘EU-derived domestic legislation’ in Clause 2?
 - should the failure of retained EU law to ‘operate effectively’ be omitted or more narrowly circumscribed as a trigger?
 - should the Clause 7(2) list of possible types of ‘deficiency’ in retained EU law be a closed list? Should Ministers be precluded from using this power to keep areas of UK law up to date with EU law?
- 1.2 Should the reach of the delegated powers in the Bill be amended, and if so how?
- Clauses 7, 8, 9
- Should the ability to amend primary legislation be removed or in some way curtailed? Should a proportionality-based test for the exercise of the power be introduced?
- Clause 9
- Should this clause be omitted? If not, should the ability to modify the Withdrawal Act itself be retained? Should Acts passed during the same session as the Withdrawal Act be protected from modification, and should the Parliament Acts be so protected?
- Clause 17(1)
- Should the power to make consequential provision also include a power to amend retained EU law, enduring beyond the two-year sunset applicable to Clauses 7?
- 1.3 To what extent will parliamentary scrutiny of delegated legislation have to be relied upon to safeguard the rule of law while the powers in Clauses 7, 8 and 9 are available to Ministers?

2. ‘Exit Day’ and Temporal Limits on Powers

Clauses 2 to 4 retain EU law as it exists before ‘exit day’ in UK law, and the legal framework of ‘retained EU law’ that the Bill provides is established and defined with reference to ‘exit day’.

⁴⁵ HL Delegated Powers Committee (n 13) para 76. Amendment 296 would give effect to this recommendation and also introduce a sunset clause into Clause 17.

So the framework of retained EU law cannot be operationally effective until exit day is set or, arguably, until exit day has occurred, even though many provisions in the Bill enter into force upon enactment, including all the delegated powers discussed in this paper.⁴⁶

The Bill's sunset clauses also refer to exit day. Thus, the delegated powers in Clauses 7 and 8 cannot be exercised 'after the end of the period of two years beginning with exit day'.⁴⁷ The power in Clause 9 to implement the withdrawal agreement cannot be exercised after exit day itself.⁴⁸ Exit day therefore also determines the sunset period for the delegated legislative powers in clauses 7-9.

The HL Constitution Committee has made the following observations on exit day, and the breadth of the power given to the Executive to define exit day:⁴⁹

'Exit day' will not necessarily be the day on which the EU treaties cease to apply to the UK—it is due to occur by default, albeit not inevitably, on 29 March 2019 by operation of Article 50 of the Treaty on European Union. For the purpose of the Bill, "'exit day" means such day as a Minister of the Crown may by regulations appoint.' [citing clause 14(1)]

The Bill contains no express provisions that constrain the scope of Ministerial discretion to define 'exit day' or that otherwise set criteria by which 'exit day' is to be determined. Indeed, the Bill leaves open the possibility that Ministers may provide through regulations that 'exit day' is to be taken to mean one thing for one purpose and something else for another purpose [citing Sch 7 para 13]. For instance, it may be possible for Ministers to provide that for the purpose of clause 1 (repeal of the ECA) 'exit day' is to be taken to be 29 March 2019, but that for the purpose of the clause 7 amendment powers (which lapse, through a sunset clause, two years after 'exit day') 'exit day' is to be taken to be some later date. This might be intended to facilitate a transitional period, between the formal disapplication of the EU Treaties to the UK and the establishment of a new, permanent relationship with the EU, necessitating phased domestic legal reforms over a longer period of time.

The HL Constitution Committee and the HL Delegated Powers Committee have both expressed concern about the fact the Bill presently requires no Parliamentary scrutiny of the Ministerial decision to determine 'exit' day, given the important implications of that decision.⁵⁰

A number of amendments have been proposed in connection with 'exit day':

The Government's **amendment 381** proposes to fix exit day as 29 March 2019 at 11 pm by amending cl 14. Such an amendment would increase the legal certainty of the Bill by not leaving 'exit date' unspecified. In terms of the sunset of delegated legislative powers, this would enhance the certainty and circumscription of those powers. However, there are concerns that, to the extent that the UK decides to maintain regulatory harmonisation with the EU during

⁴⁶ Clause 19(1).

⁴⁷ Clause 7(7) and Clause 8(4).

⁴⁸ Clause 9(4).

⁴⁹ HL Constitution Committee (n 11) para 19-20.

⁵⁰ HL Constitution Committee (n 11) para 19-20; HL Delegated Powers Committee (n 13) para 63-64.

the transition period or after-exit, the effect of setting exit day on the retention of EU law under cl 2-4 would undermine such regulatory harmonisation.

By contrast, **amendment 6** would amend cl 14 to require that ‘exit day’ be the same for every provision in the Act, achieving increased clarity in the Bill and avoiding the confusion of multiple exit days, but without fixing exit day. **Amendment 7** would make the power in cl 9 to implement the withdrawal agreement by way of subsidiary legislation subject to Parliament’s enacting primary legislation approving the withdrawal agreement.

Amendment 100 would introduce a sunset period of two years after exit day for the powers in clause 17.

Public Law Project (PLP) has suggested defining ‘exit day’ to mean ‘the day on which the UK ceases to be subject to the EU Treaties’ on the basis that ‘This would allow sufficient flexibility for there to be a transition period while also enhancing legal certainty and appropriately limiting the period for which Ministers may exercise the extensive delegated powers contained in the Bill.’⁵¹

Another approach could be to have two distinct points in time—one for the purposes of retained EU law, for which the proposed PLP definition would be appropriate, and a different date for the purposes of the sunset provisions.

Suggested Questions for Discussion

- 2.1 Do the references to ‘exit day’ in Clauses 2-4 create a rule of law problem of uncertainty regarding the content of ‘retained EU law’ before that date occurs? How does any such uncertainty affect the ability of Ministers to use their Clause 7 power prior to that date to deal with deficiencies in retained EU law?
- 2.2 Should the date for exit day be specified on the face of the Act?
- 2.3 Should there be a single exit day for all purposes under the Act, even if that date is to be determined subsequently?
- 2.4 If the date(s) for exit day are to be determined after the Bill has been passed, what process is appropriate to determine the date(s)?
- 2.5 Are the sunset clauses in the Bill effective? Should delegated legislation made by exercising powers under the Bill also be subject to a sunset clause, i.e. should its validity be time-limited?

3. Sub-delegation and Tertiary Legislation

The main delegated powers in the Bill would allow Ministers to confer legislative power on public authorities (existing or newly created) or on Ministers themselves.⁵² This is known as sub-

⁵¹ Public Law Project, The importance of “exit day” in the EU (Withdrawal) Bill (October 2017)

⁵² Clauses 7, 8 and 9 allow sub-delegation because they are Henry VIII powers and sub-delegation not among the exclusions listed in these clauses. Schedule 7 makes provision for the scrutiny of regulations made under these clauses that create or amend legislative powers. Similar provisions apply to the Schedule 2 powers in devolved settings that correspond to the UK-wide powers in Clauses 7, 8 and 9. The power to make consequential regulations in Clause 17(1) is also a Henry VIII clause but it is

delegation. Sub-delegated powers enable the recipient to make what is known as 'tertiary legislation' (in contrast to secondary legislation made by the person or body to whom power is delegated by an Act of Parliament).

The HL Delegated Powers Committee report raises concerns about sub-delegation, noting that even the wide powers in the European Communities Act 1972 do not permit it.⁵³ Moreover, the Committee notes that some or all tertiary legislation will not have to be by statutory instrument, unlike delegated legislation made by Ministers exercising their powers under the Bill.⁵⁴ The Committee observes that 'Where tertiary legislation is not made by statutory instrument, it evades the publication and laying requirements of the Statutory Instruments Act 1946. Despite its greater inaccessibility, tertiary legislation is still the law.'⁵⁵

Tertiary legislation under the Bill as it stands therefore raises rule of law concerns about its accessibility. In addition, there are concerns about the possible scope of sub-delegated powers, which have bearing on the rule of law values of legality and legal certainty identified above. Substantively, Ministers would be able to sub-delegate as much power as they are given themselves. Again, it may be difficult to ensure the proper exercise of such powers by way of judicial review. Moreover, recipients of delegated powers may include public authorities which are not accountable to Parliament in the way Ministers are. The Government has indicated that it does plan to sub-delegate powers to independent bodies such as a regulator, but only 'where existing constitutional arrangements mean that it is more appropriate for the power to be exercised independent of political control'.⁵⁶ However, the Bill does not impose any constraint of this kind, and future governments could take a different approach.

There is no time limit on the exercise of sub-delegated powers, unlike the principal powers from which they derive.⁵⁷ This raises an obvious risk that the time limits applicable to particular Clauses may be circumvented, or indeed effectively nullified to the extent that Ministers choose to sub-delegate power to themselves.

As far as parliamentary scrutiny is concerned, when Ministers wish to make regulations that create or amend powers to legislate, such regulations will be subject to the affirmative procedure.⁵⁸ However, this provision does not alter the lack of any parliamentary scrutiny in the Bill for tertiary legislation which may be made using such powers.

Amendments have been proposed to address some of these issues:

unclear whether sub-delegation is envisaged. The HL Delegated Powers Committee (n 13) report (para 83-91) also expresses concern about Schedule 4, which indicates that Ministers may subdelegate a power to levy fees to public authorities exercising functions conferred upon them by regulations made under Clause 7, 8 or 9 or the equivalent provisions in devolved settings.

⁵³ HL Delegated Powers Committee (n 13) para 27-29.

⁵⁴ Schedule 7 para 12 requires Ministers making 'regulations under this Act' to do so by statutory instrument. This clearly does not apply to public authorities exercising sub-delegated powers, and as the HL Delegated Powers Committee (n 13) observes (para 27) it also arguably fails to apply to Ministers exercising powers delegated to them by regulations made under the Act.

⁵⁵ HL Delegated Powers Committee (n 13) para 27.

⁵⁶ Delegated Powers Memorandum, para 32.

⁵⁷ Schedule 8 para 28 both preserves the effect of regulations made under Clauses 7, 8 and 9 before their respective sunset dates and provides that the passing of such dates 'does not affect ... the exercise after that time of any power conferred by regulations made at or before that time'.

⁵⁸ Schedule 7 para 1(2)(f), para 5(2)(f), para 6(2)(f).

- **Amendment 291** would ensure that any legislative power sub-delegated under Clause 7 or 8 cannot be exercised any later than two years after exit day (the same limit applicable to the powers themselves). It would also require all tertiary legislation under such regulations to be tabled in Parliament and subject to the affirmative procedure.
- **Amendment 344** would make the same scrutiny procedure applicable to any tertiary legislation by an entity other than a Minister under the Act as would have applied if it had been made by a Minister exercising delegated powers.
- **Amendment 277** would require a Minister who wishes to make regulations under Clause 7 to table a report setting out ‘how any functions, regulation-making powers or instruments of a legislative character undertaken by EU entities prior to exit day and instead to be exercisable by a public authority in the United Kingdom shall also be subject to the level of legislative scrutiny by the UK Parliament equivalent to that available to the European Parliament prior to exit day’.

Suggested Questions for Discussion

- 3.1 Should the Bill allow Ministers to sub-delegate legislative powers?
- 3.2 If sub-delegation is allowed, should there be any substantive restrictions on the power that may be delegated (Clauses 7, 8 and 9)? Should there be any time limits on exercising such sub-delegated powers?
- 3.3 Should the Bill impose any requirements as to publication and parliamentary scrutiny of tertiary legislation?⁵⁹

4. Delegated powers in the context of devolution

For a proper overview of the Bill’s delegated powers in the context of devolution, it is necessary to consider first how UK Ministers may use their powers under the Bill to change the law in Scotland, Wales and Northern Ireland, before moving on to examine the powers which the Bill grants to devolved authorities, some to exercise on their own and others by acting in conjunction with UK Ministers in various ways.

UK Ministers have far-reaching powers to alter the law in the devolved countries by using their general powers under the Bill. As already discussed in this paper, Clauses 7-9 and 17(1) are Henry VIII clauses with few substantive limits. Under Clause 7 Ministers are largely precluded from amending or repealing the Northern Ireland Act 1998.⁶⁰ However, the devolution legislation for Scotland and Wales is not protected here, and the protection given to the Northern Ireland Act in Clause 7 is not found in the other clauses. It follows that these powers could potentially be used to amend not only the substantive law of the devolved countries but also, and most readily in Scotland and Wales, the very frameworks of devolved law-making and government in those regions. As already noted in this paper, the powers are framed in extremely wide terms, which are also vague and subjective and hence difficult to challenge in court.

⁵⁹ Amendment 291.

⁶⁰ Clause 7(6)(f).

UK Ministers also have the power under Clause 11 and Schedule 3 by Order in Council to release areas of legislative competence repatriated to the EU to a devolved legislature or executive authorities. This power operates against the background of a general restriction on devolved legislative competence in Clause 11. Whereas currently the devolution statutes preclude the devolved legislatures from legislating contrary to EU law, Clause 11 would preclude them from legislating contrary to 'retained EU law'.⁶¹ For this purpose 'retained EU law' includes any changes made to that body of law by UK Ministers. The new constraint on devolved legislation has been described by the Delegated Powers Committee as a 'moving target'.⁶² The Committee went on to find that the allocation of legislative competence to devolved legislatures was not an appropriate subject for a delegated power, and that in view of the constitutional importance of revising devolved legislative competences this should be done by primary legislation.⁶³ The second meeting of this Expert Working Group saw extensive discussion of the Clause 11 power and there is little that this paper can add to that.

Amendments 2, 12 and 13 would help to address this concern by limiting the powers in cll 7-9 so that they could not be used to make subsidiary legislation 'of constitutional significance'. Changes to the devolution Acts would be of constitutional significance, and so would be excluded from the reach of the powers in cll 7-9 if these amendments 2, 12 and 13 were made.

The remainder of this section focuses on the powers which the Bill would give to the devolved executive authorities to exercise either on their own or in conjunction with UK Ministers. Clause 10 gives effect to Schedule 2 of the Bill, which creates powers in the devolved countries that are said to 'correspond' to the powers of UK Ministers under Clauses 7, 8 and 9 (in Parts 1, 2 and 3 of Schedule 2 respectively). Schedule 2 does so by repeating or referring to most of the content of the Clauses granting the relevant UK-level powers.⁶⁴ The Schedule 2 powers are, however, more constrained than their UK-level counterparts under the Bill, in several ways:

- The powers may not be used to alter retained direct EU legislation (Clause 3), or other EU law that is retained under Clause 4, including any modifications that UK Ministers have made to such forms of retained EU law.⁶⁵ The effect of this is that the powers are confined to altering 'EU-derived domestic legislation' (Clause 2) that is within the legislative competence of the relevant devolved legislature. This means that, regardless of the extent to which the UK Government uses Clause 11 to release legislative competence to alter retained EU to devolved legislatures, executive authorities will continue to be restricted to altering EU-derived domestic legislation within their devolved country.
- The powers are not all to be exercised by devolved authorities acting alone. Provision is made for some powers to be exercised by devolved authorities with the consent of a UK Minister, others jointly with a UK Minister and yet further powers after consulting a UK Minister. In each case, these requirements apply if they would have been applicable had the power been located in a source that was not the Withdrawal Bill.⁶⁶ In addition, various specific consent requirements apply:

⁶¹ There is a proviso protecting legislative competence that would have been within the legislative competence of the devolved legislature immediately before exit day.

⁶² HL Delegated Powers Committee (n 13) para 56.

⁶³ HL Delegated Powers Committee (n 13) para 58-59.

⁶⁴ Schedule 2, para 1, 13, 21.

⁶⁵ Schedule 2, para 2-3, 14-15, 22-23.

⁶⁶ Schedule 2, para 6-8, 17, 26.

- The powers in Part 1 of Schedule 2, enabling devolved authorities to prevent, remedy or mitigate a failure of retained EU law to operate effectively or a deficiency, require the consent of a UK Minister for any changes that are to come into force before exit day, or would remove a reciprocal arrangement under EU law.⁶⁷
- The powers in Part 2 of Schedule 2, enabling devolved authorities to make legal changes to prevent or remedy a breach of the UK's international obligations are similarly subject to the consent of a UK Minister for any changes that are to come into force before exit day, or which relate to the WTO Agreements or to quota arrangements.⁶⁸
- The powers in Part 3 of Schedule 2, enabling devolved authorities to implement a UK-EU withdrawal agreement, require the consent of a UK Minister if they relate to quota arrangements.⁶⁹
- Unlike the powers granted to UK Ministers, these powers do not enable the creation of powers to legislate, with the exception of powers to make rules of procedure for a court or tribunal and the extension of existing powers without altering their subject matter.⁷⁰

The substantive scope of these powers raises rule of law concerns from the perspective of legal certainty. Not only is the wide and subjective language of Clauses 7-9 largely reproduced, but in addition the powers are made subject to an overlay of restrictions set out above that give rise to further uncertainties, most notably the distinction between EU-derived domestic legislation (Clause 2), which may be amended, and the other kinds of retained EU law, which may not.

The exercise of these powers will be difficult to challenge in judicial review, for the same reasons of vagueness and subjectivity that have already been discussed in relation to the powers of UK Ministers. However, uncertainty about the outcome of a judicial review is compounded by a provision to the effect that when devolved authorities make a set of regulations then they will stand or fall together, insofar as any provision of the regulations exceeding the devolved competence of the relevant authority will lead to invalidation of the regulations as a whole.⁷¹

Suggested Questions for Discussion

- 4.1 Is the delegated power of UK Ministers under Clause 11 to release areas of legislative competence to the devolved institutions an inappropriate subject for a delegated power, as the HL Delegated Powers Committee has suggested?
- 4.2 Can the delegated powers under Schedule 2 be reframed in such a way as to produce greater legal certainty? Apart from the terms framing these powers that mirror Clauses 7-9, what are the principal areas of difficulty? Are the powers granted to devolved authorities too narrow to allow the effective performance of the tasks entrusted to them?

⁶⁷ Schedule 2, para 5.

⁶⁸ Schedule 2, para 16.

⁶⁹ Schedule 2, para 25.

⁷⁰ Schedule 2, para 1(4)-(5), para 13(4)-(5), para 21(4)-(5).

⁷¹ Schedule 2, para 2, 14, 22.