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European Union (Withdrawal) Bill 2017-19: Ping Pong

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Summary

On 20 June the House of Commons will consider a message from the House of Lords regarding further amendments to the *European Union (Withdrawal) Bill 2017-19*. The House of Commons will be asked to agree, disagree, amend, or propose amendments in lieu to proposals made to amend the Bill in the House of Lords on 18 June.

There are four remaining areas where the two Houses are yet to agree on the text of the Bill:

- **Meaningful vote**: the House of Lords amended the Bill on a division to require that the Government bring forward an amendable motion at the end of the Article 50 negotiations;
- **Enhanced protection of specific areas of EU law**: the House of Lords have proposed amendments to the Bill on 18 June to create enhanced scrutiny procedures for statutory instruments which amend or revoke subordinate legislation made under section 2(2) of the *European Communities Act 1972;*
- **Refugee family unity**: the House of Lords have proposed a change to the Bill, that means that there would be no age limit on the sponsors of reunification;
- **Sifting Committee**: the House of Lords proposed amendments provide for both Houses to sift proposals for negative statutory instruments. However, recommendations to upgrade the level of scrutiny would not be binding on ministers.

Of these four areas, only the "meaningful vote" proposal was made on a division, with the Government defeated. The other three proposals were brought forward by Government Ministers.

The House of Lords agreed to all the other changes that the Commons had made to the Bill during the Commons consideration of Lords amendments. This means that previous areas of disagreement with regard to the Bill between the two chambers have been resolved and will not be subject to further debate.

This paper includes further details of the outstanding areas of disagreement between the Houses on the *European Union (Withdrawal) Bill*. It also summarises areas where agreement has been reached during Commons consideration of Lords amendments, and Lords consideration of Commons Reasons and amendments.

1. Introduction

1.1 Ping pong

Both Houses of Parliament have to agree on the text of Bills to be presented for Royal Assent (save for the procedures under the *Parliament Acts* of 1911 and 1949).

On 12 and 13 June, the House of Commons considered all the changes made to the *European Union (Withdrawal) Bill* by the House of Lords during its passage to that point. The Commons Library Briefing Paper *European Union Withdrawal Bill 2017-19: Commons consideration of Lords amendments* sets out the changes made to the Bill up to Commons consideration of Lords amendments.

The Commons considered the amendments and either agreed, amended, disagreed to or replaced them (making an amendment in lieu). The Commons then sent a message to the Lords together with the Bill, amendments the Commons made to, or instead of, Lords amendments, and in the case of an outright disagreement to a Lords amendment with no alternative offered, a formal Reason for that disagreement.

The next stage of "ping pong" occurred on 18 June. The House of Lords considered the amendments the Commons made to its amendments, and those amendments the Commons rejected, and those where an alternative was proposed. On some areas, the Lords offered different amendments on the same subject. There are four outstanding areas where the Commons and Lords are yet to agree the same text.

The House of Commons will be asked to consider the changes made by the Lords at "ping-pong" on 20 June. Again, if there are further disagreements between the two Houses the Bill, amendments and a message will be sent to the Lords.

1.2 Double insistence

Deadlock is reached when a House insists on an amendment to which the other has disagreed, and the other insists on its disagreement, with neither having offered an amendment in lieu. The Lords did not insist on any of its amendments when the Bill was returned to the Lords after Commons consideration of Lords Amendments.

2. Continuing areas of debate

Summary

There are four remaining areas where the two Houses are yet to agree on the text of the Bill:

- **Meaningful vote**: the House of Lords amended the Bill on a division to require that the Government bring forward an amendable motion at the end of the Article 50 negotiations;
- **Enhanced protection of specific areas of EU law**: the House of Lords have proposed amendments to the Bill on 18 June to create enhanced scrutiny procedures for statutory instruments which amend or revoke subordinate legislation made under section 2(2) of the European Communities Act 1972;
- **Refugee family unity**: the House of Lords have proposed a change to the Bill, that means that there would be no age limit on the sponsors of reunification;
- **Sifting Committee:** the House of Lords proposed amendments provide for both Houses to sift proposals for negative statutory instruments. However, recommendations to upgrade the level of scrutiny would not be binding on ministers.

Of these four areas, only the "meaningful vote" proposal was made on a division, with the Government defeated. The other three proposals were brought forward by Government Ministers.

2.1 Meaningful vote

The "Meaningful Vote" issue has been the subject of the Government's only defeat on division in the House of Commons Committee Stage of the Bill, and the subject of two defeats in the House of Lords: one at Lords Report Stage and another in the Lords during "ping pong" on 18 June 2018.

During the Committee stage in the Commons, the Government had been defeated on an amendment which would require a statute to be passed on the Withdrawal Agreement before the powers available under Clause 9 of the Bill as introduced could be used.

The House of Lords then voted to amend the Bill to insert a new clause which would regulate Parliament's role in approving the Withdrawal Agreement.

This amendment was discussed in the Commons as Lords Amendment 19. The Commons disagreed to the Lords amendment on division by 324 to 298.[1] The Government's amendment in lieu was agreed to without division. The amendment inserts a new clause into the Bill which provides a statutory framework that gives effect to the Government's written statement on 13 December 2017 on the arrangements for the approval and implementation of the Article 50 agreements:

> (1) The withdrawal agreement may be ratified only if—
>
> (a) a Minister of the Crown has laid before each House of Parliament—
>
> (i) a statement that political agreement has been reached,

[1] Votes and Proceedings, 12 June 2018, Division 171

(ii) a copy of the negotiated withdrawal agreement, and

(iii) a copy of the framework for the future relationship,

(b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,

(c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—

(i) the House of Lords has debated the motion, or

(ii) the House of Lords has not concluded a debate on the motion before the end of the period of five sitting days beginning the first sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and

(d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

(2) So far as practicable, a Minister of the Crown must make arrangements for the motion mentioned in subsection (1)(b) to be debated and voted on by the House of Commons before the European Parliament decides whether it consents to the withdrawal agreement being concluded on behalf of the EU in accordance with Article 50(2) of the Treaty on European Union.

(3) Subsection (4) applies if the House of Commons decides not to pass the resolution mentioned in subsection (1)(b).

(4) A Minister of the Crown must, within the period of 28 days beginning with the day on which the House of Commons decides not to pass the resolution, make a statement setting out how Her Majesty's Government proposes to proceed in relation to negotiations for the United Kingdom's withdrawal from the EU under Article 50(2) of the Treaty on European Union.

(5) A statement under subsection (4) must be made in writing and be published in such manner as the Minister making it considers appropriate.

The House of Lords did not insist on their Amendment 19; they agreed to the Commons' amendments in lieu, but proposed a series of further amendments to the Commons amendment. These amendments, tabled by Lord Hailsham, are explained in full in Box 2 below.

The background to the amendment was explained by Lord Hailsham in the following terms:

> As your Lordships know, it is a manuscript amendment which I tabled this morning. For reasons of convenience, I shall refer to Motion F3 as "Grieve II". We also have a Grieve I, but I shall come to that. … As your Lordships have just heard, I do not move, and have not moved, Motion F1 which is on the Marshalled List and was tabled on Friday, and which I will refer to as Grieve I.
>
> By way of brief explanation before I come to my substantive comments, I say that Grieve I, which is the Motion that I have not moved, was the amendment tabled by Mr Grieve in the House of Commons. It was before the House of Commons on 12 June: it

> was discussed but never voted on. Grieve II, the Motion to which I am now speaking and will formally move, reflects the agreement that Mr Grieve believed he had made with the Solicitor-General. Mr Grieve thought that Grieve II was agreed to, but it appears that senior Ministers objected and it has now been repudiated. By moving Grieve II—or Motion F3 on the supplementary list—I am asking your Lordships to make a decision which will enable the House of Commons to vote on what Mr Grieve believes was agreed with the Government. That is the purpose of my amendment.[2]

For the Government, Baroness Evans of Bowes Park (Leader of the House of Lords) argued that Government had "fully engaged" with the issue and had proposed a "fair, practical and constitutionally sound" amendment:

> Importantly, I would point out that the Government's amendment satisfies many of the objectives of my noble friend Lord Hailsham's original amendment [Grieve I]. Subsection (5A) calls for a Motion on any statement required under subsection (4); the government amendment provides for that. Subsection (5B) calls for a Motion in the event that no deal has been reached with the EU by a particular deadline. The government amendment, while pushing back that deadline by a month and a half, provides that too. The only subsection we have not incorporated is subsection (5C) which would provide Parliament with the power to give binding negotiating directions to the Government. As I have said, that is constitutionally and practically untenable, and both sides accept that it should not make it on to the statute book. I repeat again that the Government's amendment before the House today covers the three situations that the amendment of my right honourable and learned friend Dominic Grieve sought to achieve in the other place and which is covered by the amendment in the name of my noble friend Lord Hailsham: first, if Parliament rejects a deal; secondly, if the Prime Minister announces before 21 January 2019 that no deal can be agreed with the EU; and, thirdly, if no agreement has been reached by the end of 21 January 2019.[3]

The Hailsham amendment, "Grieve 2", was agreed on division by 364 to 235.[4] It has been noted that the size of the majority had increased from the Lords amendment made during Lords Report stage, when 335 had voted in favour and 244 against.

2 HL Deb 18 June 2018 c1884
3 HL Deb 18 June 2018 c1901
4 HL Deb 18 June 2018 cc1904-1907

Box 1: Meaningful vote amendments explained: 'Grieve 2' and the Government's amendment

There are two amendments to be debated on the 'meaningful vote' in the House of Commons on 20 June: the 'Grieve 2' amendment agreed by the Lords on Monday 18 June and the Government's own proposed amendment.

The 'Grieve 2' amendment follows the same basic three scenario structure as the Government's proposed amendment (covered in this Insight) but crucially is designed to require that the Government bring forward an amendable motion to respond to each scenario, rather than an unamendable motion (as the Government's amendment would aim to do).

The structure

The 'Grieve 2' amendment would require the Government to bring forward a motion in the Commons to seek approval for its strategy in three scenarios:

- If the Commons decides not to pass the motion required by subsection (1)(b) to approve the agreements (the Withdrawal Agreement and the Framework for the Future EU-UK Relationship) (subsection 5A);
- If the Prime Minister makes a statement before 21 January 2019 that no agreement in principle can be reached on the 'substance' of the Withdrawal Agreement and the Framework for the Future Relationship (subsection 5B); or
- If by the end of 21 January 2019, there is no agreement in principle on the 'substance' of the Withdrawal Agreement and the Framework for the Future Relationship (subsection 5E).

The first scenario (5A) could be triggered if the motion required by subsection (1)(b) is either not agreed to or passed as a resolution but in an amended form. Whether or not an amendment to the resolution is considered to be a decision not to pass will ultimately be a question of statutory interpretation.

Subsection (1)(b)'s requirement that the Commons' approval takes the form of a single resolution which approves both the Withdrawal Agreement and Framework on the Future Relationship could be read to leave little scope for any conditions to be inserted to the resolution in question.

The second scenario provides that a duty to bring forward a motion would only be triggered before 21 January if the Prime Minister made a 'statement' to the effect that there was no agreement on the substance of both the Withdrawal Agreement and the Framework for the Future Relationship.

The third scenario triggers a role for the Commons in the event that there is no agreement on the substance of either agreement by the end of 21 January 2019.

An amendable motion

In each of the three scenarios provided for, under the 'Grieve 2' amendment, the Government would be under a duty to bring forward a 'motion for the House of Commons to approve the statement mentioned in paragraph (a)'. The statement in each case must set out how the Government 'intends to proceed'. This approach would mean that like the proposed 'meaningful vote' itself (as per subsection (1)(b)), the motion brought forward in the Commons to respond to each of three scenarios would be, in principle, amendable.

This contrasts with the Government's proposed amendment, which would require a 'motion in neutral terms' in the Commons to the effect that the House has 'considered the matter in the statement mentioned in paragraph (a)'. The Standing Orders of the House of Commons state that if the Speaker considers that a motion is expressed in 'neutral terms', then 'no amendments to it may be tabled' (SO No. 24B).

It would appear that the Government's intention is that the motion in each of these three scenarios could not be amended. However, even if the Government's amendment is agreed, the House is free to agree to disapply Standing Orders. A statutory provision cannot be used to force a specific Standing Order to be used to move a particular motion.

The approach taken to the Government's proposed amendment reflects the Government's stated position in relation to the meaningful vote itself: the Commons has a choice to either accept or reject the agreements, but cannot force the Government to adopt a substantive change to its approach to the Brexit negotiations.

However, the provision agreed by the Commons on Tuesday 12 June, which requires that the Commons approve both the Withdrawal Agreement and the Future Framework before the former can be ratified (subsection (1)(b)), does not provide for an unamendable motion.

Parliament's role after the 'meaningful vote' and before exit day

The amendment passed by the Lords is ultimately intended to provide a statutory guarantee that the Commons will have the ability to debate, amend and vote upon a motion on the Government's Brexit policy in the event that either the Commons rejects the agreements or the talks with the EU fail to produce any agreements.

In either scenario, even if neither the 'Grieve 2' nor the Government's proposed amendment were passed, the Commons would likely have to consider further domestic legislative proposals before exit day in order to give effect to the UK's new relationship with the EU. Such bills would provide an opportunity for the Commons to express its view, and pass amendments, on the Government's approach to Brexit.

The principal difference between such opportunities and the structure proposed by both amendments is that there is no guarantee that any such bills would be introduced in time, or would relate to matters sufficiently relevant in terms of scope, to influence the Government's position on the negotiations with the EU.

2.2 Enhanced protection of specific areas of retained EU law

An amendment made at Report stage in the House of Lords had provided for enhanced protection of specific areas of retained EU law. Under the Bill as amended by the Lords, EU law in the area of employment rights, equality, consumer standards, health and safety standards and environmental standards could be amended, repealed or revoked only by primary legislation or, for "technical" changes only, by secondary legislation subject to an enhanced scrutiny procedure.

The House of Commons disagreed to the Lords amendment (discussed as Lords Amendment 4) on division with 318 in favour of the disagreement and 301 against. The reason given for the disagreement to the Lords amendment was that "the Bill already contains sufficient protection for the areas of EU law concerned".[5]

The House of Lords did not insist on their Amendment 4 but proposed a series of amendments and amendments in lieu in their place (Amendment 4B, and Amendments 4C to 4E). The proposed amendments and amendments in lieu were moved by the Government minister, Lord Callanan.

Amendment 4B in lieu of Amendment 4 inserts extra provisions into Schedule 8, which deals with consequential, transitional, transitory and saving provisions. Amendment 4B requires the affirmative procedure to be used for instruments which amend or revoke subordinate legislation made under section 2(2) of the *European Communities Act 1972*, using delegated powers in legislation passed before the start of 2017-19 Session.

Lord Callanan explained the effect of the suite of amendments in lieu:

> …the Government have tabled Amendments 4B, 4C, 4D and 4E, to reinforce protections for regulations created by Section 2(2) of

[5] European Union (Withdrawal) Bill: Commons amendments in lieu, amendments to amendments and reasons, HL Bill 111

> the ECA and put in place an enhanced procedure once we have left the EU for secondary legislation amending such regulations.
>
> We will have left the EU and be free to change these laws, but it is right that this is possible only within the constraints placed on us by active and informed consideration by Parliament, via an enhanced procedure … . This proposed enhanced procedure for amendments to Section 2(2) regulations reflects their unusual nature and unique status in our legislative framework, and will complete the tapestry of protection that is threaded throughout the Bill's provisions for retained EU law in all its many different forms.[6]

The amendment in effect requires the Government, when relying on powers in other Acts to amend SIs made under section 2(2) of the ECA 1972, to use an enhanced scrutiny procedure. This procedure provides that a draft of an instrument to amend or revoke subordinate legislation made under section 2 (2) of the ECA 1972 must be published at least 28 days before the draft instrument is laid. It also requires a scrutiny statement to be made before the draft instrument is laid. The scrutiny statement reports how the published document was made available to Parliament; any recommendations made by parliamentary committees; and any other representations received.

This enhanced scrutiny procedure applies only to SIs to be made on or after exit day. It does not apply to the use of the correcting power in the EUW Bill itself: this may be used to amend SIs made under section 2(2) of the ECA 1972, subject to the constraints on the use of the correction power in the Bill.

2.3 Refugee Family Unity

A new clause was added to the Bill during Report Stage which sought to maintain rights to refugee family reunion currently provided for under the EU's Dublin III Regulation. The amendment, discussed in the Commons as Lords Amendment 24, was disagreed to by the Commons without division and amendments in lieu made, again without division.

During the Commons consideration of Lords amendments, Robert Buckland stated that he believed that the amendment made in the Lords had been tabled by Lord Dubs with "the best intentions" but that the Government wished to ensure that the amendment was phrased in such a way as to enable the Government to deliver the intended outcome. He continued that it was unlikely that the UK would continue to participate in Dublin III once it had left the EU. The Government proposed amendments in lieu which Mr Buckland described as seeking to establish "a new, bespoke arrangement that safeguards our commitment to these children, while being distinct from what is after all an internal EU process". This long-term reciprocal arrangement would not automatically confer long-term status within the UK for those unaccompanied children reunited with relatives in the UK:

> I want to place it clearly on record that this Government will seek a new reciprocal agreement with the EU to allow unaccompanied asylum-seeking children present in an EU member state to join

6 HL Deb 18 June 2018 c1867-1868

> close family members here in the UK, and vice versa, where it is in their best interests to do so. Any such agreement will be to allow an unaccompanied asylum-seeking child to reside with family members while their claim is being considered. That will not automatically confer long-term status here, or mean that that person will be granted refugee status. As with all claims, the UK will examine those claims in line with our international obligations and domestic rules and legislation—the due process that is such an important element of this.[7]

The Government's amendment in lieu was agreed without division in the Commons.[8]

The House of Lords did not insist on their Amendment 24 and agreed with the Commons in their amendments in lieu (Amendments 24A and 24B), but further proposed an amendment to amendment in lieu 24C. Amendment 24 C was a Government amendment which would remove the age limit the original amendment would have put on the sponsors of reunification. Lord Duncan of Springbank, Minister in the Scotland and Northern Ireland Offices, explained:

> The Government have listened to concerns raised in the other place. Following commitments given by my right honourable and learned friend the Solicitor-General, the Government have tabled a further amendment stating that we will seek to negotiate an agreement under which unaccompanied asylum-seeking children in the EU will be able to join parents, grandparents, siblings, spouses, aunts and uncles lawfully resident in the UK, and vice versa. Further, we will not seek to put an age limit on the sponsors of reunification under this agreement.[9]

Lord Dubs, who had proposed the original amendment in the Lords at Report stage, thanked the Government for their amendments, saying that "it was an important day for child refugees".[10] The Lords agreed the Government motion without division.

2.4 Sifting Committee

Under amendments made to the Bill during Report stage in the House of Lords, sifting committees in both Houses would have had the power to insist that Statutory Instruments made using powers under the Act should be made under the affirmative procedure.

These amendments were discussed during Commons consideration of Lords amendments as Lords Amendments 110 and 128. The House of Commons disagreed to the amendments made by the Lords on two divisions. Lords Amendment 110 was disagreed to by 324 votes to 302;[11] Lords Amendment 128 was disagreed to by 325 votes to 304.[12] The Reason given for the disagreement would be that "the Commons prefer their proposed arrangement for sifting". The disagreement with the Lords Amendments meant that there was no statutory requirement

7 HC Deb 13 June 2018 c937
8 Votes and Proceedings 13 June 2018 p4
9 HL Deb 18 June 2018 c1910
10 HL Deb 18 June 2018 c1911
11 Votes and Proceedings 12 June 2018 Division 166
12 Votes and Proceedings 12 June 2018 Division 167

for the House of Lords to sift proposals for negative SIs to be made under the EUW Bill, and mean that SIs making changes consequential upon the legislation would not need to be sifted at all.

On 18 June 2018, the House of Lords agreed not to insist on their Amendments 110 and 128. However, the House of Lords proposed amendments in lieu of their previous Amendments.[13] These amendments in lieu, proposed by the Government, would ensure that each House took part in the sifting process. A recommendation that a proposed negative SI should be upgraded would not be binding on a minister. But the minister would be required to explain why he or she disagreed with the parliamentary committee before making the SI. The amendments in lieu extend the sifting process to SIs that make consequential provisions, as the previous Lords amendments had also done.

Baroness Evans told the Lords that the Government had "always believed that this House should have an analogous mechanism" to the House of Commons, but that the Government's amendments for that had been pre-empted on Report by the amendments proposed by Lord Lisvane and agreed by the Lords. She stated that the Government were returning to the proposals which the Lords had not had the opportunity to decide on, as amendments in lieu.[14] In response, Lord Lisvane, who had tabled the amendments made to the Bill at Report stage noted that, "The test will be, of course, the first occasion on which the committee's view differs from that of the Government".[15]

13 HL Deb 18 June 2018 cc1852-1928
14 HL Deb 18 June 2018 c1924
15 HL Deb 18 June 2018 c1925

3. Areas where agreement has been reached

Summary

This section summarises areas where agreement has already been reached between the two Chambers following Commons consideration of Lords amendments, and Lords consideration of Commons amendments in lieu, amendments to amendments and Reasons. These parts of the Bill will not be subject to further debate.

3.1 Customs Union

The Lords amendments had required that the *European Union Communities Act 1972* could only be repealed on 'exit day' if, by 31 October 2018, a Minister had laid before both Houses of Parliament a statement outlining the steps taken to negotiate, as part of the framework for the United Kingdom's future relationship with the European Union "an arrangement which enables the United Kingdom to continue participating in a customs union with the European Union". (Lords amendment made during Report stage, agreed to on division by 348 to 225).

These amendments were disagreed to by the House of Commons in two divisions on 13 June.[16] Lords Amendment 1 was disagreed to by 325 to 298 and Lords Amendment 2 was disagreed to by 426 votes to 296.

The Commons passed amendments in lieu which require that a Minister of the Crown must lay before each House a statement in writing outlining the steps taken "to seek to negotiate an agreement… for the United Kingdom to participate in a customs arrangement with the EU". The statement must be laid before both Houses before the end of 31 October 2018. These amendments in lieu were agreed in the Commons without a division. They were also then agreed by the House of Lords on 18 June 2018 without a division.[17]

3.2 Enhanced protection of environmental principles and standards

A new clause was added to the Bill at Third Reading in the Lords which had required the Secretary of State to take steps to ensure that the UK's withdrawal from the EU "does not result in the removal or diminution of any rights, powers, liabilities, obligations, restrictions, remedies or procedures that contribute to the protection and improvement of the environment". In addition, it required the Secretary of State, after six months of the Act being passed, to publish proposals for primary legislation to establish: a) a duty on public authorities to apply principles

16 Votes and Proceedings, 13 June 2018 pages 2-3
17 HL Deb 18 June 2018 c1858

of environmental law established in EU law and (b) an independent body to monitor public authorities' compliance with environmental law. The Secretary of State would have been required, before 1 January 2020, to lay before Parliament a "statement of environmental policy" setting out how certain environmental principles would be given effect.

The Commons disagreed to this amendment on division with 320 in favour of the disagreement and 296 against.[18] The Commons then agreed to amendments in lieu (Amendments 3A and 3B). These require that within six months of the Bill being passed a draft Bill must be published that includes a set of environmental principles as set out in the amendment. Ministers would have to have regard to these (in circumstances to be set out in the Bill). The draft Bill would also include provisions for the establishment of a public authority to take enforcement action, which could include legal action if necessary. These amendments in lieu were made without division.

The House of Lords did not insist on its amendment and further amendments in lieu tabled by peers were not moved. The Commons amendment in lieu was agreed without division.[19]

3.3 Validity of retained EU law

An amendment passed by the Lords at Report stage had meant that ministers' ability to specify in regulations when the validity of EU law could be challenged in court was removed from the Bill. The Commons disagreed to the amendment (discussed as Lords amendment 52) on division with 326 voting in favour of the disagreement and 301 voting against.[20] The House of Lords did not insist on its amendment.[21]

3.4 General principles of EU law

This amendment passed by the Lords during Report stage had sought to remove provisions from the Bill that would have prevented legal cases being brought after exit day on the grounds of a failure to comply with a general principle of EU law. The House of Commons disagreed to the amendment, discussed as Lords Amendment 53, on division with 320 in favour of the disagreement and 297 against.[22] However, the Commons agreed to an amendment in lieu without division.

The Lords Library summarised the debate and the amendment in lieu as follows:

> Speaking at Commons consideration of Lords amendments, Robert Buckland, the Solicitor General, reiterated the Government's view that "it would not be right" to retain rights of action based on incompatibility with the general principles of EU law after the UK had left the EU. He did not accept that rights saved by the Bill would not be justiciable if general principles challenges were excluded, as other sources of rights would continue to exist and operate in UK law. However, he said that

18 Votes and Proceedings, 13 June 2018, Division 185
19 HL Deb 18 June 2018 c1864
20 Votes and Proceedings, 12 June 2018, Division172
21 HL Deb 18 June 2018 c1921
22 Votes and Proceedings, 13 June 2018, Division 183

> the Government had listened to concerns that had been raised, particularly in relation to accrued rights. He reminded the House that the Government had successfully introduced an amendment at the Bill's report stage in the Commons which created a three-month window for a legal challenge based on the general principles of EU law to be brought after exit day, if it:
>
> - related to something that happened before exit day; and
> - did not seek to disapply or quash an Act of Parliament or the common law or anything related to them (ie it could be made against either administrative action or domestic legislation other than Acts of Parliament or rules of law).
>
> He said that the Government was now going "considerably further", having tabled an amendment in lieu which increased the window for bringing such a challenge from three months to three years after exit (subject to normal statutory limitation periods). Dominic Grieve (Conservative MP for Beaconsfield), the former Attorney General, said that this was "a great improvement", and although likely to apply only "in very few cases", he thought it would be greatly valued, although he maintained that enhanced protections for some rights would "be lost without the Charter [of Fundamental Rights] and general principles".

The House of Lords did not insist on its amendment and agreed with the Commons' amendment in lieu.[23]

3.5 Charter of Fundamental Rights

The Lords amended the Bill at Report stage to say that the Charter of Fundamental Rights would remain part of UK law after exit day (other than its preamble and Chapter V which concerns rights to participate in European elections).

During Commons consideration of Lords amendments, the Solicitor General, Robert Buckland, argued that:

> We continue to strongly believe that it would not be right to retain rights of action based on incompatibility with the charter or the general principles of EU law after we have left. To keep these in our domestic law, as Lords amendments 5 and 53 seek, would undermine two crucial principles. First, it is not consistent with the proper restoration of parliamentary sovereignty if legislation, including primary legislation, can continue to be disapplied or quashed by the courts on the basis of elements of the EU legal system intrinsically linked to our membership and obligations.[24]

The Commons disagreed to the Lords amendment (discussed as Lords Amendment 5) on division with 321 in favour of the disagreement and 301 against.[25]

The House of Lords did not insist on its amendment.[26] They debated an amendment in lieu tabled by Lord Pannick, but Lord Pannick declined to move his proposal. He noted that he had been pleased that the Government had "confirmed that the general principles of EU law—that

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23 HL Deb 18 June 2018 c1921
24 HC Deb 13 June 2018 c931
25 Votes and Proceedings, 13 June 2018, Division 182
26 HL Deb 18 June 2018 c1875

is, outside the charter—can be relied upon in court proceedings, not to challenge legislation or decisions but as an interpretive device, and his confirmation that equality is one of those general principles of law".[27] Lord Keen of Elie, speaking for the Government, noted that "The Government have listened and the other place has agreed to significant amendments in respect of certain challenges based on general principles of EU law. Given that, I hope that the House will endorse the decision today".[28] The Commons proposal was agreed without division.

3.6 Delegated powers

The House of Lords had agreed to an amendment which meant that certain powers in the Bill could only be used when "necessary" rather than "appropriate". The amendment, discussed as Lords amendment 10, was disagreed to on division with 320 in favour of the disagreement and 305 against.[29]

During the debate, David Davis had argued against the amendment, saying that a number of safeguards had already been added to the Bill regarding the delegated powers, with some powers (such as the power to establish new public bodies) being removed from the Bill entirely:

> When using the principal powers in the Bill, Ministers must now give their good reasons for the changes they are making, exactly as the Lords Constitution Committee recommended. We have introduced further safeguards by preventing the powers in the Bill from being used to establish public authorities. We have also removed the international obligations power from the Bill entirely, as it has become clear that there are better and more effective ways to ensure that the Government's international obligations continue to be met than through the use of that power.
>
> That means that the approach before us is substantially different from what we first introduced, while still protecting the core purpose of the Bill. This reflects the fact that the Government have listened to the views of Parliament throughout the Bill's passage, but we cannot accept Lords amendments 10, 43 and 45, which replace "appropriate" as a reason for using the powers to "necessary". This House has accepted the premise of the Government's approach to delivering a functioning statute book—specifically, that we will preserve and incorporate EU law, and then make the appropriate corrections via secondary legislation. Given the scale of the task and the speed necessary, that could never have been done through primary legislation, but at every turn we have sought to ensure proper parliamentary scrutiny.
>
> Given that that fundamental premise has been supported, there needs to be sufficient flexibility for Ministers to propose changes that might not be strictly considered necessary, but that everyone here would think appropriate. "Necessary" is not a synonym for sensible, logical or proper; it means something that it is essential to do.[30]

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27 HL Deb 18 June 2018 c1874
28 HL Deb 18 June 2018 c1875
29 Votes and Proceedings, 12 June 2018, Division 173
30 HC Deb 12 June 2018 c736

The House of Lords did not insist on its amendment. Lord Lisvane, who had tabled the amendment made to the Bill in during the Lords Report Stage, noted that he had not, despite some changes made to the delegated powers sections of the Bill, seen "any new material or arguments deployed in the Commons":

> In particular, I did not see an acknowledgement that a definition of what might fall within the category of necessity—that is, "necessary"— might prevent Ministers being overly constrained by the use of that term. However, I think that, if one were to craft an interpretative provision of that sort, it would solicit a very similar answer from the House of Commons.[31]

He stated, however, that he felt that the argument had been made, and "perhaps that is where it should rest for the time being":

> but with a weather eye, which I know will be exercised by your Lordships, on how "appropriate" is interpreted by Ministers in the use of these provisions.[32]

3.7 Future relationship and implementing the withdrawal agreement

The House of Lords had agreed an amendment during Report Stage that meant that delegated powers to implement a withdrawal agreement cannot be used until both Houses have approved a mandate for negotiations on the UK's future relationship with the EU. The House of Commons disagreed to the Lords amendment (discussed as Lords amendment 20) on division, with 321 in favour of the disagreement and 305 against. The House of Lords did not insist on its amendment.[33]

3.8 Island of Ireland North/South border

A new clause was added to the Bill during Report stage in the Lords that provided for the continuation of North-South cooperation and the prevention of new border arrangements in Northern Ireland. During the Lords Report Stage debate, the Government had indicated that they agreed with the sentiments of the Bill but that the amendment was not acceptable in the form tabled. Lord Duncan of Springbank, Minister at the Northern Ireland and Scotland Offices, said the Government would bring forward provisions with the same intent in another Bill.[34]

The Government tabled an amendment in lieu at Commons consideration of Lords amendments. David Lidington argued that the original amendment, discussed as Lords Amendment 25, had not been drafted in a "legally appropriate way" and stated that the Government's amendments were designed to "tidy it up and ensure that was in a fit form".[35] The debate was then drawn to a close in consequence of the programme motion. The amendments to the Lords

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31 HL Deb 18 June 2018 c1877
32 Ibid
33 HL Deb 18 June 2018 c1908
34 HL Deb 2 May 2018 c2133
35 HC Deb 12 June 2018 c844

amendment were agreed to. The Lords then agreed to the Amendments to their Amendment (Amendments 25A to E).[36]

3.9 Future interaction with law and agencies of the EU

The House of Lords added a new clause which provides that nothing in the Bill can prevent the UK from replicating EU law in domestic law made on or after exit day, or from continuing to participate in, or have a formal relationship with, EU agencies after "exit day". The Commons agreed to the new clause without division.[37]

3.10 Exit day

The House of Lords had agreed a package of amendments at Report stage which removed the fixed exit day from the Bill. The changes made at Report stage in the Lords had followed amendments made to the "exit day" designation made during the Commons Committee stage. The Government had announced their intention to amend the Bill to add a fixed exit day of 29 March 2019 at 11pm, and they accepted an amendment tabled by Sir Oliver Letwin to allow the date specified to be changed by order. During the Lords Report Stage, the Duke of Wellington had argued that the date should not be fixed in the Bill in case it became necessary "in the national interest" to agree an extension to the Article 50 two-year negotiating period. The Lords amendment was passed on division.

The Commons disagreed to the Lords amendments (Amendments 37, 39 and 125). The Reason given was that "it is better for a default "exit day" to be specified in the Bill rather than appointed by regulations under the Bill". The Lords did not insist on their amendment.[38]

3.11 European Economic Area as a negotiating objective

The House of Lords amended the Bill during Report stage so that the provisions of the Act (other than those expressly specified) could not come into force until it was a negotiating objective for the Government to ensure an international agreement has been made which enables the UK to continue to participate in the European Economic Area after exit day.

The Commons discussed the Lords EEA amendment as Lords Amendment 51 during Commons Consideration of Lords amendments. The Labour front bench tabled an amendment to the Lords amendment but this amendment was rejected on division with 240 in favour and 322 against.[39] The Lords amendment was then disagreed to by the

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36 HL Deb 18 June 2018 c1918
37 Votes and Proceedings, 13 June 2018, p4
38 HL Deb 18 June 2018 c1920
39 Votes and Proceedings, 13 June 2018 Division 178

Commons on division with 327 in favour of the disagreement and 126 against.[40]

On 18 June the House of Lords did not insist on its amendment. Lord Callanan explained the sequence of events, and the Government's argument, to the House of Lords as follows:

> My Lords, the Commons voted by an overwhelming majority of 201 to reject the amendment tabled by the noble Lord, Lord Alli, which requires continued participation in the European Economic Area to be a negotiating objective for the Government. As set out by the Solicitor-General in the other place, seeking to participate in the EEA agreement beyond the implementation period would not pass the Prime Minister's test that our future partnership with the EU must respect the referendum result. It would not deliver control of our borders or our laws.
>
> The other place also voted by a majority of 82 to reject the alternative amendment tabled by the Opposition Front Bench replacing the requirement to remain in the EEA with a requirement to make it a negotiating objective for the UK to maintain full access to the internal market. The Commons objected to that amendment for a range of reasons. It did not respect the indivisibility of the four freedoms, it did not deliver control of our laws and it did not respect the referendum result. That is why the Commons, and indeed several members of the Labour Party, chose to vote against it. Instead, the elected House opted for the certainty put forward in the Government's position, which is not to seek membership of the single market after we leave the EU but instead to seek the broadest and deepest possible partnership, covering more sectors and co-operating more fully than any free trade agreement anywhere in the world today.[41]

3.12 Devolution amendments

As introduced in the Commons, the Bill would have prevented devolved institutions from modifying retained EU law even if it intersected with devolved policy areas. The only exceptions to this would have been if:

- the modification could have been made before exit day in relation to EU law anyway (i.e. the legal instrument being modified was domestic legislation implementing a Directive); or
- the UK Government chose to "release" these restrictions by Order in Council at a discretionary later date.

In the House of Lords, these provisions were replaced at Report stage with what is now clause 15. As amended, the Act would "release" retained EU law to devolved institutions by default. The UK Government would have to specify in regulations the parts it wished to protect from modification. Regulations would have to be approved by both the Commons and Lords, but not the relevant devolved legislature. Regulations would also now be time limited: no new regulations could be made more than 2 years after exit day and no regulations could stay in force for more than 5 years.

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40 Votes and Proceedings, 13 June 2018 Division 179
41 HL Deb 18 June 2018 c1921

There was limited opportunity for the Commons to debate the amendments made in the House of Lords (only 18 minutes). The Government's Programme Motion required a decision to be taken after six hours of debate on Lords Amendments, but the time taken to debate and then vote upon the previous amendments to the Bill took over five and a half hours.

The SNP and Plaid Cymru, and Labour had tabled alternative amendments in relation to clause 15. Neither set of amendments were moved because of the constraints of the Government's Programme Motion. The Scottish Government object to parts of the Bill and legislative consent has been withheld by the Scottish Parliament.

The House of Commons agreed to the Lords Amendments on a Division by 321 votes to 40.[42]

[42] Dvision 177

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