PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

RETAINED EU LAW (REVOCATION AND REFORM) BILL

First Sitting

Tuesday 8 November 2022

(Morning)

CONTENTS

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not later than

Saturday 12 November 2022

The Committee consisted of the following Members:

Chairs: Sir George Howarth, † Sir Gary Streeter

† Bacon, Gareth *(Orpington)* (Con)
† Bhatti, Saqib *(Meriden)* (Con)
Blomfield, Paul *(Sheffield Central)* (Lab)
† Creasy, Stella *(Walthamstow)* (Lab/Co-op)
† Evans, Dr Luke *(Bosworth)* (Con)
† Fysh, Mr Marcus *(Yeovil)* (Con)
† Ghani, Ms Nusrat *(Minister for Science and Investment Security)*
† Glindon, Mary *(North Tyneside)* (Lab)
† Grant, Peter *(Glenrothes)* (SNP)
† Jones, Mr David *(Clwyd West)* (Con)
† Madders, Justin *(Ellesmere Port and Neston)* (Lab)
† Morrissey, Joy *(Beaconsfield)* (Con)
† Nici, Lia *(Great Grimsby)* (Con)
O'Hara, Brendan *(Argyll and Bute)* (SNP)
† Randall, Tom *(Gedling)* (Con)
† Sobel, Alex *(Leeds North West)* (Lab/Co-op)
Stuart, Graham *(Minister for Climate)*

Huw Yardley, Sarah Thatcher, *Committee Clerks*

† attended the Committee

Witnesses

Sir Stephen Laws KCB KC, Former First Parliamentary Counsel

Professor Catherine Barnard, Professor of European & Employment Law, University of Cambridge

Professor Alison Young, Sir David Williams Professor of Public Law, University of Cambridge

Martin Howe KC, 8 New Square

Tom Sharpe KC, One Essex Court

Mark Fenhalls KC, Chair, Bar Council

George Peretz KC, Working Group on REUL, Bar Council

Eleonor Duhs, Partner, Head of Data Privacy, Bates Wells

Public Bill Committee

Tuesday 8 November 2022

(Morning)

[Sir Gary Streeter *in the Chair*]

Retained EU Law (Revocation and Reform) Bill

9.25 am

The Chair: Colleagues, welcome to this interesting Committee, as we get stuck into this important Bill. We are now sitting in public and the proceedings are being broadcast. I have taken my jacket off, so feel free to disrobe in any way that you feel is appropriate. I have a few preliminary announcements. *Hansard* colleagues would be grateful if Members could email their speaking notes, if they exist, to hansardnotes@parliament.uk. When I was first elected, we never had to say such things, as we did not have emails. Please switch electronic devices to silent. Tea and coffee are not allowed during sittings.

We will first consider the programme motion on the amendment paper. We will then consider a motion to enable the reporting of written evidence for publication and, if we need to, a motion to allow us to deliberate in private about our questions before the oral evidence session. In view of the time available, I hope that we can take those matters without debate. I call the Minister to move formally the programme motion in her name, which was discussed yesterday by the Programming Sub-Committee for the Bill.

Ordered,

That—

(1) the Committee shall (in addition to its first meeting at 9.25 am on Tuesday 8 November) meet—

(a) at 2.00 pm on Tuesday 8 November;

(b) at 9.25 am and 2.00 pm on Tuesday 22 November;

(c) at 11.30 am and 2.00 pm on Thursday 24 November;

(d) at 9.25 am and 2.00 pm on Tuesday 29 November;

(2) the Committee shall hear oral evidence in accordance with the following Table:

Date	Time	Witness
Tuesday 8 November	Until no later than 9.50 am	Sir Stephen Laws KCB KC
Tuesday 8 November	Until no later than 10.25 am	Professor Catherine Barnard, Professor of European & Employment Law, University of Cambridge; Professor Alison Young; Sir David Williams, Professor of Public Law, University of Cambridge
Tuesday 8 November	Until no later than 10.55 am	Tom Sharpe KC, One Essex Court; Martin Howe KC, 8 New Square
Tuesday 8 November	Until no later than 11.25 am	The Bar Council; Eleonor Duhs, Bates Wells
Tuesday 8 November	Until no later than 2.35 pm	Sir Richard Aikens, Brick Court Chambers; Barnabas Reynolds, Shearman and Sterling; Jack Williams, Monckton Chambers
Tuesday 8 November	Until no later than 3.05 pm	Sir Jonathan Jones KC, Linklaters; Hansard Society
Tuesday 8 November	Until no later than 3.35 pm	Trades Union Congress; Unison
Tuesday 8 November	Until no later than 4.20 pm	Green Alliance; Wildlife & Countryside Link; Unchecked UK; RSPCA
Tuesday 8 November	Until no later than 4.40 pm	The Scottish Government
Tuesday 8 November	Until no later than 5.10 pm	Law Society of Scotland; Charles Whitmore, Research Associate, Cardiff University; Dr Viviane Gravey, Senior Lecturer, Queen's University Belfast

(3) proceedings on consideration of the Bill in Committee shall be taken in the following order: Clauses 1 to 10, Schedule 1, Clauses 11 to 20, Schedules 2 and 3, Clauses 21 to 23, new Clauses, new Schedules, remaining proceedings on the Bill;

(4) the proceedings shall (so far as not previously concluded) be brought to a conclusion at 5.00 pm on Tuesday 29 November.—*(Ms Ghani.)*

The Chair: The Committee will therefore proceed to line-by-line consideration of the Bill on Tuesday 22 November at 9.25 am.

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication.—*(Ms Ghani.)*

The Chair: Copies of written evidence that the Committee receive will be made available in the Committee Room and circulated to Members by email.

The next motion relates to deliberating in private. We may not need to move this motion, colleagues. My suggestion is that I will start every panel by turning to the Labour lead to ask the first questions. We will then go across the Committee. Indicate to me if you wish to ask a question to the particular witness, bearing in mind that the knives are absolute; we have 15 or 20 minutes, or whatever, with each group of witnesses, and we cannot go beyond that.

It would be helpful, if you are asking a question, and if there is more than one witness at the time—particularly if we have witnesses on Zoom and witnesses in person—to indicate who in particular you would like to answer the question, or whether you would like them all to answer. That would be quite helpful, but you will probably forget that after about 10 minutes. Are we happy to proceed on that basis without going into a private session to agree how we will ask the questions? If everyone is happy, that is that.

This is a serious moment, colleagues. Before we start hearing from the witnesses, do any Members wish to make a declaration of interests in connection with the Bill? No. In that case, we will now hear oral evidence from Sir Stephen Laws, former First Parliamentary Counsel, who is waiting patiently for us on Zoom. Before calling the first Member to ask a question, I

remind all Members that questions should be limited to matters within the scope of the Bill, and we must stick to the timings in the programme motion that the Committee has agreed. For the first witness, we have until 9.50 am.

Examination of Witness

Sir Stephen Laws KCB KC gave evidence.

9.29 am

The Chair: Will the witness please introduce himself for the record?

Sir Stephen Laws: My name is Stephen Laws. I was First Parliamentary Counsel from 2006 until 2012. Before that, I had been a career drafter and civil servant since 1975. I am now a senior research fellow at Policy Exchange.

Q1 Justin Madders (Ellesmere Port and Neston) (Lab): Good morning, Sir Stephen. My first question is quite overarching. The Bill is set up to remove EU law by omission, in essence, rather than by a positive decision to retain it; if there is not a decision by a Minister between now and the end of 2023, it automatically falls away. Do you think that is the most sensible way to proceed with more than 2,500 statutory instruments?

Sir Stephen Laws: Yes, I think it is. The ideal for the law is that all law can be found from easily accessible sources and relied on to mean what it says without being qualified by complex, obscure or general glosses, or involving complex historical research to find out whether it is valid. The Bill, by removing everything that is subject to those disadvantages—because the ideal is not the situation at the moment for retained EU law—is an important step towards securing that the ideal is achieved, by forcing the decisions to be made about how this law can be properly integrated into UK law quickly. Things will only get worse if that does not happen.

Retained EU law is imprecise because it has been removed from the context needed to make sense of it. That will get worse because the sources become of historical interest only, and the methodologies in the UK system for dealing with EU law will become lost knowledge and of historical interest only. The law will become obscure. The Bill is a useful way to force things to become better.

Q2 Justin Madders: Are there adequate safeguards for scrutiny of the way in which this legislation will proceed?

Sir Stephen Laws: The way in which it is scrutinised is a matter for Parliament to work out. It is not something that you would expect to be wholly within the Bill. When deciding what parliamentary scrutiny there should be, it is important to decide what parliamentary scrutiny is for. There is a sort of myth that Parliament should treat itself as the author of legislation and should look at every line, and that legislation for which Parliament has not looked at every line has not been properly written. That is an unrealistic position.

Parliament is a political filter for legislation. It is important that it should identify the bits of legislation that are politically salient, and that it should provide an incentive for technical quality. The first can be achieved, as was the case with the legislation under the European Union (Withdrawal) Act 2018, by having a really rigorous system of triaging subordinate legislation made under the Bill to ensure that Parliament picks up the things that are politically salient. The second is achieved in practice already right across the board by random sampling; what keeps drafters keeping the quality of their drafting up is not that Parliament will look at every line, but the fact that they do not know which lines Parliament will look at, so they have to get them all right.

The Bill establishes the conventional methods of scrutiny, but they need to be backed up by a parliamentary process decided by Parliament and not set out in legislation, because, as we have learned in the last six years, if you put provisions about parliamentary procedure in legislation, you find yourself in the courts. That is not where the processes of Parliament should be.

Q3 Justin Madders: You referred to there being ways to identify politically salient pieces of legislation. How do you see that happening if the Bill becomes law?

Sir Stephen Laws: By the support given to the parliamentary Committees that look at legislation, and perhaps by asking the Government to make sure that their plans for legislation are exposed first, so that Parliament has an opportunity to look at the plans and say, "Well, if that's what you're going to do, those are the things that we want to look at in particular."

Q4 Justin Madders: Would you accept that we do not actually know what the Government's plans are at the moment?

Sir Stephen Laws: Yes, I would, because they have not told you what they aim to do with all this legislation that is going to be repealed. I suggest that you ask them to do that as the process proceeds.

The Chair: I have a feeling that that might happen.

Sir Stephen Laws: Yes, I thought that it might happen too.

Q5 The Minister for Science and Investment Security (Ms Nusrat Ghani): Good morning. Now that we have left the European Union, is it right that the influence of retained EU law should be reduced in statute and in the courts?

Sir Stephen Laws: Yes, it is. EU law applied in a situation where we are not in the EU is quite difficult to work out. The provisions of the 2018 Act are extremely complex; they are glossed. A lot of the EU law was made in the context of trying to harmonise across Europe. When you are trying to work out what it means, you want to know what it is for, and what a lot of it was for is not now relevant. It is not about harmonising rules across Europe; it is about applying rules in a domestic context.

Q6 Ms Ghani: Do you agree that the Bill strikes the right balance between providing for legal certainty and allowing the Government to seize the opportunities of no longer being tied to EU law?

Sir Stephen Laws: On the whole, yes. I have some reservations, because there are respects in which the Bill contains worrying aspects through which it might be

possible for inertia to reassert itself, and for the status quo to become the default for what replaces it. My experience of all legal change is that it is most effective when it is ratcheted—when people do not have the option of saying, "Oh well, we will exercise this power to keep things the way they were." That needs to be watched carefully and, if possible, legislatively discouraged.

Q7 Ms Ghani: You have already talked about the conflict between domestic law and laws made to harmonise across Europe, but, for the record, does not the fact that the EU legislates in a very different way from the UK create tensions between retained EU law and other domestic law?

Sir Stephen Laws: Yes, it does. The major difference between the way the UK traditionally legislates and the way the EU—and indeed lots of other countries—legislate is that under a parliamentary system the Government take responsibility for the effect and quality of the law. That means that when law is made, it is made to do something that people have agreed on. Very often, law made in Europe—in different languages as well—was a matter of agreeing words, irrespective of what the words achieved. If you could agree on the words, that was the best that you could hope for; that may happen very occasionally in my experience, and very rarely indeed in the UK. In the UK people agree on the substance, so you know what the law does. Retaining all this law that was there because it was a compromise on words is making life difficult for those people who have to use it.

Q8 Peter Grant (Glenrothes) (SNP): Good morning, Sir Stephen. One of the things that we were told about leaving the European Union was that it would return powers to Parliament. What does this Bill do to the balance of powers between Parliament and Ministers?

Sir Stephen Laws: Well, most of the law that this relates to—certainly the early clauses about subordinate legislation—is not law that Parliament made; it is law that Parliament enacted or approved because it had to. The law that will be made under the Bill will be made by a Government accountable to Parliament. The powers in the Bill are equivalent in some ways to the power under section 2(2) of the European Communities Act 1972, but in that case there was no choice about the substance of how you exercised the power; the argument was all about the means. Under this Bill, Parliament will have an opportunity to look at the substance as well as the means.

Q9 Peter Grant: You said that Parliament enacted all this legislation because it had to. Is it not the case that, for every single piece of legislation that we are talking about in the Bill, a United Kingdom Government Minister was present at the time that the legislation was agreed in Europe?

Sir Stephen Laws: Yes, but that does not mean that Parliament agreed to the substance of the legislation—nor, in some cases, did the Minister. They are all part of compromises. In the end, the European law had to be enacted because it was European law.

Q10 Peter Grant: You say that Parliament did not agree. Is not it the case that the European Scrutiny Committee, which existed throughout the time that we were members of the European Union, had the power to call in Ministers and put a stop on ministerial approval of European Council decisions until the Committee, and therefore Parliament, were satisfied that it was the right thing to do? Whether or not Parliament exercised that authority, is it not the fact that there was a Committee of Parliament that could prevent Ministers from acting against the will of Parliament?

Sir Stephen Laws: There were mechanisms to feed in the UK view, but the UK view did not necessarily have to prevail.

Q11 Peter Grant: If enacted as drafted, what difference will the Bill have on the application of EU law in Northern Ireland, in particular in relation to the Northern Ireland protocol and the Good Friday agreement?

Sir Stephen Laws: Frankly, that is not a question that I have prepared for, so I cannot say much. What I can say about the Good Friday agreement is that I am not sure that the protocol is relevant, because the law by which the protocol applies is the law of the things that are not retained just because we were carrying over the old law, which is what this Bill is mainly about. I am sorry; I have not looked specifically at the Northern Ireland aspects of the Bill.

Q12 Mr David Jones (Clwyd West) (Con): Good morning, Sir Stephen. The Bill abolishes the principle of the supremacy of retained EU law. Do you think that that is the right course?

Sir Stephen Laws: Yes, I do. I think that that is part of the confusion. If we are going to work out what the law means, it is important that the system for retained EU law should fit the system that we have for all other law, which is that the latest views of Parliament should count.

Q13 Alex Sobel (Leeds North West) (Lab/Co-op): In your initial response, you said that we should replace the laws quickly. In your view, with 2,100 or so regulations, how quickly can Parliament include those laws in UK law?

Sir Stephen Laws: I did not intend to imply that every one of the laws that will disappear needs to be replaced. A rational approach is to say that everything will cease to have effect unless we replace or retain it. There is a fallacy around legal reform that was criticised by Cass Sunstein, the American jurist and adviser to President Obama, which is that the law is very fond of the status quo: the law thinks that if we know the law already, changing or removing it must be less clear. I think that the status quo is something that needs to be justified just as much as any proposal for change needs to be justified.

We have had six years to look at all this law and to decide what of it is so valuable that we need to keep it. If people are now not able to defend specific bits of the status quo that they think are important, it is likely that they never will be able to. People will keep relying on the fact that it is the law already and must be clearer than a change, but to say that we should not change law because change is always more uncertain than keeping things the way they are is an argument against all legislation. We might as well wind up Parliament all together if we are to pursue that argument.

Q14 Alex Sobel: At the moment, it is important for business and the finance sector to have clarity in the law, which to an extent we get from retained EU laws. With the sunset clause and the lapsing of so many regulations, the concern is that there might be a lack of certainty, so that people are unclear what they will get when they invest. That is particularly the case in my area as shadow Minister with responsibility for nature and the environment. Is that a concern we should take on board?

Sir Stephen Laws: I think you need to be concerned about it, but first, you have to exclude from the equation the idea that law becomes uncertain just because you are changing it; that is an argument against changing the law altogether. Secondly, you have to recognise that most law, but not all, is about either imposing duties on people to do things, or imposing duties on people not to do things. It is quite clear that repealing a law does not bring about anything that did not exist before. You do not, by removing a prohibition, require people to do what was previously prohibited; nor do you, by removing a duty, forbid people from doing what they were previously under a duty to do. For most purposes, if a law disappears, people can carry on behaving exactly as they did before until they see a good reason not to. It is just that they are not required to undertake that duty, or are no longer subject to a duty not to do something different. I am not sure that as much lack of clarity is produced by removing a whole load of law as is being suggested.

Q15 Alex Sobel: Even if the Bill has an extremely smooth run, we will have less than a year between Royal Assent and the sunset clause coming into force at the end of 2023. What are the implications of that? Should we not consider having a sunset clause that takes effect further down the line than the end of 2023?

Sir Stephen Laws: I do not think so, because as I have said, people have had six years to look at this law and see how much of it they think is important. Another year does not seem an unreasonable period in which to finalise their views on these things.

Q16 Saqib Bhatti (Meriden) (Con): Thank you for your evidence, Sir Stephen. In 2016, a key reason for leaving the European Union was to re-establish the sovereignty of Parliament. Does the Bill help us to achieve that aim?

Sir Stephen Laws: Yes, because it removes a whole load of law that was enacted under a system that qualified parliamentary sovereignty by imposing obligations on the Government and, indirectly, Parliament, to produce particular forms of law. The Bill replaces that with a system in which all new law will be subject to questions, as to substance and form, in a parliamentary forum.

Q17 Saqib Bhatti: There have been comments about safeguards and scrutiny. Is Parliament capable of creating law that we legislators can scrutinise, and are sufficient safeguards in place when it comes to creating law?

Sir Stephen Laws: I do not think I can add much to what I said before: there is a great volume of law here; a great volume of law was produced under section 2(2) of the European Communities Act 1972 and, indeed, under the 2018 Act. It is important that Parliament develops a sensible system of scrutiny, so that it can do its job of questioning and legitimising matters that are politically salient, and providing a robust system of random sampling, so as to make sure that the quality of legislation is maintained.

The Chair: There is time for one quick question, if anyone is bursting to ask one. Ah! I call Stella Creasy.

Q18 Stella Creasy (Walthamstow) (Lab/Co-op): Thank you, Chair. I apologise; I am afraid a very grumpy toddler would not let me come in. On the subject of grumpy toddlers, our witness has just suggested that the Bill will allow for scrutiny of laws in "a parliamentary forum". Can he explain how statutory instruments introduced by Ministers allow for appropriate parliamentary scrutiny? Is that not giving a lot of power to Ministers, rather than Parliament taking back control ?

The Chair: You have 30 seconds, Sir Stephen.

Sir Stephen Laws: It is possible to underestimate the influence Parliament has, even if the procedures are relatively formal. In the last six years, we have seen that Governments who try to do things that do not have the approval of Parliament get themselves into a lot of trouble. By now, they have probably learned the lesson—indeed, I think they have always known the lesson—that Governments do not propose things to Parliament that they know Parliament will not, in the end, want to agree to.

The Chair: Thank you. That is a high note on which to finish, Sir Stephen. Thank you for the clarity of your evidence.

Examination of Witnesses

Professor Catherine Barnard and Professor Alison Young gave evidence.

9.50 am

The Chair: We will move on to oral evidence from Professor Catherine Barnard, professor of European and employment law at the University of Cambridge, and Professor Alison Young, Sir David Williams professor of public law at the University of Cambridge. Both witnesses are joining us via the magic of modern technology. For this session, colleagues, we have until 10.25 am. Could the witnesses please introduce themselves for the record? Professor Barnard, would you like to go first?

Professor Barnard: Thank you very much for the invitation. My name is Catherine Barnard. I am professor of EU and employment law at the University of Cambridge, and a deputy director of UK in a Changing Europe.

Professor Young: I am Professor Alison Young. I am the Sir David Williams professor of public law at the University of Cambridge, and a fellow of Robinson College, Cambridge.

The Chair: Thank you for being with us. We have a plethora of questions for you. The first is from Justin Madders.

Q19 Justin Madders: Morning, professors. My first question is for Professor Barnard. You have said in your written evidence that there is a serious risk of mistakes

[Justin Madders]

with the EU dashboard. Have you—or has anyone, to your knowledge—done a comprehensive audit of whether everything is on the dashboard that should be?

Professor Barnard: Thank you for that question. No, we have not. UK in a Changing Europe is trying to track the changes to retained EU law, but as we have seen from the *Financial Times* reports this morning, the National Archives has worked with Government and found an extra 1,400 pieces of retained EU law that the Government did not seem to know about until about last week, so it looks like there are about 3,800 pieces of law. If they found an extra 1,400 pieces after the extensive work that Government had done before that, it makes you wonder whether other things are out there. This is the issue with the sunset being the default position. As a default, it will turn off all retained EU law, even if the Government are unaware of what that retained EU law actually is.

Q20 Justin Madders: Thank you for that news; I was not aware that there are another 1,400 pieces of legislation. I hope that the National Archives will send that information to the Minister, if not the whole Committee. It highlights one of our concerns about the Bill. Your report recommends the Bill making it clear which pieces of legislation are subject to the sunset clause; and/or the Government could exempt certain policy areas from the sunset clause. Could you explain to the Committee why you think that would be a good idea?

Professor Barnard: On the first point, listing the provisions that will be turned off avoids those bits of legislation that we do not know about—that is, they have not been found, despite an exhaustive search, including by the National Archives—being accidentally turned off, and our not knowing that they have been turned off until they become an issue down the line in some sort of litigation. One way of avoiding error is to have a list of legislation—it looks like 3,800 pieces of legislation have been identified—and to say, "This is the legislation that is potentially subject to the sunset." If you list all those in the statute, it avoids the problem of the missed bits being caught up by the sunset.

Once you have done all that, you can say, "Right, we should consult on those bits of legislation." I am not in any way advocating, as Stephen Laws suggested, being in stasis and doing nothing—quite the contrary. One of the reasons for Brexit was to think about how we can have laws that are more suitable for the United Kingdom. The trouble is that this slash-and-burn technique means that proper consideration is not given to what a future rulebook might look like.

Q21 Justin Madders: Obviously, the vote to leave was over six years ago. Would it be reasonable for the Government to have said by now which laws they intend to retain, and which they intend to remove?

Professor Barnard: Absolutely. I am in no way advocating for no change—quite the contrary. However, the trouble is that the rather brutal approach envisaged by the sunset clause, and the lack of clarity about how the delay process in clauses 1(2) and 2 will work, will generate huge amounts of uncertainty for users. Unlike Stephen Laws, I would say that these laws cover things as fundamental as gas equipment safety and food safety—what goes into food and the listing of foods. These are things that people absolutely take for granted. The idea that manufacturers will carry on respecting the law even when they are no longer required to because the laws have been simply turned off is, I am afraid, for the birds. All businesses need to try to cut costs, and they will not necessarily comply with high standards in the absence of legislation telling them to do so.

The Chair: Professor Young, did you want to add anything?

Professor Young: To confirm what Professor Barnard was saying, it is important to recognise that although we have had six years to think about which laws to keep and which to remove, we have to put that against a backdrop of those not having been six usual years. We have also had to deal with covid, which generated lots of difficulties, and we are now dealing with energy crises and austerity. I fully accept that there is a need to think about which laws we retain and which laws we change, and that we need a period in which to think about that, but you have to recognise that there are other things on the legislative agenda that might make it difficult to have a complete list of all of them.

I agree that having a list of those laws that we have found will increase legal certainty. It would then also always be possible, once others are found, for the Government to enact regulations and say, "These regulations will be subject to the sunset," or "These will be subject to a different sunset." That would give us much more clarity, while still enabling us to change laws to build on the advantages brought by Brexit.

Q22 Ms Ghani: I am not sure whether anyone ever has a normal political year any more; I am afraid it is what it is. My first question is to Professor Barnard. Thank you so much for your evidence this morning. It has been said that the principle of the supremacy of EU law is

"alien to the UK constitutional system".

As a creation of the Court of Justice of the European Union, it

"sits uncomfortably with established constitutional principles"

in the UK now that we have left the EU. Is it inappropriate for a non-EU country to still have instances where EU law takes precedence over its law?

Professor Barnard: Thank you for that question, Minister. Yes, at first sight, it looks rather unusual to have the notion of supremacy of EU law. You are absolutely right that it was a creation of the Court of Justice. That said, the 2018 Act essentially gave a parliamentary imprimatur to the principle of the supremacy of EU law in respect of retained EU law. Supremacy comes with quite a lot of baggage attached. Thinking about what supremacy means, it is essentially a conflict-of-laws rule—we have loads of them in the legal system. Where there is a potential conflict between two blocks of rules, a conflict-of-laws rule says which one will prevail in which circumstances.

The 2018 Act says very clearly that, in respect of pre-Brexit UK-retained EU law, if there is a conflict with EU law, EU law will prevail for the time being. However, there is absolutely nothing to stop Parliament legislating to reverse that in the future. The purpose of

the 2018 Act was to ensure clarity, legal certainty and continuity. You have continuity with the snapshot approach taken by the 2018 Act. If you turn it off, which, of course, a sovereign Parliament is absolutely free to do, there will still be issues about how to manage conflicts between the rules. Indeed, the Bill makes provision for the supremacy provision to be turned back on if a Department decides it is necessary in its particular area.

Q23 Ms Ghani: Professor Young, when you gave oral evidence to the European Scrutiny Committee in its inquiry on retained EU law, you explained that EU law is drafted differently from UK law, and needs to be interpreted in the light of what type of retained EU law it is. What challenges do these drafting differences pose to both amending and interpreting retained EU law?

Professor Young: Thank you, Minister. It is a matter of recognising that EU law tends to be drafted by setting out the purposes that it is meant to achieve in certain circumstances. Directives have a different format from regulations; they set out the aims and purposes, and allow member states discretion in how to implement them, which is why so much of retained EU law is secondary legislation that was enacted by the UK to implement particular provisions of directives. In that sense, it tends to be drafted in a slightly different style. You also have to recognise that its main aim was harmonisation, so that might influence how it was drafted.

While the UK was a member of the European Union, we got used to understanding how EU law was drafted, and to interpreting it in line with background EU law principles, including the general principles of EU law. Obviously, one of the things this Bill will do is switch that off. You then have to think about how, without those general principles, we will interpret any of the retained EU law that becomes assimilated or is retained by regulations. We might have to think about not just retaining particular provisions through regulations, but whether we need to add elements to amend them or make them clear, so that we have a fuller understanding of how they are meant to apply in certain circumstances.

Q24 Peter Grant: Good morning to both witnesses. Professor Barnard, as we heard, this Bill sets an automatic date by which several thousand pieces of legislation will disappear off the statute book unless they are specifically left on. The number of such pieces of legislation, as we have just heard, is about 1,400 more than we thought this morning. Are you aware of any previous incident, either in the UK or elsewhere, where that approach has been taken successfully with such a large amount of legislation at once?

Professor Barnard: The simple answer is no; I am completely unaware of any precedent for this. Of course, that does not mean that we cannot try to adopt this approach, but we need to be extremely mindful of the associated risks. That is one of the reasons why we have proposed carving out areas, such as environment and social policy, that are already subject to obligations under the trade and co-operation agreement. That will ensure that we do not accidently turn them off but not turn them back on again through the powers in clauses 1(2), 2 or 12 to 15, and so will ensure that we are not subject to the trade and co-operation agreement's dispute resolution mechanisms, which may result in tariffs being imposed on us.

Peter Grant: Professor Young, I saw you nodding. Is there anything you want to add? Do you agree with Professor Barnard?

Professor Young: I agree. I too am unaware of any process that has tried to make such a big change to so many laws in such a short period. That is why it could impose so many practical problems. In most systems, when you have a change of legal system or regime, there is this element of what we did originally, which maintains legal certainty by retaining the old provisions. Then, step by step, in what we often call a sector-specific approach, there is a detailed assessment of whether we should keep those laws or change them. As far as I am aware, this is quite a novel way of doing this with such a large amount of law.

Q25 Peter Grant: Thank you. I do not know whether you heard Sir Stephen Laws's evidence immediately before you came on screen. He suggested that the concerns raised about the uncertainty that the Bill might create can be partly explained by the traditional resistance of the legal profession to change of any kind. He said it is wrong to assume that changing the law makes it less certain. Professor Young, how do you respond to that?

Professor Young: It is not necessarily that I am reluctant to change or am concerned about change. We need to think about what this is asking against the backdrop of what we are aiming for in the Bill. You have to recognise that the difficulties of uncertainty will be not for lawyers, but for those trying to carry out business. Those carrying out business and trade need legal certainty, so that they have an understanding of the rules, now and going forward. As for the elements and problems of uncertainty, we do not necessarily think that things will be uncertain because they are changing; the issue is that those carrying out business will not necessarily be 100% sure whether things will be retained in the long term. If so, how they will be retained? Has everything that might be revoked been listed? They are not 100% sure whether it has been revoked or not.

Other provisions in the Bill might further that uncertainty. For example, under the Bill, legal officers can refer an issue to the court if they think that a decision should have changed the interpretation of a particular piece of retained or assimilated EU law but did not. That can happen after the agreement has been included and the decision has been made by the parties. You might think, "Well, the Bill says that is not a problem because it won't affect the result between the parties," but you have to recognise that others in the legal system will have seen that case, and that interpretation of the law, and will have perhaps planned their business on that basis. They will suddenly find that there is a reference to the court that might change how the law is interpreted or what it means.

That is why we are concerned about certainty. We are concerned about the consequences for those carrying out trade, because they need legal certainty to plan their business activities.

Q26 Peter Grant: Thank you. Professor Barnard, the concern about uncertainty was a significant element of your written submission to the Committee. Is there anything that you want to add?

Professor Barnard: I would just say that the business of legal academia is forever to be making proposals to change the law, to try and improve it in some way. The

idea that lawyers are hostile to change is just not correct. The way in which the legal system has worked and has run successfully over the decades is on the basis of incremental change rather than this really quite remarkable slash and burn approach proposed by the sunset clause.

Peter Grant: Thank you.

Q27 Stella Creasy: We have talked a little bit about the content, but could we talk a little about the process? You have just highlighted that there are actually another 1,400 pieces of legislation affected. The process then gives ministerial—not parliamentary—control about what happens next. Could you give us your reflections on that process and the scrutiny of it, and some of the practicalities? For example, which Ministers will retain responsibility for which pieces of legislation?

It would be quite helpful to know, with the extra 1,400, who has drawn the short straw? Are they all in one particular Department or across the Departments? A previous witness claimed that there would be adequate parliamentary scrutiny, and if Parliament did not like what Ministers were doing, it would intervene. What would this process mean for our ability to influence the content produced as a result of the Bill?

Professor Barnard: On the first point, as you rightly point out, there are provisions in the Bill to allow Ministers, by regulations, to keep retained EU law, which will eventually be called assimilated law, but what is not at all clear is the process by which the Minister decides to engage in that process. Remember, if the Minister decides to sit on his or her hands, the default kicks in, which is that those all those provisions will go. In reality, we understand that Government Departments have a reasonable idea of the law in their area, and civil servants will need to go through that law statutory instrument by statutory instrument.

There is a real issue about capacity in Government Departments. Jacob Rees-Mogg himself said that his own Department for Business, Energy and Industrial Strategy had identified that it needed 400 civil servants to be working on the 300 or so pieces of legislation that had then been identified. Presumably, now they have discovered an extra 1,400 that number will increase. It is a huge amount of civil service time. The issue is even more acute in the Department for Environment, Food and Rural Affairs, which is the Department most affected by retained EU law. The question is, what is the internal process? Even if the Secretary of State in DEFRA decides that he or she wants to retain all the legislation because it is so important in different forms, what happens? Does it go to the Cabinet? Is there some sort of star chamber that looks at what is being proposed by the Departments? We know none of that, and we know none of the detail about whether there will be any consultation with external stakeholders, which is particularly important in the field of agriculture, where a large number of stakeholders are affected.

Stella Creasy: Professor Young, do you want to add anything?

Professor Young: We also have to think about how ministerial Departments will liaise with each other, because those different Departments might be looking at the same statutory instrument that might regulate bits that fall within the ambit of their respective Departments. Something will also be required in Government to keep track of that and to work out what the process should be.

With regard to parliamentary scrutiny, under the Bill the default position would be the negative resolution procedure. Obviously, there are some exceptions, for example, if a measure is used to modify primary legislation, to create a power to enact subordinate legislation or to create a criminal offence in certain circumstances. There is an ability to bump that up to the affirmative resolution procedure, but it will be very difficult for Parliament necessarily to keep track of all this, because so much is coming through. As I am sure you are all aware, it is very difficult for either of the Houses to actually pass a resolution to say that they disagree with a particular provision. Because of the demands on parliamentary time, it will be even more difficult when you have so many provisions coming through. Although there is a process for parliamentary oversight, it will be difficult in the timeframe to ensure that that oversight can be exercised in a manner that enables Parliament properly to scrutinise the measures as they come through.

Q28 Stella Creasy: We know that the last time the Commons overturned a negative statutory instrument was in 1979, and that the Lords has not done so since 2000.

Professor Young: Exactly.

Stella Creasy: In your opinion, then, the ability of parliamentarians, as opposed to Ministers, to influence what laws come next, if they are enacted at all, is limited. Can you suggest, or are there examples from your experience, how parliamentary scrutiny could be strengthened in this Bill?

Professor Young: Obviously we have elements that we saw under the European Union (Withdrawal) Act 2018, which allowed for aspects of enhanced scrutiny in certain circumstances as well as the ability to exercise the affirmative resolution procedures. There can be procedures that you can use whereby you put forward drafts of delegated legislation and allow parliamentarians to scrutinise them. Obviously it is difficult to set that up and to have the time to do so.

I think we need to think about two issues. First, we need to think about what is the appropriate procedure that enables parliamentarians to have adequate scrutiny and we also need to think about how we ensure that parliamentarians have sufficient time to perform that scrutiny. That is why you accurately quoted the information relating to the last time that either the House of Commons or the House of Lords voted against a particular resolution. Perhaps that shows the very great difficulty of actually achieving the time to get that on the parliamentary agenda.

Q29 Stella Creasy: To clarify that point, obviously all of that requires a Minister to bring forward a proposal for any parliamentary scrutiny.

Professor Young: Yes.

Q30 Stella Creasy: So in your reading of the legislation, to confirm our reading of it, if a Minister chooses not to bring forward a replacement to a piece of legislation, there is no parliamentary scrutiny of that decision in and of itself at all?

Professor Young: That's it; absolutely. The only way perhaps to get around that would be to ensure that different departmental Select Committees could go away and look at the area of their law, and perhaps write reports to propose that there should be changes or provisions should be retained or revoked. Obviously, that would only be a report and not necessarily something that a Minister would have to follow in any way, shape or form.

Professor Barnard: If I may just put a footnote to your questions, of course if Parliament did decide to vote by resolution against a statutory instrument, that risks running out of time. Therefore the default kicks in and the sunset kicks in, so you lose a measure all together.

The Chair: Thank you. I call Alex Sobel.

Q31 Alex Sobel: First of all, as a shadow DEFRA Minister, we were expecting 570 regulations. I would like to know whether we will have any more, but that is an aside. As I said to Sir Stephen Laws, I am concerned about the amount of time that we will have between now and the sunsetting at the end of 2023. You gave a very good explanation of how thousands of regulations will likely fall because of the lack of time, but much retained EU law will have implications for the operation of the Northern Ireland protocol, which I understand is within scope of the sunset. What is your view on the operation of the Northern Ireland protocol, if we go ahead and, as expected, hundreds or possibly even thousands of regulations are automatically revoked at the end of 2023 because of the lack of parliamentary, ministerial and civil servant time to effectively replace them?

Professor Barnard: The *Financial Times* reports, and indeed the *Mail on Sunday* report, which is where the story about the extra 1,400 pieces originated, just talk about 1,400 pieces; they do not talk about the fields in which they fall. By definition, however, given that DEFRA already has the largest group of retained EU laws—it is about 500 and something—DEFRA is very likely to be affected by the discovery of an extra 1,400 pieces.

On your question about the Northern Ireland legislation, as you know, annex 2 of the Northern Ireland protocol lists all the areas of EU law that will continue to apply in respect of Northern Ireland on a dynamic basis. Clause 1(5) of the Bill contains a rather general and ill-defined carve-out for Northern Ireland legislation, but it is not clear because, as you will be aware, the Northern Ireland Protocol Bill is also going through Parliament at the moment, which will turn off a large amount of the EU legislation that applies in respect of Northern Ireland—all the annex 2 legislation. Other bits of legislation still apply, particularly in the field of equality law and social policy, but you have this generic and rather vague exclusion in respect of Northern Ireland in clause 1(5).

Professor Young: I have nothing to add.

Q32 Alex Sobel: I wanted to put this question to Sir Stephen Laws, but I will put it to both of you. He talked about the fact that, were regulations sunsetted and not replaced, people would just carry on doing what they did before, but the regulations create a legal floor. Many DEFRA environmental regulations in particular create environmental floors, so people may not do what they did before. They will lower their standards because the regulations will go. Do you think that that is a real danger with the sunsetting and the revocation of the regulations?

Professor Young: I agree that it is a real danger, because obviously a business takes business-based decisions. If a particular regulation that was perhaps making you not as competitive disappears, you might find ways of not following the old regulation because it might give you a competitive advantage in certain situations. We need to think about this against the backdrop of the United Kingdom Internal Market Act 2020, which provides that, if a good can be marketed in one component part of the United Kingdom, it can be marketed in any other component part of the United Kingdom. That will also incentivise what we call a race to the bottom—the idea that you will have a competitive advantage if you are not following other regulatory burdens that might make your good less competitive. If you are aware that you do not have to follow that, not only will you decide not to do so, which might give you a competitive advantage, but it might put others at a disadvantage across the 2020 Act. You can sell your good across the UK because you are adhering to a lower element, and it is lawful to sell it in one component part. I think that there is a real risk that people will not follow the former rules and regulations.

Professor Barnard: I think Sir Stephen Laws takes a very benign view of human and indeed business nature. If there is an opportunity to save costs by not complying with rules, businesses will take it. The only thing I would add to that is that businesses that are doing most of their trade with the EU will still be required to comply with EU rules, otherwise they will not be able to sell their products on to the EU market. Business that are part of supply chains that feed into the EU market will still have to comply with EU rules. Perhaps he is right there that there might be voluntary compliance, but it is actually market-induced compliance rather than absolute voluntary compliance.

The Chair: Thank you. Colleagues, any further questions? Stella Creasy.

Q33 Stella Creasy: I just want to follow up on that. Clause 15(5) specifies that no replacement legislation can increase the burden on businesses. That looks very much like it is locking in lower standards as one can only secure either parity or something reduced. Is that a correct interpretation or could burden be rewritten to allow us to have the higher standards that we were promised if we left the European Union because we could set our own standards? Professor Young, you looked like the one who was nodding most vociferously.

Professor Young: The problem with that particular provision is that it is that element of not reducing burdens, which includes elements of administrative inconvenience, as well as obstacles to trade or innovations or obstacles to efficiency, productivity or profitability. The difficulty is what would or would not be increasing burdens in these circumstances. On the one hand, you are right; this is incentivising a reduction in these burdens and the potential follow-on we would see is a reduction in standards, particularly because it is looking at obstacles

to trade or obstacles to efficiency, productivity and profitability. Another way of potentially reading it is to say that if I take a number of earlier burdens, turn them into one burden with a higher standard, that is also not increasing the burden. The difficulty is that the clause could be quite ambiguous, which could, in some senses, perhaps alleviate some of the risk that that might incentivise towards removing burdens. However, that is going to leave these particular measures open to potential legal challenges because people will argue "This has increased my burden in these circumstances." That, in turn, could add to legal uncertainty.

Q34 Stella Creasy: That is where the lawyers make their millions. In your interpretation of burdens, the TCA talks about us not using changes in our regulatory processes to undercut each other. So is there a risk in that interpretation that we may affect the TCA itself? How do you feel that this legislation interacts with those other forms of legislation?

Professor Barnard: Yes, you are absolutely right. That is one of the reasons we proposed carving out, for example, environmental law and employment law, because those are the two areas that are subject to the so-called level playing field provisions in the trade and co-operation agreement. We are free to lower our standards—that is our choice—but if we do and, depending on the provision, that materially affects trade between the UK and the EU, the EU can start the dispute mechanism in the TCA. In respect of the so-called rebalancing dimension in the level playing field, the retaliation is brutal, quick and immediate.

The Chair: Final question to Justin Madders.

Q35 Justin Madders: Just following up on the burdens issue, obviously lawyers can argue all day what a burden is. For us parliamentarians, whose opinion is it that this is reducing a burden? How would we as parliamentarians establish the basis upon which that decision has been made?

The Chair: Professor Young, you look like you are about to burst forth.

Professor Young: Sorry, I could not quite hear who you were asking. It would be for the Minister to decide, when they are deciding to make a regulation, whether they do or do not think it will or will not increase a burden. There is a possibility for the Minister to make a statement, but there is no requirement to do so, and it will be up to parliamentarians when they see that particular measure to scrutinise it. If you think it imposes a burden and you are concerned about it, you could use the negative resolution procedure to vote against it.

The Chair: Professor Barnard, did you want to add anything in 20 seconds?

Professor Barnard: No, I agree.

The Chair: Thank you very much, both of you, for the clarity of your evidence. We are now moving on to our next group of witnesses. Thank you to those from Cambridge.

Examination of Witnesses

Martin Howe KC and Tom Sharpe KC gave evidence.

10.24 am

The Chair: We are now moving on to hear more evidence in person, from Martin Howe KC of 8 New Square chambers and Tom Sharpe KC of 1 Essex Court chambers. In this session, we have until 10.55. Please introduce yourselves for the record; Martin, would you like to go first?

Martin Howe: I am a practising King's Counsel, principally in the field of intellectual property law, and formerly European Union law, mainly in the field of free movement of goods and services—cross-border freedom to trade. That is my professional background. I became chairman of a group called Lawyers for Britain, which was set up during the referendum campaign to campaign among the legal profession for a leave vote. I wish we had been able to wind it all up—job done—but we still exist and I am still the chairman.

Tom Sharpe: I am Tom Sharpe, King's Counsel. I spent too long as an Oxford don, but I have been in practice for quite a long time. The nature of my teaching at Oxford and my practice was heavily European law, which I now put in the semi-past tense. I have appeared in the European Court quite a few times. The central core of my practice has always been the regulatory area—competition law and state aids—but I have done quite a lot of judicial review work, attempting to overturn EU regulations and misapplied and misadopted directives. I, too, am a member of the Lawyers for Britain group, and Martin and I made submissions in Miller 1 and Miller 2.

The Chair: Thank you very much. We will turn first to Justin Madders.

Q36 Justin Madders: Good morning, gentlemen. May I ask a rather specific question? I am presuming that you have read the Bill. Under clause 4, there is a reference to removing references to sections 183A to 186 of the Data Protection Act 2018. If you do not know why it is there, that is fine, but are you able to provide an explanation?

The Chair: Are you seeking free legal advice, Justin?

Justin Madders: I am indeed. It is the best type.

Tom Sharpe: The honest answer is no. However, your excellent House of Commons research paper does indeed advert to this and describes the justification, which I have forgotten.

Q37 Justin Madders: That is fine. I will refer back to that. I seek some free legal advice in relation to subsections (3) and (4) of clause 7, which are about the criteria for departing from retained law. The criteria are slightly different. Could you set out your understanding of the rationale for why that is the case?

Tom Sharpe: Slightly different between case law and—

Justin Madders: Yes.

Tom Sharpe: Shall I kick off? I know that Martin has some fairly strong views on this. What the Department is trying to do here is to provide some illustrative guidance as to the reasons why people can depart. They

could have done nothing and left it open to the court, which would have been unsatisfactory. By and large, judges, like all of us, need some help and guidance. As to the differences, the justification is the TuneIn case, Martin, is it not?

Martin Howe: Warner against TuneIn, yes.

Tom Sharpe: Why don't you pick this up? It is your area.

Martin Howe: One feature of the 2018 Act, as you know, is that it made European Court judgments continue to be binding after exit in the interpretation of retained EU law. I would have preferred to see them just as persuasive authority from the beginning, but that is what the Act said. It gave only a very tiny exception, allowing the Supreme Court and the High Court of Justiciary in Scotland to depart, but only in circumstances where they would depart from their own previous decisions. It was extremely narrow. That was slightly widened by a statutory instrument under the 2020 Act, which expanded that to the Court of Appeal, the Inner House of the Court of Session in Scotland and the Court of Appeal of Northern Ireland, but it still had a very narrow test. I do not think, even if you got rid of all these restrictions, that the judiciary would actually make very many changes to or departures from legislation.

That comes out from the TuneIn case, in which the Court of Appeal considered a very unsatisfactory area of jurisprudence by the Court of Justice—a very technical area on communication to the public in copyright cases—and did not feel that it wanted to depart from that law, basically because it thought that to do that you have to almost legislate to fill in what you are replacing the judgments with. Judges are naturally reluctant to do that. My view of these provisions is that they are helpful. They slightly widen the circumstances in which there can be a departure, but are unlikely to make much practical difference. They will mean very few cases that see actual departures.

Tom Sharpe: May I add a supplementary? In answer to your specific question, clearly, the case law, which is the second provision in clause 4, is much broader. All sorts of case law is affected, and some would say infected, by European principles. What this is simply doing is inviting Parliament to say that the breadth of review can be triggered by any impact or any influence. It is really very broad—"determined or influenced by". I think that is the justification for it, and I think it is sound. What is the point of having an imperfect means by which higher courts can be seized of these matters if they are important enough to go up to the higher courts?

Q38 Ms Ghani: Good morning. There has been a lot of discussion about whether the Bill should be happening now and whether it should happen at all. My question is this: is now the right time for Government to reduce the influence of retained EU law in the UK statute books, as the Bill intends? I will turn to Mr Sharpe first.

Tom Sharpe: It is not the right time at all. This should have been started in 2016, and certainly the dashboard—the process of creation—should have happened then. When—or if and when—this is enacted, it will be, what, six years since the referendum? That is a very long time; it will probably be seven years when the Lords get hold of it. It seems to me that the promises that were made in the referendum and the obligations owed to those who voted for Brexit, which in turn, of course, were repeated in the 2019 election, have to be redeemed. It seems to me that it is appropriate for that to be done, and to be done by a means whereby good faith can be applied—that is to say, a balance between speed and comprehension, balancing the requirements of Government in order to get the legislation on the statute book with the interests of Parliament and the interests of stakeholders. It seems to me, as a general rule, that this is actually what it does.

Q39 Ms Ghani: Mr Howe, I will ask a supplementary, because I know you are eager to answer the question as well. We have heard a lot, especially from the critics, saying that the Bill is not needed because the European Union (Withdrawal) Act 2018 saved all the relevant EU law, and it has been suggested that the Act took a maximalist view on retaining EU law as, at the time, our future relationship with the EU was not yet known. What is your view on whether the Bill is necessary, and why?

Martin Howe: I think the Bill is desperately needed. The flaw with the 2018 Act is that it was clearly necessary to preserve what is now retained EU law on an interim basis until it could be reviewed and either kept or replaced or modified, but what was not necessary was making it impossible to change most of it except by Act of Parliament, which is what the 2018 Act did, and also to import a whole load of EU law doctrines on top of the legislation. It was all said to be for the purposes of legal certainty. In my view, it does not add to legal certainty; it generates legal uncertainties and allows vague things to be argued.

I have had a look to see what progress has so far been made in changing the vast body of EU retained law. There is one important Bill going through the Commons now, the Financial Services and Markets Bill, which would deal with that field, where we put in place our domestic policy choices.

There are also two further Bills that I have identified. One dealt with the Vnuk case, which was a case in the European Court that interpreted the motor insurance directive—in my view, misinterpreted it—to say that it applied to off-road vehicles, so things such as farm tractors would be compulsorily insured. That has now been corrected in our law, but only via a private Member's Bill, which became an Act in April when the Government lent parliamentary time to the Bill. I think that the Government estimates are that it would have cost £2 billion per year—mainly to farmers, I suppose.

The other Bill, which is actually more important, is on the gene editing matter, where the European Court, in the case between the French peasants collective and the French Government, decided that the genetically modified organisms directive covered gene editing. Now, gene editing is a different technique from genetic modification. There is a lot of criticism of that judgment. It was completely unexpected and had very damaging effects, particularly on the life sciences industry in this country. That is subject to correction by a Bill that has just finished its Commons stages and has gone to the Lords.

Those are just two interpretations of two bits of EU law. That shows the complete impossibility of performing this exercise by primary legislation, and therefore how essential it is to have the statutory instrument power in

the Bill. It is important to appreciate that the statutory instrument power does not apply to primary legislation, so Acts of Parliament that were passed in compliance with EU obligations are not within scope; only the secondary legislation is covered.

Q40 Ms Ghani: I assume, then, that you agree that the Bill allows for sufficient opportunity for parliamentary scrutiny.

Martin Howe: Well, it does. It is comparable to the parliamentary scrutiny that section 2(2) of the European Communities Act 1972 allowed when most of these measures were introduced.

Q41 Ms Ghani: Thank you. Returning to Mr Sharpe, does the Bill, as drafted, strike the right balance between providing safeguards and enabling the removal of outdated retained EU law from our statute books?

Tom Sharpe: I see the Bill as a framework Bill. Of course, it gives Ministers and Departments very considerable powers—powers of proposal, as you know, to amend, revoke or replace existing legislation.

As Martin has just said, an Act of Parliament, which was probably passed—if I may say so respectfully—before many of you were born, provided an enabling power to enact legislation of some quite sweeping character. Despite all the things that law students learned about how Parliament needed to approve legislation, not one single regulation—this is one of the bits we are discussing—has ever been debated, approved or amended by the House of Commons or Parliament. That is a striking statement, but it is absolutely true. We were forbidden, in law, to debate or amend such legislation. I suspect you all know that, but it does not hurt to be reminded.

As for the directives, of course they, too, were approved by Parliament—or, more accurately, not disapproved—but the power of Parliament was utterly residual because the objective of a directive had to be observed. If it was not, the UK would be subject to proceedings from Brussels—and it was, on occasion, but not as often as many other countries.

We are now debating a system of revocation, amendment and replacement, and giving it far more formality than we gave the creation of the laws themselves. That ought to give us pause for thought. That is the background. As far as parliamentary scrutiny is concerned, yes, most of it will be subject to negative resolution, and it is easy to make what I will disrespectfully call a good debating point about the times when statutory instruments have fallen under the negative procedure. But here, we are dealing with a sea change. We are dealing with masses of legislation, as we know, all of which will be subject to significant scrutiny within the House of Commons by parliamentarians and by the press. It seems to me that those issues have to be given notice. There is also the sifting procedure that we adverted to earlier, which I think could be quite a powerful brake on Ministers' discretion.

Q42 Peter Grant: The evidence submitted by the Bar Council, which I assume you are familiar with, says very firmly that it has profound concerns about the Bill, and that its preference would be for the Bill to be withdrawn in its present form. Why has the Bar Council got it so wrong?

Tom Sharpe: Where do we start?

Martin Howe: I am concerned by the attitude taken by the Bar Council. As a subscribing member, I fear that it is trespassing rather too far into political issues. Unfortunately, I think there is a sort of small "c" conservative lawyer's mentality, which has led over time to various things, such as counsel saying in the "Lady Chatterley's Lover" trial, "Members of the jury, would you allow your wives or your servants to read this book?" Since so many members of the Bar are imbued with the system of working with European Union law—it is all part of their practice and the way they operate—there is a natural mental attitude towards keeping it. I do not think that reflects the necessities of the democratic process following the referendum result.

Q43 Peter Grant: Mr Sharpe, do you have anything to add?

Tom Sharpe: It is our trade union, and it does not speak on my behalf on this political matter, very obviously, and it should not have done that. I think there is a broad issue here. If you look at the criticism of the Bill by the Bar Council and by members working with it—the Hansard Society, which got a mention, and various leading members of the Bar whom I know very well; they are my friends and I respect them—the dominant theme is one of extreme pessimism. That is to say that if we have a mendacious Government, a supine Parliament and a lazy and ignorant press, all sorts of things can happen. Now, I do not think that is true. I have far more respect for this House, and even for Ministers and the press. If Ministers are getting out of hand, they will be put in check. If they are not, the judiciary has a role in reviewing the exercise of these powers. We can ignore the judiciary in this context, but it has an important residual role.

We can call it benign or naive, but I do not think that is right. I think that by and large the House of Commons does a pretty good job, and I see no reason at all why it will not continue to do so in relation to this important Bill.

Q44 Peter Grant: You suggested that if a Minister gets out of hand, Parliament can act. You will recall, though, that quite recently a Secretary of State was found by an inquiry to have been guilty of severe bullying of civil servants, and nothing happened to her because a Prime Minister did not want her to lose her job.

To go back to the comments you made earlier about the difference between primary and secondary legislation, when was the last time Parliament amended a piece of secondary legislation?

Martin Howe: It does not. The procedure is a yes/no procedure either by affirmative resolution, in which case there has to be a positive vote or it fails; or by negative resolution, in which case, unless it is prayed against and there is a vote against it, it stands.

Q45 Peter Grant: Does that not mean there is significantly less opportunity for parliamentary scrutiny if all that Parliament is allowed is: we do this or we do not do it? Does that not mean that, almost by definition, there is less opportunity for parliamentary scrutiny with secondary legislation than there would be with a Bill?

Martin Howe: Indeed. By its nature, there is much less opportunity than with a Bill, which you go through line by line, but all the legislation that is within the

scope of the Bill to be potentially corrected, changed or left out by secondary legislation was introduced by secondary legislation. The primary legislation is not covered by the powers.

Tom Sharpe: Remember what we are discussing. I think it is very unlikely that there will be a wholesale slash and burn—to use the academic term that we heard earlier—of all EU retained legislation or assimilated legislation; a good deal of it will remain. I do not recognise the gloomy picture of businesspeople clawing their way to the bottom. I understand the theory, but in the course of a year I advise dozens of CEOs and chairmen, and not one has said: "We have a terrific opportunity to make extra money out of the consumer."

What is missing here is public scrutiny and reputation, and we have to be balanced and less shrill about this: not everything will change; not everything will change at once; and some things will be changed—in particular under clause 15(3) where, respectfully, the real issues arise for parliamentary scrutiny. There, as you heard, some will be determined by affirmative resolution and others will go through the sifting procedure, which requires the Minister to come to Parliament to justify the choice of a negative procedure. You will have an opportunity to deal with that.

Q46 Stella Creasy: Martin, I was interested to hear you talk about how you were happy with the scrutiny mechanism in the Bill, because I note that in your evidence to the European Scrutiny Committee you argued for the need to have a delegated power to revise retained law and then suggested a commission to propose what should be done. That would be much more scrutiny than you are talking about now. What made you change your mind about the requirement for scrutiny that you previously advocated? I thought that the argument you made before was compelling.

Martin Howe: The argument I was putting forward was for a practical way to speed up the process. Frankly, it was a suggestion that I floated, a possible—

Q47 Stella Creasy: Are you disappointed that there is no scrutiny mechanism in the legislation, as you floated?

Martin Howe: What I was then proposing was not so much a scrutiny mechanism as a sort of motor to get the process going—

Q48 Stella Creasy: You made quite a strong argument, did you not, that there was a case for being able to look? You were advocating the superfluity of some of this legislation, but now the Bill contains none of that. Are you disappointed?

Martin Howe: No, because the main thing—the important thing—is to get the job done. What I am disappointed about is that I published a paper in July 2016, a month after the referendum, arguing that we should start a systematic process of review of European Union laws. I naively suggested that that would be with a view to revising what we needed to revise by the time of exit two and a half years later—

Q49 Stella Creasy: You felt it was naive to know what we were revising.

Martin Howe: No. I was naive to think that the process of revision would be started. I share Tom's view that it would have been better had this process been started earlier, but it does need to be done.

Q50 Stella Creasy: You also said that there were limited respects—and gave two examples from your own practice—where you thought it was a good idea to retain EU law over pre-Brexit legislation. Do you accept that there might be other areas of law where it might be a good idea to retain some of those laws? In which case, would that not be helpful to us as parliamentarians? Your colleague dismissed the idea that the Bill will lead to slash and burn, but it has slash-and-burn powers within it. Surely it would be good practice—as you have argued—to know what it is that we are slashing and burning, and to have some process of exploring that as parliamentarians, if we are to be taking back control for this House?

Martin Howe: Well, it is a matter for Parliament as to what you press Ministers on with regards to their plans and intentions.

Q51 Stella Creasy: But we do not have powers to press them; we only have a negative resolution procedure. You made such a compelling case and argued in your previous evidence for several areas of law where you think we should retain. What has changed now?

Martin Howe: To be clear, I was not suggesting that they be retained in the long term. Those areas need revising and converting into coherent UK-based law. Elements of EU law should not be retained into the indefinite future.

Q52 Stella Creasy: You make a case for being able to change your mind yourself and having a process for changing your view on this legislation. Would it not be beneficial for this place to have powers to change the minds of Ministers? Like you, Ministers may make decisions that they come to regret.

Martin Howe: Sorry, I have not changed my mind on the relationship between retained EU treaty law and other EU law. The point is that that should be converted into domestic law, but our domestic legal system can cope with the question of precedence of one law over the other. I have never been in favour of indefinite retention.

Stella Creasy: Apologies, but you did propose—

The Chair: Stella, you have asked a lot of questions. We are moving on, and we will come back to you if there is time.

Q53 Mr Marcus Fysh (Yeovil) (Con): Would it be a good idea to have, within each Department, where there might be cross-cutting issues between them, particular taskforces established by Ministers, including practitioners in the area, to look at how things can be made more competitive within those areas by this process of assessing what retained EU law is out there and how it might be replaced? Should regulators be involved in that process, given that it might be necessary to take a practical approach to getting these things done, and to get expertise from outside the Government and the civil service to accelerate the process and get it done in the time available?

Tom Sharpe: The general point is very well made, if I may say so. It seems to me that that type of exercise—that kind of inclusive thinking about making the country more efficient and getting rid of silly regulations—would be valid even if we were not dealing with the Bill.

One of the problems with the Bill is that it is a framework Bill, and I can see a quite compelling case for eliminating some of the opacity that surrounds the Government's intentions. It is early days, and the Bill is just a Bill. I do not think it would be enhanced by Ministers detailing in fine print exactly what is to be done, but there is a case for some ministerial guidance as to where the priorities should lie.

As for doing away with dud regulation, I find it amusing to read the submissions to Government. This is an important point about consultation. My understanding is that there have been thousands of responses to the dashboard—I think I am right in that. That is an element of public consultation. It is amusing to me to see that so many bodies that campaigned remorselessly against some of the EU legislation that we had no control over now resolutely do their best to try to preserve it. With a little more honesty, they would have been more compelling, I think.

Q54 Mr Fysh: This is a follow-up question to Martin Howe. Would it be possible for those taskforce processes also to involve parliamentary scrutiny through the various Committees in the Lords and the Commons, which might help to look at this prioritisation and emphasis?

Martin Howe: That is helpful and it sounds like a good idea. Whether it ought to be spelled out in the Bill is a different question, because there needs to be a certain amount of flexibility over these processes. Certainly, involving outsiders in looking at these issues, as opposed to doing it as a purely internal measure within Departments, strikes me as beneficial.

The Chair: Gentlemen, thank you for your evidence. Our time is now up. Thank you once again for being with us.

Examination of Witnesses

Mark Fenhalls KC, George Peretz KC and Eleonor Duhs gave evidence.

10.54 am

The Chair: We will move on to our final group of witnesses for this morning. Of course, we have a long afternoon ahead of us. We will now hear oral evidence from Mark Fenhalls KC, chair of the Bar Council. I wonder whether he was listening to the previous panels.

Mark Fenhalls: I was listening, Chair.

The Chair: Excellent.

Mark Fenhalls: I am very much looking forward to trying to do my best.

The Chair: I am sure you will do a great job. George Peretz KC of the Bar Council's working group on retained EU law is joining us via Zoom. We also have Eleonor Duhs, partner and head of data privacy at Bates Wells, here in person—I hope that was the correct pronunciation of your name.

Eleonor Duhs: It was, yes.

The Chair: For this session we have until 11.25 am. George Peretz is not here yet, but if he does appear we will ask him questions as well. We turn to Justin Madders to start.

Justin Madders: Thank you for giving evidence today.

Q55 Justin Madders: This is probably a question primarily for you, Mark. At the moment we are in a position where we know several thousand laws will be automatically sunsetted at the end of 2023. We do not know which ones they will be or why the Government will retain, remove or amend particular laws. As we have heard today, it appears that the Government do not even know themselves which laws will be covered by the Bill. Do you see any risks with this approach?

Mark Fenhalls: There is nothing but risk. I will tell you one brief anecdote to illustrate this point. Last week I was at an international conference, working with the Ministry of Justice on selling legal services overseas, and talking to lawyers and Bar leaders from around the world. They asked me what this country's intentions were around its laws following the departure from the European Union. I explained that I have no difficulty with change; change is a necessary thing. We all hope there is a sunlit upland where we can find better or fewer rules and regulations in the future. But when I explained about the inherent uncertainty and risks around this, they all looked and me in horror and said, "Why would we do any business with the UK"—until 2024 on the current timescales—"if we don't know what the rules and regulations are going to be around all these issues?" There is a tremendous problem with this Bill, which was described by previous witnesses as a "framework Bill", because we do not know what Ministers are going to do and Parliament does not have the opportunity to take control of the process or scrutinise it.

In our judgment, the Government should take the approach referred to in relation to the Financial Services and Markets Bill, where it looks as though considered, measured changes are being put forward, and there is an undertaking not to change the rules and regulations without consultation with the sector. We cannot understand why financial services are the subject of such a responsible, measured approach, which does not seem to apply to consumer protection, cosmetic and household cleaning product safety, water and air standards, and so forth. If the Government could take the same measured response, sector by sector, that would be a more sensible and less risky way to proceed.

Q56 Justin Madders: Following on from that, if the Government adopted the approach you are suggesting, how feasible would it be for there to be a considered and properly democratic approach to this before the end of 2023?

Mark Fenhalls: I am no expert in how much civil service time exists, but I would be astonished if it were remotely possible to cover but a fraction of this. I do not know why it is set up as anything other than a political problem. The reality is that this is our law. It was passed over four decades of membership while we were a part of the European Union. The previous witnesses may not like the process of scrutiny that existed, but we were part of that. We had MEPs and a Parliament that dealt with that. There was a democratic process, like it or not.

We now have a different democratic process, but these laws are part of our laws, which our businesses operate by and which provide protection to our citizens. If I may say so, I think Parliament has a responsibility not to import uncertainty and change without showing there is something better—and certainly not by just having the power to let the laws lapse.

Eleonor Duhs: Perhaps I could add something on the timeframes. In order to get the statute book ready for Brexit, which was in some ways a much more simple task than this, it took over two years and over 600 pieces of legislation. The reason I say it was a simpler task is that we were essentially making the statute book work without the co-operation framework of the EU. We were taking out references to the European Commission and replacing them with "Secretary of State"—that sort of thing. That was a much simpler task than what we have here, and that took over two and a half years.

A lot of areas also have several pieces of amending legislation. In data protection, which is the field that I work in, there are at least three pieces of legislation that amended and then re-amended the statute book—just to get it ready, from a technical perspective, for Brexit. There may be huge policy changes under this legislation, and the end of 2023 is simply not a realistic timeframe for the process.

Justin Madders: I see that George Peretz has joined us. I do not know whether he wanted to respond to any of the questions first of all.

The Chair: Yes, Mr Peretz, welcome. Did you hear the questions that were asked?

George Peretz: I had a slight technical hitch in joining. I was going to make a point about the effect of the sunset clause. Stephen Laws made the point that law reform is necessary and it happens, and one should not get stuck in defending the status quo. But there is every difference between a Government saying, "Here is the existing law, we propose to replace it with legislation, and here is the text of the proposed reform," which is the normal process of law reform, and what is happening here. The Government are effectively saying to business and the wider world, "All of this law is open to change; we cannot tell you whether we will keep any of it. Some of it may just disappear, it may be replaced, and we cannot yet tell you what the replacement is. All of this is going to happen in 18 months." That inevitably produces an enormous amount of uncertainty, and that is uncertainty above and beyond the inevitable uncertainty of law reform.

Q57 Justin Madders: I have one further question for Mark. There was correspondence between the previous Secretary of State—the right hon. Member for North East Somerset (Mr Rees-Mogg)—and the Justice Committee over engagement with the judiciary in respect of the Bill, particularly the effect of clauses 7 to 9. Can you tell us what kind of dialogue there has been? Do you foresee any issues with the application of those clauses?

Mark Fenhalls: I am not privy to any of that correspondence; I cannot help with that. I do not know whether either Ms Duhs or Mr Peretz is familiar with it.

Eleonor Duhs *indicated dissent*.

Justin Madders: That is fine.

Q58 Ms Ghani: Good morning, Mr Fenhalls. You talked about scrutiny quite a bit. Most retained direct EU legislation has not been through a UK parliamentary scrutiny process, but you keep going on about scrutiny. How much oversight did the UK Parliament have over laws that came into effect under section 2(1) of the European Communities Act 1972?

Mark Fenhalls: I am sorry if you think I am going on about it. All I am doing is saying that there was a democratic process, which we were party to for several decades: we were members of the European Union, and we followed the lawful processes. We now have this body of law, which Parliament owns, and we are all looking for an opportunity for Parliament to say, "Let's now take advantage of our departure from the European Union, put aside the conflict of the past and work out a better way." We are all delighted by that. None of us is hostile to change. We just want change in a measured and balanced way, so that we know what the alternatives are.

The effect of the Bill—I was thinking about it as I listened to the previous speakers—feels a bit like the uncertainty and the uncosted promises made by the former Chancellor, which so disrupted the bond market. *[Interruption.]* You asked the question, Minister. The difference between that and the Bill is that we are being told to trust Ministers to see what will happen, and we have no idea what they will do. We have no idea what is being left or what will be changed. There is conflict between current Bills before Parliament, such as the Levelling-up and Regeneration Bill, and the Bill we are discussing, and we do not know how the Government propose to address it.

Ms Ghani: Mr Fenhalls, you said you are not hostile to change, but you have been nothing but negative about the Bill. You also mentioned a democratic process. There was another democratic process in 2016—just for the record.

Q59 Peter Grant: Good morning. In your submission from the Bar Council, Mr Fenhalls, you suggested that the Bill should be withdrawn. You have also accepted that we need to do something about the huge volume of retained EU law that we still have. What would be a better way to deal with all that law, rather than the way it is being dealt with in the Bill?

Mark Fenhalls: I am not a parliamentarian or a politician. The short answer to that is that I do not know, but I do know that every single stakeholder and lawyer I have spoken to—who are simply thinking about their clients' business interests and the rights of the people involved—wants to know what the alternative proposals are before they take a view. The difficulty with this Bill is not change, because change in itself is fine; it is the fact that we do not know what the proposals will be. We have suggested what we suggested in our submission and we have put in fall-back positions saying that if the Bill is to proceed, we should put in place scrutiny measures or duties on Ministers to come to the House and say, "This is what we propose to do," and not run the risk, for example, of the sunset causing us to crash into the wall at the end of next year.

Peter Grant: For the record, there are two lawyers sitting behind you who quite clearly do not share the view that you just expressed about the various lawyers you have spoken to. Some of us think that lawyers argue with lawyers all of the time; that is what they are there for.

The Chair: Before we continue, I think Mr Peretz wanted to come in on that point.

George Peretz: I wanted to come in in response to the Minister's question about section 2(2) of the European Communities Act 1972. There are two points here. One is the point, developed by Martin Howe, that it considerably underestimates the degree of democratic scrutiny that EU law actually had, particularly in the European Parliament and on the reform of EU law. It also understates the mechanisms that Parliament had to scrutinise how Ministers acted in the Council of Ministers.

I suppose one is getting slightly political here, but perhaps the more important point is that one of the arguments for Brexit, as I understood it, was that it would strengthen democratic accountability for legislation. It is slightly disappointing that the argument put forward for the Bill is sometimes, "Well, the EU was undemocratic in this, so you cannot complain that this is equally undemocratic." We can do rather better than that.

Q60 Peter Grant: This question is for all three witnesses. Would the Bill be less of a concern if there was not a sunset clause, or if the sunset clause was later than the end of 2023? Are your concerns partly about how little time there is for the process to be completed?

Eleonor Duhs: I would still have some concerns, because the end of 2026 is not far away and that is what people are saying would perhaps be the revised timeframe.

There are some really significant things in this Bill in terms of changing the way in which the law works. I will give an example from data protection law. Clause 4 would change the relationship between retained EU law and domestic law. To show what that might mean in practice, I will give the example of a conflict between the UK general data protection regulations and the Data Protection Act 2018. This is not addressed by the provisions that Mr Madders asked about; that is simply about how data protection legislation as a whole interacts with the domestic statute book and is not overridden by it. In a conflict between the UK GDPR and the Data Protection Act 2018, if we remove the principle of supremacy, for example—which is what the Bill seeks to do—we could end up reducing data protection standards in the UK. That could cost UK businesses up to £1.6 billion and significantly increase red tape, so this is really important.

Last year there was a case called the Open Rights Group case, which was to do with exemptions in the 2018 Act that were overly broad. The Court of Appeal said that the UK GDPR had precedence—so this was decided under the retained principle of the supremacy of EU law—and that the provision in the 2018 Act was unlawful. If we had not had that retention of the principle of supremacy of EU law, and had had this new section 5(A2), the 2018 Act would have had precedence and the broader exemption would have applied, which would have reduced rights in the UK.

Why is it helpful for rights in the UK to remain as they were before? Because our current standard of protection of personal data has been deemed by the EU to be essentially equivalent to their standards of protection. That allows a data adequacy decision and, at the moment, the free flow of data between the EU and the UK. If we did not have that—if we lost data adequacy, which could happen under proposed new section 5(A2) in clause 4—UK businesses would have to spend time putting in place contracts and would have to do transfer risk assessments.

The New Economics Foundation and University College London wrote a paper entitled "The cost of data inadequacy", which they published in November 2020. It stated that losing the free flow of data could cost UK businesses up to £1.6 billion in extra red tape, and it would have other economic implications, including a reduction in UK-EU trade, especially digital trade; reduced domestic and international investment in the UK; and the relocation of business functions, infrastructure and personnel outside the UK. So the Bill could have really significant implications for trade.

Q61 Peter Grant: Mr Peretz, do you want to comment on my previous question? How much of the concern about the Bill is simply down to the very short time provided by the sunset clause? If we moved that clause further back, would it ease your concerns?

George Peretz: The short time is clearly a concern given the enormous work that will need to be done both in Whitehall and by Parliament if it intends to scrutinise any of this properly within a very short timeframe. A lot of this law is very important, a lot is very complicated, and quite a lot of it is both, so one should not underestimate the resource implications. Obviously, if you have a longer timeframe—until 2026, say—that resource could be spread over a longer period, and perhaps more efficiently.

There are other, wider concerns about the Bill and how it amends the application of some EU rules to retained EU law as it continues to operate, and about Ministers' power to revoke and replace. Those are separate from the sunset clause concerns, but the sunset clause does interrelate with the question of Minister's powers. One of the problems with the effectiveness of parliamentary scrutiny is that although one hears that Parliament has powers—in some cases via the negative or affirmative resolution procedures—the background against which it is being asked to approve legislation means that if it votes against that legislation, the sunset clause will apply and regulations disappear completely, rather weakening Parliament's ability to do anything.

To take an example, if Ministers decided to keep the working time rules but rewrite them to make them less favourable to employees, and came up with the new regulations in November 2023, those rewritten regulations would probably be introduced under the affirmative procedure. However, when the House of Commons voted on them, Ministers would say, "You may not like these revised regulations very much, but if you do not vote for them, the alternative is that we will not have any regulations at all." That weakens Parliament's ability to control the exercise of ministerial power.

Q62 Alex Sobel: I will put this question to you, George, as it is something of a follow-up. You just gave a qualitative response about the sunset-clausing, but this is more of a quantitative question. I was not aware

until Catherine Barnard and Professor Young pointed it out earlier that 1,400 additional pieces of legislation have been found. I have now found the article in the *Financial Times*, which states that

"A plan…to review or repeal all EU laws on the UK statute book by the end of 2023 has suffered another setback after the discovery of 1,400 additional pieces of legislation."

We were aware of 2,100 pieces of legislation, but that is another 1,400, so we are now seemingly aware of 3,500, with a sunset clause at the end of 2023. Is that the end of it? Will it be 3,500 pieces of legislation or could there be more? How are we going to find and define all these pieces of legislation so that we know what law we are acting under? You have just described qualitatively how pieces of legislation will fall under the negative resolution procedure because they are going to be sunset-claused out. Quantitively, where do you think we are going to end up by December 2023?

George Peretz: One does not know. On your point about the legislation being discovered, like you I have read the story in the *Financial Times.* I do not know the background to it, but we drew attention in the Bar Council paper to the risk of things simply being forgotten. As that story shows, that is not a hypothetical risk. That is one reason why we suggested as a possible amendment to the Bill that the Government add a schedule that simply lists all the regulations that are going to be affected and if it is not on the list, it does not fall. It is very difficult to see the argument against that. Presumably, the Government want to know what is being repealed. One does not want to repeal things one does not know about. What would be the good of not evaluating the risk? It is very difficult to see why there would be an objection to listing everything out. Then everyone would know precisely what goes and what stays. That was one suggestion we put forward.

It is very undesirable to have the sunset clause—for all the work that is going to have to be done to be done effectively with a gun pointed at everybody's head saying, "Unless you've done all this analysis within a very restricted time period, the rules will fall." There is just endless room for mistakes.

One of the points we discovered when we were rewriting a lot of EU rules for the purposes of the withdrawal Act—which Eleanor knows very well about and can speak about in more detail—was that, as the legislation was being rewritten, it was discovered that there were problems with it. If we look down any of the lists of amended rules, as one might experience in practice, one normally finds that over the 2018 and 2019 period there were frequent amendments. As one version was done, it was found that there was a problem with it or something needed to be added, and another amendment was made. There just is not time within the process of this Bill for that amendment process.

There is also a technical problem. It is not clear that there is the power once a regulation has been rewritten for Ministers then to say, "Oh dear—we realise that this regulation contains the following defects; we would quite like to amend it now." I am not actually sure that the Bill contains a power for Ministers to do that. That is a bit of a problem.

Mark Fenhalls: I agree with what George just said. You will know far better than we do the stresses and strains on you as individual constituency MPs attempting to deal with those issues, and what in truth MPs can do as individuals scrutinising material like this. Ministers will know how pressured their civil servants are. I know from my dealings with civil servants how afraid they are of the possible forthcoming cuts. It is very difficult as an outsider to contemplate how the civil service can begin to cope with an assessment of what all this law involves.

The concluding point would be that if you have the list that George spoke to, that is a foundation for a proper ministerial division of responsibility as to who is doing what—which regulations affect which ministries and therefore what should our plan be? By the time we get through the end of next year, we might have dealt with financial services, perhaps, and with regeneration and levelling up, perhaps, because that covers environment and habitat and planning, but with that list and that firm foundation, you can make sensible evidence-based decisions about what to do. The frightening thing about the *FT* story—again, I know nothing about where it has come from—is the thought as to the unintended consequences, which nobody can possibly want, of not knowing what is out there. That is why, in a sense, a framework Bill is so flawed in its approach, because we do not know what we are dealing with.

The Chair: I have three questions to get in before 11.25 am, so let us have quick questions and quick answers, please.

Q63 Mr Fysh: Is it not the case that the people of the UK have given Ministers the responsibility to sort this legislation out now, in this Parliament? Are you not simply trying to frustrate that because you never voted for Brexit in the first place and you hate it with every fibre of your beings?

Mark Fenhalls: That is a political accusation that could not be more unfair. That is not the case at all. The short answer to your question is no. Parliament, rather than Ministers, should be making the decisions. That is the democratic point, if I were to engage with you on a democratic level. It does not matter what I did or did not want; I have said to you, and I mean it, that I have no difficulty with change—absolutely none whatsoever.

Q64 Mr Fysh: You just do not want it to happen now.

Mark Fenhalls: I want it to happen on the basis of evidence and—

Mr Fysh: Do you want to make it happen under a different Government?

The Chair: Marcus, you have asked a question and now you are interrupting Mr Fenhalls. Let him finish.

Mark Fenhalls: I want it to happen on the basis of evidence and with better proposals coming. What I do not want is to be lost in a world of uncertainty when we do not know what is coming, because, out of uncertainty, clients and people will stop doing business and they will not know where we stand.

Q65 Mr Jones: I want to come back to Ms Duhs on her point about the supremacy of retained EU law. As a consequence of the referendum in 2016 and all the legislation that has been introduced since then, this

country has recovered its sovereignty. Do you not think it repugnant to that sovereignty to have a state of affairs whereby the laws enunciated by a foreign jurisdiction and applied by a foreign court continue to have supremacy in this country?

Eleonor Duhs: Retained EU law is domestic law. We domesticated the statute book, and we did that to provide certainty for businesses, for individuals, for the Government and for users of the law, so that they would know what the law was. That was a policy of maximum certainty. Of course, it is now for Parliament—this was in the White Paper on the European Union (Withdrawal) Act 2018—to look at the law and to decide how it should change. We should absolutely make the most of the opportunities that we have, but it must be done in a thoughtful way. It must not be done in a rush and in a way that gives rise to legal uncertainty, because this is our domestic statute book and it needs to work for all of us. It needs high standards, it needs to enable trade and it needs to be the best post-Brexit outcome that we could have.

George Peretz: I can add something to that. It is slightly unfortunate that the EU withdrawal Act chose to continue what was called the principle of supremacy of EU law, because it is something of a misnomer. As Professor Barnard explained, it is actually a conflict-of-laws rule that gives priority to retained EU law over pre-Brexit statutes. You have to remember that pre-Brexit statutes were passed by Parliament, or made by Ministers, against an understood background that EU law was supreme, so you could say that when Parliament passed a pre-Brexit statute, it expected that statute to be inferior to EU law. It was the sea in which we were all swimming at that point, so I do not accept that there is anything constitutionally objectionable about having the conflict-of-laws rule.

Before you change the conflict-of-laws rule, you also have to think very carefully about its effect. One of the disappointments I have is that nobody in the Government or outside has produced any analysis at all of the concrete effect of removing the conflict-of-laws rule. I have likened it to pushing a very large button that says, "We do not know what happens if you push this button." That is not a wise legislative technique.

Q66 Stella Creasy: I will just say that we are all free to take advice from competing lawyers, but I do not think we are free in this place to treat our witnesses with contempt, regardless of whether we agree or disagree with what they have written.

All the lawyers have talked this morning about the approach of working with businesses and whether a regulatory burden could be created, which clause 15(5) is designed to avoid. We do not have any business witnesses coming forward, but we have heard that businesses are talking about risk being a drag on growth. Can you give us some examples of where you have worked with businesses with legal uncertainty? You have all talked about uncertainty, but can you explain what it could do to your clients?

The Chair: I am afraid we have 40 seconds left.

Mark Fenhalls: In 10 seconds, an organisation such as TheCityUK, which represents a range of financial services, accountancy, law and consultancy firms, will tell you that all its international clients are saying, "We don't know what the rules are going to be; therefore, we are troubled." There are business organisations out there from which you may choose to try to take evidence, and they may be useful to the Committee.

Eleonor Duhs: That is exactly what I am hearing too. They want to invest, but you cannot invest if you do not know what the law is going to be.

George Peretz: This is not my area of practice, but colleagues of mine at the Bar have made that point. If you are involved in a large development project—

The Chair: Forgive me, Mr Peretz, but I have to cut you off because we have reached 11.25 am. It is an existing law that we have to honour. Thank you to our three excellent witnesses. We appreciate your time and thank you for being here in person and for contributing online. Colleagues, we will meet again at two o'clock this afternoon for more fun.

11.25 am

The Chair adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till this day at Two o'clock.