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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

ORDER OF BUSINESS

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Abbreviation	Party/Group
CB	Cross Bench
Con	Conservative
DUP	Democratic Unionist Party
GP	Green Party
Ind Lab	Independent Labour
Ind LD	Independent Liberal Democrat
Ind SD	Independent Social Democrat
Ind UU	Independent Ulster Unionist
Lab	Labour
LD	Liberal Democrat
LD Ind	Liberal Democrat Independent
Non-afl	Non-affiliated
PC	Plaid Cymru
UKIP	UK Independence Party
UUP	Ulster Unionist Party

No party affiliation is given for Members serving the House in a formal capacity, the Lords spiritual, Members on leave of absence or Members who are otherwise disqualified from sitting in the House.

House of Lords

Wednesday 28 February 2018

3 pm

Prayers—read by the Lord Bishop of Salisbury.

Death of a Former Member: Baroness Turner of Camden

Announcement

3.07 pm

The Lord Speaker (Lord Fowler): My Lords, I regret to inform the House of the death of the noble Baroness, Lady Turner of Camden, on 26 February. On behalf of the House, I extend our condolences to the noble Baroness's family and friends.

Retail Trade: Online Suppliers

Question

3.07 pm

Asked by ***Lord Naseby***

To ask Her Majesty's Government what discussions they have had with the Competition and Markets Authority about the impact on the United Kingdom retail trade of online suppliers, such as Amazon.

The Parliamentary Under-Secretary of State, Department for Business, Energy and Industrial Strategy (Lord Henley) (Con): My Lords, Her Majesty's Government want all parts of the retail sector to thrive. As such, we engage regularly with a range of retailers' associations and the Competition and Markets Authority. If competition is not working effectively, the CMA has powers to investigate and to take action.

Lord Naseby (Con): Is my noble friend aware of the extent of the dominance of Amazon and the threat that it poses to the retail trade in general and, soon, the grocery trade and pharmaceutical trade? Amazon already controls, in the £1 billion market, 39% of the UK and 57% of the States. Against that background, will the Government level the playing field and consider what France, Germany and so on are looking at in terms of digital taxation, a special sales tax like the USA or indeed a higher rate of VAT, which is possible under our legislation? At the very least, bearing in mind that figure of 39% of today's £1 billion market in our country, will they set up a monopolies commission inquiry? If they do not, our retail trade as we know it will disappear.

Lord Henley: My Lords, It is a matter for the CMA to look at these matters. As I said in my original Answer, it has the power to look at that. With regard to some of the aspects of taxation, I believe that Her Majesty's Government have led the way on this issue internationally. HMRC continues to work with the online marketplaces to ensure effective action against sellers who are, for example, breaking United Kingdom VAT rules and to prevent new non-compliant sellers joining the market. We believe all those multinationals in that world ought to be paying the taxes due and we will not settle for anything less. Other than that, I think my noble friend should accept that many of the changes that are happening in the marketplace are being driven by what the consumer wants, and our job is to ensure that the marketplace can adapt to that.

Lord Carlile of Berriew (CB): Does the Minister consider it acceptable that a company that delivers its goods from a warehouse in the UK to a customer in the UK but has its headquarters in, for example, the Channel Islands should pay less VAT than a company that delivers its goods from the UK to the UK and has its headquarters in the UK? That is what is happening.

Lord Henley: I do not think I can take the noble Lord much further than I have at the moment. Colleagues in the Treasury and in Revenue & Customs are aware of some of these problems and are looking at them, and he will be aware of commitments that were made in our manifesto. I cannot take it much farther than that.

Lord Fox (LD): My Lords, the Minister is very sanguine about what is going on in our high streets, but today, Toys "R" Us went into administration, putting about 3,000 jobs at risk and Maplin has called in the administrators. There is a crisis on the high street. What are the Government doing to recognise the pressure that the digital economy is putting on the physical shops on our high street?

Lord Henley: We recognise this. As the noble Lord will be aware, we have made changes to the rates system to provide some help to the high street and will continue to do so. We have also established the Future High Streets Forum, which is chaired by my honourable friend the Minister for the Northern Powerhouse and Local Growth, Jake Berry. That will look at what we can do with retailers, but it is obviously up to retailers, as I said, to adapt to a marketplace changing as a result of consumer demand.

Lord Deben (Con): Is my noble friend aware that this is a dangerous situation and requires urgent action? I refer noble Lords to my entry in the register of interests. Retailers have to pay business rates, which means that they start off at a significant disadvantage. They have to contribute to the producer responsibility levies—another disadvantage. They have to pay the proper apprenticeship levy—another disadvantage. We cannot wait for a general statement; we must act now. The latest proposition is that retail trading may decline by 22% in the next year. It is time for the Government to move urgently.

Lord Henley: I made it clear that we have made changes in the Autumn Budget, with measures worth £2.3 billion by cutting business rates and trying to bring a degree of fairness to the system. There are limits to how far one can go and one must accept that a lot of what is happening is a result of what consumers want. It is obviously up to the retail sector itself to adapt and change in the face of changing consumer and social trends. The Government are doing what

[LORD HENLEY]
we can. That is why I mentioned the Future High Streets Forum, chaired by my honourable friend and why we have announced changes to rates. Thereafter, it must be for the retail sector itself to see what it can do to change.

Lord Whitty (Lab): My Lords, is the noble Lord aware that a couple of years ago, a sub-committee of your Lordships' EU Select Committee—under my chairmanship, as it happens—produced a report on online platforms? We found that the apparent consumer advantage was taken advantage of by the big online platforms, and the competition authorities at the European level were finding that difficult to come to terms with—witness the ongoing problem with Google. Is it not now important, post Brexit, that the competition authorities here tackle the domination and abuse of competition by the online platform giants?

Lord Henley: My Lords, that is why we set up the CMA in 2013. That is why it has the powers it has and the ability to investigate abuse when it sees it.

Baroness Gardner of Parkes (Con): My Lords, has the Minister seen the story in the paper about Airbnb wanting to become as big as, or bigger than, Amazon? If that happens it will obviously threaten all the high street tourist agencies, which have said that it would take over tourism completely. Will the answers he has given today apply equally to Airbnb, if it becomes half as big as Amazon?

Lord Henley: My Lords, again it is a matter for the CMA to look at that, but the Government will obviously keep these matters under review as well. These are social changes happening in the marketplace, and very often because that is what consumers want.

The Earl of Lytton (CB): My Lords, I declare my professional and LGA interests. Does the Minister agree that, in addition to the challenge of online retailing, rental levels, underinvestment in retail streets and the business rate system, which imposes one of the highest recurring taxes of its kind anywhere in Europe, conspire collectively to damage profits prospects and the public experience of many traditional shopping environments? Furthermore, does he agree that trying to shift the burden of reliefs for business rates on to hard-pressed billing authorities is not the right answer?

Lord Henley: The noble Earl makes some valid points. These are matters that can and will be looked at. The important point is that we have done what we can to help with rates, and we hope that that significant help will make it easier for the retail sector.

Alcohol: Minimum Unit Pricing

Question

3.15 pm

Asked by ***Lord Rennard***

To ask Her Majesty's Government what assessment they have made of the cost benefits to the National Health Service and police of introducing minimum unit pricing for alcohol in England.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, data from the Sheffield University alcohol policy model in 2015 estimated that, in 10 years, minimum unit pricing could on an annual basis reduce alcohol-related deaths by 356, alcohol-related hospital admissions by 28,515, and crime by 34,931 crimes. Minimum unit pricing remains under review and the Government will consider the evidence of its impact once it is available.

Lord Rennard (LD): My Lords, figures issued today by the Institute of Alcohol Studies suggest that, for each hour worked, it is possible to buy three times as much supermarket beer as was the case 30 years ago. Given the statistics which the Minister cited from the University of Sheffield, is it not urgent that we act to prevent the sale of perhaps four cans of beer in a supermarket for as little as £1?

Lord O'Shaughnessy: As I said, the Government are looking at this issue and, following the Supreme Court judgment, the Scottish Government can move ahead with their plans. The issue is not about the lack of evidence on whether reducing drinking has health benefits, but about making sure that any new system is implemented in a way that is fair on those who drink sensibly, particularly those on low incomes. The approach we have taken up to now is to use the tax system judiciously, including high duty levels for drinks such as white cider. As we move ahead and look at the evidence, we have to consider not just the health benefits but the economic costs that could be imposed on perfectly sensible drinkers.

Lord Ribeiro (Con): My Lords, liver disease, unlike cancer, is the only major cause of premature death that has increased since 1970. As the Minister rightly says, the Scottish Government have this week introduced minimum unit pricing. Would the Minister be willing to meet me and the chairman of the Alcohol Health Alliance to discuss what we in this country can do to follow the Scottish lead?

Lord O'Shaughnessy: I would be very happy to meet my noble friend and the colleague he mentioned.

Baroness Watkins of Tavistock (CB): In terms of austerity, can the Minister justify neglecting the £3.2 billion cumulative reduction in alcohol-related harm over five years that the Public Health England evidence review into the policy cites with an MUP of 60p? That is what would be generated.

Lord O'Shaughnessy: As I have said, and reiterate to the noble Baroness, we will look at the impact of minimum unit pricing. We must not just take into account any revenue that we generate and the health benefits that could accrue, but make sure that it provides a fair deal for those who drink sensibly.

The Lord Bishop of Southwark: My Lords, the report of the University of Sheffield referred to earlier said that the top 30% of drinkers consume 80% of all alcohol consumed, as measured in pure ethanol; and

that, of the beer sold in supermarkets, a disproportionately high amount is sold on promotion—and much of that well below 50p per unit. Does the Minister agree that a floor in the unit price of alcohol would help to yield a more orderly, content and healthy society by bearing down on demand?

Lord O'Shaughnessy: The statistic mentioned by the right reverend Prelate is in a way even more alarming because 4.4% of the heaviest drinkers account for a third of all alcohol drunk. A lot of people are drinking sensibly, within the guidelines. We need a system capable of targeting those who are sensitive to both price and health interventions, among those drinking in a way that is very deleterious to their health. We are doing that for a range of interventions—public health and taxation. As I said, we will look at the progress of minimum unit pricing in Scotland as it takes place.

Lord Brooke of Alverthorpe (Lab): My Lords, has not the Minister just made the case for minimum unit pricing? Could I remind him to cast his mind back to all the arguments advanced by his side against changes to tobacco and smoking—that everybody was going to be hurt by it if we increased the price? We had to increase the price for the benefit of everyone, and the same now applies to alcohol. All the evidence that he is getting from all his senior medical advisers is that he should introduce a minimum unit price. Why will he not move on this?

Lord O'Shaughnessy: I do not recognise the picture of obstruction about tobacco and smoking. This Government have done a huge amount, and smoking levels have never been lower. In terms of increased pricing, history tells us, if you go back hundreds of years—think about "Beer Street" and "Gin Lane"—that taxation has a really important role to play in promoting better drinking habits. That is the approach that we have taken with changes in duty for drinks that are particularly problematic, such as white cider. As I have said, we will look at how minimum unit pricing in Scotland progresses.

Baroness McIntosh of Pickering (Con): Is the Minister aware that Scotland has banned or tried to reduce BOGOF—buy one get one free—at supermarkets? That is the evidence that we heard on the ad hoc committee, which I had the honour to chair, on the scrutiny of the Licensing Act 2003. Changing behaviour is a good way forward, rather than the potentially regressive tax of MUP.

Lord O'Shaughnessy: My noble friend speaks with great wisdom about making sure, not just with alcohol but with other health issues around food and drink, that we have a look at making those kinds of promotions not possible.

Baroness Jolly (LD): My Lords, the Minister has acknowledged that the evidence is absolutely there and that he will look at it in the near future, but when might a decision be made? How long does he need the Scotland experiment to last before he actually makes a decision?

Lord O'Shaughnessy: The evidence is there, and it is strong—but there is disputed evidence. The coalition Government carried out a consultation in 2013 and found that the evidence was not entirely conclusive. However, we will have a live experiment going on in Scotland, and we expect in two to three years to see evidence of its impact.

Disabled Access: Standards

Question

3.22 pm

Asked by ***Baroness Deech***

To ask Her Majesty's Government what steps they have taken to address the criticism in the 2017 report of the United Nations Committee on the Rights of Persons with Disabilities of the lack of obligatory and implemented accessibility standards in the United Kingdom, in particular in relation to transport and the physical environment.

The Parliamentary Under-Secretary of State, Department for Transport (Baroness Sugg) (Con): My Lords, the Government are committed to improving the lives of disabled people and to delivering a transport system that works for all. This is why we have consulted on a draft accessibility action plan, which contains a number of proposals to reduce barriers to disabled people accessing transport services. We aim to publish the final version of the plan in the summer. It will set out the UK's ambitions for delivering accessible travel, and timescales for delivery.

Baroness Deech (CB): I thank the Minister for that, but it is just another plan. How can the Government be so defensive in the face of the findings by the United Nations committee, when there has been no progress on accessibility over the last three years in which I have been involved in it, and the difficulties of, for example, shared space? On sports grounds, the Government did not support the excellent Bill put forward by the noble Lord, Lord Faulkner, and they did not support the excellent Bill put forward by the noble Lord, Lord Blencathra, to put in ramps over little steps. The Government have not come around to finding a way of licensing public buildings that ensures access for disabled and elderly people. It is not good enough to keep on consulting endlessly on plans and putting burdens on business ahead of the rights of disabled people.

Baroness Sugg: My Lords, I would say that we have made quite a bit of progress on the accessibility of transport in recent years. As a result of the investment made under the access for all programme, more than 75% of rail journeys will now be through step-free systems, and we have made significant progress across the rail system, and also the bus system.

Baroness Brinton (LD): My Lords, I served on the Select Committee on disability chaired by the noble Baroness, Lady Deech. Evidence that we took from

[Baroness Brinton]
the Minister, senior civil servants at the Department for Transport and, indeed, from train operating companies, indicated their intention to improve access for wheelchair users on trains. Over the last year, many train operating companies, including Southern Rail, have now instituted a 24-hour rule, with no flexibility at all and no service at unmanned stations for people in wheelchairs. Will the Minister meet me, the noble Baroness, Lady Grey-Thompson, and any other disabled users? We are hearing a lot from people who say that they are not getting a baseline standard of service, and that it is going downhill.

Baroness Sugg: My Lords, as part of the franchising process we are introducing an accessibility delivery plan, which will ensure that the end-to-end journey experience receives due focus when franchises are awarded. However, I will be happy to meet the noble Baroness to discuss this further to see what more we can do, as I do understand that this is a problem.

Baroness Eaton (Con): Will my noble friend the Minister explain what work she is doing to enable disabled people to access flying more easily?

Baroness Sugg: My Lords, 85% of disabled passengers who use assistance services at UK airports are satisfied with that service—but, obviously, that leaves 15% who are not, so there is more to do. The department is working on an aviation strategy, looking at ways to further improve air travel for disabled people. I will meet representatives of the Flying Disabled campaign later this month to discuss this further.

Lord Dubs (Lab): Has the Minister any information on how blue badges are being used fraudulently—in other words, used improperly, thereby depriving disabled people of parking access?

Baroness Sugg: I am afraid that I have seen no direct evidence of that. We are consulting on blue badge eligibility, including looking at whether they can be used for people with hidden disabilities. That consultation ends next month. I am sure that it will also look at the misuse of those badges and what we can do to address that.

Lord Tebbit (Con): My Lords, when my noble friend is looking at these matters, will she also look into the problems faced by people with assistance dogs who are frequently refused access to premises? That applies particularly to those with hearing dogs, for example, and is a particular problem where the premises are owned or controlled by people who have a cultural dislike of dogs.

Baroness Sugg: My Lords, we are working closely with all parts of the travel sector to ensure that there is accessibility for assistance dogs across trains and taxis. But I will certainly look into the accessibility of buildings.

The Lord Bishop of Salisbury: Does the Minister agree with the UN committee's concern that not enough is being done to apply the Convention on the Rights of Persons with Disabilities and to involve disabled people themselves in decisions that affect their lives? What have the Government heard from disabled people themselves about the impact of austerity on their access to the physical environment and to housing, transport, information and other services? How will the Minister respond to disabled people's concerns about the UK's increasing non-compliance with existing legislation affecting their access to these things—for example, our meeting the obligation to carry out impact assessments and gather statistics about policies likely to have a disproportionately negative impact on disabled people?

Baroness Sugg: My Lords, as I said, the Government are absolutely committed to improving the lives of disabled people in both the UK and through our international development work. We are constructively considering the UN recommendations and will provide an update on the report, as requested, this summer. We have some of the strongest equalities legislation in the world, including the Equality Act 2010. We also have a strong record of engaging with disabled people to inform policy-making across government, supported by clear guidance stating the need to consult with all groups impacted—but of course we seek to continually improve our practices. For example, as I just mentioned, the Department for Transport is consulting on proposed changes to the blue badge scheme, and the views of disabled people received during this consultation will be critical in finalising policy.

Baroness Lister of Burtersett (Lab): My Lords, disability organisations have raised concerns about the effect on accessibility standards of our leaving the European Union. What assurances can the noble Baroness give them?

Baroness Sugg: My Lords, as noble Lords will know, all existing EU legislation will be transferred to the UK statute book through the European Union (Withdrawal) Bill, and the current standards that people have will not be reduced as we leave the EU.

Baroness Masham of Ilton (CB): My Lords, following the question about trains, the noble Baroness will not be aware that I came down on Monday in a freezing cold carriage with no heating at all. Also in the carriage was a man who had nobody with him. Neither the guard nor the trolley came down, and my helper gave this man, who was freezing, a cup of tea and some sandwiches. Could they not do better?

Baroness Sugg: My Lords, I am well aware that many people will have been dealing with the effects of the cold weather, and I am sorry to hear about the noble Baroness's experience. We are working very carefully with rail companies on training, which I think is key here. It is a condition of a train operator's licence that it provides disability awareness training for staff—but of course there is always more that we can do.

ISIS: Trial of British Citizens

Question

3.30 pm

Asked by ***Lord Alton of Liverpool***

To ask Her Majesty's Government whether they are taking measures to ensure that British ISIS members captured overseas are tried for crimes against humanity, war crimes and genocide; if so, what steps they are taking; whether those individuals will be tried in Britain; and where British citizens who have had their citizenship revoked will be tried.

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, we are clear that there must be accountability for Daesh's crimes in individual cases of Daesh members captured overseas. Foreign fighters should be brought to justice in accordance with legal due process, regardless of their nationality, where there is evidence that crimes have been committed. The decision on the appropriate process will depend on the individual circumstances.

Lord Alton of Liverpool (CB): My Lords, I thank the Minister for that reply, but does the accountability that he has just referred to extend to support by the Government for the creation of a special regional tribunal to hold to account those responsible both within ISIS and in the regime in Syria for genocide, crimes against humanity and war crimes? Does he agree that execution without trial or the shipping of UK citizens to other national jurisdictions are no substitute for the prized rule of law and that the Nuremberg principles and the Geneva and Hague conventions will be rendered worthless unless those who have inflicted mass murder and appalling suffering are prosecuted and brought to justice? Does he also agree that a failure to do so will merely embolden others to believe that they can carry out atrocities with sheer impunity?

Lord Ahmad of Wimbledon: My Lords, the noble Lord will be aware that in September last year the United Kingdom Government, along with other members of the Security Council, drove the issue of Daesh accountability. I am sure we were very pleased to see the passing of Resolution 2379, which is focused on ensuring that, as peace prevails in Iraq, evidence is gathered and the perpetrators of these crimes are brought to justice, exactly as the noble Lord said. On his broader point about ensuring that justice is brought to bear on those who have committed crimes, I assure noble Lords that we expect everyone, including foreign fighters and those holding British nationality who are captured in either Iraq or Syria, to be treated in accordance with international humanitarian law. As the noble Lord will know, that includes ensuring that they have the correct legal representation by those who speak their language, among other conditions.

Lord Anderson of Swansea (Lab): My Lords, the noble Lord's Question refers to some very dangerous individuals who could cause considerable harm if they were allowed to return to this country freely. The problem is surely finding adequate evidence that will stand up in a court of law. Therefore, are the Government now providing, and are they prepared to provide in the future, funds to third-party organisations to help them bring forward evidence of ICC crimes?

Lord Ahmad of Wimbledon: I agree with the noble Lord. The first duty of any Government is the security of their citizens, and I believe we all subscribe to that. On his second point, I referred to the Security Council resolution and he will be aware that the Government are also providing financial support in this regard, having already allocated £1 million for that purpose.

Baroness Warsi (Con): My Lords, is my noble friend aware of the case of Jack Letts, a British-Canadian national who travelled to areas under the control of Daesh in 2014? In 2017 he was captured by the YPG, the Kurdish People's Protection Units. I am sure that my noble friend will say that we do not have consular support in Syria. I recognise that, but we have regular contact with the YPG. In the light of the sentiments that he expressed and the Question raised by the noble Lord, Lord Alton, can he let the House know whether the British Government have made any contact with Jack Letts and, if not, why not?

Lord Ahmad of Wimbledon: My Lords, first of all, my noble friend will be fully aware that the key advice we have given in all respects to anyone seeking to travel to the area is not to do so because they then open themselves up to great danger. She is correct to say that the UK does not have a consular presence in Syria and cannot provide support to British nationals in Syria in this regard. On the specific case that she raises, I will certainly write to her to make it clear that whatever contact and support we can provide, we have. However, as has been talked through by respective Ministers across both Houses, the general and important point is: in both Syria and, to a lesser degree, Iraq, the key advice has always been not to travel to that area because the Government cannot provide consular assistance until we have assistance on the ground.

Lord Collins of Highbury (Lab): My Lords, of the two British men who have been accused of committing crimes on behalf of ISIS, the Defence Secretary says that no way should they come back to the United Kingdom to face trial. The Home Secretary is less certain. We have even had a former Minister say that people should be shot for their crimes if they are in a warzone. Surely the Minister can take the Government's responsibility seriously. The line he is giving us this afternoon is the correct one. These people must be held to account and put to trial, and upholding the rule of law must be our vital concern.

Lord Ahmad of Wimbledon: My Lords, it is not just the line that I have been given, it is the line that I believe in as the Minister with responsibility for human rights. We must hold people to account but, at the same time, in parallel, ensure that international humanitarian law is upheld.

Lord Thomas of Gresford (LD): The Minister will be aware that there is jurisdiction under the International Criminal Court Act 2001 to try war crimes in this country for British nationals, but it has so far been used only against British soldiers. Is there any reason why it should not be used against British nationals who have formed part of ISIS?

Lord Ahmad of Wimbledon: On the issue of the process that would be used, as I said, the underlying principle and approach that the Government have taken is to ensure that whoever is tried, and wherever they are tried, it is done so according to the principles of international humanitarian law. All pathways in that regard will be considered.

Arrangement of Business

Announcement

3.37 pm

Lord Taylor of Holbeach (Con): My Lords, before we move on to day three of the Committee stage on the Bill, now might be a convenient point for me to say a word about next week.

Noble Lords will be aware that we have made steady progress on the Bill, but it has been significantly short of the targets we have set. On the part of the Government, let me say that we recognise that the House has approached the Bill in the spirit of genuine scrutiny, but we also need to continue to make progress with this important Bill. With the agreement of the usual channels, I have therefore arranged for the House to sit early on Wednesday 7 March, at 11 am. It would not be my intention to sit late on that day. My noble friend the Leader of the House will move a business Motion tomorrow to enable Questions to be taken at their normal time of 3 pm.

Noble Lords may also notice that we have postponed the Questions for Short Debate which were scheduled as dinner break business for this week and next. I am grateful for the co-operation and good will of all those who had tabled these debates. My office will endeavour to offer them suitable alternatives. It is my intention that, should progress allow and should those involved desire it, we should be able to ensure that all those speaking on the Bill have a short break at a convenient point in lieu of dinner break business and, where necessary, we will adjourn the House during pleasure. This will of course be kept under review by the usual channels as the Bill progresses. I am grateful for their continued constructive spirit.

Finally, I have another announcement to make. Members arriving early for Questions today may have already visited the Robing Room, where the House authorities have arranged the annual Members' open day. Stands cover the full gamut of services available to Members and it is open to all Members and their staff. I end my statement by whole-heartedly recommending that all noble Lords find time to pay a visit. They may be advised to wrap up well.

Lord Foulkes of Cumnock (Lab): Perhaps I may ask the Government Chief Whip a question in relation to his original statement. He clearly indicated that, on days when we meet in the morning such as next Wednesday, he would not expect us to continue late into that evening. Could he then explain why it is that Deputy Speakers are being asked for their availability after 10 o'clock next Wednesday?

Lord Taylor of Holbeach: The noble Lord will know that the House has to take all precautions. We are not expecting to sit late. The spirit in which I have been discussing this within the usual channels is that we hope to see the Bill move a bit faster than it has been and, by giving it extra time, Members will have the opportunity to scrutinise it properly. However, it is often the case that the House has to sit on Bills after 10 o'clock in the evening. It is not my intention to do so, but I am suggesting that it may suit the House that that is the case.

Lord Adonis (Lab): My Lords, the Government Chief Whip's statement was somewhat convoluted in the first part. Assuming that we will be continuing until 10 o'clock, did I take him to be giving a definite commitment that there will be a break for dinner? Is he aware that there was considerable resentment in the House on Monday that we sat for nine and a quarter hours in debating the Bill and the Government did not grant us a break? The noble Lord needs to be aware that some of us are not going to be starved into submission.

Lord Taylor of Holbeach: I am sure the noble Lord would not expect that that was my intention. Following a communication from the noble Lord, I discussed this matter with the usual channels to find a way of giving those who are dealing with the Bill an opportunity for refreshments. For example, this evening there will be a couple of repeat UQs. These will be taken in a half-hour period, when the House will resume and the Committee stage will be suspended. It is my intention that we should always have a half an hour, at any rate, where people can be relieved of attention to the Bill before the House.

European Union (Withdrawal) Bill

Committee (3rd Day)

3.43 pm

Relevant documents: 12th Report from the Delegated Powers Committee, 9th Report from the Constitution Committee

Clause 2: Saving for EU-derived legislation

Amendments 14 and 14A not moved.

Amendment 15

Moved by ***Lord Pannick***

15: Clause 2, page 1, line 12, leave out paragraphs (b) to (d)

Lord Pannick (CB): My Lords, Amendment 15 arises out of the report of your Lordships' Constitution Committee published on 29 January which I commend to the Committee. The amendment has been tabled in

the names of four members of the Constitution Committee, myself and the noble Lords, Lord Norton of Louth and Lord Beith, and our much respected chairman, the noble Baroness, Lady Taylor of Bolton.

One of the matters about which we expressed concern is whether the Bill as currently drafted will ensure, as the Government intend, the clarity and certainty that is required of the law as from exit day. I should emphasise that the amendments to the Bill which derive from the Constitution Committee's report are being moved as probing amendments. We believe that we have identified problems that require debate and consideration by the Government, but we are not suggesting that our proposed solutions to these difficult problems are the last word.

Amendment 15 addresses what we believe to be the first fundamental difficulty with the approach adopted in the Bill. Clause 2 includes within the scope of the concept of EU-derived domestic legislation not merely those regulations which have been made under powers contained in the European Communities Act 1972 that Clause 1 is of course going to repeal, it also purports to include within the scope of EU-derived domestic legislation other primary or secondary legislation which has been enacted by normal procedures—that is, not using the powers in the 1972 Act but legislation that was enacted for the purpose of implementing our EU obligations or which relate to them. A good example is the Equality Act 2010. For the purposes of this Bill, Acts of Parliament such as the Equality Act are to be treated as EU-derived domestic legislation even though they would continue to be part of domestic legislation without the Bill. As I understand it, that is the purpose of Clause 14(6).

The scope of Clause 2 matters for two reasons. First, if an enactment falls within Clause 2 and it is therefore by reason of Clause 6(7) retained EU law, the delegated powers which Ministers will have under Clause 7 will apply. The Committee will come to consider those delegated powers in due course because they are very extensive. A number of amendments have been tabled in relation to them. The other reason this matters is that the consequence of a provision being retained EU law is that the supremacy principle under Clause 5, which again we will come to, also applies, so the retained EU law such as the Equality Act will take priority over other laws which are enacted up until exit day. Clause 2 therefore poses real problems for legal certainty because some of the provisions of the Equality Act, for example, will have been enacted for the purpose of implementing EU law obligations while some will have been enacted for other purposes. Some of the sections of the Equality Act relate to our EU law obligations while others do not.

Given that, perhaps I may ask the Minister, the noble and learned Lord, Lord Keen, who I believe is going to respond for the Government on this, whether Clause 2 means that if any part of the Equality Act, as an example, was passed in order to implement an EU law obligation or relates to one, the whole of the Equality Act is within the scope of Clause 2 as retained EU law, or does Clause 2 mean that only those provisions of the Equality Act which implement an EU law obligation or are related to it are within Clause 2? I ask this because the language of Clause 2 focuses on the enactment, which suggests a statute by statute approach. If that is right, Ministers will be conferring upon themselves through Clause 7 a very wide power to amend by delegated legislation provisions of the Equality Act or other Acts in which provisions were enacted for other purposes. Indeed, if Clause 2 applies to the whole of the Equality Act then the supremacy principle will give priority to the whole of the Equality Act over other legislation enacted up until exit day. We need to know the answer to that question.

The Constitution Committee's view is that the concept of EU-derived domestic legislation in Clause 2 ought to be confined to those enactments made under the powers conferred in the European Communities Act, which is what the Bill is all about—powers that the Bill would repeal. That would have the virtue of clarity and certainty. It would cut down the scope of the delegated powers that Ministers will enjoy under Clause 7 and limit the supremacy principle. The Constitution Committee respectfully suggests that that approach accords with constitutional principle. It said at paragraph 22 of its report:

> "It is not constitutionally necessary or appropriate for primary legislation, which will continue in force in any event, to be treated as 'retained EU law' by clause 2 and subject to the powers of amendment in clause 7".

The Bingham Centre for the Rule of Law, which has made very valuable observations on these issues, has pointed out, and I agree, that if the Committee were to amend Clause 2 in this respect, consequential changes would be needed to Clause 6 to ensure that provisions in the Equality Act, for example, that implement EU law will continue to be interpreted by reference to judgments of the Court of Justice in Luxembourg delivered before exit day.

These are difficult issues but the Constitution Committee suggests that they are important. I look forward to hearing the Minister's response. I beg to move.

The Lord Speaker (Lord Fowler): My Lords, I should notify the Committee that if Amendment 15 is agreed to, I cannot call Amendment 16 by reason of pre-emption.

Lord Adonis (Lab): My Lords, the noble Lord Pannick, is a great expert in these matters. Could he give the Committee the benefit of his advice on whether he believes that converted law under Clause 2 has the status of primary or secondary legislation?

Lord Pannick: That is a very important question that we are coming to in later amendments. The Constitution Committee addressed that question. It has advised the House that one of the defects of the Bill, it respectfully suggests, is that it does not address that vital question and that legal uncertainty will be caused without it being addressed. The Constitution Committee suggested that retained EU law should be given the status of primary legislation, but there is a variety of views on this. The committee advised—I do not speak for the committee, but I am reporting what its report said—that this issue has to be addressed in the Bill. We are coming to it in later amendments.

Lord Beith (LD): My Lords, I speak as a member of the Constitution Committee to make it clear that the committee would say that the noble Lord, Lord Pannick, has spoken very lucidly for it in setting out the amendment. We are talking about provisions in Acts of Parliament—the Equality Act is one example—that implement EU obligations and would not be repealed by withdrawal or by the repeal of the European Communities Act. Yet Clause 2 opens up to the process of repeal and modification by statutory instrument provisions in UK statutes and in the legislation of the Scottish and Welsh Parliaments. These are provisions in law that are not nullified or made inoperative by the act of withdrawal; they would stay on the statute book. Of course, the legislation may contain features that do not of necessity arise from the requirements of EU directives or other EU obligations. We talk much about British gold-plating of EU measures. We will probably find in a number of measures which this clause would draw in features which were clearly not within the scope of the requirement placed on us by our membership of the European Union. The committee concluded:

"The effect is to inflate the range of domestic law—including primary legislation—in relation to which the ministerial "correction" powers … can be exercised".

These are powers the extent and scope of which are extremely worrying to the committee.

As the noble Lord, Lord Pannick, said, the Bingham Centre has produced a helpful analysis of many of the things that the committee was concerned about. In almost all cases, it agrees with the committee's analysis, but, in some, it does not agree with the committee's proposed remedies. In this case, it suggests that if we go down the route proposed by Amendment 15, there should be an amendment to Clause 6 to make it clear that provisions in EU case law should be taken into account when interpreting EU-derived law which is already on the statute book. The logic is that it is far better that the law is in only one place rather than in two, but we would not want by that means to take away from the court the opportunity to take into account EU-derived case law prior to our withdrawal from the EU, if it ever happens.

The committee is on to an important point. I hope that we can explore as a result of this short debate ways of dealing with it.

Baroness Taylor of Bolton (Lab): My Lords, while I do not want this section of the debate to be dominated by members of the Constitution Committee, I should congratulate my noble friend Lord Pannick on the way he presented the amendment despite it certainly not being in the interest of the legal profession—if we manage to get legal certainty in the Bill, the lawyers will not have their field day. However, I fear that, unless we achieve legal certainty and the clarity that my noble friend mentioned, we will be in real difficulty. Our committee has put forward suggestions, but we do not think that they are the only ways forward. It is important at this stage that the Government recognise the extent of the problem and the damage that will be done if we do not have some amendment and some concessions from them in this area. It is of course an area linked to the other parts of the Bill, because, unless we make changes here, the powers that the Government will have under Clause 7 will be completely unacceptable because of the breadth of legislation there captured.

I therefore urge the Minister to reflect carefully not only on the suggestions of the Constitution Committee but on those of others outside, because this problem will dog the Bill for ever if we do not make some changes here.

Lord Mackay of Clashfern (Con): I support the idea that we should get legal certainty in the Bill, and if that damages the interest of the legal profession, it is damage in the public interest.

However, I venture to suggest that it may be wise to leave this provision pretty much as it is. That is because quite a lot of legislation was passed in the light of obligations imposed by the European Union, but we proposed our own legislation to deal with it. As the noble Lord, Lord Pannick, excellently illustrated, that legislation is exemplified by the Equality Act. I read this clause as referring only to the part of the enactment,

"so far as … passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act".

As the noble Lord, Lord Pannick, said, "enactment" sometimes suggests a whole Act, but this provision restricts it to the part of the enactment that deals with this point.

As the noble Lord, Lord Beith, said, it is quite likely that some of these measures are gold-plated—there used to be quite a lot of suggestions from various quarters that we went in for gold-plating. When I was in a sense responsible for some of these matters, I discovered that the gold-plating was more a result of some antagonism to the Bill in question than it was gold-plating in the sense of going beyond what the European Union required. So far as there is gold-plating of that sort—that is, unnecessary as far as the European Union is concerned—I do not think that this clause would strike it, because it is "so far as" the thing is made in view of the provisions "in section 2(2)(a) or (b)" and so on of the Act. Of course, as has been pointed out, it is perfectly likely that in some of these provisions that were introduced in that way adjustment will be required because we are leaving the European Union.

Some provisions—I have not looked too closely at how many but I imagine there might be quite a few—of these ordinary Acts of Parliament will have a connection with the European Union that may be affected by our leaving it. Therefore it is important that in that situation a power to deal with that matter in a reasonable time would be required, and we will be looking at these later. Therefore, I am inclined to think it may be better to leave this provision as it is. I am very interested to hear what my noble and learned friend the Minister has to say about that.

As for the supremacy principle, I will have something to say about that if I happen to be present when it arises. I said at Second Reading and I say again that I think the Constitution Committee has produced a superb solution to that problem, which enables us to forget forever the supremacy of European law over our law.

4 pm

Lord Adonis: My Lords, there is no more terrifying ordeal in your Lordships' House than intervening in a debate between lawyers, particularly following the noble and learned Lord. It appears to me, however, as a lay man reading the Bill for the first time and reading the reports of our Constitution Committee, that a critical issue relating to all the debates we shall have on Clause 2 and the following clauses is whether converted law is primary or secondary legislation. Will the Advocate-General for Scotland give us his view, so that that can colour our discussion of the later groups?

When I was wrestling with this issue and reading debates in the other place, I noticed that the Solicitor-General said on 15 November last year:

"Converted law … will not automatically have the status of either primary or secondary legislation".

He did not then go on to say what will determine whether it is primary or secondary legislation. Somewhat confusingly, he then said:

"Indeed … paragraph 19 of schedule 8 sets this out: 'For the purposes of the Human Rights Act 1998, any retained direct EU legislation is to be treated as primary legislation'".—[*Official Report*, Commons, 15/11/17; col. 416.]

Again, as a layman reading this, I wonder whether that means only in respect of the purposes of the Human Rights Act 1998 or with general applicability. I know that the Advocate-General for Scotland is good at speaking plain English as well as legalese, so will he set out for us in plain English his view of whether the generality of law converted into UK law under the Bill will be primary or secondary legislation?

Baroness Young of Old Scone (Lab): My Lords, I repeat the worries about coming in on a debate populated primarily by lawyers, but if my noble friend Lord Adonis can do it, I can have a go. I very much welcomed the intent of the Constitution Committee and the amendment of the noble Lord, Lord Pannick, but I subsequently received a briefing that raised a question about it. I am very grateful to the noble Lord, Lord Pannick, for alluding to the issue of the amendment meaning that UK courts could not be required to consider existing European court decisions when interpreting and applying provisions that have been implemented through UK law by Acts of Parliament or regulations introduced under Acts of Parliament other than the ECA 1972. I am grateful that he referred to the Bingham Centre proposal that there needed to be consequent amendments later in the Bill to cover that. I want to highlight the importance of that because the reality is that about 80% of environment law stems from the European Union and much of it would be caught by this provision. We just need to be sure that if this provision were recognised as needing to be addressed by the Government, we will see that subsequent amendment to allow ECJ decisions to be taken into account.

Lord Mackay of Clashfern: I entirely agree with that proposition but since the noble Lord, Lord Pannick, had mentioned it, I thought for the sake of brevity I would leave it out of my remarks.

Baroness Bowles of Berkhamsted (LD): My Lords, I do not entirely agree with the Constitution Committee and so, with suitable temerity, I will suggest modifications to its approach as we go through this and later clauses. Not surprisingly, I look at matters from the perspective of recent familiarity—one could say rather too much familiarity—with the making of EU legislation. So I know rather more about the input end of the pipeline than the output. But it is at the EU end of the pipeline that the genetic markers of EU principles and case law get attached, and since those markers have been reproduced in UK case law and the reasonable expectations of those affected, I have great concerns.

I accept that it is not easy to move legislation made in one constitutional environment to a different one without losing something. The Government have tried and their approach leads to various types of uncertainty, which are then plugged, as far as they can be, through sweeping ministerial power, which brings forward more concerns and uncertainty. So something needs to be done but the Constitution Committee package, while having good ideas to build on, does not quite gel for me. I have made some suggestions to sort out the wrinkles as I see them. They come mainly in amendments to later clauses but they have backwards relevance to Amendment 15. Like others, perhaps, I also discovered on Monday, thanks to my noble friend Lady Hamwee, that the Bingham Centre had done a report, which I think I can claim in part has similar conclusions to mine on Clause 2 and, indeed, elsewhere.

When it comes to Amendment 15, moved by the noble Lord, Lord Pannick, I am torn in two directions. Doing what the amendment suggests, as with other suggestions from the Constitution Committee report, is not without constitutional cost, as is mentioned in the report in respect of the Clause 5 proposals. But it happens with Clause 2 as well: some legislation that currently has an EU dimension, and therefore would benefit from judicial interpretation using EU general principles such as proportionality and fundamental rights, will no longer benefit from that. I could add to that environmental issues that are in the EU constitution. Against that, it reduces the extent of legislation that falls to be amended under Article 7 and there is a lot to be said in favour of doing less—there will be less confusion, more time for scrutiny of the remainder, and less chance of this becoming the great gold-plating Bill.

I am not immune to suggestions that if a directive has been transposed via an Act of Parliament and that Act of Parliament has established delegated powers that have been used for other transpositions, then Parliament knew what it was doing. But without examining all the documents and the details, what was the background? Did the Government say that they had to do certain things because of the EU? Did they in fact say that to close down some other amendments? What did Members have in their minds about equality and other EU fundamental rights that were well known? They could not just say that they were not taking those into account.

If you are looking at the hybrids, as has been mentioned, some Acts may be—let us say for simplicity—half EU and half UK. One that I would choose is the Data Protection Bill, where the UK has been prepared to go much further than the EU in what can be retained. You need to know which bit is UK-only and which bit is European-only. I have always assumed

[Baroness Bowles of Berkhamsted]
that it was to only the EU-derived part that supremacy and all the EU general rights would apply, and you would have to look at how it was couched.

There is also the matter of onward intertwining. The Bingham Centre also uses the example, at the foot of page 21, of the Equality Act 2010. However, it points out that there are decisions of domestic courts interpreting that Act in the light of CJEU case law, so our decisions are going to be consistent going forward. It is considerations such as that that then provoke its first conclusion on this, which is in paragraph in 60 on page 22. That suggests, as the noble Lord, Lord Pannick, has acknowledged, that to make things work, you need to do something extra in Clause 6 about how to interpret legislation that has been removed from the scope of Clause 2. There is also a second, alternative conclusion in paragraph 61, which suggests amending other provisions; a future report is then promised.

As I have said, I did not get the report till late, so I had already gone ahead and made my plans. When I thought about it, one of my conclusions was that, perhaps instead of closing down the scope of the application of Clause 2, the thing to do was to close down the scope of Clause 7. My proposal, therefore, is not to exclude subsections 2(b), (c) and (d) from Clause 2 but to exclude them from having effect in Clause 7. That way, they will not be amended and tampered with, possibly apart from when it is necessary to remove some trivial EU reference that might no longer apply. I have already tabled an amendment that does that, which is on the supplementary Marshalled List for today.

I know that leaves the judges still having to look at EU principles over a wider range of law. If I interpreted some of the comments correctly on Monday, they would perhaps prefer to change that constitutional burden so that it fell somewhere else. However, I do not see how one can avoid that having to continue: that is the status quo, and judges have to look at where there is an EU angle—some EU derivation—and apply general principles and other things as appropriate. Without knowing what the subject matter is, it is very difficult—even dangerous—to come up with a blanket change, because you do not know what might be missing. In some cases it probably does not matter, in other cases it might be quite sensitive, and in others you would most certainly be throwing away some of the things about which other noble Lords have already spoken passionately with regard to fundamental rights. You would also be throwing away certain things to do with the environment. I have other suggestions for modification as we go forward, but I will leave those to the relevant clauses.

4.15 pm

Lord Beecham (Lab): My Lords, your Lordships may have noticed that I am rather short: this afternoon, I can give the House some comfort by saying that, in relation to this amendment at least, I shall also be brief.

The Constitution Committee points out that Clause 2 is not needed to ensure that most categories of domestic legislation—which in practice will remain in force—will continue to apply. It concludes that,

"clause 2 appears to be significantly broader than it needs to be".

The Constitution Committee affirms that it is not constitutionally necessary or appropriate for primary legislation, which will continue in force in any event, to be treated as retained EU law and be subject to the powers of the amendment referred to in Clause 7.

Does the Minister accept this? If not, on what basis does he take that stance? The provision appears to be a way of allowing the Government to amend legislation by the mechanism of secondary legislation. With all the concerns around the excessive use of such procedures that have frequently been expressed by committees of the House and by Members in the Chamber, it would be reassuring if the noble and learned Lord could make it clear that that is not the Government's intention in respect of this Bill.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, I am grateful for the contributions from Members of the House with regard to this issue. We are extremely grateful for the extensive work done by the Constitution Committee with regard to the Bill, as set out in the report, and for the consideration that members of the committee have given to the provisions of the Bill and some of the difficult issues that arise in transposing EU-based legislation into domestic law, because it represents something of a challenge in a number of respects.

I shall begin by referring to a matter that does not arise out of this group, or did not until the noble Lord, Lord Adonis, raised it, because it may help if I address his point about whether retained EU law is primary or secondary legislation. It is neither in the Bill. There are provisions in paragraph 19 of Schedule 8 with regard to the Human Rights Act, which is a very particular case, where it will be treated as primary legislation. There is the Constitution Committee's recommendation that it should all be treated as primary legislation. I shall not go into detail at this stage because we will address this later, but I want to reassure the noble Lord about where we are.

That recommendation raises enormous difficulties because there are aspects of EU-derived legislation that, for example, involve the enumeration of the contents of a particular dye or chemical, and the idea that we could amend that only by way of primary legislation raises issues of its own. Nevertheless, it seems to the Government that there is some scope for considering how we can take this forward, and we are open to considering not only the recommendations of the Constitution Committee but of others. For those who have an interest in this issue, I commend for consideration, at least, the recent observations of Professor Paul Craig of St John's College, Oxford, in a blog on the UK Constitutional Law Association site dated 26 February—only a few days ago—in which, supplementary to an earlier note that he made, he proposes a categorisation of EU-derived legislation. I cannot say that it is one that we entirely agree with, but it is certainly one that we are looking at because there is more than one route to the resolution of this issue. We are looking at that and, for noble Lords who are interested in that point, it may be worth considering.

Lord Adonis: For those of us who are uninitiated into this blog, what would that mean?

Lord Keen of Elie: I am not sure I understand the question.

Lord Adonis: What would the new status of legislation that the noble and learned Lord has just mentioned be?

Lord Keen of Elie: Professor Craig addresses a potential categorisation of EU-derived legislation by reference to its origins within EU law, so there is pre-Lisbon treaty and post-Lisbon treaty analysis based on the articles of the pre-Lisbon provisions and of TFEU post Lisbon in 2009. I shall not elaborate on it at this stage as it does not arise in the context of this group. With respect to the noble Lord, I simply want to reassure him that we understand that there is a debate about how we should categorise EU-derived legislation.

The second point I shall mention at the outset is the reference to the principle of supremacy. That turns on Clause 5(2), which ensures that the principle of supremacy—it currently has effect through the ECA—will continue to apply but only for the purpose of resolving conflicts which arise between EU law which is converted by the Bill into domestic law and pre-exit domestic law.

Again, we have to be clear what the purpose of that is. I acknowledge in passing that the Constitution Committee proposed a different way of addressing Clause 5, which on one view might be considered neat, in so far as it involves applying the principle of supremacy without using the word "supremacy". We will come on to debate that in due course, as the noble Lord, Lord Pannick, observed, and I will not take time up with that at this stage.

I turn to Amendment 15. Clause 2 has been drawn broadly deliberately. As has been noted, it will preserve any domestic regulations made under Section 2(2) of, or paragraph 1A of Schedule 2 to, the ECA 1972. But it also includes within its ambit any other domestic primary or secondary legislation which implements, or enables the implementation of, EU obligations and any related domestic legislation. In response to the inquiry from the noble Lord, Lord Pannick, I make the point that enactments often contain provisions derived from EU legislation—we have to remember that what we are referring to in Clause 2 is EU-derived domestic legislation. It is those parts of Acts such as the Equality Act or the Health and Safety at Work etc. Act that are EU derived which are to be brought within the ambit of retained EU law. It is necessary to read two elements: EU-derived domestic legislation—those parts of legislation that come from the EU—and retained EU law. They are linked.

Baroness Taylor of Bolton: I think I am following what the Minister is saying, but a moment ago he used the phrase "legislation which … enables" implementation. How much of what is "enabling" will be caught in this?

Lord Keen of Elie: It is only that part of the legislation which is derived from the EU which is then brought in and forms part of retained EU law. As a hypothetical example, let us suppose that there are 20 clauses in some piece of health and safety at work legislation, of which 10 are derived from EU legislation. That forms part of EU-derived legislation for the purposes of this Bill, and will come into retained EU law. But the other parts are not EU-derived legislation and will not form part of EU retained law.

Baroness Taylor of Bolton: I accept that, but the Minister is assuming that legislation is always very neatly compartmentalised in a way which would allow that. My fear is that there will be enabling parts of legislation that could be caught up because some subsection could be EU related.

Baroness Ludford (LD): Could I just follow on from that by expressing a related concern? We know what the Government's attitude is to the Charter of Fundamental Rights and we know that the Bill provides that there is no right of action on the basis of general principles of EU law. I am thinking aloud here, but the concern might be that even with only a strict and narrow interpretation of which bits of, say, the Equality Act are EU derived and therefore subject to all the consequences, including Clause 6, we might miss some of the context in which those narrow provisions should be interpreted if we were to remain in the EU and fully under the jurisdiction of the court.

Lord Keen of Elie: I am not sure I agree with that proposition. But of course, at the end of the day, pursuant to Clause 7, it will be necessary to bring forward regulations which address amendments that are required in regards to retained EU law. At that point of course, those regulations will be the subject of scrutiny to ensure that they are limited to those aspects which are EU-derived law and therefore EU retained law. I do not believe that that is necessarily a problem, but I hear what the noble Baroness has said. We will of course take into consideration any difficulties that could arise in that context.

I wish to add one further point that I meant to make at the outset in response to the noble Lord, Lord Adonis. He referred to me as the Advocate-General. I am not appearing here as a law officer, and nothing I say should be construed as law officer advice. I am appearing here is a Minister in respect of the Bill. I would not want there to be any misunderstanding in the light of his reference.

Lord Foulkes of Cumnock (Lab): I am really interested in what the noble and learned Lord has just said. Could he explain what the difference is if he says something as a law officer or as a Minister? What import does that have? What difference does it make in the context of this House and in the legal context?

Lord Keen of Elie: I am obliged to the noble Lord. I would never say anything in this House as a law officer. It is my role to give advice to the Government in my role as a law officer, but I do not speak in this Chamber in that role. I just wanted to make that clear. The other difference can be found in the list of ministerial salaries.

Clause 2 is not broadly drawn for the reason that all this legislation needs saving—a point made by the noble Lord, Lord Pannick, with reference to Clause 14(6).

[Lord Keen of Elie]
It is broadly drawn for two important reasons. First, any deficiencies that might arise within this domestic legislation upon our withdrawal can be corrected by the Bill powers under Clause 7. I appreciate that there are noble Lords who will want to address the scope of those powers under Clause 7 when we come to it, but that is the purpose of drawing Clause 2 in this way. During the period in which we have been an EU member state, we have brought into our domestic law a great deal of EU law, and not just expressed as EU-derived law in the form of the implementation of directives or the direct effect of regulations. We have already had reference to the scope of, for example, the Equalities Act; there is also the health and safety at work legislation. These are areas in which we know we find EU-derived legislation. It is therefore important that we bring all that together in order that it can be subject to the regulatory processes in Clause 7, subject of course to the debate that will take place with regard to the scope of the powers in that clause.

The second, rather more important, reason for treating all this legislation as part of retained EU law—I emphasise the connection between EU-derived legislation and what is defined as "retained EU law" for the purposes of the Bill—is that we have to ensure that retained EU law will continue to be interpreted consistently by our courts under Clause 6 of the Bill. This, I apprehend, is why the Bingham Centre, for example, said, while addressing the question of the scope of Clause 2, "If you're going to narrow the scope, then you're going to have to amend other parts of the Bill, in particular Clause 6". That might be a different road to the same goal. All I would say at this stage is that the road we would take is to address this in the context of Clause 2 and the scope of that clause. In a sense, if Clause 2 were narrower, the powers under Clause 7 would be much broader. If we did not bring all of this into the definition of EU-derived legislation but wanted to be able to operate by way of regulations pursuant to Clause 7, there would be virtually no boundaries for the Clause 7 powers, whereas they are circumscribed by the definition that is brought into Clause 2 in the present form.

In my respectful submission, it would be odd if we were to take these categories out of Clause 2 and therefore find ourselves in a situation in which the construction of that law now differed from what it would have been while it remained to be interpreted by reference to the canons of construction that presently apply while we are a member of the EU. It is important that it should be part of retained EU law in order that we have consistency of interpretation. I do not take issue with the suggestion that an alternative route might be to narrow Clause 2 and then completely amend Clause 6, but that is simply not the route that the Government are taking here. I have sought to explain why we are taking this particular route at this time.

I hope that I have reassured noble Lords that Clause 2 is wide in its scope, but for a legitimate purpose. As I said, we will come in due course to address the question of whether and to what extent Clause 7 should complement those provisions with regard to retained EU law. In those circumstances, and emphasising again that we are listening to various considerations about how Clause 2 is formulated, I hope that noble Lords will see fit not to press their amendments. I am obliged.

4.30 pm

Lord Brown of Eaton-under-Heywood (CB): I seek clarification from the noble and learned Lord. As I understand it, the words "so far as", are intended to give Clause 2 limited range. Is this a useful touchstone, in so far as without the provisions we would have failed to implement our obligations under EU law? As I understand it, paragraphs (b), (c) and (d) address aspects of our domestic legislation that are designed to give effect, as they had to, to EU law, but only in so far as they are achieving that objective does Clause 2 have any application. Is that right?

Lord Keen of Elie: That is indeed my reading. The noble Baroness alluded to this earlier in her contribution. That is why I sought to emphasise the term EU-derived domestic legislation. It is the derivation of that aspect of a particular Act which is to be brought within the ambit of retained EU law for these purposes.

Lord Pannick: I thank all noble Lords who have contributed to what has been a valuable debate, including the noble and learned Lord, Lord Keen, in whatever capacity he was speaking to the House. The noble Baroness, Lady Taylor, and the noble and learned Lord, Lord Mackay, emphasised the need for legal certainty not just in this clause but throughout the Bill, even though that harms the interests of the legal profession. I should have declared my interest as a barrister who may benefit from legal uncertainty. A number of barristers are present in Committee: the noble Lords, Lord Faulks, Lord Carlile and Lord Thomas of Gresford. There may be others, all of us no doubt thinking that this is the reverse of Thomas Erskine's comment when he was asked how he had the courage to stand up in the court of Lord Mansfield. He replied that he thought of his children pulling at his robe and begging him, "Now, father, is the time to get us bread".

The noble and learned Lord, Lord Keen, said that Clause 2 applies only to those sections of the Equality Act, for example, which were enacted for a specified EU purpose or have a relevant EU law connection. The noble and learned Lord, Lord Brown of Eaton-under-Heywood, gave an explanation of that, and the noble and learned Lord, Lord Mackay of Clashfern, agreed with that approach. That is very helpful in limiting the scope of Clause 2. However, it raises a problem, to which the noble Baroness, Lady Taylor, alluded. If Clause 2 applies only in relation to those parts of the statute which were enacted for a relevant EU purpose, there is still a problem of legal certainty, because there will be disputes as to which parts of the Equality Act—or other legislation—satisfy those criteria. I must say that the criteria in Clause 2 are far from clear. They operate by reference to the purpose of the legislation or whether the legislation relates to EU material. So there may still be a problem here.

I have two suggestions for the noble and learned Lord. First, if as he said, and I entirely accept what he said, Clause 2 is intended to apply only to those parts

of the enactment—the Equality Act, or whichever Act—that are linked to EU law or have an EU purpose, the Government might wish to bring forward an amendment to Clause 2 at Report to make that clear on the face of the Bill. The second suggestion is that the noble and learned Lord might wish to consider whether any further clarity can be provided as to how the courts are supposed to apply this section-by-section approach and identify the purpose of the relevant section or whether it relates to EU law.

I noted the very helpful comments of the noble and learned Lord, Lord Keen, on the status of retained EU law and on the supremacy of retained EU law. As he said, we will come to those matters next week, and there are amendments addressing them. I associate myself with the comments of the noble and learned Lord on the valuable contributions by Professor Paul Craig of the University of Oxford.

This has been a helpful debate in illuminating the Government's intention. I will reflect, and I am sure the Constitution Committee will want to reflect, on what the Minister has said and on the other contributions. I beg leave to withdraw the amendment.

Amendment 15 withdrawn.

Amendment 16

Moved by ***Lord Wallace of Tankerness***

16: Clause 2, page 1, line 12, after "passed" insert "and commenced"

Lord Wallace of Tankerness (LD): My Lords, the amendment stands in my name and that of the noble Lords, Lord Foulkes, Lord Adonis and Lord Dykes. This is very much a probing amendment and I do not intend to detain the Committee long, as the issues are quite clear.

Clause 2 refers to EU-derived domestic legislation that has,

"effect in domestic law on and after exit day",

and then goes on to explain what EU-derived domestic legislation means. If we then fast forward to Clause 14, we see that an enactment,

"means an enactment whenever passed or made".

We are trying to get some certainty into what is meant by that—and I shall come on more specifically to enactments of the Scottish Parliament.

We are seeking to probe what is intended by this. For example, if an enactment has been made but the commencement of a particular provision is not until a date post exit day, what is the status of that? Is it intended to refer only to those enactments when an Act has been made but there has been a commencement before exit day?

Let us look specifically at Acts of the Scottish Parliament—Acts of the Welsh Assembly may well come into a similar category. Paragraph 100 of the Explanatory Notes, which refers to similar phraseology in Clause 5, states that,

"an Act is passed when it receives Royal Assent".

The Scotland Act 1998, Section 28(2) states:

"Proposed Acts of the Scottish Parliament shall be known as Bills; and a Bill shall become an Act of the Scottish Parliament when it has been passed by the Parliament and has received Royal Assent".

So there are two stages—passed by the Parliament and then receiving Royal Assent. Amendment 342, in my name and that of my noble friend Lord Thomas of Gresford, seeks to give clarity that this will be an enactment when it has received Royal Assent.

There is an argument that it should be an enactment when it is passed by the Scottish Parliament or the Welsh Assembly. I took the view that it was preferable to make it after Royal Assent because there are some reasons why between being passed by the Scottish Parliament and receiving Royal Assent it could be derailed. As the noble and learned Lord, Lord Keen, as Advocate-General for Scotland will know only too well, in whichever capacity he is appearing at the Dispatch Box, he has powers under Section 33 of the Scotland Act to refer to the Supreme Court a Bill or any provision of a Bill which he believes may not be within the legislative competence of the Scottish Parliament. He has to do that within four weeks of a Bill being passed by the Scottish Parliament, and then it would be a matter for the Supreme Court as to how long it took. So you may have an enactment, or a piece of legislation—let us put it neutrally like that—which has actually been passed but may go to the Supreme Court and the Supreme Court may strike it down, so it may never actually become law. That is why I took the view that, in trying to determine when an enactment becomes an enactment, it should be in the case of Acts of the Scottish Parliament when it receives Royal Assent.

To some extent this is academic. If you were to challenge me and ask me to give an example, I probably could not—but I am sufficiently acquainted over many years with the laws of unintended consequences to know that something will happen. You can bet your life that this issue could well come up and, rather than have the matter taken through the courts, it would be preferable, for certainty purposes, to put in the Bill when an enactment of the Scottish Parliament actually becomes an Act. The preference would be for when it receives Royal Assent.

This is a probing amendment but, if it is the noble and learned Lord who replies, I hope that he will accept that there is an issue here. The wording of our amendments may not be the ones that the Government would prefer, but perhaps he will accept that there is an issue here and the Government will bring forward their own amendment to clarify the point so that, at some future date, we do not have a situation where our learned friends at the Scottish Bar make lots of money out of disputing this, and we can resolve this. It is not a major point but it is one that merits clarity, and I hope that we can get a positive response to these amendments. I beg to move.

Lord Foulkes of Cumnock: My Lords, I am really grateful to the noble and learned Lord, Lord Wallace of Tankerness, himself a former Advocate-General, for moving this amendment. In the light of what he said, all I can say is that I agree with his every word.

Lord Keen of Elie: I am obliged to the noble and learned Lord and the noble Lord not only for explaining the amendment but for their endorsement of it.

[Lord Keen of Elie]

In responding to Amendments 16, 17 and 342, I start by reaffirming our view that Clause 2 is an essential provision for providing certainty and continuity regarding our law after exit day. I think that that is plain to all noble Lords. I shall then say a little more about why Clause 2 must stand part of the Bill. This clause, along with Clauses 3 and 4, delivers one of the core purposes of this Bill: maximising certainty for individuals and businesses when we leave the EU by ensuring that, so far as is practical, the laws that we have now will continue to apply. In that respect, Clause 2 preserves the domestic law that we have made to implement our EU obligations; we have touched on that already.

More particularly, on the point raised by the noble and learned Lord in this regard, Amendment 342 seeks to clarify that Acts of the Scottish Parliament are included within the clause only if they have received Royal Assent before exit day. I suspect that Amendment 16 also seeks to provide clarity on that same point. I am grateful for the opportunity to clarify any uncertainty that there may be here. Clause 2(2) states that,

"'EU-derived domestic legislation' means any enactment"

that is described in that subsection. Clause 14 defines the term "enactment" to include an enactment contained in an Act of the Scottish Parliament. An Act of the Scottish Parliament must have received Royal Assent; until that time, it is a Bill. Section 28(2) of the Scotland Act 1998 provides for this. So an Act of the Scottish Parliament that has only been passed and not received Royal Assent does not fall within this definition, and would not be categorised as EU-derived domestic legislation for the purposes of this Bill. I believe that the noble and learned Lord rather suspected that this might be the case; his concern seemed to be one of certainty as regards the drafting.

The same applies in relation to Acts of the UK Parliament. The reference to "passed" in Clause 2(2)(b) is therefore a reference to the purpose for which the enactment was passed, not whether it was passed. In that context, I venture to suggest that Amendments 16 and 342 are unnecessary.

Lord Wallace of Tankerness: I am grateful to the noble and learned Lord. He does get my point that it is for clarity; in Section 28 of the Scotland Act, there is a distinction made between being passed and Royal Assent. It is the word "passed" that appears in Clause 14(1) and the noble and learned Lord knows as well as anyone that, when statute uses the same word, it may—not unreasonably—have the same interpretation. Yet, a Bill "passed" by the Scottish Parliament is not the same as "enacted". Simply, does it really go to the heart of this Bill that the Government could not bring forward an amendment just to make it clear beyond doubt and, therefore, not allow unnecessary litigation at some stage in the future? Because you can bet your life that something will come up when someone finds some clever point.

4.45 pm

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

Amendment 17 seeks to mirror the language of Clause 3 in terms of the cut-off point for inclusion within the scope of the clause. Clause 2 of course works in conjunction with Clause 3, which converts direct EU legislation into domestic law. Both clauses take a snapshot of the law that is in place immediately before exit day. EU-derived domestic law will fall into the scope of Clause 2 if it has been enacted before exit day—that is, if it can be said to be on the statute book at that time. There is of course a different test employed for direct EU legislation to be retained under Clause 3, because direct EU legislation must be operative within UK law "immediately before exit day", as defined in Clause 3(3). That is why there is a distinction between the two clauses; they serve distinct purposes.

As I say, we are listening and we will consider further the point made by the noble and learned Lord and by the noble Lord, Lord Foulkes. Having given an explanation of the Government's position, I hope that, at this stage, they will see fit to withdraw or not move these amendments.

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

Amendment 16 withdrawn.

Amendment 17 not moved.

Debate on whether Clause 2 should stand part of the Bill.

Lord Adonis: My Lords, I do not intend to speak to whether Clause 2 should stand part of the Bill.

Clause 2 agreed.

Amendment 18

Moved by ***Baroness McIntosh of Pickering***

18: After Clause 2, insert the following new Clause—

"Status of EU directives adopted, but not implemented, before exit day

(1) EU directives adopted by the EU before exit day remain binding, as if the United Kingdom had not left the EU.

(2) In implementing any EU directive covered by subsection (1) after exit day, a Minister of the Crown may use any power set out in the European Communities Act 1972 as if that Act had not been repealed.

(3) If, through implementing a directive under subsection (2), a situation arises which would be considered a deficiency had it arisen in retained EU law, a Minister of the Crown may use any of the powers set out in section 7 of this Act to remedy that situation as if that directive had been implemented before exit day."

Baroness McIntosh of Pickering (Con): My Lords, I am delighted to speak to Amendment 18 in my name before the Committee this afternoon. I refer especially to page 24 of the Explanatory Notes, which states, in paragraph 76 on Clause 2(1):

"This will include legislation that has been passed or made but is not yet in force".

The reason for my introducing and speaking to this probing amendment—I recognise, as Ministers have said previously, that this is a facilitating Bill—arises from the debate at Second Reading, where it was identified that a number of directives are coming forward and commitments are being discussed and agreed in both the European Parliament and Council of Ministers that will be agreed but not transposed into British law before 29 March 2019. I am not sure whether my noble and learned friend the Advocate-General will reply to this amendment, but I hope that he will see it as a tidying-up exercise that is designed to be helpful.

The purpose of the amendment is to facilitate the transposing into UK law of directives that fall into this category which have been agreed by the relevant ministries in Brussels, and in co-decision between the European Parliament and the Council of Ministers, but have not yet been transposed into UK law. This follows on from the debate at Second Reading, where the issue was discussed in particular by the noble Lord, Lord Kakkar, several noble Lords on the Liberal Democrat Benches, myself and a number of others. For example, the drinking water directive will be completed and will likely be transposed into UK law before we leave on 29 March 2019. It forms part of the price review that Ofwat is conducting, which will also conclude in 2019.

However, a further series of environmental directives does not fall into this category, including the so-called mother directive—the EU water framework directive—the bathing water directive and the waste water directive. Given the current timetable for the revisions being discussed in Brussels by the European institutions, it is quite likely that the directives will be agreed in the very month that we leave the European Union.

The purpose of this amendment is simply to clarify whether that would leave the door open to the directives being transposed at a later date, thereby guaranteeing the environmental protections that water companies themselves might wish to adopt, and which the Government and indeed all of us as consumers would wish to see implemented. So my question to the Minister is simply: is it the Government's wish to facilitate the transposing of directives that are left in this halfway house into UK law after 29 March 2019, and in those circumstances would they welcome this amendment?

Lord Wigley (PC): I support the amendment of the noble Baroness, Lady McIntosh, which seeks to clarify the status of EU directives which will be "adopted, but not implemented" on the day we exit the EU. The Government have repeatedly stressed that the purpose of the Bill is to provide legal certainty. Whichever side of the Brexit debate we take, clearly, that is a worthy and necessary objective. That being so, I am truly baffled that in this instance the Bill totally fails to give that clarity. Everyone affected or potentially affected by EU legislation that has been adopted but not implemented needs to have absolute certainty as to where they stand.

Amendment 18, if passed, would allow Ministers to treat EU directives adopted before exit day to stand, for those purposes, as if the UK had not left the EU. I understand from a House of Commons briefing that no fewer than 23 directives have already been published with implementation deadlines which fall after 29 March 2019. Several of these would enhance the lives of UK citizens. For example, one is aimed at strengthening restrictions on firearms, which are currently permitted to move freely within the European single market. If the Bill stands unamended, can the Minister clarify whether firearms will be controlled when they cross the north-south border in Ireland, for example? Another such directive aims at limiting the exposure of employees to dangerous substances in the workplace, such as carcinogens and mutagens. I will not elaborate but clearly there is an arguable case for saying that such safeguards should be part of UK law. Even more so, there is a crying imperative that people know where they stand on such matters.

Lord Pannick: My Lords, I am doubtful about this amendment for two reasons. The first is that the whole purpose of the Bill is to ensure that a snapshot of our obligations under EU law is transposed into domestic law as at exit day. If, as the amendment suggests, retained EU law contains the directives which are not yet in force, the purpose of the Bill will not be accomplished—something more will be read into EU law. However, it is not simply a technical matter; it is also a question of uncertainty. If the amendment is included in the Bill, one will not know at exit day the scope of retained EU law, as that will depend on what happens in Brussels thereafter. A directive which has been adopted but has not yet come into force might be amended before it comes into force, or it might never come into force. Therefore, I am very doubtful that legal certainty is accomplished by this amendment or that it is consistent with the objectives of the Bill. I entirely understand that it may be desirable to include within English law matters of this sort but it is certainly not consistent with the objects of the Bill.

Lord Lea of Crondall (Lab): My Lords, perhaps I might check that, in interpreting the clause as it now stands, it is not possible for there to be a freeze on implementation by a particular exit day, whereby Ministers can cherry-pick the pieces of legislation they want to

[Lord Lea of Crondall]
take through. That was not the intention. Can the Minister comment on that possible consequence of the exit date?

Lord Liddle (Lab): My Lords, for many of us, this is a seminar and we are hoping to learn quite a lot from noble and learned Lords in the course of the Committee proceedings. We are dealing with areas that certainly I have very little grip on. Perhaps I may probe the relationship between this issue and the transition agreement being negotiated in Brussels at the moment, because I do not understand it. As I understand the transition agreement, presumably we will commit to bringing these admirable pieces of legislation that the noble Baroness, Lady McIntosh, has referred to into our law. If the transition agreement requires that, does that mean that everything passed during the transition period will acquire the status that it would have had on 29 March 2019 and will all become retained law? How does the Bill deal with that point and the relationship to the transition agreement? I am sorry if this is all very ignorant but it seems to be a very relevant point.

5 pm

Lord Adonis: My Lords, I am grateful to my noble friend. For those of us who are not lawyers and are uninitiated in the complexities of this law, what does "implemented" mean? As I understand it, once the Council of Ministers adopts a directive, it is then the responsibility, under the European Communities Act 1972, of member states to implement it. Presumably the question is: what duties lie on Her Majesty's Government and Parliament to implement directives which have been adopted by the Council but which would, in the normal course of events, be implemented over a period that might or might not span beyond 29 March next year? I assume that that becomes a very important issue in the scenario that my noble friend Lord Liddle has just referred to, where, in the "implementation period", the United Kingdom is undertaking to abide by the evolution of European law in the making of new directives over that period. I am not sure whether I should call him the non-Advocate-General for Scotland, but could the noble and learned Lord, in whichever capacity he is speaking to us this afternoon, give us a view on this matter?

Lord Brown of Eaton-under-Heywood: My Lords, further to the point made by the noble Lord, Lord Liddle, as I have said before, this Bill deals with a crash-out situation in which there is no transitional period. If there is a transitional period, a good deal of this will have to change or will require some alteration—the point made by the noble Lord, Lord Liddle. As far as the noble Lord, Lord Adonis, is concerned, once the directive is adopted, the member states are then given a particular period—generally two years—in which to implement it, and sometimes they are late in doing it. This Bill surely ought to deal with the two situations, including the one where the implementation date has passed, in which case we would perhaps be in a rather different situation from that which assumes that the implementation date has not yet arrived when we leave, and so a different answer might be given as to how you deal with this position.

Baroness Young of Old Scone: My Lords, I want to add to the voices of those who have said that there is a lack of clarity and point to a specific example that raises some questions: the circular economy package. We, along with our European colleagues, have been working on this since 2014 and it is due to be agreed shortly. There is legislation to amend six EU directives on resource use, all of which are incredibly important both domestically and internationally. That includes things such as the waste framework directive; the packaging and packaging waste directive, which has a big impact on the Government's commitment on plastics; the landfill directive; and directives on end-of-life vehicles and batteries in electrical and electronic equipment, for example, all of which will be hugely germane to our potential export of motor vehicles and other electrical equipment. We will be approaching exit day with the package enshrined in EU law, but we will not have had time—nor indeed will many member states—to implement it.

For me, this package is important for a number of reasons. First, there are hugely important international commitments that we need this legislation to fulfil. Secondly, we have spent an awful lot of time on it and have been quite effective in making and shaping it to ensure that it fits with our requirements, as well as being effective for the environment. Thirdly, one assumes that we are going to keep a car industry going in this country, and I doubt that we can maintain our trade, or the levels of exchange of components for the automotive industry, across national boundaries if we do not adopt similar standards.

I am concerned about the "snapshot" mentioned by the noble Lord, Lord Pannick. I understand that it is required, but if that snapshot will leave us with a great need for this legislation to go forward but an inability to make it happen, then I must press the Minister on how he envisages that such a situation will be dealt with. It would have a poor effect not just on the environment but on our ability to trade.

Lord Deben (Con): My Lords, I draw the attention of the House to my declaration of interests. I declare an interest in the question of waste and I would like to follow on from the noble Baroness.

I am inclined to follow the comments of the noble Lord, Lord Pannick, in dealing with this amendment. My problem with the snapshot concept—although it is the concept—is that it is rather fuzzy at the edges. Unless we think carefully through this, we will find that if we leave the European Union we may have signed up to obligations which we have not had time to carry through but which we intended to carry through. We may also sign up to obligations which, perhaps in retrospect we did not intend to carry through. However, that is unlikely. We may also have signed up to obligations where we had not worked out how we were going to carry them through. So there is bound to be uncertainty at this stage.

I emphasise what the noble Baroness has said: we have worked extremely hard across the board on a number of packages, particularly those concerned with the environment. Her Majesty's Government have been enthusiastic about most of the elements that that contains. The noble and learned Lord who has replied

to the previous two debates has been extremely helpful, not only in explaining to the House where the Government are but in giving us real hope that they will look carefully at the real questions we have raised. It is not a question of whether or not you are in favour of Brexit but of how we get this right. As the Minister has been kind and generous in that way, I hope he will help us to see what we should do. I say to my noble and learned friend that I do not think we should do this, but it is clearly something we have got to do if people are to know where they will stand.

Lord Pannick: The noble Lord is undoubtedly right that there will be instruments in Brussels to which we have contributed and which we would wish to incorporate into domestic law. This Bill does not prevent that. It is designed to provide the best snapshot possible, and Parliament is perfectly entitled to—and no doubt will—adopt many other later instruments and incorporate them in appropriate form into domestic legislation.

Lord Deben: I agree with the noble Lord, Lord Pannick, on that. However, the problem comes when an agreement is in Brussels and has been agreed by us but the implementation date comes later. That is the part I am particularly concerned with.

I am also concerned to take the opportunity to say to my noble and learned friend that one of the ways in which this Bill can be more readily acceptable is for the Government to be clear with the House. If there were such circumstances, would the Government be prepared to say now that they would seek to implement those things to which they had signed up in advance in a form they would choose? That is not an unreasonable thing to ask the Government to do. Otherwise we will go through this period—it seems as though it will go almost to the end before we know what is going to happen—of negotiating, discussing, agreeing and indeed voting on some of these matters, and no one will know whether, having voted for them, we were then willing to accept them into our own system and law and implement them, having signed up to them.

It would be helpful for all of us who are trying to work these things out and trying to run businesses to remove that uncertainty by committing the Government to say that they will implement what they have signed up to, in a form which they may choose, but under British law.

Baroness Smith of Newnham (LD): My Lords, I support the amendment and declare my interest as being employed by Cambridge University; essentially my day job is teaching European politics. As the noble Baroness, Lady McIntosh, and the noble Lord, Lord Wigley, have pointed out, this amendment fills a gap in the proposed legislation, although I understand that it is probing in nature. At present, Clause 2 talks about saving EU-derived domestic legislation—that part is clear—while Clause 3 looks at incorporating direct EU legislation. However, the gap lies in EU legislation which has been agreed or adopted, and here I disagree with the noble Lord, Lord Pannick.

If the legislation has already been adopted by the European Union it will not then be amended, so the issue is that if the 28, including the United Kingdom, have already agreed legislation but the UK has not yet transposed it, that is legislation which we would have expected to be in place at the snapshot point of 29 March 2019. If the legislation has not been transposed by then, there is a question of where we are on 30 March 2019. If, as the noble and learned Lord, Lord Brown of Eaton-under-Heywood, said, it is simply a question of adopting things later, that is one thing for a crash-out Brexit, but if there is going to be a transition period and we are supposed to be absolutely at one with the EU 27 on the day we leave, surely that includes legislation that has been adopted but which we have not yet transposed and which we therefore have a duty to transpose.

Lord Mackay of Clashfern: My Lords, it is fairly clear that this Bill already has enough to do in trying to deal with the situation of withdrawal, and it cannot be right that it should take account of any transition period or implementation period, whatever you like to call it, until we know a good deal more about it than I do at the moment. That ignorance is possibly shared to some extent by other noble Lords.

On this point, the true position is that once a directive has been adopted by the European Union with a period for implementation by a member state, the obligation on that member state is to bring it into law in its own domestic arrangements within the period stated. The directive therefore does not become part of the domestic law of that member state until its implementation before or by that date. This Bill is intended to deal with the state of the law on the day of our withdrawal and therefore strictly speaking such directives, however desirable they may be, are not really part of our domestic law any more than an Act which has been passed but not commenced is part of our domestic law. I have a fair amount of experience of that happening.

The situation is clear so far as what this Bill should do, but so far as what my noble friend Lord Deben wants, that is another matter. It is perfectly reasonable that the Government should have a policy on that if they want it.

Baroness McIntosh of Pickering: Is my noble and learned friend saying that the United Kingdom Government should absent themselves from all legislation and all the directives that are being discussed, whether it is the EU circular waste package or the water framework directive? I believe that the noble Lord, Lord Wigley, referred to 23 directives—I am most familiar with the environmental ones—which fall into the very narrow category where there is every expectation that the UK Government are prepared to sign up to the commitments. However, because the Prime Minister has set an arbitrary date for us to leave, we will not be in a position to implement them. Is it the case that even if we agree them in March 2019 and it is the wish of the Government to implement them, because of the arbitrary date, we will not be in a position to transpose them?

Lord Mackay of Clashfern: The problem about the arbitrary date is that it is rather an important one because it is when we will cease to be liable to obligations under EU law unless they are made part of our law by

[Lord Mackay of Clashfern]
this Bill. The problem is that a directive which has been adopted but not yet put into effect, but with the obligation to put it into effect still running, could in some cases last for as long as two years. That would greatly alter the clarity of the Bill in the meantime. If the Government want to implement one of them there is absolutely no reason why they should not. They will have plenty of legislative power and so long as they can get parliamentary time they can do so. That is a matter of policy that my noble friend has referred to. It is a perfectly reasonable way of dealing with this sort of point.

5.15 pm

Lord Deben: Does my noble and learned friend agree that my noble friend Lady McIntosh has raised an issue that probably should not be answered in this way, but provides a difficulty for the Government that would be overcome if they said, when they had agreed and supported a particular decision, that they would then carry it out in whatever way they thought was the most sensible? That means that we can go on discussing and not be left in some sort of oblivion.

Baroness Ludford: Before the noble and learned Lord answers that point, I add a further complication. Whether we agree to a directive or not, if it was adopted by qualified majority voting it would still be adopted with an obligation for the UK to implement it. That does not quite solve the issue. What is raised is surely a very valid issue. It may not strictly come within the definitions in the Bill, but there is still a legal obligation if a directive has been adopted at EU level, whether we agree to it or not.

Lord Mackay of Clashfern: The legal obligation would cease on Brexit day. That is the situation. Unless something has been implemented by that time it is not strictly part of our law. On deciding what is to happen in the future, as far as I am concerned, there is enough to decide at the moment, but nothing will harm the Government if they give some indication of what they would do with instruments that have been adopted but not yet implemented, although, at the date of Brexit, we were obliged to adopt them on some future date.

Lord Adonis: Does the noble and learned Lord think that there is a distinction between those directives that we have agreed to where the implementation date is before or after 29 March 2019?

Lord Mackay of Clashfern: If it is implemented before the 29th it is part of our law.

Lord Adonis: What if the obligation to implement them is before that date, but we have not fulfilled that obligation?

Lord Mackay of Clashfern: The question does not arise if they have not been adopted before. The amendment deals only with directives that have been adopted before Brexit day and, even if they are not part of our law, whether they should be admitted, which the Bill could do. The problem is that that might delay the finalisation of this as an Act in force for some considerable time.

Baroness Young of Old Scone: I would like some technical clarification on this. My understanding of the example I gave is that Europe will change the standards for packaging and packaging waste, the landfill directive, end-of-life vehicles, batteries, and electrical and electronic equipment and the old standards will no longer hold, except in Britain. Quite frankly, I am not sure that that is a viable way forward. We will continue to apply standards that everyone else has abandoned immediately on exit day if we do not take forward the implementation of that directive.

Lord Mackay of Clashfern: I am beginning to find myself answering questions that I should pass on to my noble and learned friend. So far as I am concerned, it is unlikely that all the member states, if they have plenty of time for implementation, will, except for us, have implemented them on exit day.

Lord Davies of Stamford (Lab): My Lords, I am still not quite convinced by the explanation of the noble and learned Lord, Lord Mackay. Clearly, if a directive has not completed its legislative process by 29 March 2019, there is no question about it: whatever happens to it later on is nothing to do with us and it does not in any way enter English law. Equally, if a directive has been assumed into domestic law and been implemented, there is no doubt that it is part of English law. However, where a directive has completed its legislative process, has been implemented into English law in the normal way but has not come into force because it contains a provision under which it comes into force only at a certain date after 30 March, the English law—or, for that matter, the Scottish law—has already been altered and adopted the new provision. Those provisions enter into force at a certain date subsequent to 30 March but without any further change in the corpus of statute because the measure is already provided for. Surely, in those cases, that directive remains in force in English or Scottish law in the normal way. Even though it had not reached the point at which it would come into effect on 29 or 30 March, it would nevertheless be part of the corpus of law in all the union countries.

Lord Mackay of Clashfern: If it has become part of our law, even if it is postponed, it is subject to this Bill. If it has not come into our law, it is not part of this Bill. I shall not answer any more questions.

Baroness Bowles of Berkhamsted: I would quite like to complicate matters a little further. It is unfortunate that the word "snapshot" was used, because, if we look at the way in which European legislation comes into force and effect, we see that it is a bit more like a movie in that it keeps on going. Certainly, we may well have implemented some things and they will then come into force, but it would not be on a single date beyond because lots of delegated Acts and implementing regulations would come in progressively over a period of time. I am curious as to what happens when we are

straddling that. Will we then take the implementing regulations and delegated Acts on something that we have already adopted into our law, or will we make up those ourselves?

Baroness Hayter of Kentish Town (Lab): The noble and learned Lord, Lord Mackay of Clashfern, says that he is confused about the transition; my worry is that the people on the Bench in front of him remain confused about what a transition period means—but let us put that to one side.

I want briefly to broaden the discussion to regulations—I know that the amendment refers to directives, but it is probing and there is an important issue here which Ministers may have heard. The clinical trials regulation was mentioned at Second Reading. Like many of the measures that we are discussing today, that would have been adopted but not implemented, either because it was complicated or it took a lot of work to get everyone lined up to it—so it would not have reached its implementation date by the time we left. It might well reach that date during the transitional period—which raises another question and, probably, another Bill. If it is a standstill only on measures that have come in by the day we leave, there will be important issues to address such as the clinical trial regulations and those others that we have heard about today. They will not count as retained law, leaving us reliant on regulations that rapidly become obsolete—those relating to cars I know less about, but certainly in respect of those relating to clinical trials it would end our ability to participate. All such regulations are about not just anonymity but the way data are held. It will happen very quickly: if we are not on the same basis as the rest of Europe, our ability to be involved in those could end quite promptly. That is obviously important to patients, but also to researchers and, indeed, the pharmaceutical industry.

I wrote to the noble Lord, Lord Callanan, on 19 January and he replied very rapidly on 26 January. As we have heard today, he confirmed the Bill's approach, which will bring over only regulations actually operative as we leave. That would exclude these clinical trial rules, for example, although we agreed them back in 2014. The letter that the noble Lord kindly wrote to me makes smoothing comments, if you like. It says, "Yes, we recognise the importance of close co-operation, we want UK patients to have access to innovative medicines, for which we need to be part of the same system, and we want the UK to be one of the best places to do science". I turned over the page expecting the Lord Deben response, which would be to say what we are going to do about it. Unfortunately, at that point the letter stops. It says that we will discuss with the EU how to continue to co-operate in business trials but it fails to look at what will be needed, which is, I fear, a legislative process to make that happen.

Lord Deben: Will the noble Baroness be kind enough to make a distinction between these things? It seems to me that this is not a matter to discuss with the EU. The British Government could perfectly well say that where they have signed up to something already, they will in fact implement that. They could do this about regulations and directives if they wished to. They could do that in advance and would not have to say that they would have to discuss it with the European Union. That would help all of us and be an earnest of the Government's good will.

Baroness Hayter of Kentish Town: I agree: the Committee will be pleased to know that, had the letter ended like that, I would not be on my feet today. These are important measures for our international co-operation, and if the Government would say, "Yes, this is something that we are willing to do", that would take us forward. I hope that the noble and learned Lord may be able to give us that assurance as he responds.

Lord Keen of Elie: My Lords, I am obliged to all sides of the Committee for their contributions to this part of the debate, which began with an amendment concerning directives. I was not initially taken with the use of the word "fuzzy" by my noble friend Lord Deben but the term has begun to gain traction as the debate has continued. Let us try to be clear about one or two issues. The Bill seeks, for very clear reasons, to take a snapshot of EU law as it applies immediately before exit day. That is the cut-off point. Regulations emerging from the EU have direct effect on the domestic law of member states, so regulations that have taken direct effect by the exit date will be part of retained EU law. There is really no difficulty about that whatever.

Baroness Ludford: Nobody, I think, has questioned that. We are talking about directives.

Lord Keen of Elie: That is what we began talking about but the noble Baroness, Lady Hayter, for example, has referred to regulations. I will come on to address the point she made, but regulations have direct effect and if a regulation has direct effect by exit day it will form part of retained EU law. Directives have no direct effect in the domestic law of a member state. Directives have to be the subject of implementation and in that regard a transition period is given to member states for the implementation of a directive. There may be directives that have been adopted prior to the exit date which have a transitional period that will expire by the exit date specified in the Bill. In that event, the Government have indicated that they will seek to implement those directives that require implementation by a transitional date before the exit date. Therefore, they will become part of retained EU law because they will have been implemented in our domestic law.

5.30 pm

There may also be directives that have been adopted which have not been the subject of implementation by the exit date because the transition period extends beyond the exit date. Those will not, therefore, have been taken into our domestic law and will not form part of retained EU law at the exit date. So, yes, there may be directives that have been adopted but not implemented by the exit date, and those directives will not form part of our domestic law. If, however, a directive contains matters that the Government consider appropriate to form part of our domestic law, there is

[Lord Keen of Elie]
no reason why the Government should not then proceed to enact appropriate domestic legislation to take into our domestic law those very matters.

Lord Pannick: Perhaps I might suggest to the Minister, and ask him to confirm, that there will also be directives that have passed their implementation date and have not yet been implemented in domestic law, but are sufficiently clear and precise that they confer individual rights under EU law and, therefore, to that extent they will be part of retained EU law.

Lord Keen of Elie: With respect, that is a slightly different point. First, the Government are committed to implementing in domestic law those directives which have a transition period that expires before the exit date. There are, however, circumstances in which a directive may have direct effect in a question between an individual and the state but has not been implemented in domestic law. That is subject to a determination by the Court of Justice of the European Union or, indeed, by our own courts. In circumstances where a directive has not been implemented by the end of the transition period and has direct effect as determined by the courts of justice, and that has been determined prior to the exit date, that will be brought into domestic law by way of Clause 4. That is the point of Clause 4 in that context.

Where a directive has been adopted before the exit date but has an implementation period which expires after the exit date, and has not been implemented in domestic law by the exit date, that will not form part of our domestic law and therefore it will not form part of EU retained law for the purposes of the Bill.

Baroness McIntosh of Pickering: Both my noble and learned friend the Minister and my noble and learned friend Lord Mackay have indicated that the Government could choose to implement directives falling into that category if they wished to do so. My question to the Government is: what is the legal basis for doing so? My understanding is that there is not a legal basis at the moment, which is why I tabled this amendment.

Lord Keen of Elie: There is no legal basis for doing so. With great respect to my noble friend, her amendment would not actually provide one; that is perhaps an aside. The point is more central than that: directives that have been adopted but not implemented by the exit date, and which have a transition period that goes beyond the exit date, are not part of domestic law, and for the purposes of the Bill they will not become part of domestic law or EU retained law. Therefore, we will not be taking them into our domestic law by way of an implementation that takes place after the exit date.

Lord Wigley: Following this is fairly complicated, is it not? To add to that complication, what will be the position on devolved matters—such as environmental matters, which are to a very large extent devolved—where the implementation may be on different dates in different devolved regimes?

Lord Keen of Elie: We have to be clear here about the distinction between implementation and application. Essentially, there is only one date for implementation. That is when we implement the directive into our domestic law. There may be situations—and if I misunderstand the noble Lord's question, I am sure he will tell me—in which there is a directive, or indeed a regulation, that is adopted into domestic law but which applies only at a date after the exit date. There are examples of regulations as well, where we accept that the regulation has come into domestic law but its actual operation is deferred, perhaps until 2020. That regulation or that provision will form part of our domestic law at the exit date, even though the operative provisions come into force only after the exit date.

Lord Wigley: I do not want to overlabour this point, and perhaps it is one that the Minister could look at between now and Report in case there is any validity in what I am raising, but since it is by instruments that are passed in the National Assembly for Wales or in the Scottish Parliament that some of these will be put into force, there will quite likely be different dates for those purposes, and that could have a material effect. Some may fall one side and others the other side of 29 March 2019.

Lord Keen of Elie: If I understand the noble Lord's point, he is suggesting that we may have a situation in which a directive that has been adopted is implemented in England or in Wales or in Scotland but on different dates.

Lord Wigley: Yes, indeed, or it may have failed to have been implemented within the timeframe in one area and therefore does not get implemented but does get implemented in another area.

Lord Keen of Elie: In that event, it will be by reference to the exit date that we determine whether or not it forms part of the domestic law.

Lord Hannay of Chiswick (CB): I wonder if the Minister could deal with one category which I do not think he has dealt with yet; that is, a directive that is adopted before the exit date but whose implementation date is after the exit date but within the standstill period which the Government are currently negotiating in Brussels—and which, it is no secret, will involve the Government accepting that all the obligations of European law will continue to apply during that period.

Lord Keen of Elie: The implementation period is a wholly distinct issue from what we have to address in the context of the Bill. The implementation period has yet to be negotiated. The outcome of that implementation negotiation has yet to be determined. In the event that we agree an implementation period, clearly there will have to be further statutory provision—a further Bill—addressing our rights and obligations during that implementation period, and it may be that that further Bill will amend this Bill with regard to the effect of the exit date on further EU legislation, whether in the form of regulations or directives, after 29 March 2019.

But that is not an issue for this Bill. This Bill is dealing with the situation at exit, subject to the fact that, if there is a negotiation, things may change.

Lord Adonis: For those of us who have not been following the minutiae of the Government's announcements, can the Minister say that it is an absolute commitment on the part of the Government that directives that have been adopted and for which the implementation date falls before 29 March next year will be implemented?

Lord Keen of Elie: My Lords, my understanding is that the Government are determined, and have the present intention, to implement directives that have been adopted and which have an implementation period that expires before the exit date. I cannot give an absolute assurance to that extent but that has been and continues to be the Government's position. Indeed, to put it another way, we will continue to perform our obligations as a member of the EU, as we are bound to do by the treaty provisions. One of our obligations is to implement directives that have been adopted in Europe within the implementation period or by the transition date that is set out.

Lord Falconer of Thoroton (Lab): I express my gratitude and admiration for the way that the noble and learned Lords, Lord Mackay of Clashfern and Lord Keen of Elie, are bringing lustre to the Scottish Bar in the way that they are answering all these questions so brilliantly and with such trouble. My inquiry relates to a directive requiring implementation that has not been implemented, where there are certain rights that would be directly enforceable by an individual and there is no court case that says that. Can you go to court afterwards and say, "We can enforce that because there was a directive prior to the date of exit"? No court has said that it was directly enforceable; you could argue subsequently that if you win, you win—this would be in the domestic courts—and can say it is enforceable. Would that be covered?

Lord Keen of Elie: No, that would not be covered, because in those circumstances there would have been no crystallisation of the direct right prior to the exit date. That is our position with regard to that point—but I am obliged to the noble and learned Lord for his acknowledgment that we are answering questions as they are posed. I was rather hoping that my noble and learned friend Lord Mackay of Clashfern might actually come forward to the Front Bench and allow me to retire to the second tier in order that this matter could be dealt with even more cogently than I am able to do.

I return for just a moment to the actual amendment. I have sought to emphasise—clearly, I hope—why the amendment is not appropriate in the present context. It would simply take away from one of the principal purposes of the Bill, which is to determine that there is an exit date—a cut-off point—when we will determine the scope of our own domestic law. I can quite understand the point made by the noble Baroness, Lady Young, about emerging provisions in the EU that have been worked on for many years and that would bring about appropriate and attractive standards for various aspects of our life in the United Kingdom—but, of course, it would be perfectly open to this Parliament to decide, in light of what has already been agreed in Europe, that it would be appropriate to have these standards in our domestic law, and we will have the means to do that. It is just that they will not form part of retained EU law for the purposes of this Bill.

On the noble Baroness's amendment, I respectfully suggest that the mechanism that she has put forward—that you somehow retain the ECA for some purpose after it has been repealed—simply would not work. I appreciate that this is Committee, and we are actually looking at the underlying purpose of the proposed amendment and therefore have to consider whether we find that attractive and then look for a way to make it work. Nevertheless, it is appropriate to notice that the actual mechanism proposed in the amendment would not work.

I hope that I have addressed most of the points raised by noble Lords, but I agree with the observations made by the noble and learned Lord, Lord Brown, my noble and learned friend Lord Mackay and the noble Lord, Lord Pannick, with regard to what this Bill is attempting to achieve. It is attempting to achieve certainty as to the scope of our domestic law at exit date. That is its purpose, and we must keep that in mind.

Baroness Ludford: Will the Minister take another look at Clause 4(2)(b), which is a double negative? It talks about rights that are,

"not of a kind recognised",

by the European Court or any UK court. When he was talking earlier about a directive that had direct effect, I think I recall him saying that it would have had to be recognised by a court decision as having direct effect—but the wording of Clause 4(2)(b) suggests a direct effect if it is "of a kind" that has been recognised by the European Court or a UK court. He might not be able to reply immediately but perhaps, when we come to Clause 4, he could look back at what he said today on directives with direct effect and be sure that there is a logical fitting together with Clause 4(2)(b).

Lord Keen of Elie: In my submission, it fits entirely with what is said in Clause 4(2)(b) and is consistent with that. It points to the necessity of there having been a recognition by the European Court or a court or tribunal in the United Kingdom for those purposes. It may be that the noble Baroness will want to take issue in due course with the use of the word "kind", and no doubt we will come to that when we consider amendments to Clause 4.

5.45 pm

Lord Pannick: This is the precise subject of Amendment 26, which arises out of a recommendation from the Constitution Committee. If the noble and learned Lord, Lord Falconer of Thoroton, is interested in this subject, we are going to debate it under Amendment 26.

Lord Keen of Elie: I am obliged to the noble Lord, but we have ranged rather widely in the context of the present debate—or, to use my noble friend Lord Deben's term, we have got a little bit fuzzy as regards the precise terms of the amendment. I hope that, in light

[Lord Keen of Elie]
of the explanations that I have sought to give, including the reference to regulations and the point raised by the noble Baroness, Lady Hayter, to which we will return in due course, the noble Baroness will see fit to withdraw her amendment.

Baroness McIntosh of Pickering: I am grateful to all those who have spoken in this debate. I had not realised that we were going to have such a full debate, but it shows the importance of the issue that has been raised in Amendment 18. With regard to fuzzy wording, I am sure that my noble and learned friend Lord Keen, like myself, remembers a key distinction. I was one of the first law students to do the compulsory six-month constitutional law course on EU law, in which we learned straight off that a regulation is directly applicable and does not require any other implementation, whereas a directive is given direct effect only through implementation.

I am grateful to the noble Lords, Lord Wigley and Lord Liddle, who managed to put more flesh on the bones and give much greater clarification to what I was hoping to say. I am a little concerned by the Minister recognising that there is no legal basis for what we are seeking to do here—and my noble and learned friend Lord Mackay of Clashfern as well. I suggest, mindful of the comments made by the noble Lord, Lord Pannick, that this amendment has established that a legal basis is required, and that if this is not the wording that would give that legal basis, I would request that the Government come forward by Report with the legal basis in the form of an amendment on which the House could agree. On that basis, I beg leave to withdraw the amendment.

Amendment 18 withdrawn.

Amendment 19 had been withdrawn from the Marshalled List.

Clause 3: Incorporation of direct EU legislation

Amendment 20 not moved.

The Deputy Chairman of Committees (Lord Faulkner of Worcester) (Lab): I cannot call Amendment 20A, as it is an amendment to Amendment 20.

Clause 3 agreed.

Amendment 21

Moved by ***Baroness Hayter of Kentish Town***

21: After Clause 3, insert the following new Clause—

"Future treatment of retained EU law

(1) Following the day on which this Act is passed, no modification may be made to retained EU law except by primary legislation, or by subordinate legislation made under this Act insofar as this subordinate legislation meets the requirements in subsections (2) to (6).

(2) The Secretary of State must by regulations establish a schedule listing technical provisions of retained EU law that may be amended by subordinate legislation.

(3) Subordinate legislation to which subsection (2) applies must be subject to an enhanced scrutiny procedure, to be established by regulations made by the Secretary of State.

(4) Regulations under subsections (2) and (3) may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament.

(5) The enhanced scrutiny procedure provided for by subsection (3) must include a period of consultation with the public and relevant stakeholders.

(6) Regulations under this section may be used only to modify provisions of retained EU law listed in any schedule made under subsection (2) to the extent that such modification will not limit the scope of or weaken—

(a) employment entitlements, rights and protection,

(b) equality entitlements, rights and protection,

(c) health and safety entitlements, rights and protection,

(d) consumer standards, or

(e) environmental standards and protection."

Baroness Hayter of Kentish Town: My Lords, this amendment has support from across the House: it is supported by the noble Lords, Lord Warner and Lord Kirkhope of Harrogate, and the noble Baroness, Lady Smith of Newnham, who will be speaking after me. The objective of the amendment is pretty clear. It is to ensure that no reduction in rights which are being brought over can then take place without primary legislation. It is possible that there is a better way of achieving this; I am personally attracted by the proposals of the Constitution Committee, some bits of which we discussed earlier and some bits we will come to at another time.

It is worth rehearsing why we see the need for such protection for these standards. We are talking about protections and rights that cover—in these amendments—employment, equality, health and safety, consumer rights and the environment.

When we are in the EU, although regulations, for example, are not primary legislation, they are effectively ring-fenced or secured via our membership, which means that a Government cannot suddenly sweep in and sweep them away. However, once brought into domestic law under the Bill as it stands, they could be amended and, indeed, weakened by secondary legislation without consultation, when stakeholders can have their say, and without the Government having to take a Bill through Parliament where the scrutiny that takes place, which we are seeing now, allows MPs and Peers to interrogate the rationale, costs and benefits of any change.

Now we might assume that as we have worked with and lived with these rules for some time, no one would want to take away these established rights and protections, but there is the possibility that a deregulation-obsessed Government might want that to happen. We have already quoted Liam Fox thinking protections make it too difficult to fire staff, and that:

"Political objections must be overridden",

to deregulate the labour market. We have heard Michael Gove say,

"we now have the potential to amend or even if necessary rescind"—

—yes, he said "to if necessary rescind", splitting an infinitive—employment protections. The noble Lord, Lord Callanan, who is not in his place, in the name of "speeding up growth", thought to,

"scrap the working time directive, the agency workers' directive, the pregnant workers' directive".

Indeed, the Initiative for Free Trade, founded by that Minister's friend, Daniel Hannan MEP, favours tearing up the EU's precautionary principle under which traders have to prove something is safe before it is sold—a key consumer protection.

Meanwhile, the Foreign Secretary, from whom the noble Lord, Lord Callanan, sensibly distanced himself yesterday, described workers' rights from the EU as "back-breaking", a particularly inept description since most of these protections are for the health of workers, including of their backs.

At another point that Boris Johnson noted, quite rightly, is that we are a nation of inventors, designers, scientists, architects, lawyers and insurers, but it is exactly those architects, scientists, designers and insurers as well as the CBI and the British Chambers of Commerce who have been filling up my email urging us to remain in a customs union with its relevant regulation. The very businesses which already operate such rules seem very content to keep them, but the rules are at risk as they could be amended by secondary legislation. Similarly, the TUPE regulations, which protect the jobs, pay and conditions of workers who have been affected by outsourcing could be at risk. The TUC has highlighted that TUPE rights tend to protect workers such as cleaners, one in six of whom is BME. Without those protections they could be dismissed or be placed on zero-hours contracts rather than in permanent, secure jobs. The TUC heard rumours that Ministers want to scrap the working time directive and fears it could just be the start and that other protections could similarly go.

As we might expect, it is not just the TUC and unions representing workers which have these concerns. There is widespread public support for EU-derived consumer, employment and environmental regulations and minimal appetite for deregulation. Three-quarters of the public support retaining or strengthening the working time directive and nearly three-quarters want to keep vehicle emissions rules. Indeed, an Opinium survey for the IPPR found,

"little to no appetite among the public for reducing or removing EU standards".

Interestingly, that feeling was shared by leave voters and remainers, with only 5% of either remainers or leavers supporting any loosening of consumer cancellation rights, for example. Furthermore, the survey found strong support for higher standards in certain areas, particularly environmental and financial regulation. So the unions are not clamouring for deregulation and nor are the public or the public sector. I am sure other noble Lords' emails show that the rights that we are bringing over in this Bill should not be weakened.

The British Medical Association, along with 12 royal colleges and unions, wrote to the Prime Minister in December calling on her to stand firm against any Brexiteers who want to scrap European laws, warning of risks to patient safety and arguing that even with current EU regulations,

"fatigue caused by excessive overwork remains an occupational hazard for many staff across the NHS".

The Royal College of Nursing warns that,

"removing or weakening working time regulations would put patients at serious risk."

Such protections are clearly supported by those who know them and work with them, but they are not just good in themselves: they matter for trade. Indeed, non-tariff barriers are a bigger hurdle to trade than are, for example, customs duties. So even if the Government are not worried about patient safety or workers' rights—and I am sure they are—they should listen to industry, on whose success our economy depends. The CBI has stressed:

"Frictionless trade with the EU is businesses' number 1 priority",

and:

"A hard-headed look at the economic evidence ... shows that some form of a customs union is necessary to ensure frictionless-trade and no hardening of the Irish border".

The British Chambers of Commerce stresses the importance of businesses getting,

"their goods across borders as quickly as possible",

and getting things across borders means not checking for different regulations. The regulations we are bringing over under this Bill will be the ones that operate in the rest of the EU, and so long as we continue with them, our trade with the EU will be easy to maintain.

The chief executive of ADS, which represents companies in aerospace, defence and security, stresses the same issue and says that the freedom to move with the same regulations is the solution that those businesses want after Brexit. Noble Lords will know that the farming industry and the NFU strongly stress that the only way for frictionless trade in the food sector is with the same regulations, the regulations that we are bringing over by the Bill.

We are content that bringing over those regulations is the aim of the Bill. They are about safety, workers' rights and the environment but they are also about our future trade and competitiveness. This amendment seeks to ensure that having brought the regulations over it will not be possible for a Government to start playing with them by statutory instruments to weaken them after we have passed this Bill to bring them over. The Prime Minister said, I think in her response to the BMA and other bodies, that,

"it will be for Parliament and, where appropriate, the devolved legislatures to decide on future law".

That is the commitment we are trying to put into the Bill: that it would be an Act of Parliament, not secondary legislation, that would amend what we are now putting into UK statute. We are seeking to protect standards, not privileges. I hope that the Minister will accept this amendment, at least in principle, if not the wording. I beg to move.

6 pm

Amendment 22 (to Amendment 21)

Moved by ***Lord Cashman***

22: After the new clause, at end insert—

"( ) human rights protection."

Lord Cashman (Lab): This amendment is in my name and that of my noble friend Lady Kennedy. I agree wholeheartedly with what has just been said by my noble friend Lady Hayter. It seems to me we need

[Lord Cashman]
the protections on the listed exclusions not least because the Government are intent, following Monday evening, on not retaining the Charter of Fundamental Rights or the right of action on the general principles of EU law. My noble friend Lady Kennedy and I merely want to make the important and explicit amendment that "human rights protection" is included. I feel there is no need for me to say any more than that.

Lord Kirkhope of Harrogate (Con): My Lords, I support the noble Baroness, Lady Hayter, on Amendment 21. I do not intend in my remarks to spend a lot of time with the actual list at the bottom of the amendment, because she put across very well the need to protect in particular certain things which do credit to this country and which will give us advantages in the future, whatever the status of this country is.

I certainly felt my optimism rising today as I heard the reactions of my noble and learned friend the Minister to the whole question of how EU retained law will be protected in future. He seemed to be suggesting at one point that there might be some sort of hybrid approach. I am not sure what that might result in, but in the meantime we are in a situation where, as I am sure noble Lords are aware, the law, however it is made, comes in various forms. It comes in various packages, some of which are packages of principle of law, while other parts of the packages are the levers or the actual technical means by which laws are implemented.

That is why the amendment specifically states that primary legislation should of course be the main means by which any modification could take place, but also that subordinate legislation would be appropriate in certain cases to deal with technical areas that are not appropriate for a primary approach. Indeed, it is very sensible that even subordinate legislation be dealt with in a manner that allows it to have the support and security afforded to the principal legislation itself. I think there are certain doubts—to say the least—about the list of retained EU law. We have had several debates today and previously about what is actually meant by retained EU law, and we need greater clarity as to precisely what components make up this category.

There was a debate in another place on a very similar area and amendment. It was a very strong debate, to which a considerable number of people contributed, and real concerns were expressed about the way in which retained EU law, however it is finally listed, could be supported. As I said, I will not spend any time on the main areas that have been listed, but the Government have given many assurances—which I welcome—that the main areas of retained law will be specially protected and that they regard them as terribly important. That is only being affected, in a negative sense, by remarks from legislators who in the main do not form part of our Government but who nevertheless have been making statements indicating that almost with immediate effect from its arrival, the retained EU law will be either tampered with or destroyed. That has meant that a considerable number of people currently affected by the law are seriously worried about what might happen to those areas that are so important to our public and social life. The reasons for this amendment are to make sure that the Government are aware of the concerns and to ask them to do their best to put in place the security necessary to protect these areas on an ongoing basis. I support the amendment.

Lord Pannick: My Lords, I too support Amendments 21 and 22, which would restrict the powers of Ministers to modify retained EU law by secondary legislation in the contexts that have been mentioned: employment rights, equality rights, health and safety, consumer standards, environmental standards and human rights. All of those are vital areas. It is important in considering these amendments to recognise the breadth of the secondary legislation powers that are being conferred on Ministers under the Bill—and not just by Clause 7, to which we will come next week or the week after. The point is made by the organisation ClientEarth in a helpful opinion, which I commend to the Committee, written by Pushpinder Saini QC. He draws attention—and I draw the attention of the Committee—to some provisions that are tucked away in Schedule 8 to the Bill, on page 55. Paragraph 3(1) refers to existing powers in legislation to make subordinate legislation. It says:

> "Any power to make, confirm or approve subordinate legislation which was conferred before exit day is to be read, on or after exit day and so far as the context permits or requires, as being capable of being exercised to modify … any retained direct EU legislation".

That is a remarkably broad power. On page 56, at paragraph 5(1) of Schedule 8, there is a similar power for any future power to make subordinate legislation. Of course, the word "modify" has a very broad meaning, because it is defined in Clause 14(1), on page 10, to include amending, repealing or revoking.

That gives context to the importance of these two amendments. Can the Minister confirm that this really is the Government's intention? Schedule 8 does not have the two-year limitation period that Clause 7 has. Clause 7 applies only for two years, which is bad enough, but at least it is time-limited, whereas Schedule 8 is not. Is it really the Government's intention to confer power on Ministers to repeal by secondary legislation—with all the difficulties that poses for adequate scrutiny by Parliament—any employment rights and any of the other important protections mentioned in Amendment 21 and 22 in so far as they are part of retained EU law, which as we have heard covers the Equality Act and many other Acts in so far as they derive from, or are linked to, EU law obligations?

Lord Davies of Stamford: My Lords, the support of the noble Lord, Lord Kirkhope, for the amendment will be welcome. It reflects what I have always thought was a considerable cross-party consensus in this country in favour of a reasonable amount of regulation. Of course there are fanatics. Professor Minford is a very good example of an intelligent man who believes if we got rid of all regulation it would be a very good thing, and he has made calculations of the economic benefits to the country if literally all regulations—health and safety, environment, consumer protection and employment protection and so on—were simply abolished. However, he is rightly regarded as a fanatic in his own profession and indeed in politics. There are a number of people on the right wing of the Conservative Party who have always been very close to that way of thinking, and it

would be quite terrifying if the Government, under the camouflage of taking powers apparently needed to bring about Brexit, found themselves in possession of instruments that meant that without any real let or hindrance they could simply take an axe to the protective regulation that has emerged in this country over the decades.

All civilised countries have to have a reasonable amount of regulation in these fields or they very rapidly cease to be civilised. One of my great worries about leaving the EU is that we will probably end up with more regulation that in many cases will be much less rational: it will be the result of a campaign by the *Daily Mail* and weak Ministers giving in, saying, "Oh goodness, let them have what they want", and regulating on this or that. There is a much greater chance of that happening when we are no longer part of a body of 28 countries that are forced to look at these issues in realistic terms and come to some agreement on the subject. That is very worrying.

Lord Liddle: Would my noble friend give way? I want to be helpful to his argument. He refers to Professor Minford and the cost of EU regulation. It is only by making the extreme assumption that all these regulations will be abolished that the tiny number of economic studies that demonstrate some growth benefit from Brexit are able to get to that number. Those studies are quoted very frequently from the Front Bench opposite as examples of the fact that some economists differ from the consensus, but in fact that difference depends on the assumption that we would scrap every single piece of EU social protection.

Lord Inglewood (Con): My Lords—

Lord Davies of Stamford: I think that was an intervention. I gave way believing that it was.

Lord Liddle: It was to help my noble friend, yes.

Lord Davies of Stamford: I do not know whether or not to be pleased by that remark. It was very kind of my noble friend to want to help me but I do not know if I was in that much need of help at that moment. However, he has made a major contribution to the debate. He has pointed out something that all of us who were involved in the referendum campaign are well aware of: there were constant references by leave campaigners and the leaders of the leave campaign to the costs of the EU, but when you looked at the figures you found that they were based on the assumption that we would get rid of a whole raft of regulation—perhaps all regulation, as Professor Minford would like. However, very few people, if you put it to them, would want to live in a society in which there was no regulation in these areas. So there has been a great deal of dishonesty and obfuscation, not only in this area but in the whole European debate. In my view, that has not been a positive contribution to the ability of the British people to make an intelligent and well-informed decision. It is regrettable that some people have been prepared to be that cynical in this context.

To revert to the amendment and the clause before us, there is an extraordinary aspect to this: if the Government really do not have sinister intentions in this area—I cannot believe that they do; I do not actually think they intend to get rid of a whole raft of regulations, even in areas like employment protection, which we know the Conservatives particularly tend to dislike—why have they themselves not produced, in drafting the Bill or subsequent amendments, protections that would assure everyone that they had no such intentions? The amendment is a good one but it should not be necessary. It is most unfortunate that the Government have allowed the suspicion to be created that these regulations, which are fundamental to a civilised society, should be at risk. I look forward to hearing from the Minister that I am quite mistaken and the Government have no intention of using these powers in a deregulatory fashion but want only to use them functionally to assist in the transition to the post-Brexit era, and that they are prepared to accept the need to reassure the public that these powers cannot be misused and therefore will introduce some protections of their own, if they do not agree with this amendment, on Report.

6.15 pm

Lord True (Con): My Lords, has the noble Lord considered that, rather than resorting to his mythical thing of worry and terror about the Conservative Party, his arguments might gain more traction with some of us on these Benches if he considered the threat to property rights put forward by the leader of his party and the threat of the expropriation of value put forward by the shadow Chancellor in relation to the nationalisation proposals? The noble Lord talks about retaining regulation and parliamentary protections perhaps being helpful. Is he worried or terrified by a Labour Government having these powers to act without the kind of protections that he talks about?

Baroness Smith of Newnham: My Lords, we have already heard that this amendment is necessary, for some of the reasons that the noble Lord, Lord Davies, mentioned. I shall speak in favour of Amendments 21, which has my name on it, and 22. Like the noble Lord, Lord Kirkhope, I propose not to talk much about the details of areas that should not be amended, other than by a parliamentary role, but to focus a little more on the role of Parliament and the importance of ensuring that retained legislation should not be amended other than with clear parliamentary engagement, either through primary legislation or, as subsection (4) of the new clause in Amendment 21 suggests:

> "Regulations … may not be made unless a draft has been laid before, and approved by a resolution of, each House of Parliament".

One thing about the vote to leave the EU, as the noble Lord, Lord Blencathra, pointed out in Committee in Monday, is that the people of this country voted to bring back control of our laws because they believed that Parliament was capable of making better laws than the EU. Not all of us in your Lordships' House necessarily agree that we wanted to bring back control. But, to the extent that the United Kingdom voted to leave the European Union, surely the importance of the Bill is in ensuring not just that legislation is on the statute book but that there is no Executive power grab and that Henry VIII clauses and other opportunities—as in Schedule 8, outlined by the noble Lord, Lord Pannick

[Baroness Smith of Newnham]
—should not enable Ministers to make decisions that subvert the legislation without full parliamentary engagement.

It is hugely important that the rights and duties that have been outlined in existing legislation cannot be changed by ministerial fiat. If this amendment is not accepted, it is therefore important that the Government bring forward some other suitable amendment on Report that enables us to be reassured that the aim of the withdrawal Bill is not to give more powers to Ministers but, rather, to take back control to Parliament.

The Earl of Listowel (CB): My Lords, in considering how to deal with this legislation in future, will the Government keep very much in mind the impact on families? The Minister may be aware that in Germany there is no Sunday opening and that after 8 pm businesses are not allowed to send emails to people who work in their offices, yet it is the most productive of nations. I would say that part of that is attributable to the care that it takes about family life and finding a balance between that and work. The risk is that, in driving towards greater immediate remuneration and productivity, we fail to take the long-term view and think through carefully what changing these regulations would do and the impact that would have on family life.

In Germany, 15% of children grow up without a father in the home; in Britain, it is about 20%; in America, it is 25%. If we keep on putting pressure on families to be more and more active in the job market, the risk is that this will contribute to family breakdown and we will be shooting ourselves in the foot in the long term. I agree with Amendment 21: we should think very carefully and go through as strict a process as possible before removing these protections. Of course, it is a complex argument, because employment can reinforce family life and protect from family breakdown, but it needs to be carefully thought through. The Germans, with their better life balance, seem to be more productive than us, so we may need to keep that lesson in mind in legislating in such areas in future.

Viscount Trenchard (Con): I agree with what the noble Earl said about the balance between work life and family life, particularly with regard to the recently adopted hours which are becoming commonplace in your Lordships' House, but I regret to say that I cannot support the amendments, because they do not achieve their intention.

As the noble Baroness, Lady Hayter, recognised, the intention of her amendment is to ensure continuity and certainty in the law both before and after exit day. She worries that the powers granted to Ministers to amend retained EU laws should be both restricted and subject in each case to an enhanced scrutiny procedure, which would also provide for a period of consultation with the public and relevant stakeholders. But the effect of the amendments is to increase uncertainty and, ironically, reduce the likelihood—the certainty that is needed—that retained law will continue to provide exactly the same protections as before. Indeed, the period of public consultation to be provided in the enhanced scrutiny procedure gives the impression that policy changes may also be entertained. As we have heard from Ministers, the Bill is not about policy change.

Without these powers, there are huge risks that retained EU law will be defective for technical reasons—for example, due to the enormous number of references to Union institutions, which all need to be changed. Such changes would take so very much longer if each change was made subject to the enhanced scrutiny procedure proposed by the noble Baroness. That is just one area in which the amendments are counter-productive.

Lord Judd (Lab): My Lords, I shall speak to Amendment 23A but, before I do so, I should like to say how much I admired the clarity with which my noble friend introduced the lead amendment in the group and how warmly I support the amendment in the name of my noble friend Lady Kennedy on the issue of human rights.

I have two points to make. The first is that the anxiety out there in British society should not be underestimated. There is a great deal of anxiety among extremely good quality people who are doing dedicated work in the spheres with which we are concerned. Secondly, as a layman in no way involved in practising law, I have always understood as a citizen that what is terribly important about the law is its clarity and transparency. As we consider the amendments we must therefore not inadvertently allow doubt and misgiving as to whether there has been full transparency, and full commitment to that transparency, to creep into our future.

It is therefore very important, and I make no apology for proposing it, to get written into the Bill the fact that we seek to protect existing rights of citizens in the spheres affected. I shall read to the Committee the points that Amendment 23A says should be, and seen to be, central to the deliberations and negotiations that lie ahead. They include: human rights and equality, in which we have made great progress; privacy and data protection, which we have debated at great length in this House; and immigration and asylum protections—I am certainly one who believes there is much more to be done in that realm, but the Bill is not about that. My amendment is therefore not about that either but about protecting what we have. The other points are,

"criminal justice protections … employment protections … environment and public health protections … consumer protection … access to housing, education and health and social care".

I want to feel confident, in the immense amount of work lies ahead, that those issues will be in the Bill as primary considerations. I hope that the Minister, for whom my admiration increases all the time with the clarity with which he responds to amendments, will be able to reassure me that there will be some way to ensure that these things are not just implied in what is proposed but are there specifically.

Baroness Drake (Lab): My Lords, I shall speak to Amendment 21. The Bill gives Ministers what the Constitution Committee described as,

"an unprecedented and extraordinary portmanteau of powers upon which the Government could draw".

We are now seeing growing concern that by our giving such powers, well beyond those needed to effect legal

continuity, Ministers could use them to effect substantive policy changes. That is what is at the heart of this tension.

Many important protections currently enjoyed by UK citizens are not written into Acts of Parliament but underpinned by membership of the EU, which cannot be weakened by the UK Government. Once some of those protections are brought into domestic law by secondary legislation, there is no assurance that they can be changed only by primary legislation. The Bill will also allow Ministers to use the delegated powers contained in existing UK legislation to effect significant policy changes to retained EU law. The powers under Schedule 8 have already been referred to.

The merit of Amendment 21 is that it poses greater protection by enhancing scrutiny of ministerial amendments to retained EU law and restricting the modification of retained EU law by subordinate legislation to technical provisions. Such modifications could not limit the scope of or weaken standards and protections afforded to UK citizens. Amendment 21 makes a clear distinction, which the Bill fails to do, between technical and substantive policy changes—between necessary amendments to retained EU law to provide legal continuity and the wider issue of discretionary amendments that implement substantive changes to policy.

I want to refer to employment rights and consumer standards to illustrate the amendment's merits. There are many EU-derived equality and employment protections enjoyed by the people of this country that are essential ingredients of economic fairness and social cohesion. These are rights which working people now take for granted, including rights to paid holidays, equal pay for equal-value work and equal treatment in the workplace.

6.30 pm

The safety net for employment and equality rights will be weakened when the UK leaves the EU and the future framework of EU law, including the court system that supports these rights. Individuals will no longer be able to bring a free-standing legal challenge that UK law breaches the principles of EU law or seek Francovich damages where the Government fail to respect rights derived from EU law. Ministers will be free to pursue significant changes to employment and equality protections without the need for primary legislation.

Amendment 21 would ensure that Ministers cannot use the correcting powers in this Bill to weaken protections enjoyed by UK citizens. The Government will need primary legislation to do that. People are entitled to greater legal certainty that ministerial powers intended to convert EU law into domestic law will not be used to undermine their protections. Ministerial promises will not suffice. David Davis, in his recent Vienna speech, said the UK wanted to lead a,

"global race to the top",

in rights and standards, and not a,

"competitive race to the bottom".

However, ministerial statements have currency only until the next ministerial occupant. Recent government changes to employment rights heighten concerns. They capped compensation awards in unfair dismissal cases, which they could do as core rights on unfair dismissal are based on UK law. There are concerns that, post Brexit, compensation rights derived from EU law will be capped. The consultation period in the event of mass redundancies was halved. Fees introduced for employment tribunal claims led to a dramatic fall—of approximately 70% in cases going to tribunal, with women and low-paid workers particularly disadvantaged. The Supreme Court struck down those fees, but the Government hinted that a new fees scheme could be introduced.

The Government have spoken of a "new economic model" when the UK leaves the single market. They know of the growing fears that the Government will cut employment protections. David Davis, Brexit Secretary, specifically called them out in his recent Vienna speech when he asserted that Britain will not be plunged into,

"a Mad Max-style world borrowed from dystopian fiction",

after it leaves the EU. He went on:

"So while I profoundly disagree with those who spread these fears—it does remind us all that we should provide reassurance".

Promising to behave better than characters in "Mad Max" still leaves a lot of scope to behave badly, and provides little reassurance. This amendment would allow the Government to make a significant contribution to providing that reassurance by constraining the Executive uses of power in this Bill, and weakening protections currently enjoyed by the people of this country.

My underpinning reasoning applies equally to standards of consumer protection. Consumer protection standards are integral to the economy, as every month consumers spend £100 billion in the UK and, in doing so, support UK businesses, manufacturers and employees. Which?, the consumer organisation, captured it well when it observed that on the current drafting, the Bill is,

"effectively offering a carte blanche to Ministers … a Minister could realistically make sweeping changes to laws that impact on consumers in areas such as food and product safety standards, approval systems, and the oversight of financial services … changes of this scale and nature, which could impact on the Government's general policy approach, the nature of current consumer protections and even governance, oversight and enforcement arrangements, must be subject to wider scrutiny in order to ensure the best outcome for consumers".

I take another example from the Financial Conduct Authority—we should look at some of the commentary coming from the financial sector—and the FCA handbook, through which some EU-derived legislation is implemented. The powers in the Bill allow Ministers not only to make significant changes to that handbook, which could impact on consumer standards, but to alter the balance of responsibilities in the financial services sector and upset institutional coherence within the regulatory bodies. Is it any wonder that we are seeing such an amendment as Amendment 21?

In supporting this amendment I do not want to get into a debate about the preferred economic model for the UK post Brexit. My concern is to constrain ministerial powers intended to convert EU law into domestic law from being used to implement substantive changes of policy. I say to the noble Lord, Lord True: I do not want these powers given to any Executive. I happily concede that point.

Baroness Ludford: Before the noble Baroness sits down, I invite her to agree with me that the fears that she raises are not fanciful. Indeed, the reason the Brexit Secretary had to make his speech was that we have on record numerous statements by Conservative politicians who are now Ministers expressing a desire to deregulate. I quoted one from the noble Lord, Lord Callanan, the other day. In 2012, Liam Fox said:

"To restore Britain's competitiveness we must begin by deregulating the labour market. Political objections must be overridden. It is too difficult to hire and fire and too expensive to take on new employees. It is intellectually unsustainable to believe that workplace rights should remain untouchable".

That is on the record, and I have lots of other quotes in a similar vein.

Lord Falconer of Thoroton: My Lords, three pretty clear themes are emerging around the House. First, you should be able to use the subordinate legislation to change EU retained law only where it is necessary to make EU retained law work. Secondly, it should affect only technical matters; and thirdly, it should not take away any individual's rights. So there are three requirements: it must be necessary to make it work, affect only technical matters and not take away anybody's rights. The argument for being allowed to go further has not been made anywhere, and I would be very interested to hear the Minister say why those three principles should not apply to every piece of subordinate legislation under the Act. If the Government want to go further, primary legislation should be used. Unless there is a case for going further, this Act should be appropriately limited.

Lord Faulks (Con): The Bingham Centre makes the very cogent point that there is no clear analysis so far as to what the body of EU law is in an easily accessible form, so that businesses and individuals can ascertain what applies to them. However, the Solicitor-General said in the other place that there are 12,000 EU regulations currently in force in the UK and around 7,900 statutory instruments implementing EU legislation.

I understand the fears expressed around the House, particularly on the opposite Benches about the feeling that the Government have all sorts of sinister plans to take away rights. They will do so if they feel it necessary, by primary legislation, it is said, but no other way. This amendment would make it very difficult to do anything other than by primary legislation. First, a list of so-called technical provisions has to be established—a considerable challenge. No changes can modify any of the matters which are set out in Amendment 21. Those matters seem to cover more or less everything. What is to say that labelling and packaging is not a matter for consumer standards? Matters of health and safety entitlements, equality entitlements and rights of protection—almost anything can come within those definitions. Similarly, there are environmental standards and protection. I am not talking about fundamental matters such as the working time directive, but a great deal of the various regulations and statutory instruments that come from Europe are relatively trivial. Even those who endorse very much what has come from Europe would accept that not all of it is critical or crucial to our society going forward. That will make it almost impossible to change anything, which may be the desire of members of the party opposite who do not want to leave the European Union—or those all around the House.

That is the effect of this amendment. So far as Amendment 22 is concerned, on "human rights protection", the noble Lord, Lord Cashman, was very succinct; he did not specify what "human rights protection" meant. We had a debate on the Charter of Fundamental Rights—

Lord Cashman: I precisely did not elaborate on the reasons why, as I felt that I did that at some length on Monday evening. But it is precisely because the Government have said that they have no intention of carrying over the Charter of Fundamental Rights, or the right of action based on the general principles. It is precisely for those reasons that we need to protect the aspect of human rights, because it is not contained specifically within the previous amendment.

Lord Faulks: The Human Rights Act is expressly preserved as a result of the changes that the Bill is going to bring about. The charter is, of course, ruled out by the Bill at the moment; I suppose, from what the noble Lord says, this is a way in which to bring it back in under the rubric of "human rights protection"—but, of course, "human rights protection" is potentially a varied and wide description.

This amendment is an absolute recipe for confusion and litigation. Although I understand the feelings of insecurity about what a Government might have in mind, it is not consistent with the overall objective of this legislation, which is to provide clarity at the moment when we leave the European Union.

Lord Pannick: Given the noble Lord's objections to the drafting of this amendment, does he sympathise, as I do, with the noble and learned Lord, Lord Falconer of Thoroton, with the idea that a way can be found to restrict powers of Ministers by subordinate legislation to change retained EU law? Will he express the hope that the Government will think very carefully about that and bring forward an amendment before Report?

Lord Faulks: I am grateful for that intervention. I am certainly receptive to the possibility of some restrictions on what the Government can do, but this is far too much of a restriction—it is a complete straitjacket.

Lord Bilimoria (CB): If I may, I shall just reference the former Attorney-General, Dominic Grieve, who wrote recently:

"Having just spent four months considering the EU (Withdrawal) Bill … I don't think I have ever seen a piece of legislation that conferred such power on the executive to change the law of the land by statutory instrument … and where the entire structure was so closely interwoven that the same end could often be achieved by different routes".

We have not yet touched on this, but we had the Strathclyde review from the noble Lord, Lord Strathclyde. On 26 October 2015, noble Lords withheld agreements to tax credit regulations and the following day a Motion was moved and narrowly defeated and, therefore, the Prime Minister said that we should review this.

The House was criticised for flexing its political muscle and the review said that we should,

"understand better the expectations of both Houses when it comes to secondary legislation and, in particular, whether the House of Lords should retain its veto".

We built up lots of experience with secondary legislation and, of course, the House of Commons is meant to be primary and its will should not be blocked. As the noble Lord, Lord Strathclyde said:

"It would be regrettable if the Lords simply became a highly politicised 'House of Opposition'".

We are not a House of opposition; when that happened, it was a rare occurrence for all of us present, because since 1968 there has been a convention that we should not reject statutory instruments. It has very rarely happened. The rejection of the tax credits regulation broke new ground.

So it is much more complicated. There are so many different types of statutory instruments, including super-affirmative, subject to affirmative resolution procedure, subject to negative resolution procedure, laid instruments and unlaid instruments. The noble Lord, Lord Faulks, said that there were already 8,000 statutory instruments in place regarding the European Union. If you look at the number of instruments over the years, it runs into thousands. How many thousand statutory instruments does the Minister predict we will need to implement this Bill?

6.45 pm

The right honourable David Lidington responded to the Strathclyde report, saying:

"Whilst recognising the valuable role of the House of Lords in scrutinising SIs, the Government remains concerned that there is no mechanism for the elected chamber to overturn a decision by the unelected chamber on SIs … We must, therefore, keep the situation under review and remain prepared to act if the primacy of the Commons is further threatened".

Here we have a threat to this House—that if we dare to challenge the statutory instruments, we are going to get into trouble. I remember that the noble Lord, Lord Strathclyde, when this came up, said the same thing in the debate.

Now the noble Lord, Lord Pannick, has brought to our notice the wide powers tucked away in Schedule 8 and the repealing by secondary legislation of these—

Lord Forsyth of Drumlean (Con): I am grateful to the noble Lord for giving way, but does not he see how absurd the argument is that he is putting when these European regulations are matters over which the House of Commons has no choice but to implement? The whole point of this Bill is that it is restoring it to the primacy of Parliament to decide on these regulations.

Lord Bilimoria: The noble Lord, Lord Forsyth has great foresight, because I am about to cover that in my speech.

Baroness Manzoor (Con): In terms of limiting the powers of Ministers, is that not within Clause 7? Forgive me if I have misread that, but I refer both to the point that the noble Lord is making and to the point that the noble Lord, Lord Pannick, made earlier.

Lord Bilimoria: With all due respect, that is the whole objective of this—the fact that one can use statutory instruments. Here is the underlying worry—about a Government who have tried to bypass Parliament from the beginning, from the wretched referendum. They tried to implement Article 50 without Parliament. That is a fact. It took an individual—Gina Miller—represented by my brilliant noble friend Lord Pannick, to defeat the Government in the High Court. The Government then appealed to the Supreme Court and were defeated resoundingly—and the noble and learned Lord, Lord Keen, was on the other side.

Lord Hamilton of Epsom (Con): Did the noble Lord think that it was the intention of Miss Gina Miller that, when the House did have a vote, it would actually vote by an overwhelming majority to move Article 50?

Lord Bilimoria: I remind the noble Lord that this House, in that Article 50 Bill, had two of the largest votes in the history of the House of Lords; 614 of us voted in one instance and 634 in the other instance. In both instances, we defeated the Government by almost 100 votes. The fact that the House of Commons did not accept that is a different matter—and the point that I am making is that the Government tried to bypass Parliament. There is the worry that statutory instruments bypass Parliament.

Do Henry VIII clauses give Governments the power of royal despots? Well, secondary legislation is used all the time to amend the text of primary legislation in non-despotic ways, as the noble Lord, Lord Faulks, said—they do not have to be. In fact, the biggest Henry VIII section of them all can be found in the European Communities Act 1972—the very piece of legislation that we are repealing.

Lord Forsyth of Drumlean: My Lords—

Lord Bilimoria: I am coming to the noble Lord, Lord Forsyth—will he please have some patience? Specifically, Section 2(2) of that Act deals with the type of EU legislation and rulings that need to be transposed into UK law. Typically, these involve EU directives where the intended outcome of the law is made clear, but it is up to the individual member states how to implement them. After Brexit, if Brexit happens, the Government want to use a Henry VIII clause in reverse—to adapt EU laws to make them British. For example, disputes that are currently referred to EU regulators or courts will be amended to refer to their British equivalents. The logic of the noble Lord, Lord Forsyth, is that, if you are going to have a swathe of amendments to undo primary legislation that has already been made using secondary legislation, you should make those replacements in the same way. It is not as simple as that; because of the "deficiencies arising from withdrawal", the references to the EU regulators, the European Court of Justice and other entities will no longer have any sway if there is Brexit. It is not as simple as saying, "Because they are simple things, we just can't do this", and the Government saying, "We will just use these Henry VIII powers to tidy up things". The problem is that it might alter not just technical details but also the substantive effect of the law. These amendments are trying to protect really important issues.

[Lord Bilimoria]

The Supreme Court has also said that it is well established that, unlike statutes, the lawfulness of statutory instruments can be challenged in court. Even if a statutory instrument gives Ministers broad powers, the courts have established that they will apply limitations. The broader the power, the more likely the courts are to intervene to ensure that the intention of the law in question is not being altered or undermined. Does the Minister accept that?

I conclude that the power to amend all EU-derived primary and secondary legislation by the Government without sufficient scrutiny, checks and control, bypassing Parliament, goes against the ultimate supremacy of Parliament itself.

Lord Adonis: My Lords, may I elaborate on the point made by the noble Lord, Lord Pannick and invite the Minister to respond further? A key point in this debate is surely that powers conferred by Parliament should be exercised only as Parliament intended. A key point on paragraph 3 of Schedule 8, which the noble Lord referred us to, is that the power to make and approve subordinate legislation—which is conferred in primary legislation—was, in the case of retained direct EU legislation, originally conferred in the context of directives and legislation which derived from the European Union itself. So the context in which Parliament gave the power to make subordinate legislation was that it should achieve the purposes of the directive.

That being the case, allowing these powers to be used completely independently of those directives significantly enlarges the scope within which those powers can be exercised, which was not intended by Parliament when the powers to grant that subordinate legislation were first conferred. I am not sure that I am carrying the noble Lord, Lord Pannick, with me, but that seems to me to be a crucial aspect of Schedule 8, and it would be good to get the Government's comments on that.

Lord Pannick: The only reason why the noble Lord is not carrying me with him is that I do not understand the purpose of paragraphs 3 and 5 of Schedule 8. It seems to me extraordinarily broad, which is why I am seeking an explanation from the Minister as to why we need these powers, given that we also have Clause 7 in the Bill, which is time limited.

Lord Keen of Elie: My Lords—

Lord Judge (CB): May I just have a few moments?

Noble Lords: Hear, hear.

Lord Judge: Well, noble Lords may not want to hear what I am going to say. I have had a sense developing over the last 40 minutes that we are well ahead of ourselves. We should be discussing these issues when we come to decide the very important question of whether retained EU law is to be treated as primary legislation, subordinate legislation or a bit of both. We will then have a debate on Clause 7, which entirely addresses this issue of subordinate legislation and Henry VIII powers, and we will come again to it when we debate Clause 9.

I just make two points. First, no Parliament can bind its successor. We do not know what a future Parliament will think about all these various matters raised in proposed new subsection (6) in Amendment 21; they are very important issues, but we cannot bind anybody. Secondly, in relation to the exercise of any Henry VIII powers—and there will of course have to be careful thought given to it—I am fascinated by the proposal in proposed new subsection (2) in Amendment 21 that a schedule should list,

"technical provisions in retained EU law that may be amended by subordinate legislation".

When we come to look at Henry VIII powers, do we not have to take a rather more revolutionary look at them? Should we not be saying to ourselves that the Government of the day—whatever Government it may happen to be—should, at the very least, in the proposal for subordinate legislation, set out which terms of primary legislation are being repealed, amended or affected by the secondary legislation? That is some food for thought.

Lord Keen of Elie: My Lords, as may have been observed during the passage of the Investigatory Powers Bill, the Government are always listening. I am most obliged to the noble and learned Lord, Lord Judge, for his observations, because they go to the very heart of the point I want to make. We are, in a sense, having the wrong debate in the wrong place, but I am also relieved to hear from my friend the noble Lord, Lord Pannick, that he does not understand paragraph 3 of Schedule 8, because I was rather concerned about his earlier interpretation of it under reference to the opinion of Pushpinder Saini, QC—I will come back to that in a moment, if I may.

The areas that these amendments seek to protect, such as employment rights and environmental standards, are issues that are important to every Government, and in particular this Government. Of course, we are anxious to ensure that rights and standards such as these are maintained—indeed, where possible, increased—after we leave the EU. It might be observed that UK protections in many of these areas—for example, parental leave—in fact go beyond the level of protection provided for in EU law, so let us keep this in context.

It is important, however, that we are able to address deficiencies to ensure that the protection of these rights and the standards that they reflect continue to function effectively and that the Government are able to amend legislation in line with our history of leading in these areas of protection. When people voted to bring back power to our Parliament and to bring back control of our laws, they did not vote to put them in the deep freeze for any number of years. We have to see this in context: we are talking about thousands of regulations—somewhere in the order of 12,000 regulations—which were of course not the subject of parliamentary scrutiny; and we are talking about thousands of SIs implementing directives, which were of course not the subject of parliamentary scrutiny, which have come into our law and will be part of our law on exit day, because they will form part of the area of retained EU law.

The noble Baroness, in her amendment, proposes a schedule of "technical provisions" in an area where we are dealing with enormous quantities of law, by way of regulation and by way of implemented directives. The first

point that would arise is: where is the line to be drawn between what is a technical and a non-technical provision? The noble and learned Lord, Lord Falconer, alluded to this as one of the three criteria he had in mind. You have to be able to define these criteria, otherwise you immediately run into a further issue. That is in itself a very real challenge: how would we define or class a technical issue in the context of seeking to update retained EU law?

Perhaps the more important point, however, is that much of what has been said here anticipates the issues that we will debate in the context of Clause 5, on the classification of retained EU law, and, more particularly, Clause 7, in relation to the exercise of certain powers by government in dealing with the body of retained EU law. Again, it is important to try to put this in context. We have had references to the suggestion that the Government are taking untrammelled, unlimited powers to do virtually anything with the statute book. Let us not, even if we think we have a good case, overstate it because, in doing so, we rather spoil our argument. That is not at all what the Government seek to do. Clause 7 is concerned with how we deal with deficiencies arising from our withdrawal from the EU. It is therefore concerned, as it says, about the making of regulations which are,

"appropriate to prevent, remedy or mitigate—

(a) any failure of retained EU law to operate effectively".

We are not talking about wholesale policy changes to our employment or environment laws, our standards for consumers or anything of that kind. The noble Lord, Lord Pannick, referred to—

7 pm

Lord Davies of Stamford: I am grateful to the noble and learned Lord for giving way. Of course, we hope that we are not talking about any of those things. We hope that we are not talking about radical changes and reductions in some of the essential regulation which we have all said is so necessary. However, we need a little bit more than hope. We need some evidence of the Government's commitment to restrain themselves when it comes to using these powers.

Lord Keen of Elie: That is why Clause 7 is drafted in the terms in which the noble Lord will find it in the Bill.

Reference was also made to the provisions of paragraph 3 of Schedule 8. I am not sure how the noble Lord, Lord Pannick, interpreted that paragraph but let us be clear: it refers to existing powers, not to powers created under this Bill. Those powers already exist in respect of existing legislation. They are not being extended. If the Government truly intended to bring about wholesale change to these policy areas, and could do so on the basis of their existing powers, perhaps they might have done so already. The provision does not extend to these powers. Therefore, again, with respect, it appears to me that the matter is being taken out of context. However, I would be happy to look at the opinion on this from Pushpinder Saini referred to by the noble Lord, Lord Pannick.

Lord Adonis: My Lords, he pointed out that Schedule 3 is not the key—

Lord Keen of Elie: My Lords, we must make progress at this stage, if the noble Lord does not mind. We have to keep moving.

I come to the nub of the point. If there is a concern about the powers being conferred on Ministers to ensure that the retained EU law works after exit, that arises in the context of Clauses 7 and 5, which will be the subject of future debate in this House. As I say, it is not appropriate to try to represent the powers already set out in the Bill as extending beyond the boundaries set out precisely there about correction, regulation and making retained EU law work. I respectfully suggest that the route proposed by the noble Baroness is not one that we should go down as we would simply run into the sand. If we were to list technicalities and technical changes in all these areas of legislation, we would be here in 10 years' time trying to produce such a schedule; let us be frank about it. Of course, many people may wish that we will be here in 10 years' time attempting to achieve that. In that context, I invite the noble Baroness to consider withdrawing her amendment and invite the noble Lord, Lord Judd, not to move his.

Baroness Hayter of Kentish Town: I thank all noble Lords who have spoken. I know the Committee will not believe this but the three noble Lords I most want to thank are the noble Lords, Lord True and Lord Faulks, and the noble Viscount, Lord Trenchard. I thank the noble Lord, Lord True, for raising my spirits. I love the words "Labour Government"; I will use them again and again. I thank the noble Viscount, Lord Trenchard, because sometimes when you know what you are talking about, you assume that everyone else does. I had got something wrong and it was not clear. I was not talking about how, under this Bill, the current EU rules will be put into legislation by statutory instruments. We are content with that. We will in due course argue about whether the relevant word should be "necessary" or "appropriate", but that is not the purpose of this amendment. I thank the noble Viscount, Lord Trenchard, for giving me the opportunity to say that.

The purpose of the amendment is about looking way into the future and future-proofing what we are putting into UK legislation and to make sure that it cannot then be tampered with by means of statutory instruments. It is not about the current work that many of our colleagues on the statutory instruments committee are about to undertake. We are talking about the future. I again thank the noble Viscount for giving me the opportunity to discuss that.

I say to the noble and learned Lord, Lord Judge, that I said at the beginning of this discussion that we would come on to how we deal with the bigger issues involved in this matter. However, today, I want to discuss the human, environmental and consumer rights that we sometimes risk losing sight of when we get into the technicalities of law and how we are going to hold on to those. As I said, I absolutely accept that we may deal with the technicalities later.

The noble Lord, Lord Faulks, said that certain bits of retained EU law could possibly be dealt with by statutory instruments and others by primary legislation. Elsewhere in the Bill judges are allowed to deal with measures on a case-by-case basis. But in the case of

[Baroness Hayter of Kentish Town]
retained EU law, we have a difficulty as I think he said that he was happy for the Government to decide which measures could be dealt with by secondary legislation. Perhaps that is the nub of the problem.

Lord Faulks: I am very grateful to the noble Baroness for giving way. I perhaps ought to clarify that I was responding to a question from the noble Lord, Lord Pannick. I meant the Government in the course of the Bill rather than the Government simply deciding that they wanted to do it.

Baroness Hayter of Kentish Town: I thank the noble Lord. I apologise for misunderstanding that point.

I am afraid there was an offline conversation between the noble Lord, Lord Kirkhope, and myself. I do not know whether he referred to that when he spoke but in that conversation he gave a very good description of the aims of the Bill—namely, that after we have examined it and are satisfied that all the stuff is going into UK legislation, everyone should know what the rules are and the Bill should achieve that outcome. That is what this measure is about. It is about whether we leave it to Ministers in the future to decide which bits of retained EU law they can deal with in secondary legislation. As my noble friend Lady Drake said, we need to restrain executive powers as ministerial promises will not suffice. That in a sense is where we are with this issue.

My next point relates to the issue raised by the noble Earl, Lord Listowel—namely, that we as legislators look at something but may forget sometimes to undertake consultation, be it with families or anyone else. That is one of the other great advantages of primary legislation: it is much more out there for people to talk about.

The noble Lord, Lord Pannick, as always trumps everything I do and comes up with much better arguments. However, I too had not noticed the lack of a time limit in Schedule 8. I am sure that we shall want to return to that.

As we have heard a number of times, the Minister said that there has been no parliamentary scrutiny of the current EU law, so anything we get in future will be better. I remind him that much of that law goes through the Council of Ministers, where we have a Minister, and through the European Parliament, where we have British MEPs. Therefore, the idea that there is no democratic involvement from the Brits is not quite right. We are listening to the concerns of consumers, workers and, indeed, business, about the Bill and I think there will be amendments to it to address some of their concerns. However, we are looking now to future-proof it to ensure that we do not give Ministers rights that we may not want them to have. We will come back to that in the broader discussion. However, for the moment, all noble Lords will be very pleased to know that I beg leave to withdraw Amendment 21.

Amendment 22 (to Amendment 21) not moved.

Amendment 21 withdrawn.

House resumed.

Northern Ireland Border

Statement

7.10 pm

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, with the leave of the House, I would like to repeat the Answer given by my right honourable friend the Minister for the Cabinet Office and Chancellor of the Duchy of Lancaster in response to an Urgent Question asked in the other place today. The Answer is as follows:

"This Government have been consistent in their commitment to Northern Ireland as the United Kingdom leaves the European Union. First, we will never accept any solutions that threaten the economic and constitutional integrity of the United Kingdom. Secondly, we will not accept a hard border between Northern Ireland and Ireland, which would reverse the considerable progress made through the political process over recent decades. That position has been consistent, from the Prime Minister's Article 50 letter through to our position paper published last summer and the PM's Florence speech last autumn.

Most recently, the Government enshrined both those commitments very clearly in the joint report we agreed with the European Union in December. That set out very clearly our,

'commitment to preserving the integrity of',

our,

'internal market and Northern Ireland's place within it'.

It also included our,

'guarantee of avoiding a hard border',

between Northern Ireland and Ireland, including any related checks and controls. These commitments were agreed collectively by the entire Cabinet and I believe they have wide support across the House. These commitments have not changed, nor will they".

7.11 pm

Lord Collins of Highbury (Lab): I thank the Minister for repeating the Statement and I appreciate his comments about the Good Friday agreement, which were very clear. Certainly the Minister was very clear last week, too. Although he is clear, I am afraid that the Government appear less so, and certainly the bizarre comments from the Foreign Secretary have not helped the matter. Although we may find it amusing that he drew a parallel between London boroughs and the border between the Republic and Northern Ireland, it is simply not helpful. It is not a joking matter; it is serious.

In addition to the Foreign Secretary's comments, we have his private memo to the Prime Minister, in which he says that,

"it is wrong to see the task as maintaining no border",

and that the Government's task is to stop the border "becoming significantly harder". He goes on to say:

"Even if a hard border is reintroduced, we would expect to see 95% + of goods",

pass the border without checks. Just what are the Government considering here? Can the Minister tell us on what basis the figure of 95% was reached?

What analysis was undertaken, and why are the Government considering this if, as the Minister repeated today, they are committed to the Good Friday agreement and a soft border?

It is also hard to understand why the Government are so critical of the EU's proposals for a common regulatory area. The EU has been absolutely clear that this is a backstop if the Government fail to deliver on their very clear promise of no hard border. Does the Minister accept that most of us are struggling to understand how, without a customs union with the EU, the current border arrangements and the GFA can be maintained? Will he enlighten us? Will he be able to tell us how he can square this circle?

Lord Duncan of Springbank: I thank the noble Lord very much for his question. The United Kingdom Government's support for the Belfast agreement is unwavering, certain and clear. My right honourable friend the Prime Minister has iterated and reiterated that on more than one occasion. The memo written by my right honourable friend the Foreign Secretary is, I do not doubt, one of many papers that circulate at that level containing a number of ideas. That memo does not—I repeat, "does not"—represent the United Kingdom Government's position and therefore it should not be seen as such. The position remains unchanged in this regard, and it is part of what I would like to term the "joint report": that is, the agreement reached by the United Kingdom Government and the EU in December remains fixed at where we are today.

Noble Lords will be aware that there were three options in the joint report which were core and key. The UK and Irish Governments were very much of the view that they wish to see the border allow freedom of movement across it in a manner that does not fetter and is not restrictive. That remains the position of the United Kingdom Government. It is hoped that through the negotiations, which are ongoing and will continue into the near future, we will be able to bring about an agreement around what I would term "option A" of the joint report agreed by the EU and the UK Government in December of last year.

Lord Howard of Lympne (Con): My Lords, is my noble friend aware of the report commissioned by the European Parliament, no less, and produced by Mr Lars Karlsson, the very distinguished former head of the World Customs Organization? It makes it very clear in some detail that technology solutions are available which make it completely unnecessary to have a hard border on the island of Ireland. Is it not the case that the European Union and, I regret to say, several Members of your Lordships' House are wilfully closing their minds to these solutions as they attempt to exploit fears of a hard border on the island of Ireland in their misguided and misconceived attempts to thwart the wishes of the British people and keep the United Kingdom within the customs union?

Lord Duncan of Springbank: I thank my noble friend Lord Howard for his intervention. He is quite right to draw the House's attention to the report written by Lars Karlsson and published by the European Parliament. We are living in an age when technology is becoming far more widespread and we should not lightly set aside the available options. I commend all elements of that report to the House, as it is worth reading. However, I return to the point that I made before, which is that, through our negotiations, it is our intention in the next phase to secure agreement on that joint report and move this matter forward so that we can maintain a seamless border to allow trade to move north and south.

Lord Campbell of Pittenweem (LD): My Lords, I shall do my best to maintain the same level of objectivity as the noble Lord, Lord Howard, in these matters. This is a seminal moment, is it not? The publication of the withdrawal document and the Government's robust response to it highlight that the Government's position is to adopt mutually inconsistent objectives: no hard border, no customs union and, indeed, no full alignment, as the withdrawal document sets out. On the matter of electronic borders, let us remember that cybercrime is something against which we are obliged to take as many precautions as we possibly can. If you want to cause mischief in Ireland with an electronic border, you should embark on the kind of activity that allowed people to get into the Pentagon. If they can get into the Pentagon, they will undoubtedly be able to cause mayhem in any electronic arrangement for the border. My point is that, on the face of what is said in the withdrawal document and the Government's response, we are heading for a hard Brexit. How would the Government fulfil their obligations under the Belfast agreement if there were a hard Brexit?

Lord Duncan of Springbank: I thank the noble Lord, Lord Campbell of Pittenweem. With regard to the notion of the cybercrimes that we have all been threatened with over the last few years, I note again that much of the movement of goods that come into the EU is dealt with through electronic consignment. The risks that are already established for all trade are real risks, and we must take them into account as we seek to address all the challenges as we go forward.

With regard to the question about the nature of the border, the issue I come back to again is that when we reached that agreement between the EU and the United Kingdom Government in the joint report of December, it was based upon a mutual understanding that we wished to see a border in name alone to allow movement to continue. That is the position of the United Kingdom Government and, importantly, also the position of the Government of Ireland—the two principal interlocutors in this matter. We must never lose sight of the fact that they are the most affected, and we must find and secure an agreement that suits both sides. On that basis, they form the principal component parts of the negotiation elements that will unfold in the coming months. It remains the objective of the Government to deliver a seamless border, as we have promised and as has been promised by the Taoiseach himself.

Lord Trimble (Con): My Lords, reference has been made to the need to preserve the Belfast agreement, with which I am wholly in agreement. However, I draw noble Lords' attention to the December paper, which made reference to regulatory alignment but did so in

[LORD TRIMBLE]
the context of cross-border arrangements under the Belfast agreement. That is the only part of the Belfast agreement relevant to this discussion: namely, the cross-border co-operation that exists and through which there is a good case for saying that there has to be regulatory alignment for a body that is operating on both sides of the border.

What is happening now is something quite different. Those minor provisions in the December paper have been exaggerated into something that, in effect, would mean that Northern Ireland was still in the European Union, and thus left behind as Britain moves out of it. That runs contrary to and undermines the main plank of the Belfast agreement: that arrangements and constitutional matters were to be based on consent. The papers that have come forward—I hope that the Minister agrees on this—deal with issues that are moving into constitutional areas and should, if Dublin and Brussels wish to push the matter further, invoke an endorsement in a referendum. But we are not and should not be in that territory, and I hope that the Government will stand firm on this matter.

Lord Duncan of Springbank: I thank my noble friend Lord Trimble for his intervention. He is absolutely right to draw attention to the components of the joint report that emerged in December of last year. As we have stressed, the Belfast agreement must remain at the heart of our agreement. The challenge we face is that the publication by the European Union today and the remarks of Michel Barnier are, one might argue, unhelpful in that regard because they are a cherry picking of the joint report. One element of that report has been selected but there were three component parts, labelled a, b and c. The European Union has chosen to latch on only to part c. The point is that each must be a component part of the ongoing negotiations and any attempt to cherry pick risks undermining the Belfast agreement, which is at the heart of the positions accepted by the United Kingdom Government, the Irish Government and, indeed, the EU itself. I thank my noble friend for using the word "consent". Consent must be at the heart of the approach to this, otherwise we run the risk of unravelling the very agreement which has done so much to bring stability to Northern Ireland.

International Development Committee: Burma Visas

Statement

7.24 pm

The Minister of State, Foreign and Commonwealth Office (Lord Ahmad of Wimbledon) (Con): My Lords, with the leave of the House, I shall now repeat in the form of a Statement the Answer given by my right honourable friend the Minister for Asia and the Pacific in response to an Urgent Question in another place today. The Statement is as follows:

"Like the honourable gentleman, I am deeply disappointed that the Government of Burma have not granted visas for members of the International Development Committee to visit Burma. This displeasure has been communicated to the Burmese authorities. I accept that the IDC does vital work, providing oversight of UK aid programming in Burma and beyond.

The International Development Committee was due to travel on 27 February, and in the case of the honourable gentleman and the rest of the committee, on 28 February. When no decision on visas was received, in the early morning of yesterday the IDC understandably cancelled the Burma leg of its visit. However, I understand that it will continue with the second element of its trip, namely to travel to Bangladesh to review DfID's work there, including support for the Rohingya refugees displaced to Cox's Bazar and the vicinity. My officials were informed this morning that the IDC's visa applications had been formally denied. Burmese officials have indicated three reasons for that refusal: first, that there is an extended public holiday in Burma; secondly, that access to Rakhine state remains restricted for security reasons; and, finally—I think this was something brought up in the press release by the honourable gentleman yesterday—that they were unhappy that individual members of the IDC had signed a letter calling for the senior general of the Burmese army to be held to account for the Burmese military behaviour in Rakhine.

It is right that the House takes a close interest in this crisis, and I know all Members here today continue to do so. The Government fully support the work of the International Development Committee and have been active in supporting this visit. DfID Burma worked closely with the IDC to develop a comprehensive itinerary covering a range of projects in country. The British ambassador in country, Andrew Patrick, and other FCO officials pressed repeatedly for visas to be approved, both in Burma and through the Burmese Embassy in London. I myself spoke yesterday morning over the telephone to the Burmese ambassador to raise the issue of visas, demonstrating how seriously the FCO takes this matter, not least as a courtesy to the House. I understand that you, Mr Speaker, wrote to the Burmese ambassador, and that he intends to reply formally setting out the reasons for the refusal.

Through DfID, the UK is one of the largest single donors to the refugee crisis in both Bangladesh and Burma. Our aid is making a big difference. The first tranche of UK funding is providing emergency food to some 174,000 people, and safe water and hygiene for more than 138,000. Following a diphtheria outbreak in the refugee camps we deployed the UK's emergency medical team of over 40 specialists to save lives.

The decision to deny visas is highly regrettable and will prevent the committee seeing some of DfID's work at first hand. However, this Government must and will remain committed to supporting Burma's poorest and most vulnerable people. Working with DfID, we will ensure the committee has access to all the information it needs to scrutinise the programme in Burma effectively".

7.27 pm

Lord Collins of Highbury (Lab): My Lords, I thank the Minister for repeating the response to that Urgent Question. Clearly, the refusal of visas for the IDC is a shocking development. Stephen Twigg, chair of the

IDC in the other place, said it was his belief that this was as a direct result of the intervention of Aung San Suu Kyi. During his interview yesterday on the BBC's "Today" programme, the Foreign Secretary said that we need to understand the historic problem and how Aung San Suu Kyi feels the pressure. Surely our response now must be to exert more pressure, without, as he says, hurting those who need our help most.

Last October, in an Oral Question in this Chamber, I told the Minister that I welcomed the suspension of aid to the Burmese military but asked whether we should now consider the suspension of support to the DfID funding of parliamentary advice, as well as to the WFD funding of advice to the Myanmar Government. Surely now is the time to show our discontent and put pressure on those who have made this decision. The fact is that Myanmar is refusing access to the UN fact-finding mission and to the UN Refugee Agency, the only agency with the expertise and credibility to monitor the repatriation of the Rohingya people. What are the Government going to do? How do we ensure access, not only for the IDC but for the United Nations?

Lord Ahmad of Wimbledon: My Lords, the noble Lord is aware that I agree with many of the sentiments he has expressed. Let me reassure him and all noble Lords that the Government continue to implore the Burmese authorities, the civilian Government and the military authorities to provide full and unfettered access to all agencies. The noble Lord talked of the United Nations, and we continue to lobby on that. While there has been some progress—for example, the visit of the Special Representative of the Secretary-General on Sexual Violence in Conflict—the access, particularly to Rakhine and northern Rakhine, has been very limited.

I can assure the noble Lord that my right honourable friend the Foreign Secretary remains focused on the issue of Burma. Indeed, he visited Burma recently and made it clear to the civilian authority and to Aung San Suu Kyi in particular, whom he met directly—he has spoken to her a number of times during the conflict since the summer of last year—that it was unacceptable. There is a reality check for the civilian Government. Close to 1 million Rohingya people have moved to Bangladesh since the early times of the conflict over a three-year period and it is time that they returned to Burma, but they can only do so under secure and safe protection, and that is one of the key areas of focus.

I can further assure the noble Lord because only yesterday I was at the Human Rights Council, where I met the Burmese Foreign Minister. I made it clear to him directly that we do not accept the prevailing situation. We will continue to press and to raise this issue both bilaterally and through international fora.

On the issue of DfID aid specifically, I note what the noble Lord has said. However, I am sure he will accept that some of the aid programmes focused on Burma at the moment are delivering real assistance to some of the people who need basic services such as nutrition and water supplies. I know the noble Lord agrees. He raised important issues about capacity building within the context of the Government. It is important that we retain communication lines with the Burmese authorities—the civilian authority in particular.

I can assure all noble Lords that we continue to press the Burmese authorities to ensure access for all humanitarian agencies so that people can continue to receive the aid they need.

Baroness Sheehan (LD): My Lords, the inescapable fact is that the Government of Myanmar have demonstrated yet again that they wish to have unfettered freedom to persecute the Rohingya. They continue to use denial of access to quell criticism, so the International Development Committee can wear with honour the refusal of the Myanmar Government to grant it visas.

Does the Minister agree that the repatriation plan agreed by the Governments of Bangladesh and Myanmar is premature as the conditions are not there for a safe and dignified return? China continues to block resolutions in the Security Council and waters down statements critical of Myanmar's action. Does the Minister agree that it is time to co-ordinate international action and call for the suspension of the UN veto in cases of hideous mass atrocities such as this?

Lord Ahmad of Wimbledon: I totally agree with the noble Baroness on the first point: you cannot have a bilateral agreement which does not guarantee the safe and secure return of the Rohingya community and enshrine their rights within the Burmese constitution.

On her point about China, China needs to look long and hard at the humanitarian crisis prevailing in Burma. Anyone who visits Cox's Bazar will see that humanitarian tragedy unfolding. We continue to work both bilaterally with China and through the UN Security Council to gather its support so that we see action, particularly from the military authorities in Burma.

Lord Davies of Stamford (Lab): My Lords, following on from the points made by the noble Lord, Lord Collins, clearly we need to do something. The Minister has said that the Government have protested and are going to raise this matter in international fora but, as we all know, protests do not have much leverage on events. Some concrete incentives and deterrents—or punishments, if you like—are required.

I agree with the Government's intention not to reduce their aid programme in Burma—we should not make the poor and starving people of Burma suffer for this—but an appropriate response might be a travel ban on Myanmar government and military officials.

Lord Ahmad of Wimbledon: I agree with the noble Lord that we need specifics. I can assure him that those are the blunt messages we are delivering. The most recent thing we are pushing, and we hope will be achieved, is the renewal of the EU arms embargo in March 2018. When my right honourable friend Mark Field attended the EU Council he secured a strong conclusion on Burma, including targeted measures on specific military figures within the Burmese military Government.

Lord Berkeley of Knighton (CB): My Lords, the Minister mentioned the Foreign Secretary talking to Aung San Suu Kyi. Was there any response? Some of

[Lord Berkeley of Knighton]
us in this country who saluted the way she championed human rights are confused by her—to put it kindly—seeming helplessness in this crisis.

Lord Ahmad of Wimbledon: I agree with the noble Lord. I express the sentiments that my right honourable friend the Foreign Secretary expressed: there is need for a real recognition. While he raised that matter in no uncertain, blunt terms, there is undoubtedly still a real denial from the civilian authorities. And yes, regrettably, for a lady who championed human rights, we now see the worst kind of abuse of human rights in the very country she now administers.

Lord Dubs (Lab): My Lords, it is shocking that the crisis of the Rohingya has been going on for 25 years or longer. I visited Cox's Bazar before I became a Member of this House in the early 1990s. Are we the only country against which the Burmese Government have taken the kind of action they have in relation to our Select Committee, or have other countries also been discriminated against by the Burmese authorities?

Lord Ahmad of Wimbledon: I cannot speak on the specific point of other countries but the United Nations was repeatedly refused entry to Burma. We have worked directly with the UN and it was partly our efforts that ensured the access that the UN agencies and representatives have received. However, I regret deeply that that access is very limited.

The Earl of Sandwich (CB): This is not the first time that MPs have been denied visas to other countries. On the other hand, doing so to a committee of the stature of the International Development Committee raises a serious issue. I am grateful to the Foreign Office for taking it so seriously and providing a full Statement. I watched Stephen Twigg put the Question this morning. He was full of indignation. One point I thought he was raising was whether we would be reviewing our aid programme with the Burmese Government. Would we truly contemplate that? I hope we would not.

Lord Ahmad of Wimbledon: As I said in response to the noble Lord, Lord Collins, on the issue of aid, it is important that the Burmese authorities recognise the role Britain is playing. Equally, the aid we are providing and the majority of the DfID programmes are aimed at the very people who are suffering in the wider context within Burma. As I have said, there are important issues such as education, nutrition and sanitation, and I believe strongly from the humanitarian perspective that stopping such programmes would have a negative impact. They play a role and, importantly, they are helping the civilians in Burma. We will continue to work with the authorities and directly implore them but, as I said to the noble Lord, Lord Davies, we will also look at targeted sanctions against particular figures in the Burmese military.

7.38 pm

Sitting suspended.

European Union (Withdrawal) Bill

Committee (3rd Day) (Continued)

7.50 pm

Amendment 23

Moved by ***Lord Foulkes of Cumnock***

23: After Clause 3, insert the following new Clause—

"Strategy for economic and social cohesion principles derived from Article 174 of TFEU

(1) The Secretary of State must, before 31 December 2018, lay before Parliament a strategy for developing principles for economic and social cohesion derived from Article 174 of the Treaty on the Functioning of the European Union (TFEU).

(2) The strategy laid under subsection (1) must state the principles derived from Article 174 of TFEU.

(3) The principles under subsection (2) form part of domestic law on and after exit day.

(4) The aims of the strategy under subsection (1) are—

(a) to reduce inequalities between communities, and

(b) to reduce disparities between the levels of development of regions of the United Kingdom, with particular regard to—

(i) regions with increased levels of deprivation,

(ii) rural and island areas,

(iii) areas affected by industrial transition, and

(iv) regions which suffer from severe and permanent natural or demographic handicaps.

(5) A Minister of the Crown may by regulations make provision for programmes to implement the strategy.

(6) Programmes under subsection (5) shall run for a minimum of 10 years and shall be independently monitored."

Lord Foulkes of Cumnock (Lab): My Lords, it is a great pleasure to move this amendment and I am glad that we have got to it at last. It is tabled in the names of my noble friends Lady Royall of Blaisdon and Lord Judd as well as mine. I am pleased to see my noble friend Lord Judd in his place. My noble friend Lady Royall has asked me to pass on her sincere apologies for not being able to be present for the debate, but in no way is that a reflection on her enthusiasm for the amendment—quite the reverse.

The amendment proposes a new clause be inserted into the Bill to incorporate Article 174, Title XVIII of the Treaty on the Functioning of the European Union into domestic law. This would require the Secretary of State to lay before Parliament, before the end of December 2018, a strategy for the future provision of funding and other support to achieve economic and social cohesion across the regions and nations of the United Kingdom. All noble Lords will know that the European Union cohesion policy has been very effective in ensuring that the less developed and transition regions have access to operational programmes and funding to support economic growth across the whole of the European Union, and thus have been able to develop.

Once the United Kingdom leaves the European Union—in my context, I should say if the UK leaves the EU—this proposed new clause will be necessary. However—I will never give up—I sincerely hope that

the clause, and indeed the Bill, will be unnecessary, but since we are moving in a particular direction we need to make sure that safeguards are in place. This amendment would ensure that the principles of social and economic cohesion which the UK regions would have qualified for under the EU cohesion programme, along with the funding after the date of exit, are continued and that the Government will go on with the aim of strengthening and rebalancing the entirety of the union, including the regions of England as well as the devolved nations.

I hope that when the Minister comes to reply—she is my good friend and she had a good birthday celebration yesterday—which I am pleased to say makes it an even more interesting and enjoyable debate, she will be able to give us a clear assurance on this. Some vague promises have been made. It has been suggested, or perhaps hinted, that the block grant might be adjusted to take account of the money that will be lost through the non-availability of these cohesion funds. As far as Scotland, Wales and Northern Ireland are concerned in terms of the block grant, it is never guaranteed to include everything that it is supposed to include. We would never be able to check that the grant was going to be that much greater than it would have been otherwise, if the cohesion fund had not been included. Anyway, what about the parts of England that have been benefiting from the fund? They do not get a block grant, so will the adjustments to local authorities be changed? Local authority incomes are being cut and they are not getting any extra money, so it will be even more difficult for them. This amendment would guarantee that the funds would be available.

Let us take a closer look at the regions that have qualified for cohesion funding. Those which receive assistance are described as either less developed or transition regions. Of course, once a less developed region gets assistance and develops, it then becomes a transition region. It will still qualify for cohesion funding, but to a lesser extent. A region is less developed if its per capita GDP is less than 75% of the European Union average. In the 2014 to 2020 period, the less developed regions of the United Kingdom have been allocated £2.6 billion. Those are Cornwall and the Isles of Scilly, and West Wales and the Valleys. A region is in transition if the per capita GDP is more than 75% but less than 90% of the European Union average. In the 2014 to 2020 period, £2.5 billion was allocated to those regions, which are Northern Ireland, the Highlands and Islands of Scotland, Cumbria, Tees Valley and Durham, Lancashire, South Yorkshire, East Yorkshire, Lincolnshire, Shropshire, Staffordshire and Devon. It is also worth noting that the majority of these qualifying regions could be described as rural, coastal or peripheral parts of the United Kingdom and are therefore in great need of this kind of assistance.

I want to give some examples of the kind of money that will be lost and the kind of projects that will be affected. I shall first mention Cornwall and then Scotland. I refer to Cornwall because I was inspired to table this amendment by Clare Moody, the Member of the European Parliament who represents Cornwall and other parts of the south-west of England. I am grateful to her for her assistance in this. My first example is something called Launchpad, which received almost £10 million worth of European Regional Development Fund money. Launchpad is a graduate start-up programme run by Falmouth University that aims to give participants the skills to develop a project from inception to a sustainable, high-growth potential company in just two years. It will support graduates to develop new products and processes in response to market demand, focusing on the digital games and interactive technology sectors. These sectors are rapidly developing. That money would continue to be available right up until the end of the period if we were still in the European Union, but if we go out there is no guarantee that it will continue and Falmouth University will not be able to continue the programme. We need some kind of guarantee from the Minister and the Government that such projects will continue to be supported.

Another example from Cornwall is CETO Wave Energy, which gets £9.5 million from the ERDF. This project aims to build a wave energy converter device at the Wave Hub off the north coast of Cornwall, near Hayle. By developing a 1 megawatt device connected to the national grid, the project will advance wave energy technology and demonstrate its commercial viability. That is good not just for that area but for the country as a whole, and for trying to mitigate the effects of climate change as we develop wave technology. It is a very important area that is being funded.

Those are two projects from the ERDF. I will take one from Cornwall funded by the ESF, the stability fund. Some £1.3 million has been allocated to Skills for Young People. This project will provide skills development for young people not in education, employment or training—sometimes described as NEETs—or who are at risk of becoming part of that group. Managed by Careers South West and delivered by a range of partners, it brings young people closer to work and further learning. Again, it is a very important project in an underdeveloped area, Cornwall.

8 pm

I will mention Scotland for reasons that I am sure Members will understand, particularly the noble and learned Lord, Lord Hope, and my other colleagues from Scotland. I am grateful to the Law Society of Scotland for the information concerning Scotland. My good friend Michael Clancy helped me with this. He has been helping a lot of Members of this House with amendments. He managed to get some information from Tamasin Dorosti in the Law Societies' Brussels office—the Law Society of Scotland, along with the Law Society in Wales and the Law Society of Northern Ireland, have a combined office in Brussels, which is very useful indeed. She gave me information about money from the European Regional Development Fund going to Scotland, which again will be jeopardised if we come out of the European Union if the amendment is not passed or there is no clear guarantee that the money will be replicated.

Out of the European Regional Development Fund, which is €196 billion, in total Scotland secured a total investment of €941 million, split across the ERDF and the European Social Fund. The ERDF allocation was €476 million and the ESF allocation €464 million. That provides the following strategic interventions: business competitiveness; developing Scotland's workforce; green infrastructure; innovation; the low-carbon infrastructure transition fund; low-carbon travel and

[Lord Foulkes of Cumnock]
transport; a resource-efficient circular economy; smart cities; social inclusion and poverty reduction; and youth employment initiatives. They are all positive go-ahead areas that need continuing support. They will again be in jeopardy if the Government do not come up with the equivalent resources directly to these kinds of projects. That means contacting them, not just at arm's length, and indicating that they will get the same kind of support.

Then there is the European Agricultural Fund for Rural Development, which in total is €96 billion. Some €1.68 billion has been allocated to Scotland for the seven-year period from 2014 to 2020. A central priority of the Scottish RDP, which is funded through the European Agricultural Fund for Rural Development, is restoring, preserving and enhancing ecosystems relating to agriculture and forestry. Approximately 80% of the total funding is allocated to this priority, targeting more than 6 million hectares of agricultural and forestry areas through environmental land management targeted to specific biodiversity, water management and soil erosion objectives. Anyone who understands the countryside in Scotland in particular will know how important that is. Specifically, for each of the three focus areas, around 20% of agricultural land and almost 40% of forest areas will be put under contract, contributing to increased biodiversity and better water management, and preventing soil erosion. In addition, restructuring and modernisation plans, covering roughly 16% of Scottish agricultural holdings, will be available with a view to boosting the productivity of farming and forestry, thereby creating economic growth and more jobs. Support for this LEADER campaign is expected to create more than 550 jobs in the rural areas of Scotland—a large number in rural areas—and almost 13,000 training places will be created to foster innovation, knowledge transfer, co-operation, more sustainable farming practices and stronger rural businesses.

Finally on Scotland, there is the European Maritime and Fisheries Fund, of which Scotland has been allocated €107.7 million. These projects include 180 fishing vessel modernisation projects and other schemes to help with marketing, research and to help to develop ports. The EMFF helps fishermen in the transition to sustainable fishing, which again is a very important transition. It supports coastal communities to diversify their economies when fishing is no longer able to sustain them. It finances projects that create new jobs and improve quality of life across European coasts, and it makes it easier for applicants to access financing. If Members would like more information about the EMFF, they can find it on the European Union website. It would then become clear to Members, even to members of the Government, that the European Regional Development Fund, the stabilisation fund, the fund for rural development and the maritime and fisheries fund are vital in providing assistance. The noble Lord, Lord Callanan, is shaking his head.

The Minister of State, Department for Exiting the European Union (Lord Callanan) (Con): It is our money.

Lord Foulkes of Cumnock: That is the constant refrain from the leavers. We heard it all through the referendum campaign: "It's our money". It is money from all the European countries that comes in according to their ability to pay and goes out to different parts of the European Union according to their needs, and rural areas, transition areas and less developed areas are those which get it. But that is not the argument here; we have had that argument. It has been made and we can have it in another place.

Wherever it comes from, that money is within the European Union budget at the moment and is then allocated to these projects in different parts of the United Kingdom. We are asking for an assurance—we need a guarantee—that, if we leave the European Union, this money will go to the same projects and be funded by the United Kingdom Government. I hope that the Minister will be able to give us that guarantee; such projects will otherwise have an uncertain future. People's livelihoods depend on them; people who have put their lives into developing them are now faced with uncertainty. The only way in which they can be given some certainty is if the Government accept my amendment or something like it, and make sure that the money that they currently get from those European Union funds will come in future from Her Majesty's Government.

Lord Wallace of Saltaire (LD): My Lords, I apologise that I missed the first minute of the noble Lord's speech. I want to stress, first, that the history of Article 174 is one of British leadership. The regional development fund was set up by one of the first British Commissioners, George Thomson, and was designed to help poorer regions in Britain and Ireland in particular cope with the impact of joining the European Union—it is very good that two of Lord Thomson's sons-in-law are in this House and taking part in this Committee, although I do not see either of them in their place. I recall clearly how he carried that through the European Community, as it then was, in the early 1970s.

The article as we now have it was inserted into the Single European Act by the British Government as one of its flanking elements, but it was then transformed by Margaret Thatcher because she committed herself to eastern enlargement—one remembers the Bruges speech and the point she made about bringing Prague, Budapest and Warsaw back into Europe. The regional development fund within the European Union became very much part of how we have helped to spread prosperity, and therefore stability, democracy and security, into those new member countries. It is worth noting that Norway contributes to the European Regional Development Fund and that in any conceivable deal which we strike with the European Union after we leave—if we end up leaving—it is likely that we will be asked to contribute in the same way. The noble Baroness, Lady Deech, might say that this is dreadful because the European Union spreads conflict, but I think that the rest of us will agree that the European Union has helped to stabilise the former socialist countries of eastern Europe. One has only to move from Poland to Belarus to see how much difference it has made.

Now that we appear to be leaving, the question of what happens to this country and what reassurance the Government can give us about the future of regional development in it is important. The Prime Minister said when she came into office that she wanted to

bring the country back together and to reunite this very polarised public we have had since the referendum, but let us remember that England has the deepest regional disparities of any country in Europe—the United Kingdom even more so—and that the areas which qualify for and benefit most from the European development fund in Britain are Yorkshire, the south-west, parts of Wales, the north-east and parts of Cumbria and Lancashire. Recent studies have suggested that Yorkshire and the north-east are the two regions which will suffer most from Brexit because our trade is most clearly across the North Sea, from Hull and Newcastle, and the damage will be severe. Can the Minister begin to give us some reassurance that the Government are alive to this issue and that, as they attempt to bring the country back together, as we hope they do, they will have an active regional policy to cope with the impact of Brexit?

I read the *Yorkshire Post*—published by a company that used to be called Yorkshire Conservative Newspapers—and the image one gets of views in Yorkshire from our media and gossip are: that we are now governed by a very Home Counties, southern-English Government; that the north is forgotten; that the northern powerhouse is a placard without much behind it; and that the spending in the north on infrastructure, innovation, schools in rural areas and elsewhere falls well behind what is given to government. I should have thought that might leave the Conservative Party very worried. In replying, can the Minister give us some assurance—and feed this back into the Government—that, as we move towards an apparently inevitable Brexit, the Conservative Government are thinking actively about the regional disparities we already have, are taking into account that poorer regions will suffer disproportionately from a loss of European regional funds and realise that compensatory action needs to be taken by the British Government to prevent that?

8.15 pm

Lord Judd (Lab): My Lords, I warmly thank my noble friend for having put this amendment before the Committee. I should explain that I live in Cumbria and I understand very directly some of the things that have been said in this debate. It always gives me great heart when I see the European sign on tangible projects in an otherwise not too prosperous county, as an indication of European solidarity and a determination that people should stand together in making sure that a decent life is available to everyone. I do not think that, historically, we can overestimate the significance, the sadness, of what we are losing in that concept of European solidarity.

The other point I will make is that there have been references to reassurances and so on. Forgive me, I do not mean to be critical of those who have used the word, but I do not think that is enough. Possibilities have been created through our membership of the European Union. I believe that we have to have very firm guarantees from the Government that nothing is going to be lost in the context of what may be about to happen and that they will ensure that any work already in train, and any expectations already generated, will be fulfilled.

There really is a growing sense of injustice and unfairness in many parts of the country. The south-west is one example, and certainly the north is another example, not least Cumbria. There is a deep frustration—and in some instances it is not an exaggeration to say "anger"—about the disparities between what is available in the south and the south-east and what is not. I agree most warmly with the point made earlier in the debate that there is a feeling that our Government is a Government of the south-east and not a Government of the totality of British life. In that context, for Wales, Northern Ireland, Scotland, and indeed for English regions, we need those guarantees from the Government tonight.

Lord Wigley (PC): My Lords, I am delighted to support Amendment 23, moved by my noble friend Lord Foulkes, and I concur without reservation with everything he said. The amendment addresses many crucial matters for Wales, as well as for Scotland and indeed for many parts of England. Article 174 of the Treaty on the Functioning of the European Union aims to reduce disparities in terms of economic and social development between the various regions of Europe. The central plank of this is to reduce inequality. I fear that the same thing cannot be said of the policy of the present UK Government. The objective of their policy is in no way a concerted drive to attack the disparities that exist within these islands. The income per head of an area such as Kensington and Chelsea is 10 times that of the area of west Wales and the valleys, the Anglesey area or the Gwent area. We surely cannot accept a tenfold disparity in a civilised society.

Europe has been a bulwark for us over the past 15 years in Wales—the last 18 years, in fact—since we started getting the Objective 1 money in 2000. That money has come through as additional funding for Wales, after a bit of a fight, which I will talk about on another occasion, but we have not had the success that Liverpool and Merseyside, certainly, have had, and South Yorkshire has had to a lesser extent—and we still have a lot of work to do.

The reality is that, when we look at the matters of industrial infrastructure investment that are in Westminster's hands, we see that Wales is the only country in western Europe that does not have a single mile of electrified railway line. What happened to the plans that were already drawn up to electrify to Swansea? They have been dropped—and the proposals to electrify from Crewe to Holyhead are somewhere in the clouds. Yet we in Wales are asked to pay our contribution towards HS2. The reality is that we get greater assistance with our economic needs from the European Union than from Westminster. That is one reason why it hurts so much that we are about to leave the European Union, unless something can be done about it. Another example of where the Westminster regime is not sensitive to the crying economic need of Wales is the Swansea Bay lagoon, which has been confirmed as being a viable project, with a former Conservative Member of Parliament driving it forward, yet the Government refuse to come off the fence on it.

Then there is the disparity in another important aspect of economic infrastructure: broadband connectivity. The UK Government have recently directed significant

[Lord Wigley]
sums to improve broadband in three of the four countries of the UK. They found £20 million for ultrafast broadband in Northern Ireland and £10 million for full-fibre broadband in six trial areas of England and Scotland. We are missing out on important things such as this and we cannot rely on Westminster to look after our needs. The Government's justification for their broadband investment was that it will trigger the most effective short-term economic growth. Therein lies the central weakness of the Westminster approach: its short-termism and its links to political returns, as we have seen in the context of Northern Ireland.

The EU has been a major source of assistance to Wales, not least in terms of our economic infrastructure. The ERDF and the European Social Fund have been mentioned. Areas of England such as Merseyside, South Yorkshire and Cornwall have certainly benefited greatly from the EU as well. We will miss out all round when we turn our backs on Europe.

In the context of the amendment, we have a right to know how the Government intend to sustain the EU objectives of Article 174 after Brexit—if indeed they do. We are told that there will be a shared prosperity fund, but we have no details of its size or remit, nor how it will work with devolved government. In particular, given our experience in Wales with the Barnett formula, which has been such a travesty—and has been recognised by this House as a travesty—we have enormous reservations about leaving it to the Treasury in Whitehall to be the adjudicator in the distribution of such resources. It is for these reasons that I support the amendment, and I am certain that we shall have to return to these critical issues later in the Bill's passage.

The Earl of Listowel (CB): My Lords, I declare my interest as a vice-chair of the Local Government Association. I support the amendment moved by the noble Lord, Lord Foulkes, because over the past two years I have been attending two inquiries led by the All-Party Parliamentary Group for Children: the first into children's social care services and the second into different thresholds for access to those services.

It has become clear from the evidence I have heard that local authority funding has been cut by 30% to 40%. Local authorities are delivering their statutory services and safeguarding children as best they can, but all the peripheral services—the family support services and the charities—are really struggling to meet the need and therefore more and more children are being taken into care. As I said earlier, Lord Justice Munby, President of the Family Court, in his statement last year highlighted that more and more children were being taken into care and the courts were finding it difficult to process the numbers of children being taken into care.

What needs to happen is what has happened to adult social care: additional funding needs to be given to local authorities so that they can meet the needs of their children and family services and we can stop taking children away from families whom, if they had had additional support early on, they could have stayed with. It is relevant to this debate because we have heard in the inquiries that it is often the poorest local authorities, with the most deprived families, which have both the greatest demand on their services and the fewest resources to meet those needs. So in what the noble Lord, Lord Foulkes, proposes I see a way of reducing deprivation and improving the wealth of those communities so that there is more resource available to local authorities to meet local need, and reducing the need of families to turn to those kinds of services. I look forward to a response from the Minister to the principles that the noble Lord, Lord Wallace, has just set out.

Baroness Young of Old Scone (Lab): My Lords, I add my support to Amendment 23, moved by the noble Lord, Lord Foulkes, from an environmental perspective. These funds have been hugely beneficial in helping bring environmental progress, together with economic and social progress, to these very deprived areas.

The ERDF is big and it is substantial—you can see it from the moon. Four of its 11 thematic objectives are environmental: climate change mitigation, climate change adaptation, wider environmental protection and sustainable transport. The thematic approach has really helped mainstream environmental considerations into development in these areas and encouraged more sustainable development strategies and schemes that provide local employment and economic activity, often in areas that have absolutely nothing but their natural resources to rely on. That has been a hugely valuable process.

I particularly commend the Interreg process as part of the EDRF. This focuses on cross-border environmental protection projects and has provided for projects that have struggled to get funding elsewhere because they span administrative and governmental boundaries. It is quite telling, as the noble Lord, Lord Wallace, said, that Norway participates in Interreg, and I encourage the Government to consider remaining in the Interreg process. It is hugely innovative and facilitates cross-border work which simply will not be done by a "Britain going it alone" process, as is the case with many of the issues that we will face in the future outside the European Union. This is particularly important in environmental areas because, of course, the environment does not recognise governmental or administrative boundaries.

I therefore ask the Minister whether she would consider how a strategy could be brought forward to fill the gap post-Brexit. It needs two elements. First, it needs to recognise that these funds are absolutely crucial and that that level of funding needs to be continued, because so many other sources of funding for these sorts of projects are diminishing. Local authority money is going, lottery money is going, the Government themselves are broke and the charities are not too well-off either.

Secondly, there is the whole issue of stability. If the funds are reshaped along Barnett formula lines—and if they are simply locked into the block grant and not ring-fenced—key areas of high need will lose out. Currently, these funds are allocated on the basis of need and merit proposals, and we would not see a degree of stability going forward if they were simply dealt with on a pre-existing formula. I therefore hope the Government will come forward with a strategy; this is a splendid proposition.

Lord Adonis (Lab): My Lords, we are still formally on Clause 3, and I had the benefit over the short dinner break of speaking to the noble and learned Lord, Lord Keen, about the issue we were debating before the break in relation to Schedule 8. May I put a specific request to the Minister, to which I hope the noble and learned Lord will be able to respond? It will be crucial to our discussing this matter further on Report. Will he write to us to clarify a specific point that arises from what the noble Lord, Lord Pannick, said earlier? Does Schedule 8 give the Government the power to use subordinate legislation to modify primary legislation whose primary purpose is to implement EU directives? I wonder whether the Minister might write to Members of the Committee on that specific point.

Lord Pannick (CB): I can tell the noble Lord and, indeed, the Minister that there will be a probing amendment on paragraphs 3 and 5 of Schedule 8. It has been tabled today and will be on the next Marshalled List.

The Advocate-General for Scotland (Lord Keen of Elie) (Con): The group that we are dealing with is not actually mine but, with the leave of the Committee, I will respond to the inquiry. In light of the reference to the probing amendment, the appropriate step would be for us to consider that amendment and determine what response we shall make to it. If I am in a position, in light of that amendment, to write to the noble Lord ahead of Report and elaborate on our position, rather than responding by way of a government amendment or something of that kind, I will do so.

8.30 pm

Lord Adonis: I am very grateful for that response; I think that might help us in our further discussions.

In response to the amendment of the noble Lord, Lord Wigley, I will make two points. First, in the debate about regional assistance, one of the arguments is that we are simply getting our money back. The crucial point about the European Regional Development Fund and the other cohesion funds of the European Union, however, is that they are long-term development funds. The reason that they are so valued in the regions is not just because of the investment, but because they enable long-term planning to take place in the regions, which does not happen in response to Treasury funds because our own funding for these projects is so short-term. One of the big struggles that we have had in government—and this spans all three parties that have been in government in the last 20 years—is that we have had a huge difficulty in fixing and delivering long-term investment priorities because of the short-term attitude of the Treasury, which is not prepared to make those commitments.

When I became Secretary of State for Transport in 2009, the forward investment strategy for the railways in the United Kingdom was for five years, until 2014; so—surprise, surprise—there were no plans for high speed rail at all and no electrification programme. It is not just that it did not go to Swansea: it did not go anywhere. Wales is the only country in the entire continent of Europe besides Albania that does not have one mile of electrified railway. This is because of a consistent absence of long-term infrastructure planning over the last generation. Thanks to decisions that we took in 2009, electrification is at long last going to reach Wales, but the plans that were in place for it to go to Swansea have been cut back to Cardiff; it was supposed to go to Bristol but it is now going only to Bristol Parkway, not to Bristol Temple Meads.

I do not wish to bore the Committee with the details, but the fundamental underlying point here is the absence of long-term infrastructure planning. We look to the Government for a commitment not just to have significant funds for regional assistance—because clearly funds are going to be required unless we are going to see the divides between different parts of the country becoming even wider over the coming years—but we need a long-term approach. The current European Regional Development Fund has a six-year planning horizon and we need to see at least that length of planning in respect of new funds and policies that the Government put in place. Otherwise, we will see a short-term scramble for short-term projects that do not begin to be able to deliver huge benefits such as new railway lines—HS2 and HS3 that we need linking the northern cities—and significant investment in Wales. The noble Lord, Lord Wigley, referred to tidal lagoons and the investment that could be made there. That, again, is an investment that would deliver economic and energy benefits over the next 80 years, and it needs to be long-term.

My second point, which is linked to the points made by my noble friend Lord Foulkes, is about the European Investment Bank. One of the most worrying things in relation to the funding of infrastructure projects, particularly in less developed regions of the country, over the period since the Brexit decision has been the collapse in lending to the United Kingdom for projects supported by the European Investment Bank. An article in the *Financial Times* last month gave quite scary statistics: new contracts in the UK financed by the EIB are down from £5.5 billion in 2016 to just £1.9 billion last year in 2017. Of that £1.9 billion, only £377 million was spent in the nine months after Article 50 was triggered. The president of European Investment Bank, Werner Hoyer, was very clear that a key factor in this was,

"extra legal work the bank now had to do to ensure its assets in Britain would be protected after the UK left the EU",

and uncertainty on the part of investors. This is leading to a significant problem in investment in infrastructure projects, in particular. Speaking as a former chairman of the National Infrastructure Commission, I can tell the Government that they will not get a commitment to long-term infrastructure projects unless they can put together the funding packages that are required. They need to span the public and private sectors, and for many of these projects which span a 10, 15 or 20-year horizon, the public sector is looking for guarantees, and if those guarantees have to come exclusively from the Treasury in future, we will see significantly less infrastructure investment than we have in the past.

Although the European Union is not the be all and end all—

Lord Wigley: Before the noble Lord leaves the issue of the European Investment Bank, I raised a question in the debate on Monday evening about the ongoing

[Lord Wigley]
eligibility of higher education institutions, such as Swansea University, which has had £60 million out of the EIB. Will the noble Lord confirm my understanding that the UK will have an ongoing entitlement to help from the EIB? As he says, it is a question of the level of help and the confidence that is there and not that we will not be eligible.

Lord Adonis: My Lords, I am afraid we again get into the Alice in Wonderland world here, as we were in the debates on Erasmus and Euratom. My understanding from discussions with the European Investment Bank when I was chair of the National Infrastructure Commission is that if the Government were to wish to stay a member of the European Investment Bank, that might be possible. There are lots of legal issues which would need to be addressed, but it might be possible. However, it is the Government's policy, as a matter of principle, that we will withdraw from the European Investment Bank because it is seen as a European institution and apparently the instruction from the British people two years ago was that we must withdraw from it for exactly the same reason that we must withdraw from Euratom: it is seen as a European institution and we are supposed be withdrawing from all of them or else Brexit does not mean Brexit.

We are engaging in self-inflicted harm purely for an ideological purpose by choosing not to be part of an institution which has "Europe" in the title. What has concerned the Committee so much in our debates is that sector by sector, area by area, we are committing to policies that are going to make the country worse off bit by bit. The cumulative effect of all this is going to be immensely serious. Where it is possible to not engage in that self-inflicted harm, it seems to me to be just a matter of common sense not to do so. I would be very grateful if the Minister could tell the Committee the Government's policy in respect of lending currently made by the European Investment Bank and whether it might still be open.

I am constantly encouraging, and we have the more emollient face of the Government responding to the debate in the noble Baroness. I always have very high hopes of her because she sounds so reasonable when she replies. It may just be that she is so practised at doing these things, but I very much hope that she might give us a commitment that the Government will consider remaining a part of the European Investment Bank and not putting this essential investment in the future infrastructure of the country at risk, as appears to be happening at the moment.

Baroness Hayter of Kentish Town (Lab): My Lords, I do not like to start by contradicting my noble friend, but I have not heard the Government ask that we leave the Eurovision Song Contest, so there is one thing they are content with despite the name containing "Euro".

This amendment is important not simply for the amount of money being spoken about but what it is used for. I think I heard the noble Lord, Lord Callanan, say from a sedentary position "It is our money", somewhat missing the point of the amendment, which is about having regard to the principles of social and economic cohesion which we signed up to, welcomed and have benefited from. In fact, it is particularly important given the drive to equality whether in this country, Europe or both. The noble Lord, Lord Wallace of Saltaire, reminded us that England has the deepest regional disparities of any country in Europe. That is why it is not just the money, although I will come on to that, but what we want to use it for and how, and the need for a long-term aspect, as my noble friend Lord Adonis said.

This article enables funds to be used in a way that particularly led to our disadvantaged regions benefiting enormously from the Cohesion Fund, the European Regional Development Fund and the European Social Fund. In the period 2014 to 2020, they will have brought £12 billion our way, and it is not simply the money but the way it is aimed to reduce disparities and concentrates on what the EU calls less developed, transition or other regions. These are significant amounts, but it is the aims and objective that are important. They help create jobs, with start-up businesses, and with research and development. They have had a particular impact in Cornwall, west Wales and the valleys—some of us have to declare an interest there. We have heard of particular cases which have already benefited from this sort of money, including through the environmental impact of some of them, as mentioned by my noble friend Lady Young.

The important thing now is to look forward. As we have heard, the Government, in preparing for our departure from the EU, committed themselves to what they call a,

"UK Shared Prosperity Fund … using money returning to the UK from European structural fund"—

if it has not already gone to the NHS or anywhere else. The idea, as laid out in the Conservative manifesto, is to use that same amount of money. The Exchequer Secretary, Robert Jenrick, promised,

"to consult widely ahead of its launch".

However, he did not commit to matching ERDF funding after Brexit, so the consultation would presumably be about its use. We have been told:

"The design … is currently being considered, including its funding arrangements, and further details will be set out in due course".

Although he is not replying to this amendment, the Minister often reminds me that in a year and a month today, we are due to leave. That is not much time for getting these details, even in draft form, let alone for consultation or beginning to think about how people might use these funds. There is undoubtedly some urgency.

I hope that we could maybe have that detail from the noble Baroness as well as the basis on which the Government are planning to allocate the money. Will it be, as we heard suggested, under the Barnett formula, which is on a per head rather than per need basis? Will it be long term? What will the other attributes be? Will it be whoever wants matching funding or something else? Will it be concentrated in the same sort of areas as before? These are important questions, as I am sure she appreciates. It is a matter of funding, otherwise we might lose £8.4 billion from the sort of work that has

been done to reduce inequalities. We need to know not just the amount but that it will be targeted towards achieving the same sort of ends as Article 174

Baroness Goldie (Con): My Lords, first, I thank your Lordships for a genuinely interesting and very helpful and useful debate. I particularly thank the noble Lords, Lord Foulkes, Lord Judd and Lord Wigley, for the amendment to which they put their names. I again thank the noble Lord, Lord Adonis, of course for his kind remarks, although I fear he will dismiss me as a huge disappointment when he listens to my observations. I will try to deal with the points raised, because the amendment raises a very important issue, around which numerous very legitimate questions arise. I do not dispute that for one moment. Although I will not be able to answer every point raised in detail, I will do my best to try and give a helpful—I hope—indication of the direction of travel.

I know the amendment is well intentioned, but I shall endeavour to argue that, with the existing proposals which the Government have put in place, it is unnecessary. I will explain that in greater detail and expand on that proposition. The Government have an industrial strategy that covers many of the areas of cohesion policy and, as numerous noble Lords mentioned, are developing a new UK shared prosperity fund, which will replace EU structural funds. Furthermore, existing legal powers in place in this country in our domestic law already cover some of these issues, and I shall expand upon that.

To reassure the noble Lords, Lord Foulkes, Lord Wallace of Saltaire and Lord Judd, who all referred to this, I say that the Government have a manifesto commitment to replace cohesion policy funding with a new UK shared prosperity fund. It will reduce inequalities and raise productivity across our four nations, and we shall engage extensively with the devolved Administrations on that fund later this year.

8.45 pm

Lord Foulkes of Cumnock: The Minister said that the Government would consult about the shared prosperity fund later this year. We are already 21 months past the referendum and, as my noble friend Lady Hayter said, have just over a year to go. When are we going to get the proposals? When are the people hoping to benefit from this actually going to see it? When is the consultation going to start? I hope the Minister will not say "shortly" but will give us some clear indication because, as my noble friend said, people are desperate to see it and to know the details.

Baroness Goldie: I shall come on to that and endeavour to address the points that the noble Lord has raised. I was merely going to observe to the noble Lord, Lord Wallace of Saltaire, who was concerned about what he saw as a sort of Home Counties-centric Administration, that, looking at this Front Bench, there is not much Home Counties representation here, with the honourable exception of the bicycling baronet. Across this Front Bench there is a genuine understanding of all parts of the UK—including, to be fair, the Home Counties—and that is very important. The Government are very anxious to reflect the pan-UK need and relevance in conceiving and constructing policy to address the issues that are the subject of the amendment.

As I understand it, the noble Lord's amendment seeks to transfer the provisions of Article 174 of the Lisbon treaty, which provides the legal basis for EU cohesion policy, into UK law. Indeed, that policy is one of the key policies of the EU, as the noble Lords, Lord Foulkes and Lord Wigley, recognised. It recognises the importance of reducing inequalities between communities and reducing disparities across the EU. At the same time, leaving the EU allows the UK to begin to take its own decisions on the future of regional development. Arguably, perhaps, it will be better placed to ensure that those are better tailored to UK priorities rather than the priorities of the EU.

The noble Earl, Lord Listowel, raised important points, to which I listened with care. I think they are more a matter for the Ministry of Housing, Communities and Local Government and the revenue support grant, but I am informed that the local government financial settlement has allowed additional flexibility in meeting costs for adult social care, which I understand has been widely welcomed.

The Earl of Listowel: I thank the Minister for saying what she has said. That is true about adult social care, but we need the same arrangement for children's services. That is my concern; I do not think it has come in. If she could say during the passage of the Bill that that will indeed be made available for children's services, that would go a long way towards assuaging my concerns in this area.

Baroness Goldie: I assure the noble Earl that I am listening to what he says.

The noble Lord, Lord Adonis, specifically raised the issue, which I will deal with here, of UK access to the European Investment Bank. The UK wishes to explore options for maintaining a relationship with the EIB in the second phase of negotiations. To avoid doubt, I say that the UK will leave the EIB when it ceases to be an EU member state, but that is all I am able to tell him at the moment. I think that will be an important feature of the second phase of negotiations. He rightly identified that the bank has been an important source of investment finance.

The noble Lord, Lord Foulkes, rightly wants to know the shape of all this and what the Government are actually doing. If your Lordships will permit me, I shall try to outline the situation. The Government have already set out their long-term strategy in many areas covered by the noble Lord's amendment. In November, my right honourable friend the Secretary of State for Business, Energy and Industrial Strategy launched the Government's industrial strategy, which sets out the long-term plan to boost the productivity and earning power of the UK. It sets out how we will help businesses to create better, higher-paying jobs in every part of the UK with investment in the skills, industries and infrastructure of the future.

The strategy will boost productivity and earning power across the country by focusing on five foundations of productivity. It is worth repeating them: ideas,

[Baroness Goldie]
people, infrastructure—in that connection, let me say that I listened with interest to what the noble Lord, Lord Adonis, said about the value of long-term strategic thinking; he made a number of important points, which the Government will want to bear in mind—business environment, and places.

All these foundations have links to cohesion policy, but it is perhaps that final foundation which is most relevant: places. This recognises that every region of the UK has a role to play in boosting the national economy, including North Yorkshire, to which the noble Lord, Lord Wallace of Saltaire, referred. The UK has a rich heritage, with world-leading businesses located around our country. Yet—and this is disappointing—many areas are not fulfilling their potential, and that despite receiving cohesion policy funding. The UK still has greater disparities in regional productivity than other European countries.

The challenges and opportunities facing us are shared across the union. We recognise that the devolved Administrations are acting to identify and deliver their own priorities, and we respect the devolution settlement. But devolution has never meant that the Westminster Government should stop delivering for people, businesses and places in the devolved nations.

As part of the industrial strategy, we will agree local industrial strategies that build on local strengths and deliver economic opportunities. We want to work with all relevant bodies in England and partners in the devolved nations to consider how local strategies can deliver for places in Scotland, Wales, Northern Ireland and, of course, England. I hope that that to some extent reassures the noble Baroness, Lady Hayter, who asked how all this would flow out across the UK. We are also introducing a new £115 million strength in places fund to build excellence in research, development and innovation across the UK.

We are already seeing the opportunities and benefits of a focus on places. In the year that we launched the northern powerhouse project, we saw productivity in the north rise at a faster rate than London and the UK average. We have also seen further exciting developments outside England. Our city deal programme demonstrates how the UK Government can work hand in hand with our partners in the devolved Administration Governments and local authorities to deliver co-ordinated, locally led interventions that have a real impact on local economies. As confirmed by the Chancellor in the Budget, we are currently working with regional representatives from Stirling and Clackmannanshire, the Tay cities, Belfast, north Wales and the border lands between Scotland and England to negotiate new city deals.

Meanwhile, under the people foundation, we also want to tackle regional disparities in education and skill levels so that we build on local strengths and deliver opportunities for people wherever they live. The industrial strategy will do this through a major programme of reform to ensure that our technical education system can stand alongside our world-class higher education system and rival the best in the world. There will also be investment of an additional £406 million in maths, digital and technical education, helping to address the shortage of STEM skills.

The industrial strategy recognises the importance of ensuring that all areas in all parts of the United Kingdom can meet their full potential. The strategy recognises that every region of the UK has a role to play in boosting the national economy, but the noble Lord's amendment refers to a number of specific types of region in particular, including regions which suffer from what he described as demographic handicaps, and rural areas. These are very important matters. In responding to the challenges of demographic handicaps, the industrial strategy recognises these. The ageing society grant challenge aims to bring an innovation, productivity and growth lens to the challenges and opportunities of our ageing population.

Lord Foulkes of Cumnock: With respect, these are fine words beautifully delivered, but the word "guarantee", which my noble friend Lord Judd mentioned, has not appeared so far. Will all those projects, three or four of which I described, and which reasonably expected funding right up to 2020, be guaranteed funding under the strategy described by the noble Baroness?

Baroness Goldie: The noble Lord would not expect me to be able to deliver specific information on figures. That would be unreasonable, but he knows that the Government fought an election on a manifesto commitment to replace the cohesion policy. I am outlining the structures on which the Government propose to base replacing that cohesion policy. I am trying to outline how that strategy has been constructed to have regard to the whole of the United Kingdom and to deal with the issues about which the noble Lord has expressed concern in his amendment.

Lord Judd: The noble Baroness says it is unreasonable to expect figures, and there is a certain amount of sympathy with her on that. However, is she really telling us that she cannot guarantee that any projects in train, those planned on the basis of agreements, or any undertakings will be fulfilled?

Baroness Goldie: I heard what the noble Lord said and I am coming to that; I hope what I am about to say will reassure him. I am explaining what the new proposals and structures are in order to give some context to my response to what is a very important amendment. The amendment also refers to rural areas. The Committee will be aware that my noble friend Lord Gardiner is the Government's rural ambassador. He is working to ensure that government policy is addressing the challenges faced by rural areas. The House will recall that the noble Lord, Lord Cameron of Dillington, carried out a review in 2015 on the effectiveness of the Government's rural proofing policy, to which the Government responded. They have taken action based on his recommendations. That now includes practical guidance published by Defra to ensure that government departments make rural issues a routine policy consideration.

Looking beyond England, the devolved Administrations obviously have responsibility for rural policy, and I know that Scottish and Welsh Ministers will be thinking about how to ensure that their own policies and initiatives

reflect the needs of rural communities. The Government's industrial strategy and other existing policy initiatives therefore already cover the areas covered by the EU cohesion policy, which the noble Lord's amendment seeks to preserve.

Lord Wigley: One of the core principles of the EU cohesion funds is the element of additionality. In previous UK regional policies, before we went into the EU structural funds from 2000 on, there was not that element of additionality, and initially the UK Government refused to recognise the need for additionality for European funding. Can the Minister therefore give an undertaking that the funds that will replace the money now coming from Europe will be additional, over and above existing regional policy?

Baroness Goldie: What I can say to the noble Lord is that we are in new territory. We are leaving the EU and having to construct successor policies and funding streams to deal with what we were accustomed to as a member of the EU. I have tried to explain what the principal strategy underpinning that would be, but as the noble Lord is aware, there are other funding sources. There is the United Kingdom shared prosperity fund, which will be a very important source of the funding streams to which I think he alludes. Before I come on to that, I shall deal with matters raised by the noble Lord, Lord Judd, because they are important.

9 pm

In the joint report agreed with the EU and UK negotiators in December last year, we agreed a fair financial settlement with the EU, enabling us to move to the next stage of negotiations. The UK is a significant net contributor to many areas of the EU budget, including the structural funds. We will honour our share of commitments made during our membership but will see the end of very significant sums of money going to the EU every year.

I specifically reassure the noble Lord, Lord Foulkes, that we will continue to benefit from EU programmes under that budget plan. I think that the noble Lord raised specific issues about Cornwall funding. Cornwall and the Isles of Scilly are among the UK's less developed regions, which benefit from greater levels of structural funds. The Government have guaranteed EU structural fund projects granted before we leave the EU, where they are in line with domestic priorities and offer value for money. The phase 1 Brexit financial settlement, once agreed in the withdrawal treaty, will see the UK continue to receive structural funds until the current programmes close.

I want to make it clear to the noble Lord, Lord Judd, that no UK region will lose out in EU budget funding and anyone who gets European funding can continue to bid for and receive funding until the end of their projects, including for structural fund programmes. That financial settlement, once agreed as part of the withdrawal treaty, will supersede the requirement for the domestic guarantee announced by the Government last year. However, the guarantees already made will stand in the unlikely event of a no-deal scenario. The Government have guaranteed all structural fund projects signed before the 2016 Autumn Statement; they have also guaranteed structural fund projects signed after the 2016 Autumn Statement and before we leave the EU. So long as they are good value for money and in line with domestic strategies priorities, their funding is assured.

The noble Baroness, Lady Young of Old Scone, raised the future of Interreg funding. The next set of Interreg programmes have not yet been designed, but we will take decisions on participation in future programmes in due course, as proposals are developed. As the Prime Minister said in Florence, the UK is keen to continue to participate in programmes that can benefit both the UK and the EU. I am conscious of time and do not want to dwell on this needlessly but, equally, I want to try to make sure that I provide the information that noble Lords require.

Post leaving the EU, we have an opportunity, and leaving the EU will allow us to develop policy in the funding programmes with the flexibility and innovation required truly to meet the needs of the UK and support our industrial strategy. That brings me to the United Kingdom's shared prosperity fund, which has been specifically designed to raise productivity and reduce inequalities between communities across our four nations. Unlike structural funds, the shared prosperity fund will be cheaper to administer and much less burdened by bureaucracy. I know that the noble Lord, Lord Foulkes, is impatient to hear more about this, but we have already committed to consult on the precise design and priorities later this year. We will consult widely on the design of the fund and discuss with the devolved Administrations, local authorities, businesses and public bodies how the fund might work. That will give all interested parties the opportunity to contribute their views directly to the Government. As we look at where we can improve on current investment programmes, the devolved Administrations will have valuable lessons they can share with the Government.

Lord Wallace of Saltaire: Can I ask an additional question? Interreg is very much about cross-border schemes and co-operations. As we all now understand, there is one very important cross-border relationship, which we have somehow to maintain, between the United Kingdom and Ireland. Will the Government's devolution of these funds back to national level include a specific Irish co-operation dimension?

Baroness Goldie: It will in as much as, post Brexit, the United Kingdom will work within each of its component parts, which obviously includes Northern Ireland. I anticipate that discussions would principally rest in that respect on the subject of the question that the noble Lord has raised.

Lord Wallace of Saltaire: Not necessarily with southern Ireland?

Baroness Goldie: I think that, in the first instance, as we look at how we will fund different parts of the United Kingdom, the primary discussions will be with those parts of the United Kingdom—they would have to be. That is without prejudice to the Executive in Northern Ireland, which I hope will be established.

[Baroness Goldie]
We will want to pay proper respect to that Executive when it is constituted and consider what it wants to do. I would be very surprised if there were not a desire to have constructive discussions with the Republic of Ireland in the interests of trying to determine how best to address these needs, if there is a relationship. The Republic of Ireland, at that point, will be an international country separate from the United Kingdom, as it will be in the EU and the United Kingdom will not. We have to respect these new relationships and new boundaries.

Lord Wigley: This will be the last time I trouble the noble Baroness. On the Interreg question, one area that has benefited greatly has been the western Wales coast, particularly the seaports with their connections with southern Ireland. Given the pressure that there will be on Holyhead and other ports arising from Irish trade coming through the UK, surely this is an area where a version of Interreg has a very significant role to play. Can the Minister keep that in mind as the thinking on these issues develops?

Baroness Goldie: I thank the noble Lord; I think he raised an important point. The Government, as my noble and learned friend Lord Keen said, are very keen to listen. One benefit of debates like this is that points arise which merit careful consideration, so I thank him for raising that point.

The amendment strayed on to a more technical area. It would create provision for a Minister of the Crown to make provisions for programmes to implement cohesion policy domestically. I argue, however, that these powers are unnecessary. For example, under Section 126 of the Housing Grants, Construction and Regeneration Act 1996, the Government already possess power to provide financial assistance for the areas currently supported by EU cohesion policy and European structural funds. It allows the Secretary of State to give financial assistance in activities that contribute to the regeneration or development of an area, which include contributing to or encouraging economic development, providing employment for local people and providing or improving training services for local people. These activities cover much of the support provided under current European structural funds.

I have tried to set out why I think the noble Lord's amendment is not required. The Government already have an industrial strategy which covers many of the areas of the amendment. There are also existing powers in place that make the amendment unnecessary. I have endeavoured to outline our plans for new funding to replace cohesion policy programmes—I appreciate that it has not perhaps been with the detail that the noble Lord might be seeking, but I hope I can reassure him that there is a plan to provide successor mechanisms to the European funding sources. I hope I have tackled his concerns and I urge him to withdraw his amendment.

Lord Foulkes of Cumnock: My Lords, this debate has ranged rather more widely than I had expected, and the noble Baroness has given us a very comprehensive answer, for which I am grateful. I was particularly intrigued by the reference by the noble Lord, Lord Wallace of Saltaire, to George Thomson, who I remember very well. I see that the noble Lord, Lord Steel, is here; he will remember George Thomson, who represented Dundee before he became a Commissioner and was responsible for this major development within the European Community that we are talking about today.

He once told me that he was very excited at being selected as the candidate for the Member of Parliament for Dundee. He was employed by DC Thomson at the time and went to tell his employer that he had been selected as the prospective parliamentary candidate. He thought that his employer would be delighted. Instead, his employer said, "You realise if you'd stayed with us you could have gone on to be the editor of the *Beano*". So instead of being editor of the *Beano*, he went on, thankfully, to do a very good job in the European Community.

Lord Newby (LD): I am sorry to interrupt the noble Lord but as a representative of the sons-in-law of Lord Thomson of Monifieth, I should tell him that he was the editor of the *Beano* before he went on to a more serious job.

Lord Foulkes of Cumnock: How can I contradict a son-in-law? Without my noble friend Lord Liddle being present to advise me, I am not able to do so. I thought that my original story was quite funny; I wish it had been true. To return to the serious matter, because this is a serious matter, George Thomson left us a great legacy.

The noble Baroness has covered a lot of the issues. She has gone two-thirds of the way towards answering the points that I raised. She has given a very detailed and careful outline of the Government's strategy, for which we are grateful, and has indicated that projects in the pipeline will be supported to the end of the current funding period, but it is beyond that that we are concerned about. We are concerned about continuity. That is something we need to pursue.

The noble Baroness also helped us a little on the UK shared prosperity fund and said that the Government would engage with that issue later this year. That could take us almost to the exit date, which will be a few months beyond that, so we need to be told about that soon. I hope that through a Written Answer or further discussion we might get a clearer indication of the timescale, otherwise, there will be a vacuum and hiatus there.

I will talk with my noble friend Lady Hayter outwith the Committee but we need to look at the Minister's very comprehensive reply in detail and consider whether it would be appropriate to table an amendment along these lines on Report. I will withdraw my amendment but this is yet another example of the many dozens, if not hundreds, of examples that we are discussing in this Chamber and outwith it where it would be an awful lot better if we just stayed in the European Union. Why are we having to deal with all these difficulties and problems all around the country, and in this case in the poorest areas of the country, when it could be completely unnecessary? In the next year and a bit, we may have the opportunity to give the British people a chance to re-examine whether we should

continue to be members of the European Union. That point is not irrelevant to this amendment, but I beg leave to withdraw it.

Amendment 23 withdrawn.

Amendment 23A not moved.

Clause 4: Saving for rights etc. under section 2(1) of the ECA

Amendments 24 and 25 not moved.

The Deputy Chairman of Committees (Lord Brougham and Vaux) (Con): I cannot call Amendment 25A, as it is an amendment to Amendment 25.

Amendment 26

Moved by ***Lord Pannick***

26: Clause 4, page 3, line 4, leave out paragraph (b)

Lord Pannick: Amendment 26 is another amendment arising from the report of the Constitution Committee and stands in my name and those of three other members of that committee: our chairman, the noble Baroness, Lady Taylor, and the noble Lords, Lord Norton of Louth and Lord Beith.

This amendment focuses on Clause 4(2)(b), which excludes from Clause 4, and therefore excludes from the scope of retained EU law, as defined in Clause 6(7), rights and obligations which arise under an EU directive but which,

"are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not as an essential part of the decision in the case)".

The problem with that was summarised in paragraph 38 of the Constitution Committee's report. We said that this involves,

"ambiguities in the interpretation and effect of clause 4",

which,

"will inevitably cause legal uncertainty about a fundamental provision of the Bill".

9.15 pm

The fundamental uncertainty is the meaning of the words "of a kind". We discussed this briefly earlier this afternoon. I understood the Minister, the noble and learned Lord, Lord Keen, to say in response to a question from the noble and learned Lord, Lord Falconer of Thoroton, that in this context "of a kind" means that prior to exit date there must have been a court case, either domestic or in Luxembourg, on the specific provision of the relevant directive, and that it is not good enough to say that the principles decided in other cases show that this directive confers rights in domestic law.

The Minister will, I hope, clarify the Government's position but I, for my part, have difficulty in seeing how that type of narrow approach follows from the language of Clause 4(2)(b). The words "of a kind" suggest to me that it must suffice to rely on the principles stated by the Court of Justice, or a domestic court in other cases. Indeed, I would be very concerned if the general approach were not the applicable approach under this legislation; otherwise, that would conflict with the Bill's purpose—to read across, as we have discussed, a snapshot of the EU law obligations into domestic law as at exit day.

Surely, if I can show that I have on or before exit day directly effective rights under a directive applicable to the EU which has not been properly implemented in domestic law, then I must, after exit day, be entitled to rely on those rights, even if there has been no court case relating to that specific directive, either in Luxembourg or in the courts of this country, but I can show that, had such a case been brought before exit day, I would have succeeded under the principles established in other cases in domestic courts or in the Court of Justice.

Therefore, the Constitution Committee would very much welcome some guidance from the Minister on what the Government intend in this area. The committee concluded in paragraph 38 of our report that the ambiguities in Clause 4(2)(b),

"will undermine one of the Government's main objectives in bringing forward this Bill. The ambiguities need to be resolved".

I suggest to the Minister that, because of the ambiguities inherent in the phrase "of a kind", it would be very helpful if the Government could bring forward on Report an amendment that clarifies exactly what they mean so that there is no doubt. I beg to move.

Lord Carlile of Berriew (CB): My Lords, when I was a young barrister doing cases in strange places such as Caernarfon Crown Court, nobody at that time thought of bringing charges under the Justices of the Peace Act 1361, but some time in the 1970s somebody had that bright idea. The Justices of the Peace Act 1361 applies to certain public order issues. Suddenly, charges of affray started appearing before those courts, and nobody questioned the efficacy or applicability of the Justices of the Peace Act 1361 in that context. Noble Lords may well be thinking: it is bedtime and that is a good story, but what on earth has it got to do with this amendment? I venture that it has something to do with it.

I am not a member of the Constitution Committee but I admire everything it has done and I support what my noble friend Lord Pannick has just said. This is about the clarity of the law. Normally, if we in this Parliament enact a law and nobody questions its efficacy for years—such as, for example, the Justices of the Peace Act 1361—we tend to pat ourselves on the back and say, "For once we've got something right. It's not troubling their Lordships and Ladyships in the Court of Appeal or the Supreme Court, so we can be well satisfied with our legislative process". What seems to be being said here, at least to the ordinary reader, I suspect, is that if a particular provision, though it exists, has not been tested and questioned before a court, in some circumstances it should not apply. But if it has given rise to difficulty and has had to be tested in court, that is a kind of imprimatur of quality. I just do not understand it. I hope that your Lordships, at least at 9.20 pm, tend not to understand it either.

[Lord Carlile of Berriew]

Whichever version of this particular law we have—which has, I say to the Minister, the commendable virtue of retaining existing rights and allowing us to presume that we can act on our retained rights—please may we have clarity on what is intended and, if necessary, an explanation of why the Government wish to disapply certain rights that exist?

Lord Krebs (CB): My Lords, I will speak to Amendment 28, in my name and that of the noble Baroness, Lady Jones of Whitchurch, and my noble friend Lady Brown of Cambridge. This amendment, which seeks to replace Clause 4 with a new clause, includes the same intent as that of Amendment 26 but goes further. It aims to preserve, more comprehensively than the existing Clause 4, the rights, powers, liabilities, obligations, restrictions, remedies and procedures derived from EU law and incorporated into domestic law via the European Communities Act 1972. Where such rights, powers, liabilities, obligations and so on are incorrectly or incompletely transferred, it also imposes a duty to make regulations to remedy the deficiency.

The Government's ambition for the withdrawal Bill is for the same rules and laws to apply after the UK leaves the EU as they did before. This ambition has been repeatedly stated, including in the Government's great repeal Bill White Paper. As the noble Lord, Lord Pannick, reminded us in Monday's debate,

"the Prime Minister said that this Bill is not an occasion for changing the law, it is an occasion for ensuring that on exit day we have a workable, certain, continuing system of law".—[*Official Report*, 26/2/18; col. 550.]

However, the Bill as drafted fails to retain all EU law and therefore does not meet this objective which has been set by the Prime Minister.

I am approaching this from the point of view of environmental protection. The problem is not exclusive to environmental law, but because 80% of environmental law stems from the EU it is particularly important in this area. I would expect the Government to welcome this amendment as it will help to support their ambitions for protecting the natural environment. As the Secretary of State for Environment, Food and Rural Affairs reaffirmed recently:

"It is this Government's ambition to leave our environment in a better state than we found it".

It is widely accepted that, over recent decades, the state of our environment has improved in many respects, due primarily to the introduction of EU laws. Amendment 28 will therefore support the Government's ambition to go further in protecting and enhancing our environment by addressing four problems with the current Clause 4.

The first problem is the one identified by the noble Lord, Lord Pannick, in his Amendment 26. As the Explanatory Notes explicitly state,

"any directly effective provisions of directives that have not been recognised"—

that is, by a court—

"prior to exit day … will not be converted".

I do not propose to say more about this because the noble Lord has explained, in better terms than I could, the ambiguity created by this clause.

Secondly, the proposed new clause in Amendment 28 imposes a duty on the Government to make regulations that will remedy any cases in which there have in the past been an incorrect or incomplete transfer of EU law. If the Minister considers this to be unnecessary, perhaps we could understand why. The powers to do so are contained in Clause 7(2)(f) but, surely, she would agree that there is a significant difference between a power to do something and a duty to use that power.

The third point that the amendment aims to rectify is that a number of provisions of directives are relied on directly, rather than via transposition into UK legislation. The status of these provisions is unclear as the Bill stands. An example is the Government's current environmental reporting obligations. Can the Minister confirm that these will be put on a domestic footing as a result of the Bill?

The fourth point, on which I do not intend to elaborate because it is dealt with in Amendment 58, is that the current Clause 4 does not include the preambles to EU directives, which are important in interpreting existing EU legislation. I shall not say more about that today.

Without the amendment to Clause 4, which I am proposing with others, the Bill puts at risk EU law provisions such as the requirements to review and report on the adequacy and implementation of laws such as those in the marine strategy framework directive, the air quality directive and the habitats directive. It does not place obligations on the Government to report and send information to the European Commission —not surprisingly—which is then able to aggregate this information and use it in its consideration of the appropriateness of laws and their implementation.

Without Amendment 28, the Bill omits the aim and purpose of directives, such as the habitats directive specifying that its aim is to contribute towards biodiversity conservation, while some obligations incumbent on member states that have not been transposed into UK law will be lost—for example, the water framework directive's requirement that water-pricing policies provide adequate incentives for users to use water efficiently. Without Amendment 28, the requirement for regional co-operation in transboundary environmental matters—for example, in article 6 of the marine strategy framework directive—would be lost.

As I have already mentioned, these problems will not only be felt in the field of environmental law. There are other examples of where directives have been incompletely or incorrectly transposed, and which would therefore be lost because of the current drafting of the Bill. These include article 15 of the e-commerce directive and article 4 of the employment equality directive, to name but two.

Finally, I would like to give one practical example of why Amendment 28 is needed. Article 6 of the energy efficiency directive requires member states to ensure that central governments,

"purchase only products, services and buildings with high energy-efficiency performance, insofar as that is consistent with cost-effectiveness, economical feasibility, wider sustainability, technical suitability, as well as sufficient competition".

This obligation is currently implemented through a procurement policy note. The legal basis for such guidance is article 6 of the directive. No statutory

obligation exists in UK domestic law. This means that the article 6 obligation on the Government to purchase highly energy-efficient products, services and buildings will disappear from our law after exit day. The procurement policy note has no legislative status and could be revoked by a Government at any time, without any form of parliamentary scrutiny.

I hope that the Minister will address my points in her response and, if she is not prepared to accept Amendment 28, will explain what additional steps the Government intend to take to ensure that the environment is protected by law and that this Bill ensures that we will have a workable, certain and continuing system of law on exit day.

9.30 pm

Baroness Brown of Cambridge (CB): My Lords, I support Amendment 28, tabled in the name of my noble friend Lord Krebs and the noble Baroness, Lady Jones of Whitchurch, and to which I have also added my name. My noble friend Lord Krebs has already described very eloquently the purpose of the amendment. During Committee in the other place, the then Minister of State for Courts and Justice described this clause in nice, simple, visual terms. I found them slightly easier than all the legal language that we have been dealing with. He called it a sort of broom: a sweeper provision that,

"picks up the other obligations, rights and remedies that would currently have the force of UK law under section 2 of the European Communities Act".—[*Official Report*, Commons, 15/11/17; col. 498.]

Such a broom seems a jolly useful idea, but as it stands it is missing a few bristles.

My noble friend Lord Krebs mentioned the air quality directive. I believe that Clause 4, as it stands, could fail to sweep into UK law the requirement on the Government to review and adjust the airborne particulate PM2.5 targets in line with scientific information from the World Health Organization. The current clause could also fail to sweep, as he mentioned, details such as the aims and purposes of directives. For example, the environmental liability directive includes the really important principle of "the polluter pays". I am not quite sure whether I am addressing the noble Baroness the Minister or the noble and learned Lord the Minister, but I would ask one of them to please let us have a broom with denser bristles.

Lord Beith (LD): My Lords, Clause 4 contains many ambiguities, some of which have been helpfully pointed out by the noble Lord, Lord Krebs, and the noble Baroness, Lady Brown. The clause domesticates all directly effective treaty provisions whether or not they will be capable of meaningful application following exit. Several problems arise from that which the Government are aware of and say they will address. However, I am not entirely comfortable with the sort of formula the helpful Solicitor-General brought to the committee when he came to see us. He said:

"'The Government will consider how these rights can be given effect to in the context of our exit from the EU on a case-by-case basis ahead of exit day'".

There is an awful lot of work to be done before exit day and I look forward to receiving this case-by-case analysis at some point.

The Constitution Committee suggested amendments to deal with some of the ambiguities, but it could not deal with all of them for the reason we set out in paragraph 37. Reciprocal rights are,

"inextricably linked to the legal relationship between the UK and the EU post-exit. The full impact of Brexit upon reciprocal rights will not be known until the UK's future relationship with the EU is determined. This highlights a broader issue that the uncertain environment in which the Bill is being considered makes it difficult fully to assess its likely consequences, including its constitutional implications, at the time of its passage".

That is putting it gently, but that is the difficult situation in which we are operating.

I turn specifically to the effect of Amendment 26. I remain puzzled by not just the ambiguity but the conflicting language used in the clause. The noble Lord, Lord Pannick, elucidated this at the start of this short debate by citing the phrase,

"not of a kind recognised by the European Court or any court or tribunal in the UK in a case decided before exit day".

The committee responded by saying:

"It is unclear whether this means that there must be a judgment on the specific provision of the particular directive, holding that it has direct effect, or whether it simply requires that the provision in question satisfies the criteria that would be applied if the matter were to be judicially considered".

That is a pretty hypothetical basis on which to defend a right. We said:

"The language of clause 4 supports the latter interpretation, but the explanatory notes appear to endorse the former".

A great deal of paper is being shuffled around at the moment because it may be that the ambiguity is being resolved as I speak, although I suspect that what is really being looked at is how far we can get tonight in the course of these proceedings. However, we need some help in getting the Government's view on this, but that might not be sufficient because we also need to ensure that the Bill is tightened up in this respect.

The Duke of Montrose (Con): My Lords, we have spent a lot of time today trying to define what is a snapshot and what could give clarity in the transposition of the legislation. We are now poking around as to where the fuzzy edges are, and some of this is very much more than just fuzzy edges. In fact, it is very good that the noble Lord, Lord Krebs, outlined areas that this measure would solidify and imply. My worry about Amendment 28 concerns subsection (3), which deals with law that,

"incorrectly or incompletely gives effect".

It is hard to say what that will apply to. It is obviously drawn up that way because we do not know what it will apply to. In some ways, it seems we are now trying to include laws in the snapshot when we do not know what they are or what they might be.

My main gripe is that the amendment says that,

"a Minister of the Crown must make regulations for the purpose".

This is one of the things for which we might say that a Minister of the Crown "may" make regulations, because we wish to leave some power to the UK Government to intervene to construct the type of law we would like to see.

Lord Renfrew of Kaimsthorn (Con): My Lords, in welcoming Amendment 28 I note that it supplements Clause 4 in a way that can be considered constructive. Among other things, it would strengthen the position

[Lord Renfrew of Kaimsthorn]
of archaeology and cultural heritage, which are often associated with environmental issues. A new policy statement has been promised, but that would surely be weaker than a statutory approach, which this amendment follows. It takes a more comprehensive approach in what I consider to be a constructive way.

As drafted, the Bill does not fully transpose the environmental principles set out in the European Communities Act 1972 into United Kingdom law. The amendment would therefore impose a duty to make regulations to remedy this deficiency. It is fair to say that we do not want our rich body of archaeological remains to be put at risk by deficiencies that might remain in the legislation following our withdrawal from the European Union. The amendment is supported by the Council for British Archaeology and the Chartered Institute for Archaeologists. It offers an important safeguard and I am very happy to support it.

Baroness Jones of Whitchurch (Lab): My Lords, I added my name to Amendment 28, although my colleagues the noble Lord, Lord Krebs, and the noble Baroness, Lady Brown, have made the case for it very eloquently. We have rehearsed many times before in this Chamber that 80% of UK environmental law derives from the EU, so we have a particular interest in ensuring that those same environmental protections are fully transposed and are not weakened by either omission or design in the transposition. Our concern is that the current wording of Clause 4 does not give us that guarantee. The tablers of Amendment 26 attempted to address that ambiguity in one way and we have attempted to address it in a different way, but I think we are aiming to achieve the same outcome.

Crucially, the amendment concerns the issue of whether the rights, powers, obligations et cetera derived from EU law are incorrectly or incompletely transposed, and the duty to remedy that deficiency. The noble Lord, Lord Krebs, gave some examples of that. For example, under current directives there is an expectation of reporting obligations, which will cease on Brexit day and are not part of the provisions that will be transposed. Although the Government have promised to create a UK body to oversee future standards and reporting obligations, we have not seen the detail of that, so we are being asked to make a decision blind. We need a substitute for that current arrangement to be spelled out.

Equally, the principles and preambles that underpin EU environmental legislation have an important but amorphous status that needs to be underwritten with guarantees as we transfer. Such provisions set out, for example, the aims and purposes of directives. They include Article 1 of the environmental liability directive, which refers to the "polluter pays" principle, and Article 1 of the habitats directive, which sets out the aim to contribute to biodiversity conservation. These things are important; they are not about to be transposed automatically, and we need extra provision to make sure that they can be followed through, which we believe our amendment does.

Finally, I agree with the noble Lord, Lord Pannick, who described matters not having been being dealt with by the courts as a rather odd way of defining what should and should not be transposed. He made the case much better than I could, but he is spot on and I hope that the Minister is able to answer those points.

Baroness Jones of Moulsecoomb (GP): My Lords, I shall speak very briefly, first, because it is already past my bedtime and, secondly, because noble Lords have already outlined some of the problems. It was a pleasure to hear the noble Lord, Lord Renfrew, speak on this matter in relation to archaeology. I started a speech about 15 years ago, when he was in the audience, by saying that when I was a trainee archaeologist he was such an icon that I thought he was already dead. I am therefore absolutely thrilled to see that he is still not dead; it is always a pleasure to hear him.

I want to put my comments in simple terms so that Members of your Lordships' House on the other Benches understand exactly what the problem is with the EU withdrawal Bill on this issue. Amendment 28 —and, by implication, Amendment 26—is designed to make sure that we do not miss out on important parts of EU law; namely, directives. EU directives place obligations on our Government to act in particular ways, such as bringing forward particular legislation. Examples include the working time directive, a social measure, and the habitats directive, an environmental measure. These directives cover a wide span of issues. The wording of the Bill leaves huge gaps that these important directives could fall through. The amendments would plug those gaps and make sure that they are all brought over into UK law. They would also allow or require Ministers to make sure that these directives are properly implemented so that we receive whatever benefits, rights and remedies were intended. As has been said several times, the big problem with the approach set out in Clause 4 is that it will exclude legal rights simply because they have not been litigated on. I do not see the sense in that. I am sure the Government will see that it needs a little bit of fixing and that we will see some positive compromises come forward.

Lord Brown of Eaton-under-Heywood (CB): I rise to seek clarification on the precise objective of Clause 4(2)(b) in this whole pattern of legislation, and therefore on the effect of the attempt made by the noble Lord, Lord Pannick, to get shot of it. As I understand it, Clause 4(1) faithfully reproduces Section 2(1) of the 1972 Act. On the face of it, these directly effective provisions are to continue to apply. Of course, it is not always easy to decide what is a directly effective provision that comes within the ambit of Section 2(1) of the 1972 Act, which is here given effect to. As I see it, though I may be quite wrong—I should like the Minister to confirm or reject this—subsection (2)(b) is there basically to say: "Look, if it's one of those doubtful provisions as to whether it is indeed a directly effective provision under the EU legislation, whether it is completely unclear—there isn't a case on it—and nobody has specifically suggested that it is, it is not to be argued henceforth that it is". In other words, the certainty and clarity that this legislation overall is designed to achieve is supposed to be advanced by getting rid, in Clause 4(2)(b), of cases where the past jurisprudence simply leaves the thing high up in the air with no proper guidance.

9.45 pm

The Duke of Montrose: My Lords, the reason I dare to intervene at all is that I have always had a great interest in conservation, as a farmer, and in looking after nature reserves and various such things. Will the Minister make something clear? It seems to me that the habitats directive and the water directives are already part of our law; I do not quite see how they would fall through in the absence of some of these clauses, but we do want to tighten up the legislation.

Lord Beecham (Lab): My Lords, I start by affirming that we on these Benches—or what is left of us—support the thrust of Amendments 26 and 28, which deal with significant issues raised in Clause 4. As the Constitution Committee avers, as drafted,

"Clause 4 will … domesticate all directly effective treaty provisions, whether or not they will be capable of meaningful application".

What is the point of such an outcome? What is the point of creating a situation under which in the case of domesticated provisions which have,

"no practical application, or makes provision for reciprocal arrangements or rights which no longer exist or are no longer appropriate once the UK has left the EU, statutory instruments can be brought forward to repeal or amend the provisions"?

More substantively, what is the Government's response to the damning conclusions of the committee in paragraphs 37 and 38 of its report? These describe the implications of the Bill for reciprocal rights as "uncertain" and state:

"The full impact of Brexit on reciprocal rights will not be known until the UK's future relationship with the EU is determined".

What is the Government's position on this issue?

Given the concerns of the committee, what, if any, estimate have the Government made of the consequences of the Bill's impact in this area, and what is their response to the committee's observation that:

"The ambiguities in the interpretation and effect of clause 4 will inevitably cause legal uncertainty about a fundamental provision of the Bill. This will undermine one of the Government's main objectives in bringing forward this Bill"?

The committee concludes its observations on this part of the Bill by stating starkly:

"The ambiguities need to be resolved".

Does the Minister agree that there are ambiguities? If so, how and when will the Government address the problem?

Baroness Goldie: My Lords, I rise to respond to these amendments with one very clear thought in my mind: I wish my noble and learned friend Lord Keen were standing at this Dispatch Box. We are dealing with issues that are clearly perplexing much greater intellects than mine, but I shall do my best. These amendments, tabled by the noble Lords, Lord Krebs and Lord Pannick, concern the operation of Clause 4 and I am grateful for the opportunity to further explain and discuss the Bill's approach to directly effective provisions arising from EU directives, one of the issues raised by these amendments.

As the Committee is aware, one part of EU law that the Bill is not converting into our domestic law is EU directives. The reason for this is clear: as they are not a part of our domestic law now, they should not be after we leave the EU. Indeed, my noble and learned friend Lord Mackay of Clashfern made this point very succinctly in the earlier debate. Instead, the Bill is saving the domestic measures that implement the directives under Clause 2, so it is not necessary to convert the directives themselves. My noble and learned friend Lord Keen clarified that in the earlier debate. This is not only a pragmatic approach but one that reflects the reality of our departure from the EU. As an EU member state, we were obligated to implement those directives. When we leave the EU, those obligations will cease and it makes no sense to retain the direct effect of this category of law within our domestic law.

However, the Bill recognises one important exception to this approach: where, in a case decided or commenced before exit day, a domestic or European court has recognised a particular right, power, liability, obligation, restriction, remedy or procedure provided for in a directive as having direct effect in domestic law, Clause 4 will provide for that right, power, et cetera, to continue to have effect in domestic law.

The debate seemed to centre around the nub of phrasing in Clause 4(2)(b). In the earlier debate the noble Baroness, Lady Ludford, raised the interesting question of what "kind" means in the phrase "of a kind". That question was repeated by the noble Lord, Lord Pannick. In Clause 4(2)(b) "of a kind" is to be read in the context of a right recognised in a decided case. Rights recognised in particular cases are often described in specific terms particular to that case and to the individual who has brought the action. The phrase "of a kind" is designed to ensure that comparable rights particular to other cases and individuals are also retained by Clause 4 but in respect only of decisions pertaining to that same directive. It is the opinion of the Government that this strikes the right balance, ensuring in respect of directives that individuals and businesses will still be able to rely on directly effective rights that are available to them in UK law before exit day, while also providing clarity and certainty in our statute book about what will be retained in UK law at the point of exit. The noble and learned Lord, Lord Brown of Eaton-under-Heywood, encapsulated that point very neatly.

The amendment of the noble Lord, Lord Krebs, which is similar to the one tabled by Lord Pannick, would instead remove this balance. These amendments could have the effect that pre-exit directives would give rise to a directly effective right that has not previously been identified, for an unspecified period after our exit. Such rights would therefore become part of our law. The Government have always conscientiously implemented EU legislation, in accordance with our obligations as a member state, but once we are no longer in the EU, we should have no enduring obligations in relation to the implementation of EU directives. To accept these amendments would be to undermine the certainty that this Bill seeks to achieve. Businesses and individuals will be placed in the difficult position of not knowing when their rights might change, and our courts could face practical difficulties.

The amendment of the noble Lord, Lord Krebs, goes even further. It would place Ministers under a continuing duty and obligation to make regulations where there has been incorrect implementation of any

[Baroness Goldie]
of the EU law that is retained through Clause 4. I would argue that this provision is harmful for several reasons, and it would not be consistent with the principle that we are separating our domestic statute book from that of the EU.

First, binding Ministers to legislate to give effect to any incomplete or incorrect directly effective EU law retained through Clause 4 would effectively require the UK to act on obligations of implementation relative to the EU framework that it was no longer under—a situation that would be simply inappropriate following exit day. Such an approach would impact on the certainty that the Bill aims to provide in our domestic statute book. By potentially allowing developments in the EU to continue to flow into UK law past the point of exit day, the clear snapshot—I know some Members do not care for the term but I think it is the best term we can come up with—taken by the Bill will be distorted, giving rise to confusion about what our law actually is and where it comes from.

Lord Krebs: The Minister has just said that it would be inappropriate to rectify omissions or incorrect translations. But if the overall aim of the Bill is to move what is currently governed by the EU into UK law and, as it happens, maybe by accident or some other reason, we have made a mistake in the past, surely it would be right within the overall aims of the Bill to rectify errors in the translation, rather than to say, "We made a mistake in the past so we will persist with the mistake". I just do not understand the logic of not wanting to rectify mistakes.

Baroness Ludford (LD): Can I repeat something that I have raised in the Chamber before and about which I had correspondence with a Minister? The European Investigation Order, one of the directives cited by the Prime Minister in her Munich speech that she wants us to stay part of, was transposed at the end of last year into UK law, but incorrectly. It is like a European arrest warrant, but for evidence. Instead of saying that it could be opposed on the grounds that it breaches the European Charter of Fundamental Rights, which is what the directive says—I know, because I was one of the MEPs who battled to get that in—it says that it could be refused if it breaches the European Convention on Human Rights, which is not an EU measure. That has therefore not been transposed correctly. What is the status after exit day? Can someone challenge an EIO on the grounds that it breaches the charter, or only on the grounds that it breaches the convention?

Baroness Goldie: In response to the noble Lord, Lord Krebs, and the noble Baroness, Lady Ludford, we must go back to the fundamental principle of this Bill, which is that we have to have a cut-off point and beyond that point, law-making will revert to the United Kingdom. If there are corrections or incompletions or other matters that we are required to address, we can do that through domestic legislation. That is what any Government of any complexion would want to do. The matters referred to by the noble Lord, Lord Krebs, might take years to emerge. Therefore, it would be essential for Governments to pay attention to whatever was emerging, some of which might be de minimis. We do not know, but my argument is that this would confuse and cause difficulty about understanding what our law is and certainly where it is coming from.

I was going on to say in relation to the amendment of the noble Lord, Lord Krebs, that there is a lack of clarity regarding when exactly Ministers would have the duty to make such regulations under this amendment. Is it intended that all the instruments that currently give effect to EU directives should be reviewed so that such regulations could be repaired? Such a review would have considerable resource implications for both the Government and Parliament, and that should not be underestimated. Furthermore, it would be unnecessary: as I have already mentioned, while the UK has been a member of the EU, we have sought fully to meet our obligations and give effect to EU law in accordance with them. In the case of implementing directives, we have conscientiously discharged our obligations. To require potentially a proactive review exercise, as the noble Lord's amendment could require, is, in my submission, pointless.

I have tried to address the concerns and issues raised; I believe the effect of these amendments would be profound, undermining the Government's clear and coherent position on retained EU law. I hope I have explained in sufficient detail why the current design of Clause 4 is right and appropriate, and I would therefore ask both noble Lords not to press their amendments.

Lord Pannick: I thank all those who have spoken in this debate, and in particular the noble Lord, Lord Krebs, whose amendment I support. I said in opening this debate that I, and the Constitution Committee, found Clause 4(2)(b) very difficult to understand. I am reassured that even the noble Lord, Lord Carlile, with his experience dating back to 1361, with the Justices of the Peace Act, finds it puzzling.

The position is this: there is no dispute—it is well established in the case law of the Court of Justice—that an unimplemented directive does have direct effect and confers individual rights in national courts where it is clear and precise and unconditional. I understood the Minister to say that Clause 4(2)(b) is intended to exclude reliance on such a directive after exit day unless there has been a court case before exit day, either in Luxembourg or in this country on that specific directive. I find that a very odd approach—it certainly is not consistent with the language of Clause 4(2)(b) of a kind. It does not suggest that you are concerned with a court case on that specific directive.

10 pm

It is also a very odd approach because it means that the rights that are enjoyed after exit day in this area—and they are very important rights as the noble Lord, Lord Krebs, and others have indicated—depend on the accident of litigation. Has there been a court case? There may not have been a court case because it is very clear that this particular directive confers individual rights. To rely on the accident of litigation is to my mind a very odd approach.

The approach that the Minister indicates is also fundamentally inconsistent with the snapshot approach which she commended in her speech as the right

one—and I accept it is the right one—under this Bill because the Government's approach will mean that rights will be lost, even though they were enjoyed in this country before exit day. After exit day, they are lost, and the reason they are lost is because nobody has previously brought a court case. I find this very puzzling indeed.

I very much hope that the Government will think again about this. I have the feeling that there is concern around the Committee about the approach that the Government are adopting. I hope they will look at this again. It is a difficult issue, but I do not think they are adopting the right approach. Their approach is inconsistent with their objectives for the Bill. We may well have to return to this on Report, but I hope the Government will bring forward an amendment. For the time being, I beg leave to withdraw the amendment.

Amendment 26 withdrawn.

Amendment 27

Moved by ***Lord Pannick***

27: Clause 4, page 3, line 7, at end insert—

"( ) are the subject of an enactment."

Lord Pannick: My Lords, this is another amendment that comes from the Constitution Committee. It suggests that we should exclude from the scope of Clause 4 any EU law rights derived from the 1972 Act which are already the subject of an enactment—in other words, where Parliament has already dealt with the subject. The Constitution Committee explained its concern at paragraph 35 of its report.

The concern is this. Clause 4 as drafted would include, within retained EU law, rights and obligations under EU law irrespective of whether they have already been implemented in domestic law by primary or secondary legislation. The problem to which this gives rise is that, as a result of Clause 4, there may be, as part of our law after exit day, two conflicting sets of legal rights on the same subject: the ones already implemented by Parliament and the greater rights which a litigant will say are derived from retained EU law. The question is: how is the court supposed to deal with that conflict? It has two retained EU law rights on the same subject. The Constitution Committee heard evidence from the noble and learned Lord, Lord Neuberger of Abbotsbury, the former President of the Supreme Court. As set out in the report, he told the committee that this problem needs to be addressed by the Bill.

Paragraph 36 of the report mentions that the committee heard evidence from the Department for Exiting the European Union that suggested that the problem that I have sought to explain is no different from the situation under the current law where there may be a statute which has sought to implement an EU law obligation that is found by a court judgment not fully to have implemented the EU law obligation, so the EU law obligation takes priority over the inadequate domestic implementation. The problem is that under the Bill, both the domestic enactment and the EU law obligation —see Clauses 2 and 4 respectively—are treated as retained EU law, so the supremacy principle under Clause 5, to which we will come, applies to both of them, and the question remains: which of them takes priority? I look forward to hearing the answer from the Minister to this difficulty. I beg to move.

Lord Beecham: My Lords, at this late hour, I am more than content to rely on the amendment moved by the noble Lord, Lord Pannick, and the questions he has raised.

Baroness Goldie: My Lords, this will be brief, because my soulmate and prop has deserted me. With this amendment, the noble Lord, Lord Pannick, has raised what he sees as the potential conflict between the EU law retained under Clause 4 and the domestic legislation preserved under Clause 2. His amendment seeks to ensure that rights, powers, obligations et cetera provided for in EU directives which have been implemented into EU-derived domestic law—and therefore are already subject to an enactment—will not need to have their directly effective provisions domesticated through Clause 4.

The Government consider this amendment unnecessary. To the extent that there is any potential overlap between Clause 4 and Clause 2, this is no different from the situation at present in relation to EU law and how we see it given effect in UK law. A judgment may establish direct effect, and domestic legislation to implement that finding may follow. But this does not cause any practical difficulties now—indeed one process complements the other—so we simply do not agree that there will be practical difficulties under this Bill as phrased.

I am of course grateful for the suggestion made by the noble Lord, Lord Pannick, but the Bill's position is clear and consistent with existing practice, and his amendment is unnecessary. In these circumstances, I ask him to withdraw it.

Lord Beith: The noble Baroness is bringing out an explanation which the committee has already considered and was not satisfied by. As the noble Lord, Lord Pannick, explained, there is a remaining ambiguity. Can I suggest to her that she composes a note to her very good friend, the noble and learned Lord, Lord Keen of Elie, saying she was given a very difficult time over this and that the Government really have to look at it again? If she is agreeable to doing that, we will not spend much time making a fuss about it.

Baroness Goldie: I thank the noble Lord very much indeed. I am sure my noble and learned friend Lord Keen does not even need the note. He will know that I have had a very difficult time.

Lord Pannick: I am very grateful to the noble Baroness. The problem is, as I sought to explain, that under existing law we know which takes priority: it is EU law. The problem under the Bill is that the EU obligation, which is retained EU law, and the existing domestic implementation, which is also retained EU law, because Clause 2 says so, are in conflict, and the Bill does not provide any order of priority between them. I had assumed that the noble and learned Lord,

[Lord Pannick]
Lord Keen, had gone off because he wants to sit in the Library and think about the answer to this problem. I very much hope that before Report he will come up with the answer and that this can be resolved. I beg leave to withdraw the amendment.

Amendment 27 withdrawn.

Amendment 28 not moved.

Clause 4 agreed.

House resumed.

House adjourned at 10.09 pm.