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PARLIAMENTARY DEBATES
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HOUSE OF LORDS

OFFICIAL REPORT

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The first time a Member speaks to a new piece of parliamentary business, the following abbreviations are used to show their party affiliation:

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 2 May 2018

3 pm

Prayers—read by the Lord Bishop of Portsmouth.

Death of a Member: Lord Temple-Morris

Announcement

3.06 pm

The Lord Speaker (Lord Fowler): My Lords, I regret to inform the House of the death of my very good friend the noble Lord, Lord Temple-Morris, on 1 May 2018. On behalf of the House, I extend our condolences to the noble Lord's family and friends.

Creative Industries: Skills Shortage

Question

3.07 pm

Asked by ***Baroness Bonham-Carter of Yarnbury***

To ask Her Majesty's Government how their Creative Industries Sector Deal, announced on 28 March, will address the skills shortages in those industries.

The Parliamentary Under-Secretary of State, Department for Digital, Culture, Media and Sport (Lord Ashton of Hyde) (Con): My Lords, the creative industries sector deal committed over £150 million of government and industry funding to unlock growth in the UK's world-leading creative businesses and address the current and future skills needs of the creative industries. As part of this, government will fund the skills package, featuring an industry-led creative careers programme—reaching 2,000 schools and 600,000 pupils—and support for apprenticeship standards. Industry will expand its voluntary skills investment fund and work with governments to ensure high-quality work placements for students. Additionally, the BFI is rolling out its £20 million future film skills programme to tackle skills shortages in the film industry.

Baroness Bonham-Carter of Yarnbury (LD): I thank the Minister both for his response and for the Government's recognition in the sector deal of the importance of the creative industries. The Minister clearly understands that skills are the lifeblood of any industry. Does he agree that the demise of the teaching and take-up of creative subjects in schools and further education is very worrying? Will he encourage his colleagues in the Department for Education to promote STEAM, not STEM, and explain to them that the creative industries are powered by creative subjects? What we need is that old request: joined-up government.

Lord Ashton of Hyde: My Lords, no one is suggesting that STEM subjects are the only ones that matter. Indeed, I completely take the noble Baroness's point that the arts are very important, especially for the creative industries. We expect a broad and balanced curriculum to be provided for schools. I am informed by the Department for Education that there is no evidence that a greater emphasis on STEM subjects has had a direct impact on the take-up of the arts in schools. Between 2010 and 2017, the proportion of pupils in state-funded schools taking at least one arts subject remained broadly stable and the percentage of time spent by secondary school teachers on teaching music, art, design and drama has also not changed significantly. However—to give the noble Baroness some comfort—the Secretary of State recently met the Secretary of State for Education to discuss this, and another junior Minister in my department met another junior Minister in the Department for Education on 27 April. Joined-up government is going on, and we are well aware of the sector's views on this subject.

Lord Grade of Yarmouth (Con): My Lords, I am delighted to hear the support for the creative industries and the contribution they make to growth in the UK. The other considerable achievement of the creative industries is in social mobility. I cannot think of any greater engine for social mobility than them. The key to that is some of the world-leading establishments, such as RADA, the BRIT School in Croydon and the National Film and Television School. I would welcome hearing from the Minister that the Government recognise the importance of those and other institutions in feeding the creative industries and avoiding the skills shortage that may loom in 20 years' time.

Lord Ashton of Hyde: It is important to make the point that the creative industries are a tremendous success story. We are not talking about a rescue package, if you like, in the sector deal. They are growing at twice the rate of the rest of the economy. As far as my noble friend's points are concerned, of course we understand, as I said, the importance of the arts. That is why, for example, the Department for Education announced £96 million of funding to give talented pupils the opportunity to attend top music, drama and dance schools. That takes government funding for music and creative arts programmes to almost £500 million. In fact, it is the second-highest amount of funding for a sector by the Department for Education after PE.

Lord Winston (Lab): My Lords, in my capacity as champion of outreach at Imperial College, I go to a phenomenal number of schools around England and sometimes to Wales. What I find is that a huge number of students are not able to do, for example, an arts A-level with a science A-level because there is insufficient money in the system for schools to provide that, yet that is what gives them a compass in science to see how valuable it is in practice in wider society. Could the Minister recommend that to the department—it seems an important issue—to see whether we could not fund it rather better in future?

Lord Ashton of Hyde: My Lords, this is the third question that should be given to the Department for Education, but I completely understand the noble Lord's point. What I have said is that we do not think that there should be a limited amount for, for example, STEM subjects, important though they are. We understand the basis of a broad-based curriculum.

[Lord Ashton of Hyde]
As I indicated, in DCMS we are talking to Department for Education Ministers. We represent the views of our sector, which is very vociferous on these subjects. We understand them and are taking a lot of effort to do so, and are relaying them to the Department for Education.

Viscount Colville of Culross (CB): My Lords, 47% of the workforce in the creative industries is self-employed, compared with 15% of the workforce as a whole. The creative sector deal declares that it wants to protect access to global talent. Could the Minister tell the House whether the Government plan to consult the industry on the introduction of a freelance visa to ensure that the most talented creatives can work in this country?

Lord Ashton of Hyde: We are only too well aware of the importance of foreign talent, who sometimes come to this country for relatively limited periods of time to work in the creative industries. The noble Viscount is absolutely right that a lot of the jobs in the creative industries are for a limited period. We are working with the Migration Advisory Committee to look at issues surrounding immigration. Again, as part of the joined-up government we referred to, we are talking to the Home Office to make sure the sector's requirements are known.

Lord Foster of Bath (LD): My Lords, there is much to welcome in the sector deal, but meeting the training skills for the anticipated 600,000 extra jobs means that the apprenticeship levy scheme must be fit for purpose for the creative industries. Is the Minister aware that the Skills Minister has already acknowledged that the scheme is causing particular concerns and problems within the sector, which wants greater flexibility? The sector deal promises simply to monitor the scheme. Your Lordships' Communications Committee has asked for a comprehensive review. Will the Minister assure your Lordships' House that we will get that comprehensive review?

Lord Ashton of Hyde: I believe that the Department for Education is looking at how the apprenticeship levy is working and bedding down. We understand that there are particular issues for the creative industries. That is why the sector deal includes support to help quickly develop 20 new apprenticeship standards. We will work with the Institute for Apprenticeships to prioritise those standards for the creative industries. I can confirm that, as part of the sector deal, an employer representative from the creative industries will sit on the Department for Education's apprenticeship stakeholder board. I cannot commit the Department for Education, but it is certainly looking at the particular problems that pertain to the creative industries.

Plastic Packaging

Question

3.16 pm

Asked by ***Lord Dubs***

To ask Her Majesty's Government what action they plan to take to reduce the amount of plastic used in packaging for food, drink and other consumer items.

The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord Gardiner of Kimble) (Con): My Lords, the Government have been working with WRAP, the Ellen MacArthur Foundation and industry to develop the UK plastics pact, announced last week. The pact seeks to eliminate single-use plastic packaging by 2025 and ensure that 100% of plastic packaging is reusable, recyclable or compostable. In addition, government and industry are investing in research on plastics innovation and the development of more-sustainable products.

Lord Dubs (Lab): My Lords, I think the Minister will agree that it is no exaggeration to say that we are poisoning our planet. Will he confirm that 70% of the rubbish on Britain's beaches is plastic? Will he also confirm that, by 2050, the weight of plastic in the oceans will exceed the weight of fish, and that micro-plastics have been found on the tops of mountains and in the polar regions? I appreciate what the Government are trying to do, but are we not facing a desperately urgent crisis which requires more urgent action nationally and internationally?

Lord Gardiner of Kimble: My Lords, I entirely endorse all the instincts that the noble Lord has expressed in terms of our need to take action both at home and overseas. Just at CHOGM, there was a strong desire within the Commonwealth countries to deal with marine pollution. Through the UN, the G7, the G20 and CHOGM, we have been working extremely hard, because this issue must be dealt with internationally. At home, we fully recognise that we need to advance the necessary changes. That is why our resources and waste strategy to be announced later in the year will represent an important way forward.

Baroness Neville-Rolfe (Con): My Lords, noble Lords will know of my passion for this issue. I even have an eco-coffee cup in turquoise blue that I use every morning, which saves me 25p. I am delighted at the way in which this issue has gone up the agenda so strongly—it means that we can make a big difference. But how is my noble friend getting on with boosting recycling in local authorities by bringing in soon a single system for recycling, and by ensuring that all plastics have their recyclable quality marked on the product?

Lord Gardiner of Kimble: My Lords, I endorse what my noble friend has said, which is why the four-point plan that my right honourable friend the Secretary of State announced is precisely about reducing the amount of plastic in circulation, addressing different plastics in use, improving the rate of recycling and making it easier for people to recycle. That is why we need to work with local authorities. There are some very good examples, both rural and urban, of local authorities increasing their rates of recycling, and I applaud them.

Baroness Miller of Chilthorne Domer (LD): My Lords, does the Minister accept that, besides local authorities, the Government need to make extra effort with producers to give them guidance about using only one sort of plastic, where that is practical, because it is the mixed plastics that are so difficult to recycle?

Lord Gardiner of Kimble: My Lords, this is where I think industry is working much more effectively than very often we appreciate. Indeed, industry has committed to finding solutions to ensure that the recycling of all black plastic packaging is sorted out by the end of this year. Clearly, with innovation, we want to ensure that the plastic we are producing is readily recyclable.

The Lord Bishop of Salisbury: My Lords, it is good that we are making such progress on the issue of plastic and food packaging but it is important to think holistically about this. In the UK we throw away about 235 million items of clothing every month, 60% of which includes polyester. Bishops know a thing or two about dressing up, and churches and charities know about recycling, but will the Minister say what steps are being taken to address the use of polyester in human packaging?

Lord Gardiner of Kimble: I may have needed notice of that very intriguing question. However, it goes to the heart of what I would call wise and sustainable use, and it is why I actively encourage natural fibres. The use of wool is a very good idea.

Lord Dykes (CB): My Lords, I declare an interest in the all-party group. Will the Minister accept the urgent request of industry—the sector represented by the Food and Drink Federation—to have a holistic approach to this so that every form of plastic is dealt with in the measures to be drawn up by the Government?

Lord Gardiner of Kimble: My Lords, as I say, I think that industry is absolutely seized of this. I could take noble Lords through the companies involved in coffee and coffee cups, and the number of them that are now dealing with rewards, with water filling stations in their coffee shops, et cetera. I think that what we are looking at now is the beginning of a considerable revolution in the way we do things.

Lord Berkeley (Lab): My Lords, one of the consequences of the Government's Brexit policy is that all pallets importing food into the UK or exporting it from here will have to be disinfected at the frontier if they are made of timber. Will the Minister encourage the use of recycled plastic for pallets so that this does not have to happen? It would also save some of the trees that are used in pallets.

Lord Gardiner of Kimble: My Lords, wearing my other hat as Minister for Biosecurity I know that the noble Lord will well understand some of the dangers that we have had from pests and diseases coming through in timber packaging. I take the point very seriously indeed. We need to look at all sorts of innovative ways of reusing and recycling plastic. He has given a very good example of the reuse and recycling of materials.

Lord Hayward (Con): My Lords, is it not a question of physician, heal thyself? Should not this House and the Parliamentary Estate look very carefully at its lack of progress in dealing with plastics and other products? Plastics can only be recycled twice, so when one talks about continually recycling plastics, it is not accurate. Would it not be better to look at products such as the bottles being developed by Choose Water, in Scotland, that use no plastics?

Lord Gardiner of Kimble: My Lords, it is incumbent on us all, whether it is the Government, this House or Parliament. That is why I am very pleased that the Services Committee is looking at this precise point. When I think of the many plastic cups that I see in all our Committee Rooms, I think that we undoubtedly should lead by example.

NHS: Cybersecurity

Question

3.23 pm

Asked by ***Lord Hunt of Kings Heath***

To ask Her Majesty's Government what assessment they have made of the response of the National Health Service to cyber attacks.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, as the lessons learned review into the WannaCry attack by the Chief Information Officer for Health and Care set out, the NHS responded well to what was an unprecedented incident. However, a number of areas for improvement were also identified. Consequently, several immediate actions were taken to improve the cyber resilience of the NHS. They included updating and testing incident plans and investing more than £60 million to improve security in local IT infrastructure.

Lord Hunt of Kings Heath (Lab): My Lords, I welcome the measures that have been taken, but the noble Lord will know that recently the Public Accounts Committee has identified that his department and the NHS were wholly unprepared for what was a relatively unsophisticated attack, and that many trusts failed to act on warnings that they had been given to patch exposed systems. I understand that the committee said that, extraordinarily, at the time it took evidence some trusts had still not patched up their systems. My understanding is that that is because those systems were linked to the use of medical equipment, and in patching up the systems they could have damaged a lot of the service-giving infrastructure. That suggests that the NHS is in a very poor condition indeed to deal with this kind of threat in the future. Can he reassure me that the recent announcement by the Secretary of State will really do the job?

Lord O'Shaughnessy: The PAC review found that the use of Windows XP was at the heart of the problem, as an unsupported and unpatched system. Several things have happened as a consequence. First, XP usage has gone down from 18% in 2015 to 1.7% now. We also have a customer support agreement with Microsoft now and are transitioning to Windows 10, which is of course fully supported and much more secure. We also have a system now called cursor collect. The notifications

[Lord O'Shaughnessy]
that go out, called cursor notifications, are due to be acted on within 48 hours. That exposes the fact that we did not have a way of tracking that. We now have a way of tracking that and enforcing action at trust level. So there is a much higher degree of security than there was. Of course, no security is ever perfect and our vigilance carries on.

Baroness Brinton (LD): My Lords, in Scotland it is possible for your records to be transferred from one hospital to another or from your GP to your hospital without any consequences at all. One of the concerning things about the Public Accounts Committee report is the systemic failures in IT overall in NHS England. One example is where regional hospital A cannot receive data from district hospital B, even if it is a simple blood test, because they use different systems; the consultant I spoke to said that he actually advises people to use faxes. This is our NHS in the 21st century.

Lord O'Shaughnessy: The noble Baroness is highlighting a historic problem about interoperability between different bits of the NHS in England. That is absolutely fair enough. I would highlight two things that we are doing. First, the National Data Guardian for Health and Care has defined 10 data standards that should apply to both security and interoperability between different systems, and those now apply in all key NHS contracts, including the standard NHS contract. Secondly, we have launched a programme to appoint up to five local health and care record exemplars, which will provide interactive and interoperable data for patients for their direct care—so that the issue we have at the moment of data sometimes falling between different institutions will not happen any more.

Baroness Chisholm of Owlpen (Con): My Lords, obviously data security is absolutely vital, but so is the collection of data. If we are going to move forward it is so important that we collect that data for research and treatment. Can my noble friend the Minister give us some kind of indication of how we can make sure that the general public feel happy to give their data to the health service?

Lord O'Shaughnessy: My noble friend makes an excellent point. Not only is it critical that data is joined up for direct care—quite rightly, patients are amazed when that does not happen—it is an absolutely essential resource for research into new treatments. One thing we are doing to try to provide that reassurance to the public, which has not always been there, is introducing a new data opt-out at the end of this month to provide that reassurance for patients who do not want to be part of it. We are focused on providing that resilience and security so that they can be confident that, when the NHS holds their data, it uses it securely, safely and legally.

Lord Patel (CB): My Lords, one of the lessons learned following the WannaCry attack was that the weakest links in the NHS had to be identified. The Minister has already referred to the upgrading of software that was found to be weak. What work is being done to identify other areas in the NHS that would be open to cyberattacks?

Lord O'Shaughnessy: The noble Lord makes an excellent point. One thing we are now doing is more intelligence-led penetration testing based on work that the Bank of England does, which is to probe in a safe way any weaknesses and to make sure that they are dealt with. The CQC has also added data security to its well-led criteria for inspections. We have now demanded that a board member of each trust takes responsibility for cybersecurity. Indeed, for a trust to be rated as well led, it has to demonstrate that competence.

Lord Hunt of Kings Heath: My Lords, one of the things that happened when this occurred made it clear that NHS trusts did not follow the instructions they were given to patch their systems. Is the Minister assured that, if this were to happen in future, trusts would follow, without exception, the instructions given?

Lord O'Shaughnessy: I am absolutely assured that they would perform much better than they did that time. I do not think I can give the assurance that every single one would do it, because there are still capacity issues in some trusts. The investment that we are carrying out is designed to deal with that. It is a much better performance, but we need to make sure that we are always vigilant for weakness in the system.

Health: Cancer Nurses

Question

3.30 pm

Asked by ***Baroness Thornton***

To ask Her Majesty's Government what assessment they have made of the impact of the shortage of more than 400 specialist cancer nurses reported by Macmillan Cancer Support.

The Parliamentary Under-Secretary of State, Department of Health and Social Care (Lord O'Shaughnessy) (Con): My Lords, we welcome Macmillan Cancer Support's report, which acknowledges the fact that the number of specialist cancer nurses has increased by nearly 1,000 full-time equivalent posts, or by 30%, since 2014. There is more to do, however, and Health Education England is working closely with Macmillan and the cancer alliances, so that we can achieve our aim that every cancer patient has access to a specialist cancer nurse by 2021.

Baroness Thornton (Lab): I thank the Minister for that Answer. The census also pointed to the facts that there are vacancy rates as high as 15% for chemotherapy nurses in some areas, that the proportion of specialist cancer nurses who are over 50 years old continues to climb, and that almost one in 10 specialist cancer nurses comes from the European Union. We know that there has been a cliff edge for recruitment from the European Union. I want to ask two questions.

First, will the Minister assure the House that this census will be used by the Department of Health and Social Care, Health Education England and the cancer alliances to inform their strategic workforce planning? Secondly, will he explain what steps the department has taken to assess the level of funding required to deliver the recommendations contained in the *Cancer Workforce Plan*, including the long-term strategy?

Lord O'Shaughnessy: The noble Baroness is quite right that the Macmillan report highlights some challenges around vacancy rates and the age profile of cancer nurse specialists. It was explicitly set out in the cancer workforce strategy that it would have a phase 2 of planning once the census had been published. This census has been published, so there is an absolute commitment by Health Education England to work with Macmillan and the cancer alliances to bottom out how many more staff are required to meet the standard that we have set out—for every patient to see a cancer nurse specialist by 2021—and how many extra people we would need to recruit for that, and therefore to deliver the funding that would enable that to happen.

Baroness Hayman (CB): My Lords, I declare my interest as a member of the General Medical Council. What assessment have the Government made of the effect on cancer services of the repeated refusal of visas to overseas doctors qualified to work here, and who have been recruited by the NHS to work here, but not being allowed to enter the country because of Home Office policies? Given the severe shortages of doctors across the board in the NHS, not just in A&E, is it not time that the cap on tier 2 visas for doctors was lifted?

Lord O'Shaughnessy: The noble Baroness will know that the NHS benefits from many of those visas issued under tier 2, which obviously has great benefits for our workforce. It is in the long-term interests of this country that we recruit more of our staff, wherever possible, from the domestic workforce. On that basis, Health Education England has committed to increase the number of cancer consultants by more than 20% between 2016 and 2021, as well as increasing the number of radiographers and others.

Lord Forsyth of Drumlean (Con): My Lords, does my noble friend really think it necessary that specialist cancer nurses are educated to degree level? If he does think that, given that because of their levels of remuneration most of the student loan will not be paid back, would it not be a good idea to consider writing off those student loans for those nurses who stay for a period within the health service?

Lord O'Shaughnessy: What comes to life in the cancer workforce strategy and the Macmillan report is the complexity of the workload that these nurses carry out, so a very high level of qualification is required. One thing we do not have at the moment is a national competency framework, which is being designed. Funding for nurses is obviously a topic that we come to often in this House and it is worth noting that the income point at which repayment of the loan starts has been increased by this Government, to make sure that lower-paid nurses and other staff are alleviated from that burden.

Baroness Corston (Lab): My Lords, how many nurses from overseas have applied to work in the National Health Service and have been refused permission on the grounds of the arbitrary target set by the Prime Minister, as exemplified by the 100 Indian doctors who wish to work here and have fallen foul of this arbitrary rule?

Lord O'Shaughnessy: I do not believe that nurses would have fallen into that category as nursing is named as a shortage profession in the immigration system, but I would have to check those figures and I will write to the noble Baroness.

Baroness Jolly (LD): My Lords, the failure to screen nearly half a million women for breast cancer is a scandal. When it is coupled with the report of Macmillan Cancer Support, it has really been a bad few days for cancer. Immediate action is required on both counts. Is it the Government's view that this shortage of cancer nurses is due to local budget constraints or to workforce planners' failure to act on the demographic trend of the ageing workforce?

Lord O'Shaughnessy: My Lords, regarding the Statement made by my right honourable friend the Secretary of State earlier today about the errors in the breast cancer screening programme, I take this opportunity to apologise wholeheartedly and unreservedly on behalf of the Government, Public Health England and the NHS for the suffering and distress that has been caused to women by this flaw in the screening service. We will have an opportunity to discuss this at greater length tomorrow, when I will repeat the Statement.

The shortage that has been described is based on an analysis of vacancy rates. The number of cancer nurse specialists has actually increased by 1,000—that is 30%—in the last three years alone. That is a huge increase. Of course we know that we need to do more, but it is worth recognising the great steps forward that we have made in cancer treatment in this country.

Baroness McIntosh of Hudnall (Lab): My Lords, can I take the Minister back to the question from the noble Baroness, Lady Hayman? In his answer, he made the rather odd observation that it was in the long-term interest of the service that we should recruit our workforce domestically, and no doubt that is at least an arguable position. However, we are not talking about the long term here: we are talking about the immediate term. In the interest of joined-up government, could he go back to his colleagues at the Home Office and ask them to look again at whether they have made the right decisions in this case?

Lord O'Shaughnessy: I reassure the noble Baroness that we have lots of discussions with the Home Office about the recruitment of international doctors and nurses. I reiterate the point, however, that it is our intention to increase the number of training places for doctors and nurses from this country.

European Union (Withdrawal) Bill

Report (5th Day)

3.37 pm

Relevant documents: 12th, 20th, 23rd and 24th Reports from the Delegated Powers Committee

Amendment 88

Moved by ***Lord Patten of Barnes***

88: Before Clause 10, insert the following new Clause—

"Continuation of North-South co-operation and the prevention of new border arrangements

(1) In exercising any of the powers under this Act, a Minister of the Crown or devolved authority must—

(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998, and

(b) have due regard to the joint report from the negotiators of the EU and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 of the Treaty on European Union.

(2) Nothing in section 7, 8, 9 or 17 of this Act authorises regulations which—

(a) diminish any form of North-South cooperation across the full range of political, economic, security, societal and agricultural contexts and frameworks of co-operation, including the continued operation of the North-South implementation bodies, or

(b) create or facilitate border arrangements between Northern Ireland and the Republic of Ireland after exit day which feature—

(i) physical infrastructure, including border posts,

(ii) a requirement for customs or regulatory compliance checks,

(iii) a requirement for security checks,

(iv) random checks on goods vehicles, or

(v) any other checks and controls,

that did not exist before exit day and are not subject to an agreement between Her Majesty's Government and the Government of Ireland."

Lord Patten of Barnes (Con): My Lords, a number of other noble Lords have added their names to my new clause. It is perhaps appropriate to say—as the number of Members in the Chamber is declining—that I have to begin with a confession. Some noble Lords might be rather surprised that what I say will sound remarkably like a statement of government policy. That is because it largely is. I have read very carefully the Government's position paper on Northern Ireland and Brexit; I have read the other seminal documents—the Mansion House speech and so on—and my speech, I hope, will reflect what I understand to be the Government's policy both on a frictionless border and on the relationship between the border and the Good Friday agreement.

If at the end of this debate the Minister, with his customary civility, says "What's the problem? We're going to do all this anyway. Why bother to put this new clause into the Bill?", my response will be that while I totally expect him to honour his word and do what the Government have said, I think the Prime Minister and others, such as the Minister, need some support at this moment when a number of their colleagues and Conservative Party Members in the other place, who are very keen on the over-the-cliff, on-to-the-rocks Brexit, are making it rather more difficult for the Prime Minister to square circles than should be the case.

We have debated these issues. We have debated the relationship between the Good Friday agreement and the border on a number of occasions: at Second Reading, in Committee and on Report. On Report we passed an amendment on a customs union, which has significant relevance to this. I am not going to go over all that ground again. The vote on a customs union led to the present-day custodians of constitutional propriety calling for fire and brimstone. They were fresh, of course, from their views on the independence of the judiciary, and I do not think any of us take any of that too seriously.

I will not go through all the arguments that were used in those debates. In the debate on the customs union, I will be telegrammatic. I think a number of noble Lords found it difficult to discern the cornucopia of trade possibilities that await us once we have left the customs union. I think it is also true that a number of noble Lords thought that we would have our work cut out to try to replicate some of the existing trade agreements that the European Union, with us as a member, has made elsewhere, for example, with South Korea, Japan, Singapore, Vietnam and others. I think it is fair to say that a number of noble Lords pointed out that there are 44 non-EU members of the Commonwealth which have trade agreements with the European Union and that 49 of the poorest countries in the world have access to European markets without any tariff or control over quotas.

During that debate we enjoyed this spring's parliamentary game: hunt the virtual border. We travelled around the House, we looked under Benches, we looked under the Woolsack, but nobody could find the virtual border. We went from continent to continent looking for it. Since then, I have heard one or two people suggest that it has been discovered and is the border between Switzerland and France, two countries which, I am happy to say, have not been at war for 200 years. That has been referred to as a model of a virtual border for us. Well, if you look up the facts, you discover that the average minimum waiting time for a lorry going from France into Switzerland or the other way is between 30 and 45 minutes, that they have to go through customs checks and, in addition, they have to fill in two lots of VAT forms. Just to make the position absolutely clear, I am indebted—I think this is probably the first time he has been mentioned in this House—to Mr Cyril Kinsky of Wiltshire. He wrote to the *Times* last week about the frictionless border and noted that he had recently been in Switzerland and had travelled into France to shop at the local French supermarket. He had bought four chickens—poulet fermier, I am sure. He had brought them back into Switzerland, where he had been stopped and hit with a heavy fine. I hope the chickens were tasty. They were certainly not frictionless.

Why is there such a problem that we address in this new clause? There is a problem because, as the excellent Northern Ireland position paper makes clear, the current substantive position in Northern Ireland and the Republic—that is, the existence of a frictionless border—is not to be changed by Brexit. The Prime Minister,

perhaps as well as or more than anyone, understands the problem. Two days before the referendum, she said, in effect, that you can be in a customs union and not have a border but outside a customs union you have to have a border. That situation is made much more complicated when you look at the provisions and rules of the World Trade Organization.

3.45 pm

We are hoping to become on our own a member of the WTO and are presumably looking for some concessions as we make all these trade deals around the world. Presumably we will want to follow the rules. We should know that under the World Trade Organization, the European Union as a free trade area has to be able to demonstrate that it has a border with a country which is not a member of the same free trade area and that there have to be checks on that border.

That will sooner or later be true of us when we enter any free trade agreements with anyone—unless, of course, every trade agreement that we enter with everyone has absolutely no tariffs attached at all. The World Trade Organization is absolutely clear that any agreement reached with one country has to apply to all the others. It is called the most favoured nation status. On those grounds as well, we face some difficulties.

As Comrade Lenin said in his famous pamphlet, *What Is To Be Done?*, what indeed is to be done? Some have taken to blaming the Republic of Ireland. Initially, there were even some who said: "The answer is for the Republic of Ireland to leave the single market, leave the customs union and leave the European Union, then there would be no problem with a border". They stopped short, I think, of suggesting that we should send back a viceroy, although there are one or two of us in the House, I have to say, who have certain experience of these matters. I am sure I speak for my noble friend Lord Luce as well. We have experience in these things which we could perhaps put in the Government's hands.

Others blame the Republic for other reasons. The Secretary of State for Exiting the European Union said that the problem was because the Leader of the Fine Gael Party, the Taoiseach, was in the pocket of Sinn Féin. Sinn Féin and Fine Gael—I think the Secretary of State must have been away the day they did Irish history at school.

I am pleased to say that the Prime Minister has been absolutely clear on this point. She said in her Mansion House speech that it is not good enough to say:

> "We won't introduce a hard border; if the EU forces Ireland to do it, that's down to them. We chose to leave, we have a responsibility to help find a solution".

Why is that? It is because we recognise the relationship between the border and the issue of identity in Northern Ireland and the relationship between the border and security.

We have been looking for a solution. The Prime Minister is doing that this afternoon, we are told. Various proposals leak out—whether they are true or not, I do not know. The efforts of the Prime Minister were described the other day by the chairman of the European Research Group, I think it is called—I have to say to the House that I find a little of him goes a long way—not as unwise but as "cretinous". I certainly would not use that language. I think what the Prime Minister is trying to do is to underline the fact that the border is closely related to the survival of the Good Friday agreement.

I hope that everybody will support the new clause today, including the Minister, wise man that he is—I do not want to ruin his career by all this flattery. The first half puts in the Bill the Government's commitment to the Good Friday agreement. The second part makes it clear what is meant by a frictionless, or seamless, border. Just in case anyone says, "You can't rule this or that out for ever", we have made it clear, after proposed new subsection (2)(b), that we are talking about things that did not exist before exit day and are not subject to an agreement between Her Majesty's Government and the Government of Ireland. What we are doing in that part of the clause is recognising that the Good Friday agreement includes a specific commitment to the removal of security installations along the border.

There are some people who say, "But there have to be these security installations". The paradox is that, today and in the past, security installations have produced the exact opposite of security. If anyone did not believe that, they might listen to the chief constable of the Police Service of Northern Ireland, which I am pleased to say has today probably the best relationship that there has ever been between the PSNI and Garda Síochána. The Government plainly understand the importance of the relationship between the border and the Good Friday agreement. In the Northern Ireland position paper, they quote with approval that the border is,

> "the most tangible symbol of the peace process".

That is said by the Government in their own position paper, and I happen to agree with that.

There are two reasons why I think that is particularly important. The first is the issue of security. The Northern Ireland Chief Constable is not threatening or blackmailing; he is recalling history, and is properly concerned about the welfare of the men and women who work for him. I think I am right in saying that the first two fatalities during the Troubles, or certainly among the first fatalities, were two customs officers who were murdered on the road between Belfast and Dublin. The Newry customs house was blown up again and again. What worries the Police Service of Northern Ireland and others is not just the likelihood that any manifestations of a hard border would lead inevitably to civil disobedience but that they would also provoke violence that was totally unjustified.

I think the peace process and the Good Friday agreement were a spectacular success. We have made a bloody shambles of sharing this archipelago for the last several centuries, particularly the last century, but at last the agreement offered some hope. That is why two Prime Ministers, the Taoiseach and George Mitchell have spoken out so strongly in favour of finding a sensible answer to the border and its relationship with the agreement. As the Government say in their own position paper, the issue of identity goes to the heart of the agreement. Anyone who doubts that that is the case should look at kerbstones or consider flags. In 2012 the city council in Belfast decided that it wanted

[Lord Patten of Barnes]
to reduce the number of times during the year that the union flag was flown. The result: a year of demonstrations and civil disorder, 130 police officers injured and a political office firebombed. Ask yourself this question: why are the Northern Ireland Executive not working at the moment? Because of an argument about identity, about parity of esteem for different cultures and different loyalties. That is why it is not working.

The genius of the Northern Ireland agreement was to extract from nationalists the commitment that they would ask for constitutional change in Northern Ireland only through the process of democracy. However, they were told that they did not have to sign up to be loyal to all the usual symbols of what they regarded as the unionist state. That has not meant "Kumbaya", it has not meant that everybody loves one another to bits, but it has ended the violence: violence that saw the death of 1,000 police officers and soldiers during the Troubles—twice as many as died in Iraq and Afghanistan—violence that maimed many more and destroyed livelihoods and a lot of the values of civil society.

We should remember something that we very rarely talk about. David Cameron, when he made his extremely well-judged remarks on Londonderry, or Derry, said that things had been done in Northern Ireland in the name of the state which were neither justified nor justifiable. We cannot possibly want to risk going back to that.

During these debates, things have occasionally been said heatedly on both sides to which some of us have taken exception. I do not think I have to say that, although I disagree with a lot of what the Government are being obliged to do and although I think referendums are awful constitutional devices, I do not think that we are teetering on a Weimar edge, with the horrors of authoritarianism lying just around the corner. I do think there are risks to what the French would call our social solidarity in this country when, for example, civil servants are attacked for doing the job they are asked to do by the Government. It was ironic that we in this House were getting criticised for allegedly undermining the Government's negotiating position when people in the European Research Group and others were busy putting the knife into the civil servant charged by the Prime Minister and the Government with negotiating for us in Brussels.

I am not surprised that the Cabinet Secretary, doubtless to be denounced by the *Daily Mail* as a member of the establishment—well, yes—said what he did. I was very pleased that the Prime Minister's chief of staff said what he did, presumably with her cover. I do not want to go back to any of that. There are things I have disagreed with. I did not agree with the proposition that what we were doing was somehow the greatest constitutional outrage since 1689—that covered a lot of history. Nor did I believe that encouraging the House of Commons to do its duty, examine the agreement carefully and take a decision on it was triggering a constitutional crisis.

Something else I heard I objected to much more. It was the suggestion in the debate on the customs union that this House, by talking about that, the border and so on, was playing with fire. I will tell you what I think playing with fire is: blundering into the politics of Northern Ireland with a policy which is sometimes clueless and sometimes delinquent with a can of petrol in one hand and a box of matches in the other. That is playing with fire. That is what we are in danger of doing.

In the middle of the 1930s, a great Church of Ireland Bishop, Louis MacNeice's father—an Orangeman, a huge opponent of fascism and anti-Semitism—said this to his diocese:

"It would be well to remember and to forget, to remember the good, the things that were chivalrous and considerate and merciful, and to forget the story of old feuds, old animosities, old triumphs, old humiliations".

He concluded:

"Forget the things that are behind that you may be the better able to put all your strength into the tasks of today and tomorrow".

I do not want to go back to the old triumphs, old humiliations, old animosities and old feuds. It would be shameful and dishonourable if this House were to do anything that made that more likely. It would be a stain on our history. I beg to move.

4 pm

Lord Spicer (Con): I rise having just torn up the speech that I was going to make, as a result of the very eloquent speech that we have just heard, made by the former Hong Kong governor and present chancellor of Oxford University, and a person with whom I entered the Conservative Party on the same day. We entered the research department together on exactly the same day in the 1960s.

It was a very eloquent speech, but it had one flaw. What I agreed with, and why I have torn up my other speech, is that my noble friend is quite right in saying that we cannot mess about with this question of whether we leave or not, or whether there is a border or not. He is absolutely right in saying that we cannot have a sort of fantasy border. If you leave, what it means is that you depart one set of rules and one market to go to another market. He is quite right in saying that at that point, you acquire a border. I absolutely agree with that.

The question is whether the whole future of this country is to be dependent, as his speech seemed to imply, on one issue—our relationship with the Republic of Ireland. Is our whole future to be dependent on that? I have to say that I do not think that it should be. There are ways around it, and they do not include having a fantasy border. For instance, if we have a border between two different markets and we do not go down the path, which was one of my noble friend's alternatives, of the Republic joining us, what we must have, in the normal way in which these things are done, is a bilateral agreement between Britain and the Republic of Ireland. We should probably do that—make the final agreement—after we have come out, because we will then be totally in charge of our destiny and be able to make whatever agreements we want and the European Union, with which the Republic of Ireland will have to make its peace, will be less inclined to obstruct such a bilateral agreement.

There is no reason why we should not have a bilateral agreement—and there is no reason why we should be particularly nice to the Irish Republic, as it

has not been particularly nice to us in recent months. It is absolutely right, however, that we should try to maintain the good will and the pleasant relationship that we have had in recent times, but we can do it in the normal way in which these things are conducted. We do not have to have the whole of our policy towards the European Union obstructed by this one element. My noble friend suggested that to do this, we should turn our backs on what the British people have asked us to do and voted for us to do, which would be an enormous decision for us to have to make and quite wrong, in my view. A lot of what my noble friend said is good sense in terms of the actualities of the border and us leaving a market, but I think that his conclusion is the opposite of the right one.

Baroness Lister of Burtersett (Lab): My Lords, in Committee, I and others spoke about the importance of paying attention to the voices and rights of the children and young people of Northern Ireland in our considerations, not least because they had no say in the referendum but will live with the consequences long after the rest of us. Indeed, just on Monday, my noble friend Lady Massey reminded us how important it is to consider children in all aspects of our discussions on Brexit. From a meeting that I and others had with some children and young people from Northern Ireland in March, and reading reports of conferences that they themselves had organised, it is clear that they are really anxious about their future rights as citizens of the island of Ireland and about how their lives will be affected on a daily basis if the border issue is not resolved. As one briefing put it:

> "Children in NI, and not just those living close to the border, live their lives 'across' what has become an increasingly seamless border".

We owe it to these children of Northern Ireland to provide the certainty of writing the rights and protections into the legislation.

More generally, I and others have also emphasised on a number of occasions the centrality of human rights protection to the Good Friday agreement and, therefore, the importance of ensuring non-diminution of human rights in Northern Ireland as a result of Brexit and the maintenance of the equivalence of rights between Northern Ireland and the Republic. On a couple of occasions, I have also raised the fact that civil society organisations in Northern Ireland have asked for movement on a Bill of rights, promised in the Good Friday agreement and subsequent agreements, as they believe that Brexit makes it even more important now than before. The Minister, who has always been extremely charming and helpful in his responses, has not responded on this point. If he is not able to respond today, I would be grateful for the promise of a letter from him on that. The Minister has otherwise been consistently positive and reassuring on the questions of the Good Friday agreement and the border, which is of course very welcome.

As the noble Lord, Lord Patten of Barnes, said in his marvellous opening speech, I do not think there is anything in this amendment that the Government could not agree with. But warm words in this context are not enough. The children, young people and civil society organisations of Northern Ireland are looking for something stronger. That must mean writing such commitments into the Bill itself. That has both practical and symbolic significance. That is why I believe it is crucial that we pass this amendment on behalf of our fellow citizens—children and adults—in Northern Ireland, who are looking to us for firm, legally binding assurances about their future rights.

Lord Alderdice (LD): My Lords, I put my name to a similar amendment in Committee and, as those who were there will recall, spoke very strongly in favour of it. However, when I saw the draft of this amendment, before it was tabled, I was unhappy about two things. One was that the commitment to entrench the principles of the Good Friday or Belfast agreement had been excised from it; I really do not understand why that is. It is referred to only in oblique ways, by referring not to the agreement but to the Act, which is not the same thing. I think that is a missed opportunity and I do not really see any good reason for it.

However, my main reservation about the amendment concerns proposed new subsection 2(b)(iii). It effectively suggests that one could not accept a requirement for security checks. The noble Lord, Lord Patten of Barnes, has spoken about security and how it can be counter-productive if done in particular ways. I remember very well all the watchtowers and so on that he called to mind; I spent quite a lot of time flying round in helicopters watching soldiers taking them down. But this does not talk about watchtowers; it talks about security checks.

As legislators, we are not expected to be able to predict the future beyond what can reasonably be understood. Donald Rumsfeld advised us about "unknown unknowns". But there are potential things that are not so unknown at all. Around the time we were coming up to mark the anniversary of the Good Friday agreement, Mr Gerry Adams was interviewed by the German magazine *Der Spiegel*. He was asked whether he felt that terrorism and politically motivated violence was ever justified now. He said that yes, he believed that it was, and Sinn Féin went on to defend him in that stance, some 20 years after the Belfast agreement. In the last month we have also seen a new organisation, the Irish Republican Movement, announcing that it wants to get operational again because it is not happy about how things are going.

I therefore do not ask myself what the situation is with security now, well before exit day, when thankfully we have peace and a considerable deal of tranquillity and agreement within Northern Ireland and between the north and south, which is marvellous. I ask myself how things might develop over the next year or two, when there are those who are unhappy about Brexit and those who want to promote it. That is not the Brexit we are talking about, of Britain exiting the European Union, but the Brexit that is Britain exiting the island of Ireland and leaving Northern Ireland. There are those who are still prepared to use physical force to bring that about. Do they have any significance?

We are likely to see an election in the Republic of Ireland in the next 12 months, between now and Brexit day, and it is wholly within the bounds of possibility that Sinn Féin will be a member of a new coalition. Possibly it would not be with Fine Gael—although

[Lord Alderdice]
who knows? Anybody who would predict politics in any part of the world at the moment must be a courageous individual. But with Fianna Fáil, that is entirely possible. So the backstop protective position is that if there are no security checks near the border, it will be okay because we will be able to negotiate that with the Irish Government; and if it were the current Irish Government, I rather suspect we would be able to do that quickly. But I would not feel the same sense of confidence if there were the possibility of a Sinn Féin coalition Government.

Of course, if there was a major outbreak of violence, it might be possible to sit down and have that negotiation. However, what would happen if our security services had good information that a real danger was coming from across the border, not just to Northern Ireland but to this part of the United Kingdom, and they needed to get into negotiations with the Irish Government to introduce certain kinds of security checks which had not existed for some years and do not exist now? Are we confident that that could be addressed promptly, and that Sinn Féin would say, "The British security services have said this—that is absolutely dependable; we know we should act with responsibility in that regard, and we will act promptly and immediately against other Republicans"? Maybe it would, but "maybe" is not sufficient.

In February 1996 a huge bomb broke the IRA ceasefire, here in this city, in Docklands. Two people were killed, 100 people were injured and £150 million of damage was done. Where did that bomb come from—the Home Counties, Wales, Scotland or west Belfast? No; it came from the South Armagh Brigade of the IRA, from the border area we are talking about. I simply want to have the confidence—and I do not see it in this component of this otherwise excellent amendment—that if our security services were clear that the Irish Republican Movement or some other organisation had decided to create a bomb to do damage in my part of the United Kingdom or in this part, they would be able to act freely and with the alacrity necessary to ensure that a disaster does not happen.

That is why—I say this with deep regret, because I support the spirit of the amendment—this wording is not entirely wise. I have talked to a number of colleagues, who say, "Don't worry, John: it'll be fine, because other legislation will let us get through that". But that is not what it appears to say, and if there are other ways round it, it will simply justify in Irish minds that phrase "perfidious Albion": we say one thing but we mean something different because we have a legal way round. That is why, with regret, I fear that I cannot support this otherwise excellent amendment.

4.15 pm

Lord Carlile of Berriew (CB): My Lords, the amendment was moved with eloquent brilliance by the noble Lord, Lord Patten. I want to add a few words based on my nine and a half years' experience as the Independent Reviewer of Terrorism Legislation and the close interest that I have taken in Northern Ireland, and specifically the border, since then. Before I do, however, and with the greatest respect to the noble Lord, Lord Alderdice, whom I admire greatly—I mean that genuinely—may I point out to him that he may have misunderstood the words of the part of the amendment that he just referred to? The amendment does not allow an intergovernmental requirement for security checks. There is absolutely no question that security checks will be required from time to time. I have been in security checks myself from time to time in Northern Ireland and they have been put in place and removed ad hoc extremely quickly. I have seen them happen at extraordinary speed within minutes. So I ask the noble Lord if he would not mind having another look at that part of the amendment before encouraging other noble Lords, if there is a vote, to vote against it or by voting against it himself.

I have spent time in Northern Ireland, including time with Sinn Féin Members of the legislative Assembly. I regret very much that Sinn Féin MPs do not take their seats in the other place. They could make a very useful contribution on the subject of Northern Ireland and Ireland in general. I disagreed with an awful lot of what they did before, but my observation from the time that I have spent with them, including, on one occasion, making the journey from Belfast down to South Armagh and observing how the person in question operated as an elected representative in that part of the world, is that they have committed themselves to the constitutional arrangements which appertain in Northern Ireland. That is because of one event: the Good Friday agreement and all that has flowed from it. A large number of institutions have been built as a result of that agreement. If we look at the membership of the legislative Assembly when it sits, particularly at the identity, experience and backgrounds of today's Sinn Féin Members, most stand as elected representatives whose integrity could be compared to almost any other legislative body in Europe. We have come an incredible distance over those years.

On the present situation, I have heard all the encouraging words from the Government—and rather less encouraging words from the European Union—that there will be a resolution of the Northern Ireland situation. But it has not happened. In my view, we are no nearer to a solution being presented by the Government than we were in Committee or a year ago. The situation today, on Report, requires us to vote for this well-constructed amendment because this will tell both our Government and the European Union that this is a subject that cannot be neglected. Indeed, this subject should never have been part of Brexit. It is something that should have been negotiated in the first week so that we were not sitting in your Lordships' House worrying—and this is the greatest worry of all—about Brexit as we approach, rather more quickly than we would have wished, 29 March next year.

We must give every bit of encouragement to an early solution of this problem that does not involve any of the difficulties that we have talked about time and again in this House. If the matter is put to a vote, I encourage noble Lords to go with the noble Lord, Lord Patten, and to follow his eloquence into the Content Lobby.

Lord Eames (CB): My Lords, a few weeks after the result of the referendum was announced, I ventured to suggest to your Lordships' House that the question of

the border between Northern Ireland and the Republic would suddenly become crucial to the outcome of the Brexit negotiations. On that occasion, several noble Lords told me not to worry; I was told that, like all things, it would find its own place further down the line on a coming day.

With what I hope is self-imposed humility, my feeling now is "I told you so"—not because of a line on the map that could be easily seen in any atlas, but because of the symbolism of what that line stood for in the development of the island of Ireland, particularly Northern Ireland. That line is no longer our border; it is your border. It is our collective border with the EU, so some of the significance of what has worried us in continuous Brexit debates takes on a new light for one simple reason: the people of Northern Ireland are not on their own in worrying about the consequences of the border. It is of equal concern, as it should be, to the people of Scotland, Wales and England—the United Kingdom—and because of that, a growing apprehension is developing in Northern Ireland that, if I may say so, we will be left to carry the can. In the light of what has already been said, this is an extremely dangerous apprehension and situation. As has been said by the noble Lord, Lord Patten—not only today but previously—connection with the symbolism of the border touches on culture, politics, social media and education. It covers the entire breadth of the concerns of the people of Northern Ireland.

When I began my professional career more years ago than I care to remember, it would have been unimaginable to talk about the relationship between Northern Ireland and the Republic as we do today. Progress has been made, due not only to political understanding and growing maturity on both sides but, equally, to our having come through the chequered history of the past 30 or 40 years. There is a lot more hanging on this debate than simply the security and arrangements on the border. The reversal—or the danger of the reversal—of all that has been achieved is at stake. The peace process is still a growing infant. The absence of an Administration at Stormont makes it very difficult for one aspect of progress—the cross-border institutions—to work at the moment. A lot of us put faith in those institutions because they were doing practical things in practical ways but now, with the Administration at Stormont absent, it is difficult.

On first glancing at the wording of the amendment, I would have said, "I have no problem with that. I am delighted to support it because it's saying the things that the people of Northern Ireland want to hear". Then, I paused. I am still pausing because I have come to the debate in what I call a listening mood. I am listening not just for the constant, ongoing repeat of Her Majesty's Government giving us assurances. That will not change. It is copper-fastened. It is not that assurance I am looking for from Her Majesty's Government, but the assurance that says, "We understand that some of the institutions and achievements of your peace process are worth protecting, supporting, keeping in place and allowing to develop". I want to hear that from the Minister. I do not want to hear the usual repeated reassurance, which, because it is repeated so often, loses a lot of its impact. I look to Her Majesty's Government to say not just to this House but to the people in Northern Ireland that there are certain things we will stand over.

I turn to the words of the amendment. I ask myself: what is wrong with it? Why cannot I, with my experience over the years, say that this is marvellous, I want to support it and see it through and backed up? It is simply this. Just the other day, the chief negotiator of the European Union visited Ireland. I think he is still there. In the course of a press conference he said that the EU will not allow the conversations to go on until there is sufficient movement by the United Kingdom on the question of the border. I once tried to teach jurisprudence to those who were prepared to listen. As at least one of your Lordships will remember very well, I tried to get through to the students that the secret of success was often to look at the meaning of words. In any negotiation there has to be compromise and give and take. Did the chief negotiator mean that there will be a lot of give and take once we move on the border, or was he saying, "We will move if you move"? Was he going even deeper? Was he warning us that, "Unless certain requirements in the control and operation of our border are met according to our terms, we will not continue to help you to get Brexit"? This might be unimaginable to those who see the road to Brexit as paved with gold, but I suggest that there is a lot more to it.

I say to the Minister, who has impressed us all with the way he has handled the sensitivities of post-Good Friday Northern Ireland: reassure me. Tell me that I am worried unduly that there might be a gap in the words of the amendment from another person I greatly respect. What can he say to me, who has come through so much of the past with and among the people of Northern Ireland, as Primate not just of the Church in Northern Ireland but with responsibility for the whole of the island? I can honestly say that I know a little of what I am talking about.

I have one final point to add to the Minister's growing vocabulary of life in Northern Ireland. There is a wonderful town, the town of my birth, called Lurgan. Out of that town have emanated a great many wise sayings. The one in my mind at the moment is: call a spade a spade. When you talk, call a spade what it is—a spade; when you talk, tell the truth, because you believe it; and when you pontificate, make sure that you do so with sincerity. So, Minister, I, for one, am listening.

4.30 pm

Lord Trimble (Con): My Lords, it is always a pleasure to listen to the noble and right reverend Lord, Lord Eames. I share his concern about some possible dangers in the situation, although not perhaps in quite the way he expressed it—but I shall come back to that later.

I recall a question that was asked of a leading member of the Social Democratic and Labour Party shortly after the beginning of the inter-party talks. The interviewer asked him whether he was confident that Sinn Féin and the republican movement would stick with the political process. The reply was: he trusted the circumstances that led Sinn Féin to that point. My interpretation of it was they were not necessarily coming of their own good will; they had

[Lord Trimble]
not had a damascene conversion; they were coming because the circumstances left them with this option. I agree, too, with the comments about how Sinn Féin Members elected to the Assembly have carried out their functions and it would take a very unusual situation to move them away from where they are.

I point to these circumstances because I think that it is a mistake to link this process, this legislation, with the maintenance of peace in Northern Ireland. I do not see a connection in the terms that have been said and I am dubious about whether this should be addressed as any more than scaremongering, and scaremongering on a fairly limited basis.

However, there are things to worry about. The noble and right reverend Lord, Lord Eames, referred to what Monsieur Barnier has been saying and saw various ways of interpreting that, the third of which was the bleakest and, I think, the nearest to the truth. That is because pressure has been coming from Brussels and Dublin for some time for a significant change to be made to how Northern Ireland is governed. The drive is there to get Northern Ireland into a special situation: linked permanently to the European Union and with the union with the rest of the United Kingdom to that extent weakened. That is what Barnier openly called for a couple of days ago; it is implicitly what Coveney said in a newspaper article a week or two ago, where he called on the British Government to abandon some of their red lines in pursuit of peace and prosperity—so the threat is there as well. If that goes down the way—here I should say that our own Government have rejected this proposal; some of it was published some time ago—there is a danger that the things being said today and how the vote goes may strengthen the hand of Barnier in his demands on us and weaken the hands of our own Government. There has to be careful consideration of that.

I have not yet mentioned the amendment. I had thought of going through it in a little detail, but I shall confine myself to just one bit, subsection (1) of the proposed new clause. That reads,

"a Minister of the Crown or devolved authority must—

(a) act in a way that is compatible with the terms of the Northern Ireland Act 1998".

I am all in favour of that. I am all in favour of acting in accordance with the terms of the agreement; I have a personal affection for that agreement. I will not go into detail on that, because it would take too long, but it is something I would like to see.

Then we come down to the very last line of the amendment. It talks about various things,

"not subject to an agreement between Her Majesty's Government and the Government of Ireland".

What is missing? There is something very important missing. There is no reference to the people of Northern Ireland, the Northern Ireland Assembly or the Northern Ireland Executive. Do not dodge that by saying, "Oh, the Assembly is not sitting at the moment". There is a very important principle here, which is at the heart of the agreement. The heart of the agreement contained what we call the principle of consent with regard to the people of Northern Ireland, their future and the institutions they create.

A long time ago, back in the 1970s, Governments tried to impose an arrangement on the people of Northern Ireland, through the Sunningdale agreement. Another long time ago the Anglo-Irish agreement was made, without reference to the views of the people of Northern Ireland. Both were huge decisions and big mistakes by the British and Irish Governments which prolonged the political instability, and the violence as well. When we got to the agreement, thankfully by then the two Governments had learned the lesson and the negotiations fully involved the people of Northern Ireland and we, collectively, took control of that—"ownership" is the term used. This amendment would deny us that.

Some people have gone around suggesting that Brexit might damage the Good Friday agreement. Brexit is not going to damage the Good Friday agreement; this amendment will, because it excludes the people of Northern Ireland. If future arrangements are to be made over the Northern Ireland border it is obvious that you have to have the people of Northern Ireland and their elected representatives closely involved in that. If not, you are going to make the same mistake.

Baroness Crawley (Lab): On that last point, surely the reference to the UK and Irish Governments contains the basic assumption that there will be extended talks with the Northern Irish Government, and it refers to the fact that the British and Irish Governments are the official guarantors of the agreement.

Lord Trimble: In the examples I mentioned, going back to 1985 and 1973, there was no consultation by Her Majesty's Government with the unionist elected representatives. The Irish Government, of course, consulted closely with nationalists, so there was that imbalance. In any event, I come back to the amendment and I think that the proposed new clause has the wrong approach and should be looked at again.

I have one other point and it is simply this: we made the agreement 20 years ago; it was a bit rough at times for a short period afterwards but it has settled in. There are still some difficulties but I am quite sure that those difficulties will be overcome and these institutions will survive because they have the wholehearted endorsement of the people of Northern Ireland. In doing it, we also helped to change the relationship between Belfast and Dublin and, indeed, between Dublin and London to a certain extent as well: relations between them in recent years have been very good. They have been extremely good and I am delighted, but the behaviour at the moment of the Irish Prime Minister and Coveney, backed up by the European Union, is actually destroying that relationship and doing considerable damage to it. I know that we cannot directly affect that, but the message should go out very clearly to Dublin and to Brussels that they are not to continue to damage the basis of our institutions in pursuit of some petty objective, such as getting yourself elected as the head of a European body in Brussels.

That is where I want to stop. It is hugely important that the Government stand firm on this proposal to move to what is called the backstop and against a

situation where Northern Ireland is to be moved away from the rest of the United Kingdom and permanently attached to Brussels, as far as these things are concerned. That is the wrong way to go.

Lord Hain (Lab): My Lords, I support this amendment, moved so compellingly by the noble Lord, Lord Patten.

The land border between the United Kingdom and Ireland is a state border—for tax, excise and legal jurisdiction. It is also a border across which public services connect, public agencies operate, people make their daily commute, livestock graze and goods flow back and forth without restriction. The levels of integration across the Irish border are among the closest in the world, bringing material economic benefit to the island—particularly to Northern Ireland—and, even more importantly, a remarkable transformation of a border that fewer than 20 years ago was a highly securitised boundary, close to which hundreds of people lost their lives. Soldiers, police officers, customs officials, farmers, factory workers, musicians and teenagers were all killed near the border because of a conflict about the border.

The 1998 Good Friday agreement and the Act that followed it, which is referred to in the amendment—I point that out to the noble Lord, Lord Alderdice—brought that conflict to an end by making the border a point of co-operation, without raising questions about the sovereignty or constitutional integrity of either the United Kingdom or the Republic of Ireland. This was made much easier by the fact that common EU membership of the United Kingdom and Ireland had already removed many of the barriers to such co-operation and movement. This was because the EU came to form a customs union and create a single market, both of which transcended state boundaries. Thus from the quiet rural hamlets of Fermanagh and Monaghan to the busy border towns of Newry and Dundalk there is no need for customs controls, no tariffs payable, no need to pay VAT at the border, and no checks for quality, standards or regulatory compliance.

As a line of soft integration between the UK and Irish jurisdictions, the Irish border has faded into relative insignificance, allowing Irish and British citizens—nationalists and unionists—both to feel quite comfortable in Northern Ireland. Given the bitter sectarian and violent history, this is a remarkable achievement. But it is also a fragile one, and we ignore that at our peril. To withdraw from the EU is to remove Northern Ireland from the conditions that currently make the Irish border so frictionless. Finding a resolution to the border conundrum while respecting Brexit must somehow preserve those connections and protect those benefits of co-operation. This is an economic necessity as well as a political imperative.

In their joint report with the European Union of December last, the UK Government repeated their commitment to protecting the operation of the 1998 agreement and to the avoidance of a hard border. Indeed, they went so far as to preclude,

"any physical infrastructure or related checks and controls".

The amendment would bring into legal effect the commitments the UK Government have already made to the European Union and to everyone. In Brussels, a means of doing so in legally operable terms in the withdrawal agreement is currently being negotiated. It is essential that we do likewise in passing this amendment to the Bill.

Any customs partnership must be tight and seamless enough to avoid such checks while ensuring that the border is not a back door into the EU's single market. Any technological facilitation must not entail physical infrastructure, random checks or compliance checks at any point. The amendment will provide much-needed security and legal certainty, with no fudges, creeping barriers or sly erosion of the finely honed balance. It will ensure that cross-border movement, north-south co-operation and day-to-day, mundane integration will continue to happen unimpeded. It does not tie the Government's hands on the precise solution, except to insist upon what everyone says they want anyway: namely, a border as free, open and invisible as it is today. In my view this can only mean reproducing in some form the customs, trade, rules of origin, standards and regulatory arrangements that we now have across it.

It is our responsibility to ensure that Brexit does not mean the emergence, at any level, of any new conflict about the border, because that would be both economically catastrophic and politically lethal. That is why this amendment is so vital.

4.45 pm

Lord King of Bridgwater (Con): My Lords, I congratulate my noble friend Lord Patten on a most impressive and, if I may say so, entertaining introduction to this subject. Having enjoyed listening to his speech, I think anyone who saw this amendment would say, "It's all pretty obvious, isn't it? There's an overwhelming case and it must be right". But then we had a little opening into the world of Northern Ireland in the contributions that came from one or two of those who are more closely involved directly with the Province and understand some of the background to it. The noble and right reverend Lord—a former Archbishop of Armagh and Primate of all Ireland—and the noble Lords, Lord Alderdice and Lord Trimble, have spoken and they have echoed some of my concern about this. Everybody wants to see the concept that is contained in this amendment; my concern is about putting it into legislation in this form.

The noble Lord, Lord Alderdice, raised the details, as do I. We are back in the same country that we were in during our discussion on the proposed clause on the meaningful vote. That amendment got longer and longer as dates were added into it that would complicate it. My noble friend Lord Callanan shakes a rueful head as I say that. The complications introduced seemed to me to make the position of the Government in their negotiations increasingly difficult. I echo the surprise about the activities of Monsieur Barnier, negotiating with different bodies within the United Kingdom. I do not know whether he asked permission to do that and whether it was agreed but I thought that was open to question, in the circumstances.

Looking at the situation, the amendment has all this detail set down. Is it all exactly right? Will it all be held tight or will it be subject to legal challenge

[Lord King of Bridgwater]
thereafter? All sorts of complications arise within this. I have devoted quite a few years of my life, both in Northern Ireland and in defence, to trying to see what we now see as the much happier, and hopefully continuing, life in Northern Ireland. I have written too many letters of condolence to people—there are others here who carried similar responsibilities and know what I am talking about—about those who stood to try to ensure a happier future for people in the Province and for everybody on the island of Ireland. I am therefore determined to see that, whatever comes out of Brexit, we do not undermine the important advances that have been made. However, then I look at the details of this amendment.

I recall that the noble Lord, Lord Trimble, glossed a bit over the arrangements and problems that I had over the Anglo-Irish agreement, which was of course the start of the peace process and led on to the further discussions in which we introduced the principle of consent. There was one item that I had to stand on continually. I was challenged by unionists who said, as the noble Lord, Lord Empey, will remember well, that we had sold out to the Irish Government and no longer was Northern Ireland a part of the United Kingdom, a sovereign country. They said that we had let joint authority be introduced and that the Irish Government were able to rule part of Northern Ireland in that respect. All that time, with some personal embarrassment and threat to myself on certain occasions, I stood to make it absolutely clear that joint authority was not contained in it. We would listen with good will, attention and interest to any representations the Irish Government wished to make. They had a perfectly legitimate interest in the interests of the nationalist community of Northern Ireland but, in the final analysis, joint authority did not exist. The United Kingdom Government have the responsibility for the whole of the United Kingdom of Great Britain and Northern Ireland, and we maintained that position.

I am not a lawyer, so I tried to consult the Convenor of the Cross Benches on this. I see the last line of this amendment introducing something like a touch of joint authority. I spent a lot of my life persuading and assuring people in the Province that we would not have joint authority, but we seem to have it here. This is exactly the problem that I tried to raise on the meaningful vote issue and I raise it on this as well. Although the intention is good and the ambition absolutely right, we now start the complication of drawing up a very specific and long, detailed amendment. That is not the way to go. We make our position absolutely clear: I expect the Government to achieve those objectives, and I would look very hard indeed and wonder what my vote would be in the final analysis. There will be a final parliamentary vote at the end of these proceedings if we do not get a satisfactory outcome that we all wish to see for Northern Ireland, but this amendment is not helpful.

Lord Carswell (CB): My Lords, I have lived all my life in Belfast. That is rather a long time: even longer than my old and valued, noble and right reverend friend Lord Eames has. During those years, I have been backwards and forwards across the border many, many times, without let or hindrance. That is why I want to focus—just for the purpose of my remarks this afternoon—on subsection (2)(b) of the proposed new clause. I am not going to touch on the rest of it: there are many good things in the rest of the new clause, but I will say nothing about them. However, one thing is very clear: people of good will all agree on the ideal of the smoothest possible operation of the passage of people, goods, livestock and vehicles across the border. However, that good will needs something more: it needs good sense. When that criterion is applied, I fear that it is rather more difficult to accept the portion of proposed new subsection of (2)(b) that deals with this. It would, in effect, have the consequence of fixing everything in aspic: not a stone to be moved, not a blade of grass to be bent unless the two Governments agree.

Recent history does not give us any great confidence in that. I say with regret that the approach of the EU negotiators to this issue has been rigid and intransigent to the point of being obstructive. I am equally sorry to say that the Government of the Republic have thrown themselves in line with that. That is most regrettable because their predecessors were taking a very much more constructive, co-operative and sensible line. When the present Government took over, they immediately reversed that policy to being equally difficult—if I may put it as politely as possible—as the EU.

What the amendment really appears to involve, if the Governments do not agree, is the status quo, which in effect means a full customs union: either the whole United Kingdom with the EU or Northern Ireland alone with the EU. I am afraid that I would find it equally impossible to support them. I hope that sense will prevail and that it will triumph over experience, but, as with all the old phrases about hope and experience, it is difficult to be entirely confident. If it does not, what will happen? I am talking about this imprecise and unfortunately misleading phrase of a hard border.

I ask your Lordships to look at three facts. First, it would not involve some sort of iron curtain. I lived through times, personally and professionally, with a real hard border during what we called the Troubles, with checkpoints manned by armed soldiers, border posts, watchtowers looming over the countryside—dreadful things—large numbers of roads closed off, bridges destroyed and roads cratered to stop access. There is no suggestion, and should never be, that we want to return to that or will do so. Going back before we joined the EEC as it was, I remember the border. It was an ordinary border between states. There were customs officers, you had to have a triptyque for your car and there were inspections, but they were not terrible obstructive or difficult to negotiate. With the greater volume of trade these days, we will want to do something better than that and, if possible, not return to that.

Secondly, the passage of persons has never been a problem—the common travel area sees to that. When I was a youngster in the 1940s and early 1950s, I rode my bicycle up and down to Dublin many times, and nobody looked sideways at me. In the 1970s and 1980s my dear late mother sat happily on the train travelling down to visit my brother who lives in Dublin. That is not a problem and should never be.

Thirdly, as noble Lords have mentioned, the Provisional IRA war ended 20 years ago, and it has stayed that way. Most of the perpetrators of dissident violence are dissident republicans who, in various manifestations, have been causing violence in smallish quantities compared with what it was, but it is still there. The source of discontent leading to violence in the first place was nothing to do with the border and its arrangements. It was a wholly different fons et origo. I am not going to go into it now, but it was focused on discontent which had many sources and many problems in it from other directions. I am sorry to say that those who talk up the risk of a resumption of violence are misguided. It is an emotive argument, another project fear, which was roundly described a few days ago by a highly respected, very experienced and very independent-minded commentator in the *Belfast Telegraph* as "quite simply scaremongering".

We need to look realistically at what could be arranged even in the absence of agreement between Governments. Technology is advancing at a dizzying rate. The possibility of resorting to it has been dismissed airily by the EU negotiators, and I am sorry to say that the Irish Taoiseach has run along with that and dutifully repeated their sentiments by talking about magical thinking. One of the things I have seen practically no mention of during the whole of this affair is an important document which emanates from the EU itself. A report by Lars Karlsson, a senior customs officer in Sweden, was commissioned by the policy department of the EU Parliament. It goes into very great detail about possible technological devices and concludes that a border arrangement can be managed,

"that serves both sides of the border with maximum predictability, speed and security and with a minimum burden and cost for traders and travellers".

The report says it could be done,

"using a combination of international standards, global practices and state-of-the-art technology".

It is much too long and too complex to try to summarise now, but I commend that report to your Lordships' attention. I am quite sure there could be an extended argument about its viability, and I would not dispute that, but it requires consideration.

I cannot say whether it received any attention during the negotiations with the EU, but it is the EU's own document and it deserves attention. Perhaps ideally to get to the situation that the report suggests requires governmental agreement and we may be going round in a circle. Indeed, it might not produce as easy arrangements as many people would like. But it shows that it is not necessary to resort to the complete status quo and not necessary to adopt the customs union which would be, in effect, the result of this amendment. Perhaps we should all remember, in this aspect of the withdrawal as well as others, that the best is the enemy of the good. I cannot support the amendment.

5 pm

Lord Campbell of Pittenweem (LD): My Lords, I almost hesitate to take part in this debate because I do not have the specialist knowledge and understanding of many who have spoken about Northern Ireland. But I do know a little about sectarianism because I was born and brought up in the west of Scotland. Although there was never violence, none the less, there was deep division. Some of that may have been alleviated, but from time to time it still expresses itself, not least when two football teams play against each other.

I want to go back to the terms of the amendment, because I hope I may be able to alleviate the anxiety of my noble friend Lord Alderdice. It is important to consider the whole terms of the proposed clause. It begins by saying:

"In exercising any of the powers under this Act"—

so it confines its application to this Act and not to any other Act. Subsection (2) says:

"Nothing in section 7, 8, 9 or 17 of this Act authorises regulations"—

among which my noble friend picked out with anxiety subsection (2)(b)(iii) relating to,

"a requirement for security checks".

It is only if a Minister of the Crown, with the authority and powers conferred on them by these sections proposes to act, that these other matters arise. That does not preclude in any circumstances, nor could it, the exercise of other powers for the purpose of security.

The noble Lord, Lord Trimble, knows more about this and was properly rewarded for his enormous contribution to the welfare of the people of Northern Ireland. He talks about the very last two lines of the amendment:

"that did not exist before exit day and are not subject to any agreement between Her Majesty's Government and the Government of Ireland".

Many individuals, like the noble Lord, argue fervently that the United Kingdom as a whole left, or proposes to leave, the European Union and therefore the reference to "Her Majesty's Government" is entirely consistent with the position which says: "Irrespective of the views of the people of Northern Ireland, who after all voted to stay, none the less, it is the Government of the whole of the United Kingdom to which are accorded both the responsibility and the power".

If this matter were easy, why has there not been a solution? I think I am correct in saying that I do not believe any of those who have spoken have offered a solution. We know that the Cabinet is divided. We know that that Robespierre, Mr Jacob Rees-Mogg, has already issued yet another of his threats. We know that the Government are deeply divided. If this is a simple issue, perhaps the Minister will be able to tell us precisely what the solution to this matter is that the Government now endorse. I think I can argue with some force that they have had plenty of time to get to that conclusion.

As has already been said, I think by the noble Lord, Lord Hain, the Good Friday agreement is a fragile piece of agreement. The noble Lord, Lord Trimble, shakes his head. From time to time there are terrorist outrages in Northern Ireland, and were it not to be fragile in any way one would not have expected the kind of attacks that we have seen on prison officers and members of the police. I believe the agreement combined both symbolism and practicality, and I support the amendment because it does exactly that.

It is said that those of us who talk about risk are overstating the case. I want the House to remember for a moment how many people on both sides of the

[Lord Campbell of Pittenweem]
argument died, and how many people's lives were materially affected by the Troubles. I have one illustration in mind, which is entirely personal; other noble Lords will have equally valid and compelling illustrations. I remember the three young privates of the Royal Highland Fusiliers who, on the promise of sexual favours, allowed themselves to be persuaded to go to a flat where they were executed by being shot in the back of the neck.

A huge price has been paid for this agreement, and nothing should be done that has the effect of undermining it. That is why I support the amendment.

Lord Bridges of Headley (Con): My Lords, I rise with a considerable amount of hesitation because I am very conscious of the level of experience in this House on matters pertaining to Northern Ireland, not least my noble friend Lord Patten, who spoke with considerable eloquence in introducing his amendment.

I utterly reject the views expressed in some parts of the media that noble Lords, including my noble friend, should not be allowed to express their views on this issue. That is what we are here to do, it is what we should do, and we should not face the opprobrium of the media in so doing. The issue is whether we get the balance right between advising and scrutinising this important piece of legislation as opposed to blocking it and thwarting the will of the people. That is an issue that I am sure my noble friends have very much in mind as we debate this amendment and all others.

I stand shoulder to shoulder with all noble Lords who wish to see the Good Friday agreement remain intact as we leave the EU. None of us, whether we voted to leave or whether, like me, we voted to remain, wishes to see Brexit undermining that agreement, nor do any of us wish to see Brexit undermining the union of our nation itself. I would find it very difficult—I almost say impossible—to vote for any withdrawal agreement that contained a backstop whereby in the event of no deal a new border or unacceptable new barriers were to arise between Northern Ireland and mainland Britain. My fear is that come the autumn the agreement on the future arrangements will be fudge, but it must not and cannot be fudge containing the poison pill of that backstop. People voted to leave the European Union; they did not vote to break up the union that underpins our nation.

The doublethink of the December agreement, in which paragraph 49 says one thing and paragraph 50 another, cannot be allowed to seep into the final agreement, but there is clearly a risk that it might. Given that risk, if this House were to pass the amendment in the name of my noble friend, it would seem odd not to pass another one preventing this Government from creating such a border in the Irish Sea or creating new barriers to trade between one part of the United Kingdom and another in the event of no deal. For if we treasure the Good Friday agreement, as we all clearly do, surely we treasure the union just as much. Would it not be odd for Parliament to stop the Government from erecting new borders on the Irish border only to leave them free to erect them in the Irish Sea? After all, this too is government policy, and it would be unacceptable.

However, I argue that now is not the time to do any of this. We should not pass the amendment nor anything else on this sensitive topic for two simple reasons: first, the Bill is one of process; and, secondly, we must remember where the negotiations stand. We are hurtling towards a reckoning. The EU appears to reject the Government's concept of a free trade agreement, rejects their approach to customs, is insisting on frictionless trade between Northern Ireland and Ireland and is committed to this dreaded backstop as a contingency. Meanwhile, our Government are rejecting membership of a customs union and rightly refusing to accept the EU's definition of a backstop. As of Monday, this Parliament may be given the power to stop the UK leaving the EU without a deal.

We are approaching a deadlock. The Brexit negotiating chamber is, I fear, beginning to resemble the Little Ease in the Tower of London: so tiny that there is no room to move. As a remainer, I believe that we must honour the referendum result and negotiate an agreement to leave the EU that is in our national interest. The key word in that sentence is "negotiate". As my noble friend said, in any negotiation there must be compromise. If your Lordships agree on that, it surely follows that we must give the Government room and space to make compromises. The more we put constraints on what the Government can and cannot do in any eventuality, the more it will hinder the Government's room for manoeuvre.

Rather than put this into legislation, I simply ask your Lordships to think of this. Would it not be better to reserve judgment until we see what the negotiations actually produce? To vote against the amendment is not to vote for a hard Brexit, it is certainly not to vote against the Good Friday agreement, it is simply to vote to give the Government the space they need to negotiate, and then we can and we must decide.

Lord Howarth of Newport (Lab): My Lords, we are told that unless we remain in the customs union, there will be a hard border between Ireland and Northern Ireland, which would be contrary to the Good Friday agreement and endanger peace in Northern Ireland. The noble and learned Lord, Lord Carswell, spoke to us illuminatingly just now about the reality of the historical border.

The future of Northern Ireland and of peace in Northern Ireland is of course hugely important, and we have very serious responsibilities with regard to Ireland, but the future of Britain, the future interests of Britain and the future economic opportunities for Britain are just as important—I would contend, more important, as the noble Lord, Lord Spicer, said earlier. The intransigence of Monsieur Barnier and of some remainers, and their ruthless exploitation of the border issue in order to coerce us into remaining in the customs union is inappropriate. Neither should we be coerced by the threat of hypothetical violence, should some border changes need to be made.

As someone who has had family members on both sides of the border and spent a great deal of my life in Ireland, I am fully aware of how terrible the Troubles were and of the extraordinary blessings of peace that the Good Friday agreement has brought about. One of the virtues of the Good Friday agreement is that,

through it, the people of Northern Ireland have learned to live with complexity and uncertainty. With the spirit of compromise advocated by the noble and right reverend Lord, Lord Eames, with pragmatism, good will and the smart use of technology, a workable solution can be found. The noble Lord, Lord Patten, was somewhat dismissive of the possibilities of creating a virtual border, but I understand that the Cabinet sub-committee is, quite rightly, looking at that very issue this afternoon. I think it would be wise of the Republic of Ireland to look equally seriously at that option, which would be very much in the interests of the economy of Ireland.

There are other possible solutions to this problem. This is perhaps not the moment to elaborate on them, but I just note—my noble friend encourages me. One possibility would be for us, when we are no longer members of the European Union and not in a customs union, to decide to abolish tariffs. That would be good for our own people and would very satisfactorily address the border issue.

Another solution—I would not wish events to play out in this way, but it would be entirely within the letter and spirit of the Good Friday agreement—would be for there to be a referendum in Northern Ireland, in which the people of Northern Ireland could decide for themselves whether they wished to be reunited with Ireland. After all, 56% of them voted to remain; it would be an opportunity to test how serious they are about that. If that was the decision that they took, that, too, would solve the problem of the border. I emphasise that it is not a resolution that I would like to see—but it is nonsense to say that there are no policy solutions other than staying in the customs union.

I finally note that it is a curiosity to me that Amendment 88 effectively gives the Government of Ireland a veto on the list of policy options in relation to the border that is set out in the amendment. Since this Government of Ireland take their instructions from the EU, it effectively gives a veto to the EU. The noble Lord, Lord Patten, mentioned in the debate on the customs union the other day that he has experience of international negotiations. I would just ask him whether he really thinks that it is wise to legislate to give to the people you are negotiating with a veto on crucial issues that you are negotiating on. I do not think that that is sensible, realistic or appropriate, and I do not think that we should support this amendment.

5.15 pm

Lord Bew (CB): My Lords, I rise briefly to comment on proposed new subsection (2)(a) and (b) of the amendment and to speak in the spirit of the noble Lord, Lord Alderdice. As a number of noble Lords have said, it is quite true that you could construct a backdrop, to use the phrase of the moment, which says that these amendments do not mean quite what they appear to mean. The point made by the noble Lord, Lord Alderdice, is much more serious in saying that it is the nature of Irish political culture that, if we do not at some future point live up to the terms of what apparently is in these amendments, with their strong hint of joint authority between the Irish Republic and Great Britain, we can be certain that Irish public opinion will take the view that, once again, we have betrayed them and raised expectations. You can be absolutely certain about that. I absolutely accept the good faith of those Peers who have said that, no, it does not mean that, if you read it this way—but it does not matter, because you are dealing in this case with Irish politics.

I want to disagree in one small respect with the noble Lord, Lord Alderdice, when he said that a Fianna Fáil/Sinn Féin coalition was more likely than one with Fine Gael. Actually, most commentary in Dublin says that they are equally likely propositions. The noble Lord, Lord Patten, made the point that, if you know anything about Irish history, you will know that it is ridiculous, a Fine Gael/Sinn Féin coalition. But we are living in new times; history does not matter—it is the current moment. In the last few weeks, in the Irish press, an email correspondence has been leaked between the Taoiseach's office in Dublin and Sinn Féin, on a most sensitive matter, showing an intimacy of spirit, which nobody would have believed possible from a Fine Gael Government, and which certainly would not have happened a few years ago, when the noble Lord, Lord Patten, was a distinguished Minister in Northern Ireland.

So we are now living in new times. I remind this House that the recommendation of our own Select Committee on Europe is that this matter should be dealt with by negotiations ongoing between British and Irish officials—that was going on under the previous Prime Minister in Dublin and was stopped by the new Prime Minister. When noble Lords ask why we are making so little progress in solving this problem, not the least of the reasons is that the recommendation made by our own Select Committee of quiet negotiations between British and Irish officials has been vetoed by this current and new Irish Government. We are living in new times, and historical considerations—much as I hate to say it as a former professor of history—are not actually relevant. This is the sharpness of the current moment.

The noble Lord, Lord Alderdice, is also quite right to say that, although there is a great deal of spirit behind this amendment which one can fully respect, the failure to mention the actual Good Friday agreement as opposed to the Act is a problem, because the Act does not signal in a way that the Good Friday agreement does that the Good Friday agreement was dependent on the agreement between the parties. One great achievement of that agreement between the parties was, for example, the new north-south arrangements for co-operation in agriculture, and one of the most remarkable things about the current moment is the tacit and explicit acceptance by the Democratic Unionist Party, which opposed these things at the time and now accepts them. When they say that they do not want a border in the Irish Sea, they have no opposition whatever to the ongoing north-south co-operation that has carried on. It is, therefore, hobnail boots to put it into this amendment; it is unnecessary and over the top and, once again, has the flavour of joint authority. As the noble Lord, Lord King, says, the whole success of policy since 1985 has been based, at least partly, on separating out the British Government's intentions from the concept of joint authority.

[Lord Bew]

My final point is on technology. I know that the noble Lord, Lord Patten, and indeed other supporters of this amendment are very sceptical about the possible role of technology. I heard his witty reference to the non-frictionless chickens. Last year, however, Bertie Ahern—the former Irish Taoiseach with intimate experience of the peace process—said that the solution was technology on the border plus turning a blind eye to certain forms of smaller trade. That is the former Taoiseach, not a Tory Brexiteer. The Swedish former deputy head of customs, Lars Karlsson, who has been referred to already, gave evidence to the relevant Select Committee in the other place and said that it was possible not to have any infrastructure on the border—key to the technology report. I know that noble Lords dismiss this as magical thinking, but I am certain that there are noble Lords in this House who will have their lives extended by some technological operation that today is magical thinking. We live in a world that is transformed daily by magical thinking and new technological developments. The reason I say this is the vagueness of the phrase "border arrangements" in this amendment. I do not think there is a legal backstop to this. What do we mean exactly by border arrangements?

One possible technological solution, which has been discussed on both sides of the border, is that you carry out any check that may be necessary—which, by the way, would be a really tiny quantity, if you know the amount of checks currently carried out on all our borders—maybe 20 miles in on both sides. This may or may not be a good idea, and it may be the case that there is no technological solution. That is not my point. Does this amendment mean that we cannot discuss any possible technological solutions that may or may not be available? I think that those who tabled the amendment have to explain what they mean by border arrangements. Does it just mean something that happens on that narrow tiny span of the border, or does it cover other possible developments, some of which might be quite benign but might at any rate be worthy of consideration? It is the ambiguity of that term that worries me.

Baroness O'Neill of Bengarve (CB): My Lords, I have my name to this amendment with considerable misgivings, but the misgivings will perhaps shed some lights on why I think it is nevertheless important. Very early on after the referendum, the then Secretary of State for Northern Ireland said at a meeting at which I was present that there would be no return to a hard border. This has become a stock phrase, a mantra, but is deeply ambiguous. Some people imagine, "Oh well, at least we are not thinking of going back to the worst of the Troubles, with the particular sort of border there was then". I am sure it did mean that, but when I asked the Secretary of State how, her answer was, "By passports". We have been talking about goods and what may be installed at borders to deal with the movement of goods. I believe that, if we are thinking about the principles of the Good Friday agreement, it is the movement of people and respect for people that is really much more important. That answer of "passports", illuminating as it was, does not tell us who has to have a passport or when they have to show it and to whom. We will need answers to these questions if that "no hard border" intention is to be redeemed. In short, I do not believe that the intention is adequately served by talking about technologies for observing the movement of goods. I am sure that they are interesting and revolutionary—and I am equally sure that we have many people in the island of Ireland who would know how to get round them and subcontract to people below the radar.

If we are to retain the confidence and esteem of people in the island of Ireland—in the north and in the Republic—the important thing is that people feel that the deeper things are honoured, which of course include what we still refer to as the common travel area, with the particular rights it gives to citizens of the Republic in this country. Those rights must be preserved. They are fundamental to the economy of the island of Ireland, and are woven into the fabric of our lives. These people are not foreigners. An old phrase from the former Soviet Union, "near abroad", comes to mind. This is hardly "abroad"—it is very near abroad. We know these people. But here is the rub: "By passports". Many of them live here, were born in the Republic and do not have passports, because when you go by boat you do not need one; or they have not been there in a while, or not by air. Passports, biometrically adequate ones, are quite expensive. We have to face the reality that many people will not be able to produce the documentation they need to exercise what amounts to almost dual citizenship. This is nothing to do with the fact that some noble Lords have taken out an Irish passport. I will myself, because I have a birthright to it, but I have never bothered—it has not been important. That is the situation, and we have to think about those people who cannot document that they are Irish. If Brexit happens, I presume that we will not wish to extend the same rights to work, to NHS treatment and to vote, which Irish people get here, to people from other countries who come perhaps via the Irish Republic.

Therefore, we need to have—I am sorry—passports or ID cards for everybody in this situation. This is the human rub that we need to think of before we start wondering about new technologies for the goods which, after all, do not move independently. So let us go back to thinking that the point of this amendment, ultimately, is respect for the principles of the Good Friday agreement, which has made such a difference to life in Northern Ireland, and which means respect for all the people who might be affected by change. We do not want another version of Windrush for Irish citizens living here.

Lord Hay of Ballyore (DUP): My Lords, over a number of months we have listened to many speeches in this House on the Irish border. While I listened to them I wondered whether the speakers were serious about trying to resolve the issue or whether it was another way of stopping Brexit. I listened to the noble Lord, Lord Patten, opening the debate, and heard some laughter around the Chamber. I can assure noble Lords in this House that this is no laughing matter. The question of how the Irish border issue might be resolved is a serious one. If your Lordships listen to the Peers from Northern Ireland, there is almost unity of purpose today. We are on the ground in Northern Ireland and we know what people are thinking on this issue.

5.30 pm

You have Mr Barnier from the European Union and you have the Irish Government, and there are other people tucked in there. Their language and their body language is not helping the situation. I would go further and say that, the longer the debate goes on around Brexit and how the Irish border issue might be resolved, it is further dividing both communities in Northern Ireland. Unionists are now taking one side of the argument and nationalists are taking the other. That is sad. Negotiators in Europe need to realise that they must take a balanced approach to how they deal with Northern Ireland, and especially to how they deal with both communities. They should be batting for both communities, but, at the moment, it is seen from a unionist point of view that the negotiators in Brussels, and especially the Irish Government, are on one side of the fence. We will see over the next number of months whether that changes.

The whole issue of the border could be resolved if Mr Barnier and the European officials were listening. Unfortunately, they are not, and they are not prepared to look at other solutions for the border, which is sad. The approach of European Union negotiators appears to be, "Take it or leave it, but this is the way it has to be". We all know that we will have to try to reach a compromise to resolve this. The blockage at the moment seems to be from Brussels, and especially from the Irish Government.

The other issue is clearly that none of us, after we leave Europe, wants infrastructure on the border. I could not be any clearer on that. We do not want infrastructure on the border; we want the free movement of traffic and people across the border, with maximum access for goods and services.

The noble Lord, Lord Trimble, mentioned the backstop position to avoid a hard border, keeping Northern Ireland within the customs union after we leave the European Union. That is something we will not accept in Northern Ireland. Anything that treats Northern Ireland differently from the rest of this United Kingdom, we cannot accept. That message has gone very clearly to the Prime Minister.

There is another issue, and I will be very quick because I know that other Members want to speak on this subject. Some of the speeches seem to be saying that, if we do not do what Brussels and the Irish Government want us to, there is a threat to the peace process. That is very much like blackmail—that is how it sounds. If you live in Northern Ireland, you know the reality. Maybe some Peers need to come and live in Northern Ireland to learn what we are hearing on the ground. These threats, and the threats coming from Brussels and from the Irish Government, are wrong. They need to go away and work with us to look for and find a solution to our problems.

I listened to the noble Lord, Lord Bew, who rightly said that we have a different Government in the south and they are not listening. The British Prime Minister said that the best way to resolve the border issue is to have a meeting of the Republic of Ireland Government, the British Government and Europe—to sit down and resolve the problem. The Republic's Government refused that meeting on two occasions. You can see exactly what the Irish Government's agenda is.

When the House looks at this amendment, they should think on it very carefully. This is not the time to divide the House on an issue that is causing huge difficulties for the people of Northern Ireland as a whole. I say that very respectfully. As somebody who held the position of Speaker of the Northern Ireland Assembly for some years, I know the politics in Northern Ireland and I know the issues, some of which can be very difficult. I also believe that if the Assembly were up and running, some of these issues would be easier to resolve and easier for this Government as well because there would be input from an elected Northern Ireland Assembly. I say to this House very clearly that rejecting this amendment is the best way forward. Let us all work together to find a solution to the problems of Northern Ireland and to the border.

Lord Robathan (Con): My Lords, the vexed history—

Noble Lords: Front Bench!

Lord Taylor of Holbeach (Con): Order. A large number of Peers still wish to speak and we should hear them.

Lord Robathan: Thank you. The vexed history of Northern Ireland and the island of Ireland is known very well by most of the noble Lords in this House. We have heard some very good speeches from the former Lord Chief Justice, the former Primate of All Ireland and former Secretaries of State. The whole history of Northern Ireland is scarred by bad faith, a lack of good will, which we heard about from the noble Lord, Lord Carswell, and by intransigence. No side in any debate in Ireland—and no Government indeed—has a monopoly on that intransigence.

We heard from the distinguished historian, the noble Lord, Lord Bew, a short time ago. I was going to mention him anyway. I am not sure if one is allowed to put in a plug for a book, but I will. I read his book *Churchill and Ireland* only last month. I commend it to everybody in this House. First, it is very readable. Secondly, it shows that, over a period of 50 years, intransigence and a lack of good will led to division, death and conflict. Today, again, we have intransigence in Northern Ireland, where there is no Assembly and where the two sides cannot come to an agreement. I have to say that I blame that on Sinn Féin.

Let us look briefly at the current situation with the border. We heard a little from the noble Lord, Lord Carswell, about bicycling down to Dublin. I spent the best part of a year of my life in Northern Ireland, often in uniform but subsequently working in the Northern Ireland Office for the previous Government. Just over three years ago, I went down to south Armagh with some people. Noble Lords may think that everything is normal in south Armagh, but I was in one car with armed police, I recall that there were four other cars around to check that there were no ambushes and there was a helicopter overhead. This is still bandit country.

I mention that because the big issue at the time was the smuggling of diesel and then the washing of the red dye out of diesel, which by the way causes the most appalling environmental damage. People smuggle diesel

[Lord Robathan]
because red diesel is very cheap, especially in the Republic, and it is brought up to the north, washed and sold at a cheap rate in Armagh. Smuggling of fuel continues to go on—the diesel has slightly changed—and there is smuggling of cattle. I read that 10,000 cattle in the last three years were stolen in the Republic, smuggled across the border and sold in the north. Members of this House may know Slab Murphy, who was notorious in Northern Ireland. He was closely involved with the IRA. He was basically a racketeer who made a great deal of money. I am glad to say that he finally went to jail a couple of years ago.

To cross the border, there are already different currencies. There are variable duties in the south and north. There are customs officers who actually work on the border. They do not sit in posts, but they work checking things. There are random checks. I was on one or two with the police. There are no fixed posts and, as the noble Lord, Lord Hay, has just said, nobody wants fixed posts. We do not need them. But there are already, as mentioned in subsection (2)(b) of the amendment, security checks and random checks.

The head of Irish Customs, Niall Cody, said on 25 May last year that it is "practically 100% certain" that there will be no new customs facilities along the border. He added:

"We are not planning customs posts".

He said that in the Dáil.

I am indebted to the son of my predecessor in the House of Commons—my noble friend Lord Lawson—who wrote an article recently and drew my attention to the following in an address by Michael Ambühl, who was Switzerland's chief negotiator in its trade agreement with the EU. He said:

"We have a smoothly operating frictionless border with the EU, though we are not a member of the customs union. That is even though 2.2m people and 23,000 lorries cross the borders between us and the EU every day".

So what is the problem? Perhaps some of the chickens pay a little bit of duty, I do not know. The problem is the lack of good faith and, yet again, intransigence. I am told, as we have already heard, that Monsieur Barnier is encouraging the Taoiseach in this enterprise. I worked with the Government of Enda Kenny, which was very much on the side of and emollient towards the UK. They wanted to work with the UK. I would say that Mr Varadkar is cutting off his nose to spite his face.

Nobody wants a hard border, yet the Government and the Labour Party have a manifesto pledge to leave the customs union. Why do we not get on with it, to the mutual benefit of everybody? Others may attribute motives, but Barnier has said in the past that he wants to educate the British people, which means teach us a lesson. I see bad faith in Barnier and I see intransigence. Surely it is not beyond the wit of man, with good faith and good will—unless you do not want a settlement, which I fear is the case with the noble Lords who proposed the amendment—to come up with a decent frictionless border.

Noble Lords who are tempted to support the amendment should consider, as has been alluded to, that we should not use Ireland and its history as a stick with which to beat Brexit or as a pawn. Let us instead give Ireland, north and south, and its good people—nationalist, unionist, whatever they may be—what they really want: co-operation, friendship, prosperity and the ability to trade and cross the border happily.

Lord Cormack (Con): My Lords, I will not detain the House for long. I want to make one or two points. First, my noble friend who has just spoken talked about intransigence and he exhibited it. I would remind him, very gently, that whatever happens after 29 March next year, the Republic of Ireland will remain within the European Union and we are therefore dealing with a very sensitive issue. I would also remind him gently that the majority of people in Northern Ireland voted to remain in the European Union.

I do not wish people to interpret from that that I am party to anything that the *Daily Mail* would refer to as wrecking the Bill. That is my final point, as touched on—gently but elegantly—a little while ago by my noble friend Lord Bridges. Your Lordships' House is merely fulfilling its constitutional role in examining and scrutinising the Bill. We have every right to pass amendments. As those of us who seek not to wreck but to improve have said time and again, the ultimate decision will rest with the House of Commons. It is right and proper that the responsibility ultimately lies there, but that does not deprive us of our responsibility to scrutinise carefully. It does not recognise the reality of the British constitution to talk about playing with fire or to call for an elected second Chamber; think what impasse there would then be between the two Houses. It does not serve the constitutional debate to make threats of that sort, which have come up during the debate in both articles in the press and speeches in this House. We have a duty and we seek to perform it, as we should, but at the end of the day, the responsibility lies at the other end of the Corridor.

If your Lordships' House did not vote against government measures from time to time, it would have no point or purpose. I say to some noble Lords on my side of the House, who have been cross with myself and others, that if we were dealing with a complicated Bill, brought in by a Government led by Mr Jeremy Corbyn, would we say, "Oh, we don't want to vote against that"? I rest my case. I am sorry to have detained the House, but those points needed making.

5.45 pm

Lord Empey (UUP): My Lords, my noble friend Lord Patten, introduced the debate with his customary excellence and good humour. However, while I took the points he made very well, I felt concerned about the direction of travel and the linkage between some of the points we were trying to debate. The amendment has a number of issues that concern me, the most obvious one, picked up by the noble Lord, Lord King, being the last line. With so much reference to the Belfast agreement, the four Members currently in the Chamber involved in that negotiation—I am one of them—will know that it is so sensitive because it challenges the fundamental principles of consent, which is one of the reasons why the referendum in 1998

was successful. We actually achieved that point. If we take a power that is currently exercisable only by the Government of the United Kingdom and share it with the Republic of Ireland, that will change the dynamics of the whole situation. Effectively, it would create a form of joint authority.

I have other issues with the amendment. It refers to:

"Continuation of North-South co-operation and the prevention of new border arrangements".

Perhaps we will need new border arrangements to avoid the pitfalls we have all drawn attention to during the debate. I also feel we are in a unique situation. Everybody agrees with the ultimate objective. Therefore, it should be not a source of division in this House but something on which we can come together to send a clear message not only to the Government, but to our colleagues in the European Union and in the Republic.

During his visit to Northern Ireland and the Republic this week—which, incidentally, was announced to us through the press release of a Sinn Féin MP, not even a Sinn Féin MEP—Michel Barnier, according to Sam Coates in the *Times*, did the following:

"During a visit to Ireland, Michel Barnier urged Theresa May to reconsider introducing a border in the Irish Sea".

We assume that that matter is resolved; I fear that it is not. Within the document agreed on 8 December and the subsequent agreement referred to by my noble friend Lord Bridges of Headley there is a fundamental conflict. We are saying on the one hand that we want regulatory alignment for Northern Ireland as this backstop and on the other that we do not want any difficulties between Northern Ireland and the rest of the United Kingdom. Unless Brexit does not take place and we reverse our decision to leave the European Union, those two things will be mutually exclusive. We have to get our heads around that.

We have talked about the principles and the bigger picture. I worry about linking the Belfast agreement so closely with the discussions we have now because, quite frankly, there are risks attached to that. I will try to put into context the scale of the problem we face.

I believe that the solution lies with the United Kingdom Government, the Irish Government and Michel Barnier and his team sitting down at a table to deal with the details. The Benches opposite are filled with many people with trade union backgrounds. They will know, as everybody else knows from their own experience, that the only way to settle these things is to sit down and talk about them, however embarrassing and difficult it may be. Even if we are dealing with people with whom we would normally have no truck, the fact is that we have learnt that lesson and learnt it very hard; we have to sit down, to talk and to negotiate. We must also remember that we cannot successfully negotiate if the person with whom we are negotiating is flat on the canvas at the end of the negotiations, so it cannot be a 10-0 win; there has to be compromise and movement.

We use the term "the all-Ireland economy". There is no all-Ireland economy. If we take the figures for the period 2005 to 2015 given to us by the Irish Government in their document on Brexit, which sets out clearly the relationship and the scale of it, we see that of the total exports of the Irish Republic to the rest of the world 1.6% currently goes to Northern Ireland. That has dropped in the period from 2005. It means that 98.4% of the Irish Republic's goods go elsewhere. Most of them travel via the United Kingdom, because the border is not simply on the island; it is between Dublin and Holyhead and Rosslare and Fishguard—that is where most of the goods are going. Mainland Britain is the land bridge so the Republic can get its goods to the continent and the rest of the world.

Let us take imports to the Irish Republic from the whole of the world. From Northern Ireland, they have dropped in the period from 2005 to 2015 from 2.2% again to 1.6%. So the actual trade on the island is relatively modest. We are talking primarily about goods in transit, going to and from ports in Northern Ireland to and from Scotland and the north-west of England. So the trading relationship on the island is 1.6% of the Republic's exports and 1.6% of its imports. That is the scale of the trade. It includes live animals and agricultural produce.

The noble and learned Lord, Lord Mackay of Clashfern, said in an earlier debate that he believed that one part of the solution could be a new treaty between the United Kingdom and the Republic of Ireland which would be recognised by the European Union. Part of the solution could lie in the north-south bodies that we set up under a treaty which have certain specific functions. There is no reason why those bodies cannot change and vary over time. One of them, the SEUPB, which looks after special European programmes, will have to be dissolved. We may need to look at the functions that some of those bodies perform and whether the United Kingdom Government and Parliament might devolve to them specific matters where they could negotiate on details, particularly around agriculture, animal health and other issues, and where regulations—because we are one land mass—are better, on the same scale or equivalent. If we are looking at the way ahead, we have to look at solutions. That is one possibility, but the idea of a new treaty is something that we should look at.

Lord Foulkes of Cumnock (Lab): Come on. You are better than this.

Lord Empey: If the noble Lord is such an expert on the Belfast agreement, why is he not prepared to listen to somebody who lives there and was negotiating it? I can assure him that I have been used to dealing with fairly tough customers and I will have a say.

We are looking here at a problem which has been grossly exaggerated and at some risk, because we should concentrate on solutions. The best way to achieve that is for the parties to sit down together and negotiate.

I conclude where I started: with the comments made by Michel Barnier on Tuesday this week, where he said that he wanted the Prime Minister to reconsider a border up the Irish Sea for Northern Ireland. If that is his position when our Government go in to negotiate, the difficulty created by this amendment is that it would move the emphasis away from negotiating a settlement, removing one lever from the hands of the Government and placing it in the hands of those with whom we are negotiating. We should be united as a House in trying to get the right solution. It is a shame that we would be divided on something where the

[Lord Empey]
objective we all seek is the same. It is so unusual to get that—where two Governments and the European Union are all committed to the same thing. We are confusing the two arguments. This is a matter for detailed negotiation, as has happened before. There is no reason why it cannot be done. We can look for help. If we need unique solutions—we are good at those—let us have one; that is what a treaty could facilitate.

When the Minister replies, I hope that he will address some of those points and indicate that the United Kingdom Government are prepared to sit down to negotiate, to re-emphasise that and to reissue the invitation, which sadly has been refused so far. Let us remember also that we are dealing with politics. Ireland is on the verge of a general election at any point. Sinn Féin, which was always an anti-European party, has got on to the bandwagon and now pretends to be a great pro-European party. It could have huge influence on the Irish Government if an election takes place. We have all these moving plates, but we must keep our eye on the detail and on the long-term objective, which is the preservation of as free a border as it is possible to achieve and the preservation of the institutions that were passed by referendum on both sides of the border. They should be used as part of the solution and not become part of the problem.

Baroness Suttie (LD): My Lords, well over two hours ago, this amendment was eloquently moved by the noble Lord, Lord Patten, so I want to make two brief points in response. The first point is about the Government's own proposals to solve the issue of the border on the island of Ireland. They have produced no new detailed proposals since last August. Clearly, there is an ongoing, and perhaps heated, discussion taking place this afternoon at the Cabinet sub-committee which, for reasons of internal division, is unlikely to reach a conclusion. But at a certain point, the Government will have to take a position. Time is running out and they cannot keep kicking the can down the road.

The so-called technical solutions which many noble Lords have referred to are, at best, wishful thinking and almost certainly not viable for the time being. On the House of Lords EU Select Committee, we have heard numerous experts inform us that the required technology is, at best, five to seven years away. How can that work with the current timetable of December 2020? Does the Minister accept that the only alternative is to remain in some form of customs union?

Secondly, it is important to remember that the border issue is not just about economics, tariffs and trade. It is also about emotions and feelings. Many noble Lords, including my noble friend Lord Alderdice and so many others who have spoken this afternoon, played a vital role in installing the principles of the Good Friday/Belfast agreement, principles that have done so much to remove borders, both physical and psychological. Many people would see any checks, even if efficient and unobtrusive, as a step backwards. It is the principle and symbolism of the checks themselves that is the issue.

My noble friend Lord Alderdice raised some objections and concerns about the amendment. I believe that my noble friend Lord Campbell of Pittenweem explained that this is, perhaps, a misunderstanding of the amendment before us. The noble Lord, Lord Carlile, made a very firm and forceful point and I hope my noble friend Lord Alderdice may reconsider his position. The aim of the amendment is to put into the Bill the commitment that the Government themselves agreed in the joint declaration last December, so that the hard-won gains of the peace process are not reversed for future generations. That is why I urge all noble Lords to support this amendment.

6 pm

Lord Murphy of Torfaen (Lab): My Lords, it has been a fascinating debate. I am the 20th speaker in it. The first speaker, the noble Lord, Lord Patten, made a wonderful speech—if he really wants to be viceroy of Ireland he has my unqualified support and vote.

It is 20 years since the Good Friday agreement was signed. A number of us in this Chamber were present three weeks ago in Belfast when we commemorated and celebrated that occasion. I know that the Minister, when he winds up, will say that both he and the Government fully support the principles of that agreement. But there are some, not just in his party but in others too, who now say that the Good Friday agreement is out of date and not relevant anymore. I wholly and utterly reject that assertion. We have had 20 years of peace in Northern Ireland. If noble Lords cast their minds back to what happened 20 years before we signed the agreement, 3,500 people perished in Northern Ireland and 30,000 to 40,000 people were injured, either physically or mentally, as a result of those Troubles. The principles which were hard fought for and hard won—there are noble Lords who have already spoken in the debate, including the noble Lords, Lord Trimble, Lord Empey and Lord Alderdice, who were present at those negotiations—are still utterly relevant to Northern Ireland, to the United Kingdom and to the Republic of Ireland as well.

The noble Lord, Lord Trimble, spoke about the principle of consent. In my view, there is no threat to that principle in the amendment that we shall vote on in some minutes. Parity of esteem for all people in Northern Ireland, from whatever community they come; a power-sharing Assembly and Executive; human rights; equality; a police service which was totally new; criminal justice; north/south co-operation on the island of Ireland and improved relations, to an unprecedented degree, between the Republic of Ireland and the United Kingdom—much of that was underpinned by our common membership of the European Union. We belonged, as two countries, to the same club, and there is no question in my mind that the constant meetings between Ministers and between civil servants over those two decades and before—that constant arrangement and co-operation between Ministers and Governments in Brussels—meant a smoother transition to where we are today. It also meant, of course, that the border became blurred.

The noble and right reverend Lord, Lord Eames, rightly referred, in a great speech, to the fact that the border was more than simply physical infrastructure and that the blurring of it—the softening of that border, if you like—was very much the result of the agreement between the parties in Northern Ireland.

Baroness Kennedy of The Shaws (Lab): My Lords, in giving that very powerful list of what happened in that process, my noble friend has not mentioned the fact that southern Ireland also changed its constitution, whereby the claim it had always maintained to the six counties of the north was removed from the constitution of southern Ireland. In terms of symbolism, it was a huge change: we have to remember that it was not just the pragmatism of those in the north and in other parts of Britain, but also the pragmatism of those in the south who wanted peace too.

Lord Murphy of Torfaen: My noble friend is absolutely right: it was a huge development, and of course all this was voted on in a referendum, north and south. In both Northern Ireland and in the Republic of Ireland, there were big majorities for precisely that.

But Brexit does affect where we are in Ireland and affects the principles of the Good Friday agreement to a certain extent. In the first place, Ireland, of all the 27 countries left in the European Union when we have departed, will be the most affected by Brexit; of that there is no doubt. It also means that some unionists in Northern Ireland—not all—now believe that exiting the European Union will in some way reinforce their Britishness. Some nationalists and republicans—not all—believe that Brexit will bring a united Ireland closer. None of that helps because at the end of the day the agreement was about an agreed island.

The noble Lord, Lord Hay, talked about the need for balance in all this. He was absolutely right: that balance can be upset by what is happening as a result of the debate on Brexit—not necessarily Brexit itself, but the debate on it. The purpose of the amendment before us is to enshrine the principles of the Good Friday agreement in the Bill.

Lord King of Bridgwater: My Lords—

Noble Lords: Order!

The Countess of Mar (CB): My Lords, I remind the noble Lord that he has already spoken.

Lord King of Bridgwater: The noble Lord speaking for the Opposition held the office of Secretary of State for Northern Ireland with distinction. He knows that during all that time he never shared joint authority. Will he comment on why an amendment may be carried by a number of his noble friends that will, for the first time, enshrine in legislation—this is the proposal—that we change the policy, which has been agreed between parties during all these years, that we do not have joint authority in Northern Ireland?

Lord Murphy of Torfaen: No, no; I do not think for one second that this amendment refers to or is about joint authority. What it is about is the recognition that both the British Government and the Irish Government are joint guarantors in international law of the Good Friday agreement. That is what it is about. Also, the agreement itself set up the British-Irish Intergovernmental Conference, which meets from time to time in order to deal with matters of common concern.

To return to the amendment, it rejects a hard border. The word "hard" has been debated by a number of speakers. The Government themselves have attached the description to what they do not want. The Government do not want a hard border, the Opposition do not want a hard border, the European Union does not want one, the Government of Ireland do not and nor do any of the parties in Northern Ireland. None of them wants a hard border, and all this is doing is putting into the Bill what everybody actually wants.

The amendment protects the Northern Ireland Act 1998, which as it happens I steered through the Commons 20 years ago. That set up the Assembly and the Executive and dealt with rights and equality. The noble Lord, Lord Trimble, asked: should we not have the Good Friday agreement in the amendment rather than the 1998 Act? Of course, the 1998 Act incorporated a great deal of the agreement and was based on the principle of the consent of the people of Northern Ireland.

The other issue is that of the north/south arrangements. There is no question, in my view, that those are extremely important and need to be protected as a vital part of the agreement, and they actually deal with millions of pounds of European funding for cross-border projects. All the amendment is about is a guarantee that the integrity of the Good Friday agreement is enshrined in law and put into the Bill.

The actual, real threat to the agreement in Northern Ireland is the fact that there is no Assembly or Executive there. The institutions should be restored. Their absence is the real threat to the Good Friday agreement and one that I hope the Government will work intensely over the next weeks and months to resolve. As parliamentarians in both Houses, we need to protect one of the most successful peace processes of modern times, and I believe that the amendment goes a long way towards doing that.

The Parliamentary Under-Secretary of State, Northern Ireland Office and Scotland Office (Lord Duncan of Springbank) (Con): My Lords, I had a five-page speaking note when I arrived here. I have now written more than 10 pages myself. I am not sure my speaking note will do the debate justice so I will set it aside.

I will try to capture the key elements of this discussion. I will turn, as I often do in matters concerning Ireland and Northern Ireland, to the noble and right reverend Lord, Lord Eames, who reminded us that we have heard the same words used many times about the Good Friday agreement, to the extent that earlier today we almost had to use a thesaurus to find a replacement for "steadfast" because we have said it so many times. As it happens, the word in the note is "unwavering", if you are looking for a description of our support for the Good Friday agreement. But the noble and right reverend Lord is correct: we must give comfort and certainty to the people of Northern Ireland that they will not be abandoned, sacrificed, left behind, have their rights trimmed to suit a separate agenda or find themselves in a situation where what they thought they had they do not have at all. I had the pleasure of having a cup of tea yesterday with the noble and right reverend Lord and he spoke about what he called the Ballymena spade—where they call a spade a spade. We need to be clear that there can be no border down the middle of the Irish Sea. We simply cannot create a division between one part of our country and another.

[Lord Duncan of Springbank]

Michel Barnier, the chief negotiator for the EU, has said that there needs to be some adjustment to particular rights and proprieties, that there needs to be some acceptance that we cannot have these things, and that some of the red lines themselves, as the Foreign Minister of Ireland has said, may need to be adjusted in the light of peace and prosperity. But they cannot be, that is the point. So if I was to give a message to Michel Barnier, it would be: "Ecoutez les deux communautés"—you must listen to the two communities in Northern Ireland. You cannot listen to only one of them. Both are integral to what we will be able to achieve on the island of Ireland, and any suggestion otherwise is fallacious and unhelpful. In truth, it risks creating greater uncertainty for this particular negotiation. I would advocate great caution on behalf of Michel Barnier in this regard.

Lord Reid of Cardowan (Lab): The Minister knows the respect in which I hold him and the job he is doing. I have no wish to have a border which differentiates Northern Ireland from the rest of the United Kingdom. But will he accept that the problem was not created by Michel Barnier? The promise to have complete alignment between Northern Ireland and southern Ireland was not made by Michel Barnier, it was made by the British Government. Michel Barnier is doing no more than holding the Government to the promise they made to Europe in the initial agreement, and it is not his responsibility that outside that the Government also promised the DUP—correctly, in my view—that there would be complete alignment between Britain and Northern Ireland. That is the essential problem, because if you have alignment between Britain and Northern Ireland, between Northern Ireland and southern Ireland, and between southern Ireland and Europe, you automatically have alignment between Britain and the European Union; in other words, staying inside the customs union.

Lord Duncan of Springbank: I hear the noble Lord, Lord Reid. With the greatest respect, I recognise what he is saying, but the joint report did not have just one element in this regard, it had three elements. The important thing about the three elements is that each must be afforded the ultimate engagement to try to deliver a solution. If Michel Barnier has decided that the first and second are sacrificial elements and he must now focus only on the third, frankly, he is becoming part of a bigger problem.

6.15 pm

Lord Wallace of Saltaire (LD): Michel Barnier is negotiating for the other 27 member Governments. It is not a question of listening to the Northern Irish Catholic community but it is part of his job as negotiator to listen to the Irish Government, who are, after all, one of the 27 member Governments with whom we are negotiating. It is the Irish Government who—perhaps to the Minister—present the problem. We have to deal with the Irish Government, not just the two communities.

Lord Duncan of Springbank: If the negotiator Michel Barnier does not hear the people of Northern Ireland, he will be derelict in his responsibilities. He must hear both communities. He cannot listen only to one. It is for that reason that I say again to Michel Barnier: listen to both communities.

It is important to recognise where this journey began. I hope the noble Lord, Lord Patten, will forgive me for not beginning by thanking him for bringing this issue before us today. This is what the Government intend to do, as I am sure he will agree. Many of the elements of the amendment are exact statements of government policy, but the issue is very unusual and it needs to be iterated here. When we look at the lower elements of the amendment, the language is that of political statements, not legislative statements; they are not in the language of legislation. It is on those points that a number of noble Lords have been very clear that they leave a conspicuous ambiguity. It is important to recognise that it is the intention of the Government to return not with ambiguous statements which may or may not be subject to misinterpretation but to return in the appropriate Bill with the exact, detailed language which will give the absolute confidence that we must have in this law. That is why we are unable to support the amendment that the noble Lord, Lord Patten, moved so eloquently and passionately. Indeed, all the speakers today have spoken with that passion. Of that I have no doubt.

I was drawn in particular to the words of the noble Lord, Lord Alderdice. He was very clear in his assessment of those parts of the amendment I have spoken of. I know that a number of noble Lords have sought to correct him, but I do not believe that he needs correcting. Indeed, the noble Lord, Lord Bew, said simply that it has a flavour of a joint approach. However you want to look at it, if individuals who live in Northern Ireland are looking at the amendment and expressing their deep unease with it, I would hope that noble Lords would recognise what message that is sending. That is why we must be cautious in the messaging that we send.

In truth, there are two elements to the Bill: the optics and the mechanics. The mechanics of the Bill mean that the Bill must function and give absolute legal certainty. That is its job. The optics of the amendment are wholly commendable in many respects. They are an affirmation and a recitation of the Government's intention, proposals and policy. But, again, this is not the place for them to sit sensibly and with legal certainty. That is one reason why we have a great problem with the amendment. As a number of noble Lords have asserted, as they begin to look in detail at those elements they are uneasy.

Talking once again of the optics, if the noble Lords in here who have looked at those self-same provisions feel uneasy, imagine then what the message will be on the front page of the *Belfast Telegraph* when these particular elements are looked at if they are presented in such a fashion that they could be misunderstood or misinterpreted. That is why we are seeking, as we have always sought, absolute and utter legal certainty. My right honourable friend the Prime Minister has been clear in all her utterances that we will deliver a borderless aspect on the island of Ireland but the point about this, and the reason why I emphasise it, is that this Bill is not where that will or can be delivered. I am almost

channelling my inner Callanan when I say this but, in truth, this is not the right place to be doing that. There will be an opportunity to pick that up.

I shall return to some of the specific points raised. Once again the noble Baroness, Lady Lister, has raised a point which I will be happy to respond to in writing. I will make sure that that is absolutely delivered. I hope that I have been able to give words of respect and comfort to the noble and right reverend Lord, Lord Eames, so that he can take them away and be able to say to people that this is not a place where we can trim—where we can simply take out, manoeuvre or dispense with it.

I listened again to the noble Lord, Lord Hain, whose wisdom is welcome in this debate. He rightly described the fragility of the peace process, echoing the words of the noble and right reverend Lord, Lord Eames. It is in its infancy and we need to make sure that nothing whatever can interfere with that. However, I do not wish to see the two aspects here become entangled. That is why many noble Lords have spoken today about the impact these words can have when they are misunderstood—indeed, when they become weaponised in one fashion or another, so that where they land they cause destruction upon receipt. We cannot have that, for that in itself is ultimately destructive.

As I listen to the noble Lord, Lord Trimble, I am aware that there speaks an individual who helped to craft the Belfast agreement itself, as did a number of noble Lords who have spoken this afternoon. Each of them who spoke has echoed the same sentiment. That is worthy of pause and reflection because there is an element, in truth, in what all the Peers from Northern Ireland who have spoken today said: they are uneasy with this amendment. Whatever its optics or its intention, they are uneasy with its component parts.

Baroness Altmann (Con): Can my noble friend reassure the House, then, that "no deal" is now off the table? In a no-deal scenario, WTO rules require a hard border. It is impossible to fulfil the Good Friday agreement if we crash out with no deal.

Lord Duncan of Springbank: I thank the noble Baroness, Lady Altmann, for her intervention. The clear thing here is, as I believe all sides in this discussion recognise, that if there is no resolution of the joint report's component parts—A, B and C—then all will be the poorer and the weaker. All will suffer because of that, which is why the important thing here is to ensure that agreement is reached on those elements in the negotiation. It is absolutely essential that those parts are then returned to the other place and to this House for clear discussion and debate at that time. That will ultimately be the key to it.

As I listened to the noble and learned Lord, Lord Carswell, I was aware of him iterating the same issues once again. He brings his own experience to them, saying that particular elements of this amendment cause him unease. They cause him to see difficulties which might emerge. The last thing we need right now is for that to percolate through the situation in Northern Ireland, with all its incumbent troubles and all the difficulties which will be in play.

As I speak today, I am very conscious that we need to find the outcome that delivers for Northern Ireland and one that delivers for the Republic of Ireland. I listened to the noble Lord, Lord Howarth, expressing clearly the danger we have, however, in taking these important elements of where we need to seek agreement and somehow or other turning them into a threat—a method whereby we can seemingly upend or turn over the very things that we are all trying to achieve.

I think it is true to say that anyone who seeks to prognosticate on or forecast Irish politics will almost certainly always be disappointed. There are, no doubt, many greater minds in this Chamber than elsewhere who could do that but the point remains that irrespective of which Government are in power in Dublin, they have to be able to work to deliver an outcome which is good for the Republic of Ireland, just as we are able to deliver that self-same outcome for Northern Ireland, and indeed for ourselves. Listening to the noble Lord, Lord Bew, it was imperative that, as he put it forward, there are elements that need to be addressed now.

I also note the remarks of the noble Baroness, Lady Suttie, who asked whether I can explain how the technology will work on the borders. The truth is that I am a geologist, I am afraid, and I really cannot explain that. I am not knocking geologists; I am fully aware that they know many things. What I am clear about is that this must be returned to the other place, and to this House, to deliver the very things which noble Lords seek. If they are not delivered, I do not doubt that the House will vote it down. That is a clear thing which your Lordships do and it is a prerogative which you will have in this House. That is how it will ultimately work.

It will be important to ensure that the methods which we put forward are understood by all. I listened to the noble Baroness, Lady O'Neill, touch upon the issue of passports and I would like to write to her on those elements, because I believe that they are appropriate to be discussed. There are costs inherent in biometric passports and so forth. If noble Lords will forgive me, I will have an offline discussion to take through some of those elements. In some respects I am conscious, as the noble Lord, Lord Hay of Ballyore, said at the beginning, that this is indeed no laughing matter. I understand that but, in truth, we need to recognise that in each of these elements we must be able to deliver for the people of Northern Ireland and for the rest of the island of Ireland.

I also listened to the noble Lord, Lord Patten, when he spoke of Louis MacNeice's father, Bishop MacNeice. I am a passionate supporter of Louis MacNeice and a great lover of his poetry. I am aware of the line where he said:

> "My father made the walls resound,
> He wore his collar the wrong way round".

He was an extraordinary poet but if your Lordships will forgive me, I will bring to you the words which I believe in this instance might be slightly appropriate, although very cryptic. They are from the poem by Louis MacNeice called "Snow", in which he was confronting two seemingly difficult and different things coming together: broadly, large flowers in a window and snow outside. He simply said:

[Lord Duncan of Springbank]

"The room was suddenly rich and the great bay-window was
Spawning snow and pink roses against it
Soundlessly collateral and incompatible:
World is suddener than we fancy it.
World is crazier and more of it than we think,
Incorrigibly plural".

In many respects, as we look at the island of Ireland we need to recognise its plurality. We need to recognise how that island will continue but also, none the less, that this Bill is not the place for that amendment. We remain passionate and unwavering in our support of the Belfast/Good Friday agreement. It is enshrined in more than nine pieces of primary legislation and there it will remain.

There will be a negotiation on the joint report—on those three elements—and, in that, I hope that Michel Barnier will be able to respect the views not just of the Irish Government but of the communities of Northern Ireland, whose voices must be and need to be heard. In many respects, I hope that it will be appreciated—

Baroness Smith of Newnham (LD): The Minister keeps talking about Monsieur Barnier. Surely his job is to represent the views of the 27; it is the job of Her Majesty's Government to represent the views of all communities across the United Kingdom, including the communities of Northern Ireland.

Lord Duncan of Springbank: The noble Baroness raises her point but I will be clear in my statement in response: it would be daft if he did not speak to both communities. Irrespective of whether he felt that he must speak to only one Government, the resolution in Northern Ireland will depend upon the two communities, not upon the will of two Governments ignoring those self-same communities. It cannot be done on that basis.

I return briefly to the point that we wholeheartedly agree on the sentiments underpinning my noble friend Lord Patten's amendment. We recognise, however, that those elements towards its latter half are not workable in that form. They are political statements, which are not legally binding texts, but I must say one final thing. If the noble Lord decides to divide the House, I hope he will recognise that it must not and cannot be interpreted in any way such that either side is not willing to give its wholehearted support to the Belfast/Good Friday agreement, but rather only to this amendment as it has been defined. Let there be no doubt whatever that the Good Friday/Belfast agreement has our unwavering and steadfast support.

6.30 pm

Lord Patten of Barnes: Charitably, I can assure the House that I shall be very brief. I shall make only three points. First—I hope this will not finish his career—I congratulate the Minister once again. It makes a pleasant change to have a Minister at the Dispatch Box who quotes poetry; as ever, he responded with considerable civility. It is also a great pleasure that he does not make speeches that begin, "It says here". He responded to the debate, and the whole House recognises that.

Before making two more substantive points—although being flattering to the Minister is substantive, as is inviting him to join me later in voting for the Government's policy, which might make life a little awkward for him—I assure the House that I shall not go back through all the old arguments about a customs union. If I hear any more references to the wretched Karlsson report, I will go red in the face. It is like *Das Kapital:* it is more referred to than read. Most of the people who refer to it have never read more than two or three lines in the summary, and will not recognise the bits that talk about the necessity of an infrastructure or the necessity of those customs offices.

Of course, I respect everybody, but I particularly respect the noble Lord, Lord Alderdice, and my noble friend Lord King. The points that they made about security on the border were extremely well answered by the noble Lords, Lord Carlile and Lord Campbell. They should look carefully at what this proposed new clause actually says. They are probably also aware that co-operation across the border and security are probably better than they have ever been, with the joint agency task force between the Garda Síochána and the Police Service of Northern Ireland working together very effectively. The former Northern Ireland Justice Minister—when there still was one in the Northern Ireland Executive—said that she thought that these days, co-operation was saving lives in the island of Ireland. I therefore hope that the noble Lord will consider that.

The point that my noble friend made about a joint approach and joint authority was well responded to by the noble Lord, Lord Murphy. He pointed out that what we are talking about is part of an international agreement. There are two sides to an international agreement; more than that, this is about the border, and most borders have two sides to them. It is therefore not surprising that the people on one side of the border need to talk to the people on the other side.

I would like to insert myself—an exciting prospect—somewhere between my noble friend Lord Bridges, the noble and right reverend Lord, Lord Eames, the former Prelate of All Ireland, and the Minister. Bishops are not by nature suspicious, even though they have so much experience of the human condition. However, I hope that the noble and right reverend Lord and my noble friend Lord Bridges will not mind my saying that if I thought that this whole endeavour—this whole negotiation—was in their hands, I would be happy to withdraw my amendment. However, I listened to some of the things that were said, or murmured, about the Taoiseach in the Republic. I hear some of the blame that some people are trying to put on the Republic of Ireland. I notice that, in spite of all these months of intellectual effort, we still have not managed to define what the frictionless border will be.

Touching on the point made by my noble friend Lord Bridges about not having a border down the middle of the Irish Sea, I do not think I would have signed an agreement in Brussels that accepted that. I know enough about "one country, two systems" to keep me going until I drop dead. I hope that will not be for a bit and so does the University of Oxford. I have no doubt about what my noble friend says and where I hope my noble friend on the Front Bench stands. I suspect that the tone of the discussions this afternoon in No. 10 has not been entirely in line with their sentiments. In that slightly suspicious spirit,

recognising that we are simply stating, in this proposed new clause, what the Government's policy purports to be, I would like to test the opinion of the House.

6.35 pm

Division on Amendment 88

Contents 309; Not-Contents 242. [The Tellers for the Not-Contents reported 242 votes, the Clerks recorded 241 names].

Amendment 88 agreed.

Division No. 1

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Goschen, V.
Grade of Yarmouth, L.
Green of Deddington, L.
Greenway, L.
Hague of Richmond, L.
Hamilton of Epsom, L.
Hanham, B.
Harding of Winscombe, B.
Harris of Peckham, L.
Hay of Ballyore, L.
Hayward, L.
Helic, B.
Henley, L.
Hill of Oareford, L.
Hodgson of Abinger, B.
Hodgson of Astley Abbotts, L.
Hogan-Howe, L.
Holmes of Richmond, L.
Hooper, B.
Hope of Craighead, L.
Horam, L.
Howard of Rising, L.
Howe, E.
Howell of Guildford, L.
Hunt of Wirral, L.
James of Blackheath, L.
Janvrin, L.
Jenkin of Kennington, B.
Jopling, L.
Judge, L.
Kakkar, L.
Kalms, L.
Keen of Elie, L.
Kilclooney, L.
King of Bridgwater, L.
Kirkham, L.
Laming, L.
Lamont of Lerwick, L.
Lang of Monkton, L.
Leigh of Hurley, L.
Lexden, L.
Lindsay, E.
Lingfield, L.
Liverpool, E.
Livingston of Parkhead, L.
Lothian, M.
Lucas, L.
Luce, L.
Lupton, L.
MacGregor of Pulham Market, L.
Mackay of Clashfern, L.
Magan of Castletown, L.
Mancroft, L.
Manzoor, B.
Marland, L.
Maude of Horsham, L.
Mawson, L.
McColl of Dulwich, L.
McInnes of Kilwinning, L.
Mone, B.
Montrose, D.
Morris of Bolton, B.
Moynihan, L.
Naseby, L.
Nash, L.
Neville-Jones, B.
Neville-Rolfe, B.
Newlove, B.
Nicholson of Winterbourne, B.
Noakes, B.
Norton of Louth, L.
O'Cathain, B.
Oppenheim-Barnes, B.
O'Shaughnessy, L.
Palumbo, L.
Patten, L.
Pidding, B.
Popat, L.
Porter of Spalding, L.
Price, L.
Rawlings, B.
Redfern, B.
Renfrew of Kaimsthorn, L.
Ribeiro, L.
Ridley, V.
Risby, L.
Robathan, L.
Rock, B.
Rogan, L.
Rotherwick, L.
Ryder of Wensum, L.
Saatchi, L.
Sassoon, L.
Scott of Bybrook, B.
Seccombe, B.
Selborne, E.
Selkirk of Douglas, L.
Selsdon, L.
Shackleton of Belgravia, B.
Sheikh, L.
Shephard of Northwold, B.
Sherbourne of Didsbury, L.
Shinkwin, L.
Shrewsbury, E.
Skelmersdale, L.
Slim, V.
Smith of Hindhead, L.
Spicer, L.
St John of Bletso, L.
Stair, E.
Stedman-Scott, B.
Sterling of Plaistow, L.
Stoddart of Swindon, L.
Stowell of Beeston, B.
Strathclyde, L.
Sugg, B.
Suri, L.
Swinfen, L.
Taylor of Holbeach, L. [Teller]
Taylor of Warwick, L.
Tebbit, L.
Thurlow, L.
Trenchard, V.
Trevethin and Oaksey, L.
Trimble, L.
True, L.
Ullswater, V.
Vaux of Harrowden, L.
Vere of Norbiton, B.
Wakeham, L.
Warsi, B.
Wasserman, L.
Wei, L.
Whitby, L.
Wilcox, B.
Williams of Trafford, B.
Wilson of Tillyorn, L.
Wolfson of Aspley Guise, L.
Woolf, L.
Wyld, B.
Young of Cookham, L.
Young of Graffham, L.
Younger of Leckie, V.

6.52 pm

Schedule 2: Corresponding powers involving devolved authorities

Amendment 88A

Moved by ***Lord Keen of Elie***

88A: Schedule 2, page 17, line 29, leave out from "under" to end of line 29 and insert "sub-paragraph (1) above"

The Advocate-General for Scotland (Lord Keen of Elie) (Con): My Lords, we are dealing here with truly technical amendments to ensure that the provisions of the Bill deliver the intended policy. They achieve two things. The first is to clarify how the requirement for regulations made by devolved Ministers under Schedule 2 to be within devolved competence interacts with the principle of severance applied by the courts.

The normal practice would be that when a Minister makes regulations that include, for instance, 10 different provisions, should one of those provisions be outwith the scope of the power, the courts would not strike down the regulations as a whole, they would simply sever the offending provision and allow the remaining nine provisions to stand as law. Some concerns were raised that the requirements in the Bill might imply that this standard practice should not occur. The amendments therefore make it clear that when a provision is outside devolved competence, only that provision would be ultra vires and not the whole instrument in which the provision is included.

The second purpose of the amendments is to allow for a devolved Minister and a UK Minister acting jointly to make provision that would not be in the competence of the devolved Minister acting alone. It has always been the Government's intention that the Schedule 2 powers can be exercised jointly to allow us to work together in areas where we may need to make the same or related changes to retained EU law and so that, where appropriate, those changes can be subject to formal scrutiny and approval in both this Parliament and the relevant devolved legislature.

We believe it is right that, for instance, where a UK Minister and a Welsh Minister jointly make regulations in relation to a matter that concerns the England/Wales border, those regulations can include both the provision for England and the provision for Wales, even though it would not be within the Welsh Minister's competence to make the provision in relation to England if they were acting alone.

We will also be bringing forward at Third Reading a number of further drafting changes to permit combinations of instruments beyond what is normally possible, reflecting the level of joint working that will be needed in relation to these powers. I will be speaking to the Government's Clause 11 amendments shortly, when we reach the group beginning Amendment 89DA. I am sure noble Lords will appreciate that we have a number of further groups to get through on other parts of the devolution provisions before we reach that debate. The amendments provide what I hope to be welcome legal clarity. They reflect standard practice and the mechanisms for good, collaborative joint working between the Administrations. I beg to move.

Lord Wallace of Tankerness (LD): My Lords, I am grateful to the noble and learned Lord for his explanation of these technical amendments. Can he say whether there is agreement among the devolved Administrations and the UK Government on these amendments?

Lord Griffiths of Burry Port (Lab): My Lords, at last we have reached this stage, although I find it a little off-putting that we are coming to consequential, technical matters before we look at the meaty issue; but that will come, as was said.

I would like to pay the respects of those on our Benches to the serious way in which the Government have contributed through the joint ministerial group to the success of the proposals, and thank them for bringing them to us now. I would also like to thank Mark Drakeford from the Welsh Government and Mike Russell from the Scottish Government for the part they played, even if the latter has thus far been unable formally to sign up to the inter-governmental process. As the Minister said, we are going to discuss Clause 11 and neither of us can wait for that. It is coming in more detail later this evening. However, we on these Benches recognise and appreciate the progress that has been made. We have come a long way since the Bill was published and it is against that backdrop that this and subsequent groups of amendments should be considered.

The Labour Party has always been the party of devolution. While we will be watching the Government's treatment of the devolved Administrations very closely throughout the Brexit process—that is our job—we recognise the genuine progress that has been made and welcome the amendments in this group. They allow United Kingdom and devolved Ministers jointly to exercise powers in Schedule 2 in order to make provisions that could not be made by a devolved Minister acting alone. This clarifies the use of so-called composite instruments, as the Minister said, and we hope paves the way for collaborative working between the devolved Administrations and the UK Government.

Other amendments in the group improve the position regarding ultra vires provision within instruments made under Schedule 2. I believe that the devolved Administrations previously raised concerns with the Government as to whether the courts would permit those parts of an instrument that were within competence to remain law. We are glad that Ministers and officials have responded positively to the appeals from the devolved bodies and that the amendments provide greater clarity for all involved. The group amounts to just one piece in the jigsaw puzzle. I usually start my jigsaws with the edge pieces. This looks like putting a piece in the middle and working around it in due course. It is a piece that these Benches are happy to support.

Lord Keen of Elie: My Lords, I am obliged to the noble Lord, Lord Griffiths, and note his comments. The amendments will provide not only clarity but a much needed flexibility when it comes to the application of the schedules.

[Lord Keen of Elie]

With respect to the point raised by the noble and learned Lord, Lord Wallace of Tankerness, my understanding is that both devolved Administrations were content with the proposals. Indeed, much of the force for the first group of amendments came from them. I hope that satisfies noble Lords.

Amendment 88A agreed.

7 pm

Amendment 88B

Moved by ***Lord Keen of Elie***

88B: Schedule 2, page 17, line 30, leave out from "8" to end of line 35

Amendment 88B agreed.

Amendment 89

Tabled by ***Lord Wallace of Tankerness***

89: Schedule 2, page 17, line 35, at end insert—

"( ) No regulations may be made under this Part after the end of the period of two years beginning with exit day."

Lord Wallace of Tankerness: My Lords, since submitting this amendment, I note that Clause 7(8) covers the point and therefore I do not wish to move it.

A89 not moved.

Amendments 89ZZA to 89ZZQ

Moved by ***Lord Keen of Elie***

89ZZA: Schedule 2, page 17, line 37, leave out "regulations" and insert "provision"

89ZZB: Schedule 2, page 17, line 37, leave out from "made" to "unless" and insert "by a devolved authority acting alone in regulations under this Part"

89ZZC: Schedule 2, page 17, line 38, leave out "every provision of them" and insert "the provision"

89ZZD: Schedule 2, page 18, line 4, leave out paragraphs 3 and 4 and insert—

"3A(1) No provision may be made by the Scottish Ministers acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 30A(1) of the Scotland Act 1998 if the provision were made in an Act of the Scottish Parliament, or

(ii) the restriction in section 57(4) of the Act of 1998 if section 57(5)(b) of that Act so far as relating to this Schedule were ignored.

(2) No provision may be made by the Welsh Ministers acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 80(8) of the Government of Wales Act 2006 if section 80(8A)(b) of that Act so far as relating to this Schedule were ignored, or

(ii) the restriction in section 109A(1) of that Act if the provision were made in an Act of the National Assembly for Wales.

(3) No provision may be made by a Northern Ireland department acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 6A(1) of the Northern Ireland Act 1998 if the provision were made in an Act of the Northern Ireland Assembly, or

(ii) the restriction in section 24(3) of the Act of 1998 if section 24(4)(b) of that Act so far as relating to this Schedule were ignored.

(4) No provision may be made by a devolved authority acting alone in regulations under this Part so far as, when made, the provision is inconsistent with any modification (whether or not in force) which—

(a) is a modification of any retained direct EU legislation or anything which is retained EU law by virtue of section 4,

(b) is made by this Act or a Minister of the Crown under this Act, and

(c) could not be made by the devolved authority by virtue of sub- paragraph (1), (2) or (as the case may be) (3).

(5) For the purposes of sub-paragraphs (1)(b), (2)(b) and (3)(b), sections 30A and 57(4) to (15) of the Scotland Act 1998, sections 80(8) to (8L) and 109A of the Government of Wales Act 2006 and sections 6A and 24(3) to (15) of the Northern Ireland Act 1998, and any regulations made under them and any related provision, are to be assumed to be wholly in force so far as that is not otherwise the case.

(6) References in this paragraph to section 80(8) of the Government of Wales Act 2006 are to be read as references to the new section 80(8) of that Act provided for by paragraph 2 of Schedule 3 to this Act."

89ZZE: Schedule 2, page 19, line 5, after "Ministers" insert "acting alone"

89ZZF: Schedule 2, page 19, line 9, after "department" insert "acting alone"

89ZZG: Schedule 2, page 19, line 19, after "authority" insert "acting alone"

89ZZH: Schedule 2, page 19, line 34, after "(b)" insert "and of a devolved authority acting alone or (as the case may be) other person acting alone"

89ZZJ: Schedule 2, page 20, line 31, after "Ministers" insert "acting alone"

89ZZK: Schedule 2, page 20, line 36, after "Ministers" insert "acting alone"

89ZZL: Schedule 2, page 20, line 42, after "Ministers" insert "acting alone"

89ZZM: Schedule 2, page 21, line 2, after "department" insert "acting alone"

89ZZN: Schedule 2, page 21, line 35, after "Advocate" insert "acting alone"

89ZZP: Schedule 2, page 22, line 11, after "Ministers" insert "acting alone"

89ZZQ: Schedule 2, page 22, line 43, after "authority" insert "acting alone"

Amendments 89ZZA to 89ZZQ agreed.

Amendment 89ZA

Moved by ***Lord Keen of Elie***

89ZA: Schedule 2, page 23, line 14, leave out paragraphs 13 to 20

Amendment 89ZA agreed.

Amendment 89A had been withdrawn from the Marshalled List.

Amendments 89AA to 89D

Moved by ***Lord Keen of Elie***

89AA: Schedule 2, page 26, line 25, after "taxation" insert "or fees"

89B: Schedule 2, page 26, line 27, at end insert—

"( ) establish a public authority,"

89BA: Schedule 2, page 26, line 28, leave out paragraph (d)

89BB: Schedule 2, page 26, line 37, leave out sub-paragraph (5)

89BC: Schedule 2, page 26, line 41, leave out from "under" to "are" and insert "sub-paragraph (1)"

89BD: Schedule 2, page 27, line 2, leave out "regulations" and insert "provision"

89BE: Schedule 2, page 27, line 2, leave out from "made" to "unless" and insert "by a devolved authority acting alone in regulations under this Part"

89BF: Schedule 2, page 27, line 3, leave out "every provision of them" and insert "the provision"

89C: Schedule 2, page 27, line 5, leave out sub-paragraph (2) and insert—

"(2) See paragraphs 27 to 29 for the meaning of "devolved competence" for the purposes of this Part."

89CA: Schedule 2, page 27, line 8, leave out paragraphs 23 and 24 and insert—

"23A(1) No provision may be made by the Scottish Ministers acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 30A(1) of the Scotland Act 1998 if the provision were made in an Act of the Scottish Parliament, or

(ii) the restriction in section 57(4) of the Act of 1998 if section 57(5)(b) of that Act so far as relating to this Schedule were ignored.

(2) No provision may be made by the Welsh Ministers acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 80(8) of the Government of Wales Act 2006 if section 80(8A)(b) of that Act so far as relating to this Schedule were ignored, or

(ii) the restriction in section 109A(1) of that Act if the provision were made in an Act of the National Assembly for Wales.

(3) No provision may be made by a Northern Ireland department acting alone in regulations under this Part so far as the provision—

(a) modifies any retained direct EU legislation or anything which is retained EU law by virtue of section 4 or confers functions which correspond to functions to make EU tertiary legislation, and

(b) would, when made, be in breach of—

(i) the restriction in section 6A(1) of the Northern Ireland Act 1998 if the provision were made in an Act of the Northern Ireland Assembly, or

(ii) the restriction in section 24(3) of the Act of 1998 if section 24(4)(b) of that Act so far as relating to this Schedule were ignored.

(4) No provision may be made by a devolved authority acting alone in regulations under this Part so far as, when made, the provision is inconsistent with any modification (whether or not in force) which—

(a) is a modification of any retained direct EU legislation or anything which is retained EU law by virtue of section 4,

(b) is made by this Act or a Minister of the Crown under this Act, and

(c) could not be made by the devolved authority by virtue of sub- paragraph (1), (2) or (as the case may be) (3).

(5) For the purposes of sub-paragraphs (1)(b), (2)(b) and (3)(b), sections 30A and 57(4) to (15) of the Scotland Act 1998, sections 80(8) to (8L) and 109A of the Government of Wales Act 2006 and sections 6A and 24(3) to (15) of the Northern Ireland Act 1998, and any regulations made under them and any related provision, are to be assumed to be wholly in force so far as that is not otherwise the case.

(6) References in this paragraph to section 80(8) of the Government of Wales Act 2006 are to be read as references to the new section 80(8) of that Act provided for by paragraph 2 of Schedule 3 to this Act."

89CB: Schedule 2, page 28, line 2, leave out "without the consent of a Minister of the Crown"

89CC: Schedule 2, page 28, line 5, at end insert ", unless the regulations are, to that extent, made after consulting with the Secretary of State"

89D: Schedule 2, page 28, line 16, at end insert—

"Meaning of devolved competence: Part 3

27_ A provision is within the devolved competence of the Scottish Ministers for the purposes of this Part if—

(a) it would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament (ignoring section 29(2)(d) of the Scotland Act 1998 so far as relating to EU law and retained EU law), or

(b) it is provision which could be made in other subordinate legislation by the Scottish Ministers, the First Minister or the Lord Advocate acting

alone (ignoring section 57(2) of the Scotland Act 1998 so far as relating to EU law and section 57(4) of that Act).

28_ A provision is within the devolved competence of the Welsh Ministers for the purposes of this Part if—

(a) it would be within the legislative competence of the National Assembly for Wales if it were contained in an Act of the Assembly (ignoring section 108A(2)(e) of the Government of Wales Act 2006 so far as relating to EU law and retained EU law but including any provision that could be made only with the consent of a Minister of the Crown), or

(b) it is provision which could be made in other subordinate legislation by the Welsh Ministers acting alone (ignoring section 80(8) of the Government of Wales Act 2006).

29_ A provision is within the devolved competence of a Northern Ireland department for the purposes of this Part if—

(a) the provision, if it were contained in an Act of the Northern Ireland Assembly—

(i) would be within the legislative competence of the Assembly (ignoring section 6(2)(d) of the Northern Ireland Act 1998), and

(ii) would not require the consent of the Secretary of State,

(b) the provision—

(i) amends or repeals Northern Ireland legislation, and

(ii) would, if it were contained in an Act of the Northern Ireland Assembly, be within the legislative competence of the Assembly (ignoring section 6(2)(d) of the Northern Ireland Act 1998) and require the consent of the Secretary of State, or

(c) the provision is provision which could be made in other subordinate legislation by any Northern Ireland devolved authority acting alone (ignoring section 24(1)(b) and (3) of the Northern Ireland Act 1998)."

Amendments 89AA to 89D agreed.

Clause 11: Retaining EU restrictions in devolution legislation etc.

Amendment 89DA

Moved by ***Lord Keen of Elie***

89DA: Clause 11, page 7, line 25, leave out subsections (1) to (3) and insert—

"(1) In section 29(2)(d) of the Scotland Act 1998 (no competence for the Scottish Parliament to legislate incompatibly with EU law) for "with EU law" substitute "in breach of the restriction in section 30A(1)".

(2) After section 30 of that Act (legislative competence: supplementary) insert—

"30A Legislative competence: restriction relating to retained EU law

(1) An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament.

(3) A Minister of the Crown must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations under this section unless—

(a) the Scottish Parliament has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Parliament having made such a decision.

(4) For the purposes of subsection (3) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Parliament first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(5) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (3) must—

(a) provide a copy of the draft to the Scottish Ministers, and

(b) inform the Presiding Officer that a copy has been so provided.

(6) See also paragraph 6 of Schedule 7 (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Parliament).

(7) No regulations may be made under this section after the end of the period of two years beginning with exit day.

(8) Subsection (7) does not affect the continuation in force of regulations made under this section at or before the end of the period mentioned in that subsection.

(9) Any regulations under this section which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to any Act of the Scottish Parliament which receives Royal Assent after the end of that period.

(10) Subsections (3) to (8) do not apply in relation to regulations which only relate to a revocation of a specification.

(11) In this section—

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the Scottish Ministers,

and, in calculating that period, no account is to be taken of any time during which the Parliament is dissolved or during which it is in recess for more than four days."

(3) In section 108A(2)(e) of the Government of Wales Act 2006 (no competence for the National Assembly for Wales to legislate incompatibly with EU law) for "with EU law" substitute "in breach of the restriction in section 109A(1)".

(3A) After section 109 of that Act (legislative competence: supplementary) insert—

"109A Legislative competence: restriction relating to retained EU law

(1) An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the Assembly's legislative competence.

(3) No regulations are to be made under this section unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, each House of Parliament.

(4) A Minister of the Crown must not lay a draft as mentioned in subsection (3) unless—

(a) the Assembly has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Assembly having made such a decision.

(5) For the purposes of subsection (4) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Assembly first makes a decision falling within any of paragraphs (a) to (c)(whether or not it subsequently makes another such decision).

(6) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (3) must—

(a) provide a copy of the draft to the Welsh Ministers, and

(b) inform the Presiding Officer that a copy has been so provided.

(7) See also section 157ZA (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Assembly).

(8) No regulations may be made under this section after the end of the period of two years beginning with exit day.

(9) Subsection (8) does not affect the continuation in force of regulations made under this section at or before the end of the period mentioned in that subsection.

(10) Any regulations under this section which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to any Act of the Assembly which receives Royal Assent after the end of that period.

(11) Subsections (4) to (9) do not apply in relation to regulations which only relate to a revocation of a specification.

(12) In this section—

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the Welsh Ministers,

and, in calculating that period, no account is to be taken of any time during which the Assembly is dissolved or during which it is in recess for more than four days."

(3B) In section 6(2)(d) of the Northern Ireland Act 1998 (no competence for the Northern Ireland Assembly to legislate incompatibly with EU law) for "incompatible with EU law" substitute "in breach of the restriction in section 6A(1)".

(3C) After section 6 of that Act (legislative competence) insert—

"6A Restriction relating to retained EU law

(1) An Act of the Assembly cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown.

(2) But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Assembly.

(3) A Minister of the Crown must not lay for approval before each House of Parliament a draft of a statutory instrument containing regulations under this section unless—

(a) the Assembly has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Assembly having made such a decision.

(4) For the purposes of subsection (3) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Assembly first makes a decision falling within any of paragraphs (a) to (c)(whether or not it subsequently makes another such decision).

(5) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (3) must—

(a) provide a copy of the draft to the relevant Northern Ireland department, and

(b) inform the Presiding Officer that a copy has been so provided.

(6) See also section 96A (duty to make explanatory statement about regulations under this section including a duty to explain any decision to lay a draft without the consent of the Assembly).

(7) No regulations may be made under this section after the end of the period of two years beginning with exit day.

(8) Subsection (7) does not affect the continuation in force of regulations made under this section at or before the end of the period mentioned in that subsection.

(9) Any regulations under this section which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to any Act of the Assembly which receives Royal Assent after the end of that period.

(10) Subsections (3) to (8) do not apply in relation to regulations which only relate to a revocation of a specification.

(11) Regulations under this section may include such supplementary, incidental, consequential, transitional, transitory or saving provision as the Minister of the Crown making them considers appropriate.

(12) In this section—

"the relevant Northern Ireland department" means such Northern Ireland department as the Minister of the Crown concerned considers appropriate;

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the relevant Northern Ireland department,

and, in calculating that period, no account is to be taken of any time during which the Assembly is dissolved or during which it is in recess for more than four days.""

Lord Keen of Elie: My Lords, to be clear, the noble and learned Lord, Lord Wallace, indicated that he was not going to move Amendment 89, but government

[Lord Keen of Elie]
amendment 89AA was to follow from that amendment so I would just like to address our amendment in order to avoid confusion. I am afraid that this is like one of those smart restaurants where you get a series of amuse-bouches before you get to the main course.

Amendment 89AA replicates the restriction that we have already applied to Clause 9 on the withdrawal agreement power in relation to imposing fees and charges for the corresponding power for devolved Ministers. This follows exactly the same rationale as the Clause 9 power. It has never been our intention for these powers to be used to impose fees; that is the preserve of the bespoke Schedule 4 powers, which are exercisable by devolved Ministers and should be subject to the limits that apply to those powers. This same restriction has already been applied to both the correcting power in Clause 7 and its Schedule 2 equivalent. The devolved Administrations were informed in advance of our intention to apply this restriction to that power and have agreed to its effect, so I hope noble Lords will support the amendment.

I turn to Amendment 89DA and the group that follows it. I thank noble Lords for their constructive engagement on this important issue during the passage of the Bill. The Government have now tabled a comprehensive set of amendments to Clause 11. We have worked with the Scottish and Welsh Governments to develop them, and noble Lords will recognise that we have drawn heavily on their consideration of our initial amendments in Committee. I put on record our thanks to this House, and to the Scottish and Welsh Governments for their endeavours in crafting these amendments. We are immensely pleased that the Welsh Government have agreed this approach and I am of course disappointed that the Scottish Government have not. I hope they will sign up in due course.

The intention behind Clause 11 as originally drafted was to provide maximum legal certainty across the UK to our communities and businesses after EU exit in areas that are subject to a common EU framework. As the Welsh Government aptly put it,

"it is essential to provide legislative continuity at the point at which the UK leaves the EU".

We know, of course, that the EU has common legislative arrangements across a vast range of areas, but we must now decide in which policy areas we may need to continue those common arrangements legislatively, informally or not at all. To provide the time to do that work and provide assurances that there would not be immediate divergence across the UK, the original Clause 11 sought to freeze the law in all those areas.

We are all familiar with the views of the devolved institutions on this clause, and of course the Government have accepted the case for a more targeted and proportionate approach. This has been supported by the work that we have been doing with the devolved Administrations on assessing these current frameworks. Since we agreed the framework principles, which set out why common approaches may be needed across more than one part of the UK, our Governments have worked closely to analyse those policy areas that sit across devolved competence and EU law.

Noble Lords will recall that in March we published our initial analysis. It demonstrated that our work with the devolved Administrations indicated that legislative frameworks may be needed, in whole or in part, in only 24 of the 153 areas that had been identified, and 82 areas could be managed through more informal, non-legislative arrangements. The remaining 49 areas would likely require no further arrangements at all. We also agree that where common approaches are needed, they cannot all be designed and implemented by exit day. So it continues to make sense to maintain existing frameworks and provide certainty over which areas may be subject to change in the future, but we can and should do this in a more measured way.

Our amendments in Committee set out targeted mechanisms for doing so, following discussions with the Scottish and Welsh Governments. We have carried forward the basic proposition from Committee and have built on that in the amendments that we have put forward today. Our amendments would see powers returning from the EU in otherwise devolved areas pass directly to the devolved institutions. Where a common legislative framework may be required, we propose to freeze the current arrangements to provide the time to establish our own framework for the UK. This would apply only to those policy areas that have been explicitly frozen through regulations, rather than across all policy areas where EU law currently creates common frameworks. That was the proposal that we put forward in Committee and that we had been discussing with the Welsh and Scottish Governments. We withdrew our amendments because discussions with those Governments were ongoing and we were committed to continuing them. Our Committee proposal was a substantial, but not a final, offer. It meant that noble Lords were able to debate the very latest proposition and inform those discussions.

One theme raised here and by the devolved Administrations was consent. The devolved Administrations thought it right that there was a role for the devolved legislatures in deciding whether specific areas should be the subject of a freeze. We also heard that in the debate in this House. This House agreed that a role for the devolved legislatures was important in this process, but that it must be balanced against preserving the right—indeed, I would say, the responsibility—of the United Kingdom Parliament to act, where there may be a cross-United Kingdom impact. Only the UK Parliament can do that.

The Government listened carefully to the submissions on this matter and reflected them in discussion with the devolved Administrations over Easter. We have amended the Committee proposal. We shall seek to agree which areas should be subject to a freeze. This is part of the bigger frameworks question that we continue to progress.

We should also have the view of the devolved legislatures, not just the Administrations. Our amendments ensure that, before the UK Government may lay regulations in draft in this House, they must have sent them to the devolved Administrations and sought the consent of the legislatures. The devolved legislatures will have 40 days in which to decide whether to give or withhold consent for the regulations. Only after that

decision is given or the 40 days have passed can the United Kingdom Government lay the regulations before Parliament. This process is built on collaborative working. It favours agreement for freezing areas, but also recognises that if agreement cannot be reached, it must be for the UK Parliament to decide what is in the interests of the UK as a whole.

We believe that this approach should minimise areas of disagreement, as we have also developed a comprehensive intergovernmental agreement that supports and complements the legislative amendments we are considering today. It emphasises that we will work on these regulations together and in advance of sending them to the devolved Administrations formally.

Where there is unavoidable disagreement and the United Kingdom Government consider that they must proceed in the absence of consent from a devolved legislature, UK Ministers would be under an express legal duty to provide this Parliament with a Statement, and, if provided, a statement from the devolved Administration on why consent was not being granted. The UK Minister will be under a duty to explain to Parliament why the Government consider that they must proceed without that consent. Parliament will decide on the case presented: whether it is indeed in the best interests of the United Kingdom to freeze a specific policy while we implement new arrangements.

I should also remind noble Lords of the additional reporting duties on UK Ministers. I do not wish to repeat the detail that I provided to the House on them in Committee. Needless to say, they ensure heightened accountability by providing transparency to the process of developing frameworks, the use of the regulation-making powers and where frameworks are maintained in the short term. They will also require us to report on those principles that underpin this work, the principles agreed between the United Kingdom, Scottish and Welsh Governments at the Joint Ministerial Committee in October last year. Through this, our work on future frameworks is open to the scrutiny of this Parliament and of the devolved legislatures.

The other key change to the amendments that I should mention, as compared to the proposals that noble Lords considered in Committee, is the addition of sunset provisions for both the new powers and the regulations made under them. This was raised explicitly by noble Lords in Committee. We have always said that any freeze under Clause 11 would be temporary. The amendments place that beyond doubt by making it explicit in law.

I am grateful to noble Lords for the constructive manner in which they have engaged with the question of sunsets. In particular, I must give due credit to the noble and learned Lord, Lord Wallace, for the tenacity with which he has pursued this, including by tabling his amendments. I hope that he will be satisfied that his concerns in this respect have been addressed and will feel able not to press those amendments.

The powers last for only two years from exit day. This aligns them with the other powers in the Bill and makes certain that they will not be an ongoing mechanism for limiting competence. The regulations will also be time-limited. We have had in-depth discussions with the devolved Administrations on how long is needed to determine and implement our future frameworks. We have settled on a period of five years from when regulations come into force.

7.15 pm

We have agreement from the Welsh Government that five years is the right period. It accounts for the detailed work that we still need to undertake on designing new arrangements and time for implementation. That is only the upper limit. In any areas where we have put future arrangements in place, we can and indeed will repeal those Clause 11 regulations sooner.

The progress we have made does not end with the amendments before your Lordships, just as our collaboration with the devolved Administrations does not end simply at the point required by law. The agreement and memorandum that we have co-authored and signed with the Welsh Government set out the commitments that we have made to each other to underpin these joint undertakings. The Welsh Government's report on securing Wales' future after we leave the EU argued that we needed,

"imagination and vision to stimulate new ways of joint working among administrations outside the EU".

I believe that this agreement demonstrates that. It makes clear that Clause 11 regulations will not affect the operation of established conventions and practices where we need to enact framework arrangements in future. It also makes clear how we and the devolved Administrations will work together, using the powers in the Bill, to prepare our laws for exit day.

Paragraph 10 of the agreement also sets out the position we have reached with the Welsh Government on their continuity Bill. That is that steps will be initiated to secure the repeal of the legislation passed by the Welsh Assembly as a possible alternative to the withdrawal Bill before the withdrawal Bill receives Royal Assent. I may say that we are still in discussion with the Welsh Government about how that repeal should be given effect. If any amendments to this Bill are appropriate in relation to that paragraph, we will propose them at Third Reading.

I am grateful to the Welsh and Scottish Governments for their co-operation and contribution to the proposals before noble Lords, and for the constructive manner in which they have engaged with us. Of course, I am particularly grateful to the Welsh Government and their officials for finding a way forward that delivers a reasonable and agreeable compromise. I am glad that they have recognised the movement that we have made, the trust that we have built, and welcome the fact that they have also moved to meet us, acknowledging the need for legal certainty for the United Kingdom as a whole.

It is regrettable that the Scottish Government have been unable to do the same. I believe that we can reflect positively on the role that they have played in developing these amendments. This was collaborative work in the best sense, and I think we can agree that it has delivered for both sides. As a result, I think it is only right that the provisions that we have proposed none the less speak to Scotland and to Northern Ireland as well. My hope is that the Scottish Government will sign up to this agreement, and I continue to urge them to do so.

[Lord Keen of Elie]

In the absence of Northern Ireland Ministers, officials have also engaged on the technicalities of the Bill with the Northern Ireland Civil Service to ensure that the provisions work for Northern Ireland, without prejudice to the views of incoming Northern Ireland Ministers. The Government's focus remains on restoring devolution in Northern Ireland so that Northern Ireland Ministers can engage substantively on these issues.

If Committee is anything to go by, I look forward to a lively debate on these amendments, but a thoughtful, reasoned, and constructive one. On this issue in particular, we are in novel territory and we have looked to others for their suggestions. I thank noble Lords for their suggestions, which have shaped our proposals, and their efforts in engaging the devolved Administrations. I should of course give special mention to the noble and learned Lords, Lord Mackay and Lord Hope, who have ably led the House in scrutinising the Government's proposals and endeavouring to broker compromise here. The amendments we have tabled today are a reflection of our joint working with all parties. They show how far we have come and the sincerity with which we, and indeed the devolved Administrations, have approached this matter. I beg to move.

Amendment 89DAA (to Amendment 89DA)

Moved by ***Lord Hope of Craighead***

89DAA: Clause 11, in subsection (2), in inserted section 30A(1), leave out "in regulations made by a Minister of the Crown" and insert "by Her Majesty by Order in Council"

Lord Hope of Craighead (CB): My Lords, before I introduce the series of amendments in my name, perhaps I can express my thanks to the noble and learned Lord the Minister for the very helpful way in which he has introduced his Amendment 89DA, and also pay tribute to the work that he and his Bill team have done since we began these discussions way back at the beginning of Committee. The Bill has changed very substantially since its original form. In many respects, I was concerned about the way in which it failed to recognise the structure of the Scotland Act. Considerable advances have been made to bring this Bill into line with the recognised approach to devolution in that Act.

There are 10 amendments in my name, grouped from Amendment 89DAA to Amendment 89DAE, then with Amendments 89DAG and 89DAH and two important amendments, Amendments 92BAA and 92BBA. These amendments come from a list of proposed amendments attached to a letter sent to the Lord Speaker by the First Minister of Scotland at the end of last week; in fact, I think that it arrived last Thursday. It is against the background of that letter that I have introduced these amendments for debate this evening. I shall quote short passages from the First Minister's letter, because they set the scene for what she sought to achieve in writing to the Lord Speaker. Commenting on the amendments that the noble and learned Lord has introduced, she says:

"The amendments represent a considerable advance on the original position of the Bill, in its introduction to the Commons".

She goes on to say:

"What is not acceptable to the Scottish Government is that these amendments would bind the Scottish Parliament in law in these areas, whereas the commitment on the part of UK Government is binding in political terms only".

When she says "these areas", she refers to the common frameworks to which the noble and learned Lord referred in his introduction. Near the end of her letter she says:

"Annexed to this letter are further amendments (with explanatory notes) which, if made, would resolve the concerns set out in this letter, and give the Scottish Parliament its proper place in the constitutional arrangements of the UK, during the challenging but necessary task of preparing our laws for EU withdrawal".

For the First Minister to write to the Lord Speaker in this way is a very odd way to proceed, but it was probably unavoidable, due to the refusal of the Scottish National Party to nominate anyone for membership of this House. Before I develop a point on that issue, one ought to recognise the fact that the amendment introduced this evening has been awaited for a very long time indeed. Various Members in the House of Commons were pressing for an amendment before the Bill left the Commons. I am not attributing any blame whatever to the Government for the fact that they have only now come forward with these amendments. The fact is that it has taken a great deal of work and much careful negotiation and planning to achieve what the noble and learned Lord has achieved in the amendment which we see before us this evening. It is a long way from what was being thought about in the House of Commons, and it is just a misfortune of timing that we are facing the position that the amendment comes so late in the process of taking the Bill through Parliament.

That being said, I very much regret the absence of at least one member of the Scottish National Party in this House who could represent the views of the Scottish Government. There is no shortage of suitable candidates, I believe. Their position is all about ideology and their view of the principle of democracy; they refuse to have anything to do with an unelected Chamber. We are not short of people—I look particularly to my right, towards the Liberal Democrat Benches—who believe that this House should be an elected Chamber, but they take the view that, while the present system exists, it must be made to work, and they are content to sit here recognising that that is how Parliament as a whole works today. In a way, it is rather like a bicycle, which has two wheels to it; you cannot really get anywhere unless both wheels are attached. That is how this Parliament works. The House of Commons works in tandem, to use another analogy, with the upper House, and we all know that this House performs a valuable function—much valued by the Government, I may say, on behalf of the whole country—as a revising Chamber. We also know that the House of Commons always has the last word, and we never assert ourselves to the extent of insisting on our view when the Commons has made its view, if it contradicts us, absolutely plain. So it is a real shame that the Scottish National Party cannot accept how this place works. If it is to participate fully in what this Parliament does, it needs to make use of the whole machinery, as it is an essential part of the legislative process.

One could say that, for much of the period when the SNP has had large numbers of Members in the other place, their absence from this Chamber has not mattered very much, but we are entering a time when

it is going to matter a great deal, and this evening's debate is one example. Much of the delegated legislation that we are anticipating, which is going to come through the mechanism to which the noble and learned Lord referred, will refer to Scotland, and many other bits of delegated legislation will come through Clause 7, and probably Clause 9, which will affect Scotland too. Who, then, is to represent the views of the Scottish Government? Are we to have a succession of letters by the First Minister to the Lord Speaker, which somebody might possibly pick up, to achieve what she seeks to do? It is very sad that the ideology is so deeply rooted that there is no real prospect of its being changed. The public should know that Scotland is not being very well served by adhering to it as precisely as we see being done today.

Despite all that, it is important that we should look at and debate at least some of the amendments that the First Minister attached to her letter. There were two sets. The first set took a more radical view of the amendments that we are considering this evening than the second. It invited the Government in effect to remove the entire system, which Clause 11 is really designed to set up, by placing restrictions on the legislative competence of the Scottish Parliament for a temporary period. It is far too late to engage in a debate fundamentally altering what we set out in the amendment before us, particularly having regard to the fact that the Welsh Government have agreed to what is on offer.

The second set is the one from which I have selected my amendments. I have not included all the amendments in that set, because I do not think that it is necessary to do that to put forward the basis of the argument which the Scottish Government seek to advance. I am taking my 10 amendments from that particular group. It may be convenient to start by addressing Amendments 92BA and 92BB, which refer to something called type C, with reference to Sections 30A(1) and 57(4) of the Scotland Act 1998.

Those not familiar with the systems might wonder what type C is all about and why my amendments seek to change type C to type A. The point is that Schedule 7 to the Scotland Act 1998 contains a table listing various provisions in the Scotland Act that are subject to treatment by delegated legislation, setting out in a table various types of procedure that are to be used to subject those bits of delegated legislation to scrutiny. The type C procedure requires that the measure be approved by resolution of both Houses of Parliament; in effect, it is describing the affirmative procedure for dealing with statutory instruments, which we are very familiar with. The type A procedure has that too, but the essential difference between them is that type A requires the measure to be laid before, and approved by resolution of, the Scottish Parliament as well, so it seeks the agreement of both the devolved legislature and the United Kingdom Parliament. That is really the central point that runs right through all these amendments.

7.30 pm

The point that they seek to make—I refer now to the Scottish Government's amendments—is that we are dealing with a system of regulation that is sought to be introduced by the proposed new Clause 11, which under the system introduced by the Scotland Act requires the use of the type A procedure. I do not want to trouble your Lordships by going through all the details of the Scotland Act, but there are three particular sections that carry the type A procedure with them and which all deal with situations where modifications are sought to be made either to the legislative competence of the Scottish Parliament—"modification" being the word that is used—or modifications to the powers of Scottish Ministers in the performance of their duties as an Executive. In each of these three sections—Sections 30, 57 and 108—the prescribed system is the type A procedure. It is introduced by means of Orders in Council, which are to be conducted through this Parliament and the Scottish Parliament via the use of that procedure.

The essential point to understand in order to gather why the type A procedure was regarded as so important when this system was being set up is that, within the Scotland Act, there are two schedules that set out the boundary between the reserve powers—that is, those reserved to the Westminster Parliament—and the areas of devolved competence. As the noble and learned Lord, Lord Wallace of Tankerness, has said many times, what is devolved is devolved and what is reserved is reserved, and the boundaries are very clearly set out.

Schedules 4 and 5 set out in detail the arrangements that were debated intensely by both Chambers when the Bill went through Parliament in 1997 and 1998. It made sense then that the procedure that would have to be adopted if there were to be any modification of those closely argued provisions should be the heightened procedure, which is the type A procedure. The point really is that those schedules were of crucial importance to the operation of the Scotland Act and the scheme, therefore, was that both legislatures should be involved in the scrutiny and approval process if any modification were made by way of addition or subtraction—addition, because the Scottish Parliament would need to be satisfied, no doubt, that it could cope with the additional responsibilities, and subtraction because it would no doubt wish to be able to exercise control over what was being taken away from it, if that were the intention from the system designed in Schedules 4 and 5.

We are now dealing with a situation that was never anticipated, I think it is right to say, when the 1989 Act was being discussed. At that time we were a member of the EEC and we were able to write into the Scotland Act 1998 a limit on the competence of the Scottish Parliament, which meant that EEC law—Community law, as it was then called—was outside competence. It is of course now EU law, by the amendment following the setting up of the European Union. We are now facing the situation where EU law will come to the United Kingdom as retained EU law, and we are talking of course about the redistribution of EU law and the frameworks that are being set up, particularly with reference to the internal market that is to be designed within the United Kingdom after Brexit.

One has to understand that, while we are dealing with a new situation, nevertheless the Scottish Government's position is that what is being discussed affects fundamentally the legislative competence of the Scottish Parliament and the executive powers of

[Lord Hope of Craighead]
Scottish Ministers. A modification is being considered by means of the frameworks being discussed that will increase the responsibilities of both the Parliament and Ministers. The point being made is that, if you follow through the principle underlying Sections 30, 54 and 108 of the 1998 Act, the principle should be applied to what we are discussing this evening; therefore, the type A procedure is required. It is not just a matter of reading through the Scotland Act; there is also a constitutional point that informs the approach being taken, which is that it would be inappropriate for the powers of a representative and democratically elected Parliament, which the Scottish Parliament is, to be changed without its consent by subordinate legislation made by a Minister who is not accountable to the Scottish Parliament. That is why there is a fundamental point of principle as well as the point of the understanding of the principles that underlie the Scotland Act itself, which is the basis of the position that the Scottish Government have taken up.

I think it is right to say that both the Scottish Government and First Minister have been criticised for the stand they have been taking on the issue of consent and, like the Minister, I too very much regret that it has not been possible for agreement to be reached, especially as it appears that much of what we are talking about in the area of frameworks is the subject of agreement and it may be that, at the end of the day, when one assesses how much is likely to result in disagreement, there will be very little. We are talking about a very thin area of potential dispute in comparison with a very large area of material that is not in dispute at all. Nevertheless, there is a fundamental point of principle that guides the Scottish Government and I am bound to say that I can see considerable force both in principle and in the construction of the Scotland Act that indicates that they have some justification for the position that they have adopted.

I look forward very much to the contribution of the noble and learned Lord, Lord Mackay of Clashfern, who has added his name to my amendments. I do not think he takes quite the same view as I do, but his contribution may assist in putting the views that I have expressed into what he regards as the proper context. No doubt the Minister may find himself in sympathy with the view of the noble and learned Lord, Lord Mackay, as well. I welcome what the noble and learned Lord is going to say because it is so important that we should be debating and discussing the Scottish Government's position. If there are reasons for feeling that it is misguided, they should be made clear and we can look at whether the basis on which they are being criticised stands up to examination.

Before I move my amendment and sit down, there is one other point on which I think the Minister may be able to assist in drawing the parties together: there is a view, I think, among members of the Scottish Government and their advisers that what is being attempted in proposed new Clause 11 may be the thin end of a wedge. It may be that we are seeing here the beginning of an attempt to undermine the system that I described earlier, set up by Sections 30(2) and (3) and 108, in particular, and the use of the type C procedure when modifications of the kind discussed in those sections have been made. It would be, I should have thought, a very serious step to seek to undermine the structure of the Scotland Act in that way, if that is what is in prospect.

It would be a great help if the Minister could say, if he is able, that we are dealing with a one-off, special situation that lies outside the structure of those sections, and that for that reason he is taking the line that it is a type A and not a type C case. Perhaps he could give an assurance that if we are dealing with something that is precisely covered by Section 30 and the other sections I have mentioned, the system laid down by the Scotland Act 1998 will be adhered to. An assurance of that kind will, I hope, give some comfort to those on the other side of the discussion and reassure them that they are talking about a special situation, which need not in any way cast doubt on the future relationship between the devolved system and the Westminster Government when we come to other debates on how the systems that were set up by the 1998 Act might be modified. Against that background, which I hope has set the scene sufficiently, I beg to move.

Lord Wallace of Tankerness: My Lords, I will return to the points on the amendment moved by the noble and learned Lord, Lord Hope of Craighead, but first I endorse what has been said by everyone who has contributed to this debate so far—the noble and learned Lord, Lord Keen, the noble Lord, Lord Griffiths, and the noble and learned Lord, Lord Hope—in expressing gratitude, if that is the right word, to those who have laboured hard to try to move forward and get an agreement on the kind of structure we need for when EU law is, as it were, repatriated. I think there is common ground that the original Clause 11 proposals were not fit for purpose; that has been said on many occasions, and I will not rehearse all the arguments for that now. It is to the credit of the Government that they recognise that and have sought to address it —unfortunately, some valuable time was lost, but nevertheless they have done that in a constructive way. Indeed, I am grateful to both Mark Drakeford of the Welsh Government and Mike Russell of the Scottish Government for their efforts. What has been brought before us represents a considerable advance with much better arrangements for dealing with retained EU law after exit day. It is regrettable that the Scottish Government did not feel able to sign up, notwithstanding the considerable advances that had been made. One or two people have speculated that, if one is not satisfied with what the Government are doing, there may be an argument for voting it down. I pointed out that if you did that, we would be left with Clause 11, which no one seems to think we should give any house room to any longer. However, the progress made is welcome.

I listened carefully to what the noble and learned Lord, Lord Hope of Craighead, said when he moved his amendment. I have been trying to work through it, because something about it was not quite right. It may be just my approach. He quite rightly drew attention to the fact that the "type A" Order in Council procedure is deployed when changes are to be made in the competence of the Scottish Parliament and Scottish Ministers, and specifically where there is a change to Schedule 5, which defines what is reserved, and to the

restrictions which are currently set out in Schedule 4. Where I possibly have a difficulty is that of course these are not the only two restrictions; the noble and learned Lord himself pointed out that EU law, and for that matter the European Convention on Human Rights, is another restriction, as indeed is territoriality. As he acknowledged, we are dealing with a situation that was never foreseen when the Scotland Act was being drafted and taken through both Houses back in 1998, and that is a situation where, potentially, the restriction on the legislative competence of the Scottish Parliament —namely, that it must abide by European Union law —will fly off, and we will be in what might be described as a sui generis situation. The question is whether the procedure which is for modification of Schedule 4 or 5 is appropriate for this one-off situation.

7.45 pm

I would like to tease out the following. Is my understanding correct that, if the Order in Council procedure proposed in the amendment that has just been moved was to apply, that could mean that in an effort to establish a United Kingdom framework—in 24 areas, plus perhaps two in the margins where there is still some dispute, where it is generally agreed that there should be a common UK framework—it might be possible for the Scottish Parliament to derail, as it were, the establishment of a common framework, which would affect Wales, Northern Ireland and England? It was not part of the original devolution settlement that changes in relation to the competence of the Scottish Parliament should be able to amount to a veto on what might happen in England, Wales and Northern Ireland.

It is important in this unique situation, where European Union law is being repatriated, that we remember that there are two aspects to it. It is important that the devolution settlement is respected; my understanding of what the Government propose is that, with the exception of those where they seek a common framework, powers will automatically flow back to Cardiff, to Belfast, I hope, and to Edinburgh, where they would fall under areas which are not otherwise reserved.

The Duke of Montrose (Con): My Lords, there is a provision in Section 29 of the Scotland Act that covers the thing that worries the noble and learned Lord. Section 29(2)(a) provides that it is outside the competence of the Scottish Government to apply,

"part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland".

So this raises a great problem in the area he is talking about.

Lord Wallace of Tankerness: My Lords, if an Act of Parliament gives the Scottish Parliament power to say no and refuse its consent, what I am asking is whether that affects what might happen in other parts of the United Kingdom, so that you would not be able to get the common UK framework which people might otherwise think is necessary and desirable to be able to sustain a single market within these islands. At the moment, we have to some extent a form of competence at a different level—the European level—which is being brought back down to the United Kingdom. I ask these questions because it possibly means that there is a difference between the procedure which has been used if you wish to modify Schedule 5 or change Schedule 4 and one where we are returning the laws which hitherto have been subject to the European Union.

The amendments in my name, which I know are supported by my noble friend Lord Thomas of Gresford, are Amendment 89DAF in respect of Scotland, Amendment 89DAJ in respect of Wales and Amendment 89 DAK in respect of Northern Ireland. These amendments would, as the noble and learned Lord, Lord Keen, indicated, change the sunset—although it is not really a sunset in this respect—overall from seven years to five years, and they do that by changing the period during which the frameworks must be established from five years to three years. I did not seek to change the two-year period during which these orders have to be made, because that is consistent with other provisions in the Bill.

If my understanding of the situation is correct, if an order is not made that would identify the area for a framework and freeze, the power would automatically flow back to, let us say in this case, Edinburgh. Is it therefore to be expected that all these orders will be made, identifying the areas for freezing to establish common frameworks by the time we leave the European Union? Otherwise, it might appear that, within a period of days, weeks or months between our leaving the European Union and the order being made, there could be divergence between the different parts of the United Kingdom. After the order is made, I suggest that there should be a three-year period for the frameworks to be established rather than a five-year period.

I welcome the fact that time limits have been put in at all—that was a step forward, and the Government have obviously been listening on that. But I have not heard why it should be five years rather than three. That figure may have been plucked out of the air. The noble Lord, Lord Foulkes, is not in his place, but he did have an amendment in Committee in which five was suggested. It may be that that commended itself to the Government because it came from the noble Lord, Lord Foulkes. I would like to hear a rationale as to why five years is to be preferred to three. The noble and learned Lord said that they had agreement from the Welsh Government on this. It would be interesting to hear the Minister's views on whether the Welsh Government thought that a shorter period of time would be ideal but they were prepared to accept this.

No one disputes the amount of work to be done but we are potentially in a Parkinson's law situation, where work expands to fill the time available for its completion. If we say five years, it could take up to five years; if we say three years, it would focus the mind and we could possibly do it in three. That is not least because we are dealing with dynamic issues, and if we are to freeze retained EU law in areas where there might be need to update the law—I assume that in these circumstances we would seek to do so by agreement—three years would allow progress to be made faster.

Also in this group is Amendment 90, which again provides a sunset. However, I think it is superseded by what we are debating and so I will not seek to press it.

[Lord Wallace of Tankerness]
But it is important that the Government give us a rationale as to why they have chosen this period of time.

On a very specific point, Amendment 92AD—on page 19 of the Marshalled List—talks about the reporting that is to be made by Ministers to Parliament:

"After the end of each reporting period, a Minister of the Crown must lay before each House of Parliament a report which … (b) explains how principles … (i) agreed between Her Majesty's Government and any of the appropriate authorities, and (ii) relating to implementing any arrangements which are to replace any relevant powers or retained EU law restrictions, have been taken into account".

I rather suspect that these are the principles that were agreed at the Joint Ministerial Committee back in October or November, which have certainly been discussed before. However, it is slightly odd to have reference to "principles" which, as far as I can see, will not actually appear in the Bill. Because we have debated this often enough, we perhaps know what the principles are, or at least know where they can be found, but to anyone coming to this fresh it would not necessarily indicate where these principles are. Will the Minister confirm that these are the principles that are being referred to—the ones agreed at the Joint Ministerial Committee—and explain whether there is any reason that they should not be added as an annexe to the Bill?

In conclusion, the noble and learned Lord, Lord Hope, quoted a letter from the First Minister, which was very measured in its terms—slightly more measured than her writings in last week's *Sunday Herald*, in which she said that the Tories would "completely demolish" Scottish devolution. I immediately thought of the many debates we had during the passage of the Scotland Act 2016, in which the Conservative Government extended devolution to cover almost all of income tax and a substantial amount of social security. This could be a very cunning plan, if they assume that the Scottish Government will—I was going to say "screw it up", but I am not sure whether that is parliamentary—act in such a way that it would end devolution, but I do not think that that was the plan. This Government have shown a very strong commitment—and I say this from the opposition Benches—through the number of things that they have devolved to the Scottish Parliament. Take one example from the 24:

"EU regulations on the classification, labelling and packaging of substances and mixtures (CLP); the placing on the market and use of biocidal products (e.g. rodenticides); the export and import of hazardous chemicals; the registration, evaluation, authorisation and restriction of chemicals (REACH); and plant protection products (e.g. pesticides)".

I cannot honestly believe that trying to establish a common framework on that somehow undermines devolution, given that the Government transferred, almost entirely, income tax to the Scottish Parliament. It is a degree of hype that does not serve the debate well.

I rather hope that, as we go forward, we can recognise that what we are trying to do is seek a position so that, when we are no longer part of the European Union, we can in many important areas where it is thought necessary—indeed, the Scottish Government have accepted that in some areas it is necessary—establish a common framework throughout the United Kingdom. There will be further arguments as to the content of these frameworks, but for the moment we need to identify what they are. I would welcome a response to the points that I have made.

Lord Wigley (PC): My Lords, in addressing Amendment 89DA, I will, as did the Minister, cover the broader ground contained in the amendments in the group. Some of my misgivings with the new proposed settlement dealt with in this group will arise in later amendments, 91 and 92, which for some reason have not been coupled with these.

While I welcome the progress that was made in the joint discussions on resolving some of the difficulties between Westminster and the devolved Governments—a welcome that has been expressed by both Mike Russell of the Scottish Government and Mark Drakeford, Wales' Brexit Minister—I am acutely aware that not all the difficulties were resolved, and I beg the indulgence of the House for a few minutes in setting these issues in their context. I realise that some of my points may seem to be Second Reading ones, but in these amendments—there are 21 in this group alone—we have matters before us which were not in the Bill at Second Reading. I noted in particular the Minister's invitation in his speech for us to contribute positive ideas in this context.

The adjustments before us tonight are in the context of what many people in Cardiff and Edinburgh, across party lines, regarded as a power grab—to use the term that was used then—by Westminster, in taking unto themselves powers returning from Brussels, including powers in what had previously been regarded as devolved functions such as agriculture. The fact that the Labour Government in Cardiff held out so long before agreeing reflected that fear; as did the fact that members of all parties in the Assembly—including initially Tory and UKIP AMs—supported having a continuity Bill to withstand that perceived power grab. The recent debate in Edinburgh reflected similar cross-party support for its continuity Bill. Rather than just scream "power grab" and hurl abuse at those we see as the authors of our difficulties, I will try to put forward what I see as a considered case and implore, even at this late stage in the Bill's passage, that noble Lords appreciate the complexity of these issues—some of which have already emerged tonight—and rise to the challenge of finding a positive way forward, if not in this Bill then in some parallel or future legislation.

There have been calls from all sides for greater mutual respect in this process—for a mutuality that is not reflected by one side having a veto but other partners being denied that facility. The difficulty, repeated time after time by those involved in the recent negotiations over several months, is that there seems to be a basic lack of trust between Westminster and the devolved regimes. That is not so much a personal lack of trust but rather a lack of trust in the respective institutions.

Part of the lack of trust felt in Wales arises, perhaps, from different social values and from historic experience. There has been a growing lack of trust in Wales during my lifetime, emanating from difficult issues such as the Tryweryn Valley flooding in the 1960s, the S4C debacle of 1980 and, more recently, the Barnett formula. Devolution was meant to help avoid at least some such

difficulties, but power devolved is power retained—a truism of which we have become acutely aware in these recent experiences. The underlying issues, which recent difficulties in the context of Brexit have highlighted, are not going to go away. They will continue to plague us until a proper constitutional settlement is reached. I suggest that the sunset clauses define a timescale within which this has to be sorted out.

In the wake of Brexit, the sorts of issues that will arise, and which will strain our constitutional settlement, perhaps to breaking point, include for Wales state aid for threatened industries like steel, the establishment in place of the CAP of a viable sheep-meat regime, and an acceptance that procurement rules can be used to ensure maximum community benefit from public expenditure. Sheep meat is an excellent example of the different perspectives of Westminster and Cardiff. Westminster tends to see it in terms of consumer needs; the Assembly sees it as the cornerstone of our rural economy and of local communities and their attendant culture. Quite frankly, I do not begin to see such considerations being addressed, and if Westminster insists on having a veto over such policies as agriculture, it will be seen as a constraint on devolved ambitions. There has to be give and take or the whole edifice will crumble under the strain of its own self-inflicted tensions. We are in fact trying to constrain the needs of a quasi-federal system within the straitjacket of a unitary state, and it just will not work; four into one will not go.

8 pm

I ask the Minister to be judicious in the way that he uses his powers and that his colleagues do likewise—ones secured with Cardiff by agreement—and I hope before too long that there can be sufficient movement by the UK Government to secure Scotland's agreement too. I beg him not to use these clauses as juggernauts driving pre-conceived ideas into legislative force; but rather, and notwithstanding the powers of these clauses, still to seek agreement on all matters of mutual concern. I put it to the Minister that the price of maintaining the unity of the United Kingdom is to find effective mechanisms that respect diversity.

The wheels of Brexit re-orientate so many aspects of our lives in these islands, it is time for a new beginning, a new mutual respect, between the peoples of our four nations; and the time is now. As I listened to the previous debate on Ireland, I pondered on what might have been our history had there been a federal solution a century ago; but then I remembered that this was not possible because Westminster always wants to have the whip hand. We should now return to that agenda. We should seek to build a new partnership between the nations of these islands to cope with the new world into which Brexit places us. There needs to be a new order—one based on mutual understanding, mutual tolerance and mutual respect. Only then will we get a lasting settlement of these most difficult issues.

Lord Morris of Aberavon (Lab): My Lords, this series of amendments, as the noble and learned Lord has explained, expresses the changes necessary to implement the agreement between Her Majesty's Government and the Welsh Government. I immediately congratulate the Welsh Government on having gone the extra mile and skilfully reached an understanding. I also thank the government negotiators for their part. There has been a great deal of give and take on both sides. I make my comments generally on the agreement and I have given notice in my discussions with Ministers of some of my interests.

I also queried the five years mentioned by the noble and learned Lord, Lord Wallace. Perhaps justification for that can be given. I will not repeat the concerns that I have already expressed, at Second Reading and in Committee, at the insensitive drafting of the original Clause 11. In short, there was a failure—nothing new in Whitehall—to take on board that there is a legally constituted Government in Cardiff as well as in Westminster. I will repeat only that, had the JMCs been working properly and regularly, a great deal of time and energy could have been saved. I welcome the promise of a collaborative process of working out the agreement and the development of frameworks in the JMC in the future. I hope it works much better in the future than it has in the past.

But have the Welsh Government missed a trick? The ghost that is missing—completely absent—from this feast is a reference to financial arrangements. Having spent half my life at the Criminal Bar, the overwhelming maxim in fraud cases with which I was involved was "follow the money". There is no mention of money here. Agriculture and public procurement constitute a substantial amount of money that comes into Wales from Brussels. My interest in farming, with all my family in west Wales in that industry, is well known.

Agricultural support and agricultural matters constitute at least 10 of the 24 temporarily reserved areas. Public procurement deserves a detailed explanation. Why was it included? Could it mean the privatisation of the NHS in Wales through a Westminster input? These matters have not been explained and they are there in the agreement. I would like the Minister to explain the extent of what public procurement means in this context. Have the Welsh Government given away too much under these specified headings?

Mr Gove has promised the continuation of existing agricultural support until, I believe, 2020. Brussels subventions are generally based on need. In general, the present financial arrangements between Westminster and Cardiff are based on the Barnett formula. When I raised the issue with Mr David Lidington at a recent meeting, there was no reply at all on this issue, but it is crucial. What is the future, how is it envisaged and how will the payments be made to Welsh agriculture? Can I have a clear statement of the progress being made by Mr Gove in his negotiations, and what assurances have been given to the Welsh Government in Cardiff?

The implementation of these amendments will be the key to the effectiveness of the agreement between the Welsh Government and Westminster. Could it be confirmed that it is the intention, or at least the hope, that the number of 24 subjects in the temporary arrangements will be reduced in the light of experience? In my day as Secretary of State—I think after I took over agriculture—I had to sign personally all the regulations in addition to the Minister at Westminster

[LORD MORRIS OF ABERAVON]
signing them. So there were two Ministers signing each regulation. Heaven forbid that this involves the resurrection of such bureaucracy in the future. The agreement states:

"It is possible that some additional areas … will be reserved".

What timescale is envisaged for this? It is such an open-ended commitment. I hope the Minister will be able to indicate what is meant by that particular term in the agreement.

In paragraph 3 of the agreement, the words "without prejudice" occur in two contexts. What exactly is the effect of those words in this area? Do the references to the Sewel convention and the words "not normally" mean what they say? There were protracted battles to get confirmation from the Government that there would be legislative consent Motions. That was dragged out of the Government. First there was the prevarication of the Prime Minister, then of the Leader of the House of Commons, and then eventually the Minister here agreed that legislative consent would be given. I hope we can have an explanation of how that will operate, and that there will be no further question about it in the future.

I have said before that once devolution is granted then, short of a Westminster intervention, devolved powers cannot be taken away. I hope, and I specifically wish for confirmation, that the effect of these amendments is that all powers and policy areas will continue to rest with Cardiff unless they are specified to be temporarily held by Westminster.

Lord Lang of Monkton (Con): My Lords—

Lord Thomas of Gresford (LD): My Lords—

Lord Lang of Monkton: I say with great respect to the noble Lord that I think it is the turn of this side of the House.

Like other noble Lords, I welcome the progress that has been made in clarifying the clause as it originally appeared and I congratulate my noble friend and the Bill team on further refining the intentions in a way that I hope will make it much clearer at the end of the day. Their patience and diligence has caused them to go many extra miles and they should be warmly thanked for that. But we have now reached a conclusion that all people of reason and good will will surely welcome. I congratulate the Welsh Assembly Administration on their welcome for these changes. Sadly, the Scottish Administration have not done so. Like the noble and learned Lord, Lord Wallace, I regard that as regrettable. Like the noble and learned Lord, Lord Hope, I truly wish that there were some Scottish nationalist Peers in this House to argue their case, answer our comments and explain their purpose and motives. Just because they are not here, however, that does not absolve us from the obligation to question and challenge their policies and make clear what we think of their motives and the way that they are trying to drive affairs.

Having expressed my views on this matter fairly clearly in Committee, and given the hour and the bulk of amendments that we still have to get through, I propose to cut what I intended to say in half and move on to other matters. So I shall spare the House half of what I originally intended to say.

I welcome the introduction of the new sunset clauses. In Committee, I suggested that the Scottish First Minister was capable of creating a grievance out of a ray of sunshine. On looking at her letter to the Lord Speaker, I see that she does not take too kindly to sunset either. She thinks that the sunset clauses are,

"not something I can recommend to the Scottish Parliament for approval".

I think this a very good idea and an important improvement. The Constitution Committee has long argued for it, as have many others. I will be interested to see what my noble and learned friend the Minister says in his reply to the proposal of the noble and learned Lord, Lord Wallace, to shorten the extensive seven-year period to five years, which must have some arguments in its favour.

I particularly want to ask the Minister about the frameworks. I hope he can clarify the position on something that troubles me, here and elsewhere in the Bill: the possible accumulation of new provisions in legislation, arising from the Bill, that may not all evaporate when the sun eventually sets. For example, as I understand it, all frameworks have to be agreed, and legislation arising from them implemented, before exit day—or, at any rate, secured in some specific way if things stray into the transition period. Otherwise, they could accidentally be allowed to be devolved, to the great detriment of the United Kingdom and as a major change to the devolution settlement. Surely that creates a major time pressure in not just this Bill but those that will flow from it over the next few months. The 40-day cooling-off period adds to the pressure, although I welcome it as a measure. Given the propensity of the devolved Administrations to string matters out for as long as they can, can the Minister assure the House that provisions exist to ensure that all the framework-related legislation will meet the timing deadlines?

Secondly, the Bill would include legal commitments to consult the devolved Administrations on certain areas in future. As a matter of constitutional propriety, that should—and would—happen anyway; it already has, extensively, but now it will be enshrined in law. Given the propensity in some quarters to consider that to consult is to concede, and that consent is equal to granting a veto, can the Minister confirm that there is no question of consultation carrying such implications with it, that this dangerous route is closed off, that all the detritus that will be left after the Bill is implemented will have served its purpose because the measure is essentially transitional, and that such things will eventually fall by the wayside? With those queries and comments, I welcome the changes that have been made. I am confident that they are an improvement and I hope they will speed the Bill towards completion.

Lord Thomas of Gresford: My Lords, I also welcome the fact that the Government have moved so far from their original stance and that the Welsh Government have been able to agree to their proposals. It is a tribute to the force of the argument that united all parties in the Welsh Assembly—as pointed out by the noble Lord, Lord Wigley—against the Government's initial proposals, as well as to the negotiating skills of Mark Drakeford and his team.

As said by the noble and learned Lord, Lord Keen of Elie, the purpose of these provisions is to freeze the exercise of powers transferred from Brussels to Cardiff in 24 specific areas of policy, pending the negotiation and agreement of UK frameworks in those areas. There is a gap: what happens to the powers that are repatriated from Brussels between exit day and the making of these regulations? Where do they lie and are they exercisable by anybody? The noble and learned Lord asked for further guidance. I have looked at the amendment; it is not so much insensitive as tortuous. The machinery by which the restriction is implemented on the Welsh Assembly is contained in proposed new subsection (3), which introduces via proposed new subsection (3A) a new Section—109A—into the Government of Wales Act 2006. There are a number of steps to be taken to implement a restriction relating to retained EU law. It is important that both the principle and the mechanism be clear and understandable to the public and lawyers. I must confess, I found it difficult to understand; I am grateful for the help of the Minister, Chloe Smith MP, and her excellent legal adviser in guiding me through these provisions.

Step one of the process is discussions between the Government and the devolved Administrations. This is not in the new section at all. It is set out in paragraph 7a of the memorandum of understanding:

"Building on the 'Deep Dive' process, which has been a collaborative effort between the governments, discussions will take place between the governments to seek to agree the scope and content of regulations. This process will continue to report into JMC(EN)"—

that is, EU negotiations. Discussions will take place; that is the first step. The forum for those discussions and the means by which binding decisions are made is a very important topic, raised by Amendment 92A, tabled by the noble Lord, Lord Wigley. I reserve further comments until then.

8.15 pm

Step two is set out in subsection (6) of the proposed new Section 109A, which requires a Minister of the Crown to,

"provide a copy of the draft",

of the proposed statutory instrument,

"to the Welsh Ministers, and … inform the Presiding Officer that a copy has been so provided".

The machinery for making subordinate legislation in Wales is in the hands of the Secretary of State and is not made by an Order in Council. I heard the remarks of the noble and learned Lord, Lord Hope, in relation to Scotland; I believe that it is appropriate for the Minister to make the regulations.

Step three of the process is in subsection (4) of the proposed new Section 109A, which requires the Assembly to make a "consent decision" on the draft. That is a misnomer, because the decision of the Assembly may, under proposed new subsection (5), be not to consent or to refuse to consent. A "consent decision" carries with it the implication that the decision is to not consent or refuse to consent. On the face of the clause as drafted, the making of the so-called "consent decision" is just a box to be ticked that permits the Minister to lay the regulation before the UK Parliament for its approval.

What about the Sewel convention? Much is made in paragraph 6 of the intergovernmental agreement, made with the Welsh Government, on the application of the Sewel convention:

"The implementation of this agreement will result in the UK Parliament not normally being asked to approve clause 11 regulations without the consent of the devolved legislatures".

A similar reference to Sewel appears in paragraph 8 of the accompanying memorandum of understanding. Would it not be sensible to put in this clause something to this effect: "The UK Parliament will not normally be asked to approve a draft of regulations made under this section without a consent decision under subsection 5(a)"? That would at least give some meaning to what is meant by a "consent decision". On the other hand, the Government may tell me that they regard themselves bound in making these regulations by the express commitment to the Sewel principle, which we inserted last year as Section 107(6) in the Government of Wales Act 2006:

"But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Assembly".

I would like an express commitment from the Dispatch Box on this point, either to amend the proposed new Section 109A at Third Reading to put the Sewel convention in this clause, or to confirm that Section 107 (6)—last year's insertion into the 2006 Act—will apply.

Having gone through steps one, two and three, there is a step four in making the regulations under proposed new subsection (3)—we go backwards in the drafting. That is confusing. Would it not be helpful to put these steps for making the regulations in their correct order?

The termination of the regulations by sunset provisions is in proposed new subsection (10)—we have to dot around a little bit more. The period specified in the amendment is five years not from exit day, but,

"beginning with the time at which they came into force".

Amendment 89DAJ, tabled by my noble and learned friend Lord Wallace of Tankerness, which I support, seeks to restrict that period from five years to three. Five years is too long. It will certainly extend across at least one electoral cycle of the Welsh Assembly. That means that a Welsh Government might have no powers to act in very important areas of policy at a crucial time of change and development. The creation of an appropriate UK-wide framework agreed between the devolved Administrations surely cannot possibly take as long as five years.

Proposed new subsection (11) is unusually opaque. It says:

"Subsections (4) to (9) do not apply in relation to regulations which only relate to a revocation of a specification".

I do not know what that means. What is "a specification"? Is this subsection designed to permit the revocation of the regulations within the five-year period before the sunset clause comes into operation, if and when a UK framework agreement has been made? If so, should not that mechanism be made clear? Will there be regulations to revoke the regulations—if so, by what procedure—or will the UK Minister be able to revoke those regulations at the stroke of a pen? This subsection needs a meaning attached to it.

[Lord Thomas of Gresford]

I have gone rather technically into the Welsh legislation. I will very briefly turn to Scottish issues and don my MacThomas kilt, which I have not worn since last year's Lonach games in Aberdeenshire. I hope that the Scottish Government see fit to accept the solution agreed by the Welsh Government, but what would be the position if the Scottish Government pass a legislative consent Motion to the Bill but with a caveat regarding these amendments to Clause 11? That is what we were told they were likely to do at a meeting we had with the Minister a few days ago. If that were to happen, should Clause 11 be removed from the Bill altogether, as I have argued at Second Reading and since, and its provisions brought back in new primary legislation after further discussion and, we hope, agreement? What will the Government do with what cannot be a real legislative consent Motion for the Bill if that caveat is put in place?

I do not share in the opprobrium that has been heaped upon the Scottish National Party from time to time during the debates. Scotland is a proud country with a population larger than 10 of the current 28 states that form the European Union. The SNP seeks to take back control. It is prepared to take the risk of economic collapse to gain sovereignty—whatever that means, as someone once said—and it pursues a mirage of prosperity by leaving not the European Union, but the union of Great Britain and Northern Ireland. I would have thought that there are people in this House who might understand that. I understand its position, but I do not agree with it.

Lord Mackay of Clashfern (Con): My Lords, it is appropriate that I should follow the noble and learned Lord, Lord Hope of Craighead, on the Scottish amendments. The First Minister took the unusual step of sending these amendments to the Lord Speaker. I do not think she expected him to put them before the House.

I narrated in Committee how I had been invited to accept some briefing from the Scottish Government through Michael Russell, with whom I have had very pleasant and genial talks and communications since. I should acknowledge that he kindly said in a statement to the Scottish Parliament that he was grateful for the help that the noble and learned Lord, Lord Hope, and I had given, as well as many people in other parts of the House. Relations between us have been extremely good. I have communicated with nobody about it except for Mr Russell and the Lord Advocate. I have not sought to involve anybody else in these communications, except, of course, the Government of the United Kingdom, with whom I was authorised, if you like, to negotiate. I have enjoyed the best possible approach of the Government of the United Kingdom in the Minister responsible and the Bill team. The officials responsible for the negotiations have been extremely helpful. Like many others I am sorry that the Scottish Government have not yet found it possible to agree with the arrangements that have so far been made.

I will take a word or two to explain what I understand the new government Amendment 89DA amounts to. If EU law is removed from the Scotland Act, all EU law comes immediately either to Scotland if it is a purely local country legislation, or, if it covers more than one of the countries of the UK, to the UK Parliament. That happens on Brexit day unless something is done. From what I understand, the proposed new section before us in the amendment will suspend the application of the new arrangements until arrangements are made for the single market—or the internal market—in the United Kingdom. There are, as all of us know, provisions in EU law for that single market. They might require amendment in light of the fact that the EU is no longer the authority for the law, but it is important to keep them in place until it is possible to get them amended in a way that is satisfactory to the United Kingdom, including the devolved Administrations—I include Northern Ireland in that phrase. Therefore, a power is given in the proposed new section to suspend that part of the immediate operation of the Brexit treaty so far as it affects the law.

It is important to see that proposed new subsection (2) says that that kind of restriction does not apply to any modification of EU law so long as it was, immediately before Brexit day, within the competence of the Scottish Parliament. That restricts it to the kind of provision relating to the common market. That is what the amendment proposes in that situation, in the light of the discussions set out in the agreement—the noble Lord, Lord Thomas of Gresford, spoke of that in a general way that applies to Scotland as well as to Wales. As far as I am concerned that is a reflection of the kind of amendment I proposed in Committee to try to get a better arrangement for negotiation. I am glad to know that such a memorandum of agreement has been accepted by the Welsh Government and, I hope, will be accepted by the Scottish Government.

8.30 pm

The First Minister of the Scottish Government sent these amendments to the Lord Speaker. The noble and learned Lord, Lord Hope, and I wanted to give this House an opportunity to hear what they were and to give them some analysis. The noble and learned Lord has opened with that, and I am going to give my analysis. Those of you familiar with the Scottish procedure will know that, in Scotland, the junior spoke first and the senior came second. The noble and learned Lord and I were often in that position, but, at that time, it was a division of status whereas, now, it is a more regrettable division reflecting the age of the participants.

All the amendments on the sheet before us—I suppose that we can call it the recipe for today—refer to Orders in Council. An Order in Council is a method of making alterations to the Scotland Act, which are provided for in it. My understanding is that they apply to variations of or modifications to Schedule 4, which protects various statutes; to Schedule 5, which is the reserved part of the provision; and to Section 63, in relation to transfer of responsibility between Ministers in the UK Government and Ministers in the Scottish Government. These are areas where an Order in Council is required. A common feature of them is that they can be made only with the consent of the Scottish Ministers. That is why this is an attractive way of doing it so far as Scotland is concerned. However, in my approach to the law, it is perfectly open to the Government of the United Kingdom for secondary legislation to be

used wisely. There is no provision that I know of which requires that to be with consent. On the other hand, in the spirit of devolution, it would be right for a type of Sewel convention to be applied. It is on that basis that the memorandum has been constructed. Your Lordships have heard the noble Lord, Lord Thomas of Gresford, suggest that it go on to the statute; I was just anxious to have an informal procedure which was recognised and could be altered, with time for that to happen.

The Scottish amendments that we have put forward for consideration do not really apply to what is here, because what is here is just a modification to the way in which the conclusion of the EU treaty will apply to the laws of the United Kingdom. That provision is perfectly made in this withdrawal Bill without further ado.

The power under new Section 30A(1) is to postpone the freedom to go with EU law in this situation. That power is restricted to two years. The power used under that provision to make the regulations required to implement the single market of the UK are then subject to review by the Administrations if they so wish. The regulations are made to implement that single market as a result of the holding up of the application of EU law. The application of the EU law will then come in in full force after the period of postponement has finished. I do not read the sunset clause as necessarily applying to that. It is more appropriate for the regulations that are made in implementation of the single market. If that is right, the only purpose of the sunset clause is that the regulations cease to exist unless they might be out of existence already as a result of legislation that the Scottish Government or the Welsh Government seek to introduce under the powers that they would then have free from EU law.

There is a question as to how long the subsection (1) powers should apply. They say they are not to be made after two years. I hope it would not be necessary to make provision under that situation for very long—just long enough to pass the regulations that would have to be made to implement the single market. I sincerely hope that the Scottish Government will see that what is being proposed here is not along the lines that require Orders in Council under the Scotland Act, but that it is a completely special situation to deal with the fact that we are going out of the European Union and there is a consequence for the single market. I hope that my noble and learned friend Lord Keen will be able to assure all the devolved legislatures that this is not a common or repeated process but is likely to be absolutely unique. I certainly cannot envisage a second process that is quite the same, and I do not know whether any of your Lordships can. For me, this is unique.

I was rather inclined, when I spoke before in Committee, to think that the way to do this was by a statute of the UK Parliament. Mr Russell indicated, when he spoke to a committee of the other place recently, that it does not require the consent of the Scottish Parliament, although the Sewel convention arrangements are in place. I was of the view that that would be the better way to proceed, because it is fairly simple and straightforward. On the other hand, there are different situations for the different areas of policy where this is required—I think it is 24 or 26 areas of policy—and it seems right that if some are easy to fix, they should be fixed at once, and if some are more difficult, that may take a little longer. So separate instruments are appropriate, rather than necessarily waiting for an Act of the UK Parliament that would embrace the whole lot. I think this is a reasonable arrangement and the best we can achieve. I do not think the UK Government can do any better than this. They have certainly done all that I have asked for, and I hope it will be acceptable to the Government of Scotland. I still hope that maybe, in the light of all the discussion, it may be possible for the Scottish Government to accept it as not in any way seeking to undermine the devolution settlement. It is a method of conforming to the devolution settlement that is practical in the very special arrangements that exist at this time.

Reference has been made to the comments of the First Minister on Scottish Tories. I am a lifetime citizen of Scotland, our home has always been there and, as your Lordships know, my legal training, like that of the noble and learned Lord, Lord Hope, was in the Scottish system. We regard ourselves—certainly I regard myself and I am sure it is the same for my noble and learned friend—as loyal citizens of Scotland and to suggest that we want to destroy devolution is, I think, slightly less than fully true. When I was Lord Chancellor, Sir John Major, as he is now, was Prime Minister and he said he did not want the Lord Chancellor to be involved in the nitty-gritty of party politics. I have tried to follow that ever since and I have never taken any part, recently, in public Scottish politics.

Lord Steel of Aikwood (LD): My Lords, as many Scottish colleagues in the House are aware, over the last year or so my attendance in this place has been spasmodic and uncertain. I am sorry that I have not been able to make any contribution to this very important Bill until now, but I want to make two points, even at this late stage. The first is that it is the second time in 50 years that the country has had to ponder whether to remain part of the European entity. My mind goes back to 1975 when I was appointed to the committee of the Britain in Europe campaign, headed by Roy Jenkins and Willie Whitelaw. I was very much the junior member, the statutory Liberal stuck on this committee of the great and the good, but it was an amazing experience. We had huge public meetings. I remember one, in particular, in Edinburgh at the Usher Hall, where we must have had 2,000 people. I was simply the warm-up man for the great people who were going to speak; namely, the noble Lord, Lord Carrington, and Roy Jenkins. The end result was absolutely decisive, unlike this last occasion in 2016. It was two-thirds to one-third in favour of remaining in the then European Economic Community.

Some will argue that we had it easy in those days because there was no Assembly in Wales; Northern Ireland, then as now, was under direct rule; and there was no Parliament in Scotland, so it was a fairly simple, straightforward argument. But I thought then, as I think now, that the whole history of this country in relation to Europe has been one of running after the European bus after it has left the stop. I am very proud of the fact that I belong to a political party that, under

[Lord Steel of Aikwood]
the inspiration of my great predecessor, Jo Grimond, in 1955 divided the House of Commons on the issue of whether to take part in the Messina talks. They only got a handful of people in the Lobby on one side against the massed ranks of the Labour and Conservative Parties in the other, but they were right and ever since then we have been running to catch the European bus and we have never got near the driving seat. We were simply passengers going in the direction that it happened to be going.

At least in 1975 we were talking about the future of Europe and the kind of country we wanted to be in Europe, which was not the case in the 2016 referendum, when people were arguing about slogans on the side of a bus, money for the National Health Service, immigration and other issues which were not directly related to the kind of country that we wanted to see. One of the extraordinary results of the 2016 referendum was that the over-65s voted clearly to leave and that is a terrible condemnation of the way that the referendum was run, not just by the Brexiteers but by the remainers. It was not run by professional politicians, unlike in 1975, and the result was that people operated on slogans rather than dealing with the real issues. That is my first point.

Now we are in the reverse position of trying to get off the moving bus. People who try to get off moving buses sometimes have accidents and I think Clause 11 was a major accident, which has now been put right. This is my second point. When the Bill was first published, Clause 11 was greeted in Scotland with total incredulity right across the political spectrum. The noble and learned Lord, Lord Hope of Craighead, put it very well at the time, that it was as though the drafters of the Bill simply had not realised what had happened in 1998 with the Scotland Act. They assumed that powers from Europe would automatically come to London and that the Government in London would graciously consider whether at some future point they might transfer some of those powers to Edinburgh. That was not just wrong, it was totally the opposite of what the Scotland Act 1998 said: that when powers that were covered for Scotland by the EU were returned, they would go automatically to Edinburgh, not to London. I think the Government got it completely wrong.

8.45 pm

I join others in paying tribute to Ministers—the Advocate-General and others—who have seen the error of their ways, if late in the day. The noble and learned Lord, Lord Hope, was much more polite than me in saying it was rather late in the day. In fact, we were promised amendments in the Commons; that never happened. It never happened when the Bill was published here in the Lords. But now at last we have the new amendment which is under discussion.

I think these negotiations have gone well. The Ministers in the UK, Wales and Scotland deserve every credit for having achieved what they have so far. I know we are not supposed to discuss Amendment 91 but I hope that, when we come to that, the Government might have something to say on that issue as well. I attach great importance to what the Minister said right at the beginning, which is that we are not near the end: we still have Third Reading to come and there is still the possibility of further discussions. I hope that the Government will be flexible and that the Scottish Government will be flexible and come round to the view that this is really quite a good deal.

Baroness Randerson (LD): My Lords, with so many lawyers speaking this evening, it is with some temerity that I stand to add a few comments. I emphasise that there will not be many.

We have an inelegant, lop-sided form of devolution. I will not spend my time analysing the amendments in detail because the lawyers have done that much better than I possibly could, but I will talk about the process. We would not design devolution like this now and I believe these amendments show how poorly designed our devolution is. Until now it has relied on the overarching EU presence to smooth things over—to take the politics out of the politics—and I think it will be difficult in the future.

The amendments are not ideal. Like my noble friend Lord Steel, I would prefer that Clause 11 had not been there but this is an acceptable compromise. The important thing from my perspective is that it is acceptable to the Welsh Government and the Welsh Assembly. As my noble friend Lord Thomas said, the amendments are complex and tortuous. I was relieved to find that he did not understand one particular phrase. I had been too timid to ask what it meant. My concern is that the Government's attitude towards this has hampered progress. It has taken far longer to reach agreement than it should have done and I believe the grudging attitude of the Government has meant that they have backed themselves into a corner. I recognise the tremendous efforts that have been made in recent days and weeks to deal with this. Nevertheless, while I might be a passionate devolutionist I do not believe that it is honest or straightforward to try to shoe-horn into this Bill an expansion of devolution. I believe that that is the Scottish Government's current position and I feel that it is necessary to accept these amendments, in the current situation, in order to be straightforward with the people of Wales and Scotland. This is about trying to represent devolution in the situation as it is at the moment. If we are to expand devolution, we need a full debate about it in the future.

I believe that it will be politically tricky in the future to manage devolution. Some very sharp edges are revealed in these amendments between the powers of the UK Government and the devolved Governments. For that reason, my final point is that I would very much like to see the position of the JMC properly and fully established. It should not be the occasional add-on at the Government's convenience which it currently is.

The Duke of Montrose: My Lords, perhaps I may come in here to congratulate the Minister on how far the Government have got in solving this rather knotty problem. As I go with this, I feel that I should re-emphasise my authority for speaking as a Scot and as a nationalist, rather as my noble and learned friend Lord Mackay of Clashfern did. Mine is founded rather more in history than in current experience, in that members of my

family have fought and died for Scottish independence on a number of occasions. They were also responsible for sitting on the whole negotiation for the Acts of Union.

I am not sure whether I can fully accept what the noble Lord, Lord Steel of Aikwood, said about all measures going immediately to Scotland. The provision that I tried to raise when the noble and learned Lord, Lord Wallace, was speaking is that what is devolved was devolved under Schedule 5, but Schedule 5 was subject to the earlier parts of the Act. In attempting to modify Section 29, we are in really novel territory because that provision has remained as it was put in the Act in 1998. This is the first time that we have had to take a hatchet to it but the remaining subsection says that the Scottish Parliament will exceed its powers if it tries to legislate for any provision which,

"would form part of the law of a country or territory other than Scotland".

A great many of the powers that are coming back affect all parts of the United Kingdom and that element has to be sorted out.

It is very good to hear from the Minister how the agreement on dealing with the powers from Brussels has been achieved. However, it sounds—or rather, it sounded at the start—as if the Scottish Government had the same view as the noble Lord, Lord Steel of Aikwood: that all law should immediately be devolved to them. This is clearly not going to do. Accompanying a letter from the Chancellor of the Duchy of Lancaster was a table, which explained the Government's view at that point on sorting out what was, I think, a total of 167 measures that they had identified in EU legislation as needing to be addressed. Of these, at that point they had no problem with 12 that needed to be reserved and 49 that could be immediately handed over. Can the Minister give us an update on the Government's view on how many of these laws could immediately be handed over now, as I am sure that they and such things have been subject to negotiation over the Easter period? At the same time, however, we would like to know what legislative process will be put in place to achieve the handing over to the devolved Parliament and Assemblies and how long it is likely to take for those measures.

One or two noble Lords have quoted from the letter of 26 April from the First Minister of Scotland. The noble and learned Lord, Lord Hope of Craighead, has provided a very good outline of how Section 30 will work. I have no doubt that many of us have much to learn about that. I was slightly worried about the First Minister's second suggestion in her letter, when she talks about,

"the existing constitutional arrangement where changes to devolved competence are to be made under Section 30 … by Order in Council subject to the approval of both the Scottish Parliament and the UK Parliament".

I was led to wonder whether an Order in Council, if passed by Her Majesty, was actually subject to approval by the Scottish Parliament at that stage, whereas I think that the amendments that are now in place are suggesting that approval would be sought and, with any luck, granted before the application was made for the order. If the Scottish Parliament were being offered the chance to turn down such a thing as an Order in Council that had already been made, a constitutional change in this order would need more than a memorandum of understanding, which is how the present system works.

Lord Bruce of Bennachie (LD): My Lords, I am comforted by the fact that all of the learned noble Lords who have contributed have acknowledged that this is an extremely complicated situation, one in which there are clearly differences of views. Indeed, the submission that we have had from the Law Society of Scotland took a similar view. However, I also recognise that it is just as well that it is complicated because Clause 11, in its initial format, was brutally simple and wrong. We therefore have got to a position where, after some time, we are now able to debate something that acknowledges the difficulties that Clause 11 originally contained.

Everybody has genuinely welcomed—and should rightly welcome—the progress that has been made, the spirit with which it has been made and the work that has been done to get to a situation which genuinely acknowledges that what we are trying to do is find a decision-making process that carries everybody with us, recognises legitimate interests, but is always left with the elephant in the room, which is, "Where does the buck stop?" Clearly, the buck ultimately stops with the UK because we are a United Kingdom. That, of course, is not entirely acceptable to people who do not believe in the United Kingdom and do not wish it to continue.

It is fair to say that Mike Russell in particular has, on more than one occasion, acknowledged constructive progress and engagement. Indeed, many of us have the view that, left to his own devices, the Scottish Government might have accepted where we are today. The First Minister clearly has not. She has not only sent a letter here to the Lord Speaker, but made fairly—shall we say—lively representations in the Scottish media as to what she thinks is intended. The trouble is that what she said might be legitimately attached to Clause 11 as it was, but it does not legitimately attach to where we are today. That is why the sentiment of this House—and I suspect the sentiment of those people in Scotland who think about it—is that the Scottish Government should be very careful that they do not over-push their position, because Scotland has voted to be in the United Kingdom, is part of the United Kingdom, and recognises that there are shared interests, where we will need to make decisions together. The issue is: how do we find a process that has the trust and confidence and the interests of everybody that can be taken on board?

We might eventually have to talk about a federal constitution; the noble Lord, Lord Wigley, was the only speaker to mention quasi-federalism. We are stumbling towards a federal United Kingdom and we may need to acknowledge that, because federalism would provide a legal framework in which the powers were clearly stated in law and disputes were resolved through a constitutional court.

9 pm

Lord Adonis (Lab): I have been following the noble Lord's very interesting speech very closely. How would he propose to deal with England, which has not been

[Lord Adonis]
mentioned at all in this very long debate, and its 53 million inhabitants in his federal constitution?

Lord Bruce of Bennachie: Of course I would wish to deal with England in a friendly and constructive manner, but the serious point is that many of us have recognised that ultimately, the United Kingdom is England, Scotland, Wales and Northern Ireland. They are the entities. Within England there are lots of other entities, but they fall below the state level. I certainly have never had the difficulty other people have had in saying that a federal constitution would include England having its own voice, but that is for another day. All I am saying is that we have muddled along and now have elected mayors, metropolitan authorities, the London Assembly, the Northern Ireland Assembly, the Welsh Assembly and the Scottish Parliament—all with different powers, different terms of reference and different mechanisms. Although it is very British to maintain this pluralism and diversity, at some point or other we may need to try to find a slightly more coherent framework in which these matters can be resolved and in which people can know that where there is a dispute, there will an impartial resolution based on law, rather than the heavier political weight overruling the lighter weights.

The fact remains that the noble Lord's intervention is entirely right: 85% of the population lives in England. England does not constitute 85% of the land area, but if we have a United Kingdom, there is a responsibility on those of us who live elsewhere than in England to acknowledge the weight of England. But if the English want the United Kingdom to continue, it behoves them to understand that they will have to give probably slightly more than they want to accommodate Wales, Scotland and Northern Ireland, because the price is holding the union together. That is what this debate has fundamentally been about. The argument I always make is that I wonder at what point, if ever, an ultranationalist would regard anything that left residual power with the United Kingdom as acceptable. If your objective is to leave, my only point is that once you have left, you will suddenly find that England is still there and you still have to deal with it. We have had that debate for the past several weeks—about Europe still being there and still having to deal with it. It is the same point.

This debate has been very academic, legalistic and process-driven. In the end, it is about politics and policy and what the Government believe is essentially determined by the UK's national interest and where they believe that allowing the devolved authorities to block something would be contrary to the UK interest. I say that as somebody who acknowledges that there is sometimes a danger that if Scotland insists on its rights, it will be in the interests not of Scotland but of an ideological commitment to being Scottish, and there are people in Scotland who would rather be poor and independent than well off and sharing resources with the rest of the United Kingdom. We need to know where people are coming from. In a sense, in Scotland people are clearer about that than they were a few years ago. I suggest that support for the United Kingdom, with all its faults—and, by God, there are many and they are very conspicuous at the moment—is significantly stronger than it was a few years ago because people have seen the abyss. We are looking into another abyss right now, and I suspect opinion will change accordingly.

The sunset clause has been mentioned by many people. It would be helpful if the Minister explained why we need five years rather than three. The noble and learned Lord, Lord Mackay, made a point about what the sunset clause applies to. I thought it was to the period to which the process would apply, not to the decisions made under that process. That is a point for clarification. From the Government's point of view, what does the sunset clause apply to?

My noble and learned friend Lord Wallace articulated that for a regulation on, for example, pesticides there would clearly be a UK agreement and it would be perverse for any component part to resist it. I shall give one final example because agriculture features quite strongly in these powers. We are about to leave the European Union. The common agricultural policy has been the basis of support for Scottish farmers. It has been based on an acquis which is focused on smaller, more marginal farmers in the less-favoured areas. The House will be well aware that most of them live in Scotland, Wales and Northern Ireland, although I acknowledge that they also live in the Pennines, the Lake District and other parts of England.

There are debates in the Conservative Party about abandoning subsidies altogether. There is clear concern in the devolved areas about the impact of that. But we can look at it both ways. For example, somebody who sees Scotland as having twice as much, much more marginal agriculture than England, in most cases, would say, "We want to be able to continue to support our agriculture". But they might also say, "But we think that is something the United Kingdom should help us with, so there should be a UK policy that helps to contribute to it". The arch-UK nationalist point would be to say, "Well, you can have the right to support your farmers, but you will pay for it out of your own tax base". I would suggest that questions the validity of the United Kingdom, and I will say that in friendly terms to Michael Gove and his team in due course.

The other area is social security, where we have decided that we want to transfer the power. I find it interesting that the SNP is saying, "No, no, we want more power", having said, "We can't quite accept responsibility for social security just yet, because we haven't got the mechanisms in place".

I think we have probably reached a settlement which is the centre of gravity of this debate for now. We now need to devise a process in the longer term whereby collective decision-making can be put into a context where all the component parts honestly feel that they are likely to get their voice heard and a fair and equitable decision, with some kind of external judicial review or appeal process as the final backstop, rather than it being based simply on weight of numbers.

Having said that, I think many of us who saw the beginning of this debate when Clause 11 was published are very grateful that we are now at the end of it and can actually see a way forward. I wish it was true of all other aspects of the Bill.

Lord Adonis: My Lords, I am not sure that it is permissible for an English Peer to intervene in this debate. We have been going for two hours six minutes on Scotland. Earlier, I think we went on for two hours and 57 minutes on Northern Ireland, which reinforces one of the strongest impressions that these debates on the EU withdrawal Bill have left on me, apart from the tragedy of the withdrawal from the European Union itself: the lopsidedness of our constitution.

The United Kingdom is a state of 63 million people, of whom 53 million are in England. The noble Lord, Lord Thomas of Gresford, said earlier that if Scotland were an independent state, it would be larger than 10 EU states. But if England were an independent state, it would be larger than 24 EU states. It would be fourth in the EU and the separation from Scotland, Wales and Northern Ireland would make a difference of only one place in its ranking: it would be behind, rather than in front of Italy.

I only make these points because it is very clear to me that the future constitution of the United Kingdom is going to become increasingly debated and contested, particularly if we leave the European Union and one of its major existing planks is wrenched away. It is also clear to me that one of the reasons why we may be leaving the European Union—there is still a lot of water to pass under this bridge over the next 11 months—is that in England, politicians, particularly in the Conservative Party, which is the dominant political party of England now and historically, have huge difficulty with the notion of sharing power and of different tiers of government to which power is distributed.

By a very painful process, which has been graphically exhibited by all the procedures that have had to be gone through in this Bill—legislative consent Motions and all that—over the last two generations we have managed to reach an accommodation with Scotland and Wales which has enabled devolved government to be introduced. It was extremely painful. It took two lots of referendums, in the case of Scotland and Wales, to do it and we all know the difficulties that there have been in Northern Ireland. In England, we have not even begun seriously to go through that process of sharing power and establishing new tiers of government, with the partial exception of London.

London is very interesting because, like all the metropolitan authorities, it had a long-standing authority, the Greater London Council, which had previously been the London County Council for the best part of a century, but when it diverged from central government policy in the 1980s it was abolished, though it was re-established afterwards. However, that is the only real exception in terms of an authority with significant power in England. Attempts to establish regional assemblies have failed. We are still struggling in the early stages of establishing mayoral authorities but, significantly, the mayoral authorities outside London are partial and weak, and in many parts of the country it is still not even possible to devise what they are.

I simply put down as a marker—it may be that we continue this debate on the next group of amendments—that this is going to be an increasingly big and problematic issue for us. Indeed, if Brexit is accomplished in the next 11 months, because the unitary state of England, which effectively runs the UK, will be even more powerful in its own sphere than it is now because it will not even be sharing any of its sovereignty and power with Brussels, then I suspect this is going to become a still more difficult issue to address in due course. I was very struck by the noble Lord, Lord Bruce, mentioning federalism. At some point this issue will have to be grasped, but at the moment no one has the faintest idea how England would be represented and be able to exert its proper role within a federal constitution. I cannot see that happening any time soon.

I note that the noble Lord, Lord Wigley, has an amendment coming up. The noble Lord has played a complete blinder through these debates. I have to say that Wales has been spectacularly well represented—in his person, for a good deal of the time, with a bit of help from one or two other noble Lords. If England had had a voice as powerful as his in this Chamber, I think we might have got a federal UK with a Government and Parliament of England a long time ago. He is doing a spectacularly good job.

I notice—this is very telling—that the noble Lord's Amendment 92A on the Joint Ministerial Committee makes no reference whatever to England. The JMC is about the Government of the UK and then Scotland, Wales and Northern Ireland. That sums up the huge constitutional deficit we have in the UK at the moment, which is the government and proper representation of England within the UK. I suspect that this issue will increasingly dominate our politics if we leave the EU.

Lord Griffiths of Burry Port: My Lords, we come to the conclusion of this debate on Clause 11. Once again, it behoves me, I feel, to express appreciation for the very hard work and the deep diving that has been done by all those who have produced the state that we now find ourselves in. In presenting my concluding remarks, I want to set out one or two reasons why the party I belong to here, the Labour Party, has been more than happy to give its assent to the intergovernmental agreement—that is, the statement that culminates from the various strands of thinking that have gone into the making of it. For someone who is new to political exercise, and who was always taught that politics is the art of the possible, this seems to represent as good an illustration of that as I could wish to find.

I should like to set out why we on these Benches support the government amendments now. There are at least five reasons, and I will be very quick about them because it is a late hour already. As the Welsh Labour Government have recognised, so we want to confirm that this package represents a solution that protects devolution, which is very important, as fully as possible as we grapple with the myriad consequences of Brexit. First, as we see with the amendments in this group, it confirms the inversion of the Clause 11 brought before us by the Government in Committee. The original proposal would have retained all returning EU powers over devolved policy areas at Westminster and allowed only Ministers of the Crown to release them to the devolved institutions when they chose to the extent, and the timescale, that they alone determined. That has been reversed. All powers over devolved policy areas, except those in areas where it is agreed that UK frameworks are needed, will be held in Cardiff

[Lord Griffiths of Burry Port]
and Edinburgh and, at the appropriate time, we hope and trust, in Belfast. When the EU law restriction ends, that means the devolved institutions will be able to exercise them without the current requirements to operate within those EU frameworks. In these areas, devolved competence will increase. This model is therefore wholly compatible with the reserved powers model embedded in the Scotland Act and the Wales Act 2017, whereby everything is devolved except things specifically retained at Westminster.

9.15 pm

Secondly, the agreement sets out a collaborative process between the Governments to identify where frameworks are needed and to develop draft regulations that specify which EU powers will be frozen. Moreover, it applies the Sewel convention. Reference has been made to all these matters, so forgive me for repeating them while trying to bring them together now. On secondary legislation, the National Assembly and the Scottish Parliament will be asked for their consent, and the United Kingdom Government make the same commitment not to normally proceed without such consent, as applies to primary legislation that touches on devolved policies.

Indeed, it contains further safeguards compared to Sewel, because if the United Kingdom Government want to press on with making regulations in the absence of consent, they have to present not just their views but those of devolved Ministers as to why their legislature has refused consent. This puts the United Kingdom Parliament in a position of genuinely deciding on the facts, not just on the recommendations of the Westminster Government.

I feel led to break off this list for just a moment to go into parenthetical mode to comment on two things that people north of the border have tried to say about the agreement. The first is that all that the Government need to proceed without further explanation is a consent decision, referred to in the amendments. I invite the Minister to confirm that this is absolutely not the case. If any of the legislatures do not give consent, Ministers of the Crown will have to set out both their reasoning for wishing to press ahead and the arguments of devolved Ministers. The purpose of the amendment on the consent decision is simply to enable regulations to be put before Parliament before 40 days have elapsed if all the devolved legislatures have given their views more quickly.

The second is the view that where consent is denied, it is the United Kingdom which will get to decide. That is hugely misleading, as in those circumstances, as we understand it, it will be for both Houses of Parliament to decide whether to approve the draft regulations, taking into account both the arguments from Ministers of the Crown and those from the devolved Ministers. This House has a strong record of support for devolution, and it is hard to envisage your Lordships' House supporting future instruments that potentially undermine it.

Let me return to the piste that I was on. I have sat in a seminar room with the noble and learned Lord, Lord Hope of Craighead, and now understand a jolly sight more about the law than I did. It was interesting to hear the way that he and the noble and learned Lord, Lord Mackay of Clashfern, dissected the proposals that came from Scotland to omit Clause 11 and the whole business about type A and type C—I made a note of it and will look it up—and whether Orders in Council made for a specific purpose under the 1998 Act can readily, easily and naturally be applied in these instances. I shall do no more than congratulate the noble and learned Lord, Lord Hope, who wanted to open up consideration of the Scottish aspects of the agreement, and has certainly succeeded. I have listened carefully to the debate, and a lot of Scottish voices have spoken. I hope that the way in which the issues, as they relate to Scotland, have been discussed will be studied well by those north of the border. As others have said, we can only hope that there is even now hope—no, not "Hope", "hope"—of a revision or development of thinking there.

The intergovernmental agreement gives an unequivocal guarantee that UK Ministers will not bring before Parliament any legislation relating to England to make changes to retained EU law in areas subject to regulations. This effectively establishes a level playing field across the UK, with the effect of the regulations being to retain the current EU frameworks in operation across the whole UK until new frameworks are negotiated and agreed. This commitment will also provide a strong incentive to the UK Government to agree frameworks long before the five-year maximum term, to which ample reference has been made, provided by the regulations, because otherwise they cannot make changes—for example, to reform agricultural policy. It is worth noting here that, in current circumstances, although the duty not to legislate in contradiction of EU law applies to all parts of the UK, it is also asymmetric: in Scotland and Wales it is a requirement of the devolution legislation while, in England, it is enforced by the EU treaties.

These amendments put into the Bill sunset clauses—again, there has been a good discussion of that issue. All powers in devolved areas currently held by the EU will be exercised in Holyrood and Cardiff Bay. Any restrictions on competence, therefore, are temporary. Despite the distance travelled in recent months—we can only rejoice at that—we can express the hope for two things in the minutes, days and weeks that lie ahead. First, I hope the Minister will confirm that the door remains open to the Scottish Government. Given the progress made—and the intergovernmental agreement when it was formed seemed to have the support of both the Welsh and Scottish Governments, a situation that has regrettably changed subsequently—it would be a tremendous shame if the Government closed off the possibility of further talks taking place or limited changes being brought forward at Third Reading. Constitutionally, in terms of the conventions of this House, I do not know how that could be done—finding wriggle room to achieve something of significance that might take the argument further, even at this late stage.

Secondly, assuming that the Minister is happy to keep the door open, as I hope he is, I urge the Scottish Government to continue engaging with a view to joining the intergovernmental agreement and providing legislative consent for this Bill. The Labour Party is

the party of devolution; we accept that this amendment is a huge improvement on where we started and sincerely hope that games are not being played with the devolution settlement by the Scottish Government.

I note that the noble and learned Lord, Lord Mackay, in presenting his amendment in Committee, and in his earlier contribution, highlighted the necessity for Parliament to act as a backstop if, despite collaborative processes designed to lead to agreement between the UK and the devolved Governments, discussions ended in deadlock. This contention, which commanded widespread support across the House in Committee, is one at the heart of our current constitutional settlement. We rejoice at the place we have reached, which is honest, open and takes things forward. In the spirit of wanting a legal system that is functioning, and well, the day after Brexit, it is a noteworthy contribution to that progress.

Lord Keen of Elie: I am most obliged to noble Lords for their contributions to this debate. I am essentially moving a series of very complex and extensive amendments to the Bill, from Amendment 89DA through to Amendment 92AD, with consequential amendments from Amendment 89DB through to Amendment 117C. The noble and learned Lord, Lord Wallace, has moved his own amendments on sunsetting constraints, which I shall address; and the noble and learned Lord, Lord Hope, has moved extensive amendments from Amendment 89DAA through to Amendment 92BBA—and, indeed, could have extended his Motion for amendment further than that, I suspect.

At the heart of this lies a simple principle. The EU has developed and maintained a single market for the benefit of the members of the Union. As we exit the EU, we are anxious to maintain a single market for the benefit of the union of the United Kingdom. That is what it comes to. In doing that, we must of course respect the devolution settlement and the position of the devolved entities and parliaments, whether in Scotland, Wales or Northern Ireland—even though at present it is not sitting as an Executive, which we acknowledge.

I am not going to address the original Clause 11. Noble Lords have expressed their views on that and I do not need to either add to them or necessarily rebut them; we are anxious to move on, and to move this amendment. What are we intent on doing? Well, I would counter the suggestion from the noble Lord, Lord Wigley, that this is a power grab. Such rhetoric has been thrown about before, of course, and I do not feel that it would advance matters to engage with that sort of rhetoric. I just remind noble Lords of the terms of the amendment itself. If your Lordships have the Marshalled List of amendments, at page 7—or, for the noble Lord, Lord Wigley, page 8, where it refers to Wales—I simply read out proposed new Clause 30A(1):

"An Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law so far as the modification is of a description specified in regulations made by a Minister of the Crown".

We know that there is then an elaborate process for the making of those regulations; the noble Lord, Lord Thomas of Gresford, referred to the stages that would be gone through in the making of those regulations. Let us then look at subsection (2):

"But subsection (1) does not apply to any modification so far as it would, immediately before exit day, have been within the legislative competence of the Parliament".

There is no intention here to intrude upon the existing legislative competence of the parliaments. But of course, as powers come back, it is necessary to consider which of those powers have to be maintained in order that we can have a functioning internal market in the United Kingdom. That is the objective and what we seek to do. All powers pass to the devolved Administrations on exit day where no regulations have been made under the proposed amendment. That is the right policy outcome that we have agreed with the Welsh Government and which we still seek to agree—I emphasise still—with the Scottish Government.

That takes us on to the question of how the frameworks have been arrived at. Noble Lords will recollect that, at the Joint Ministerial Committee in October last year, the principles to be applied were agreed by all those attending: the Welsh Government, the Scottish Government and the United Kingdom Government. I just add in response to a point raised by the noble and learned Lord, Lord Wallace, that where he finds reference in the amendments to "principles", that refers to the principles that were agreed at that stage and are carried over in the agreements. At the present time, we have identified 24 areas of retained EU law—or what will be retained EU law—where we require frameworks to maintain an internal United Kingdom market. There is debate about some additional areas, which will have to be addressed in due course. We have focused our attention now on 24; it may be fewer at the end of the day, as we talk our way through them, because they apply only to particular areas of policy, not to one general area. We are not talking about agriculture or fisheries, we are talking about discrete aspects of these policy areas that are perceived to be necessary in order to maintain the UK internal market.

Perhaps before I move on, because a number of noble Lords have raised the point, I should address the question of how the regulations will operate. That can be seen from the proposed amendment, and there are two elements to it. Proposed subsection (7) says:

"No regulations may be made under this section after the end of the period of two years beginning with exit day".

That is the first period of two years. If no regulations have been made in respect of what is perceived to be a necessary framework, no regulations will be made. Proposed subsection (9) says:

"Any regulations under this section which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to any Act of the Scottish Parliament which receives Royal Assent after the end of that period".

Therefore, in so far as we have not taken that forward, these powers will then revert to the appropriate authority.

9.30 pm

As regards those periods, perhaps I may respond to two points, one made by the noble Lord, Lord Thomas of Gresford, and the other by the noble and learned Lord, Lord Wallace. First, it will be possible to revoke those regulations before the five-year period—that is, the outlier that is, as we say, the sunset clause. Under the terms of the Interpretation Act, it is implicit that

[Lord Keen of Elie]
where there is a power to make regulations by the affirmative procedure, there is a power to revoke those regulations by the affirmative procedure. The same procedure would be used to take them out as to put them in. That is how we would intend to proceed in that context.

On the period of the clause and the suggestion that it should be reduced to three years, there have been considerable and in-depth discussions between officials as well as Governments with regard to these provisions. In light of those detailed discussions, particularly at official level, it was concluded that a period of five years would be appropriate for the second part of the sunset provision. That is why we have arrived at the period of five years, and we feel that in light of the advice given in that context, it would be appropriate to maintain that period of five years. I cannot say that there is some formula I can apply to justify five years; it is based on the in-depth analysis that has been carried out over a period of time since October last year with regard to how we will deal with these frameworks.

Of course, there may be a situation in which, after exit, regulations have not been made, in which case powers will then—

Lord Wallace of Tankerness: It seems that we have an explanation. Were officials of the Scottish Government involved in that and, if in-depth work has been done, would the Minister help the House by publishing it?

Lord Keen of Elie: I am not in a position to say that such work would be published, because of course it has been on the basis of engagement between officials dealing with this. I do not believe that there is any official report to that effect; it is just a matter of the product of engagement between officials negotiating these matters. Therefore I cannot indicate that we will publish anything in that regard. That is to try to explain the position with regard to the sunset clauses in the regulations. I turn to the question—

Lord Thomas of Gresford: The Minister was about to tell us about the gap my noble friend introduced between exit day and the making of the regulations.

Lord Keen of Elie: I am obliged to the noble Lord. There may be a situation in which powers go to the devolved Administrations and yet they do not deal with those powers, and it may be considered that upon further consideration there are additional areas where frameworks ought to be based on a UK-wide determination and where regulations would be made. But as the noble Lord himself observed, that regulation-making process would involve us consulting the Scottish and Welsh Governments—and, I hope at that stage, a Northern Ireland Executive—so that we could secure their consent. Only if there was a failure to secure the consent would the matter go forward to this Parliament, with two clear safeguards. First, the Minister of the Crown would have to explain to Parliament why he was seeking to make those regulations without the consent of a devolved Administration, and secondly, there would be an opportunity for the devolved Administration to make their representations to this Parliament as to why they felt it appropriate to withhold their consent. But, as I said, there may be a period after exit when it occurs to parties that it might be appropriate to proceed in that way.

Turning to the question of where we are with the Scottish Government, I begin by saying that the door—

Lord Kerr of Kinlochard (CB): Before the noble and learned Lord moves on, did I miss it or has he answered the point made by the noble and learned Lord, Lord Mackay, on when the sun will rise before it spins across the sky for five years? When does it start? Is it with the particular regulation?

Lord Keen of Elie: I am obliged to the noble Lord, Lord Kerr. My understanding is that the five-year period will commence from the point at which the regulation is made.

Lord Kerr of Kinlochard: So in practice we could be looking quite a long way ahead—it is five plus X.

Lord Keen of Elie: I am tempted to mention here the noble Countess, Lady Mar.

Noble Lords: Oh!

Lord Keen of Elie: But I will not. If the noble Lord wishes me to elaborate on the operation of the sunset clauses, I would be quite content to write to him. At this stage, perhaps I can continue—with the encouragement of the noble Lord, Lord Griffiths—to address the question of the Scottish Government.

We are extremely grateful that we have achieved consensus with the Welsh Government and will be able to take this forward with their wholehearted agreement. I will come on to one or two points raised by the noble and learned Lord, Lord Morris, in a moment. As far as we are concerned, the door is still open for the Scottish Government, and we would be anxious to see them come through it so that we can take this forward with the agreement of all the Administrations in the United Kingdom. However, we are where we are at the present time. As regards their proposed amendments, they would, by different routes, result in a situation in which one of the devolved Administrations would effectively hold a veto over the implementation of UK-wide legislation for the maintenance of the UK internal market. That, I respectfully suggest, could not and would not be appropriate.

The exit from the EU raises complex questions with regard to the construction and application of the Scotland Act 1998 because, in 1998, such an exit was never contemplated. Reference has been made to Schedules 4 and 5 to the Scotland Act 1998 and the mechanisms for their amendment, but, as we were reminded by the noble and learned Lord, Lord Wallace, those are not the only mechanisms that impact upon the competence of the Scottish Parliament. We have to look at the terms of Section 29 of the 1998 Act, which as the noble and learned Lords, Lord Wallace and Lord Mackay, observed raises issues with regard to territoriality in respect of the competence of the Scottish Parliament. I do not want to go into the detail of that at present, but one notices that its competence is

limited in that respect, and by reference to EU law as well. Therefore, we do not consider that, at the end of the day, we can appropriately accept a situation in which the devolved Administration can exercise a veto over the exercise of power by the United Kingdom Parliament in situations where it is being exercised for the benefit of the UK as a whole. I hope that that goes some way to explaining, without looking at the complexities of the 1998 Act, why we do not feel we are in a position to accept the position expressed by the Scottish Government on this point.

We simply regret the fact that, despite the very significant efforts—I underline "significant"—of the representatives of the Welsh Government and the Scottish Government in producing an outline agreement, it has not been possible to persuade the Scottish Government to join us on that point.

The noble Lord, Lord Wigley, suggested that this might reflect a lack of trust. As I have observed on previous occasions, this is not an issue of trust. This is an issue of constitutional propriety. Whatever view one takes of the devolved settlement and of where we are with regard to the legislation on that, at the end of the day it is not appropriate to accept that one of the devolved Administrations could effectively exercise a veto over legislation for the benefit of the other members of the Union—namely England, Wales and Northern Ireland.

Lord Wigley: I thank the Minister for the detail in which he is responding to this debate and the work that he has undertaken. None the less, there may be issues such as the sheep meat regime, which we have used in a number of circumstances as an example where the differential impact of policies in one area such as Wales may be much greater than the impact in other areas. To that extent, the wishes of the Welsh Government in that context should have a greater weight, in the same way as when Welsh Ministers represent the UK in the Council of Ministers to discuss the sheep meat regime. Is it not possible to fine-tune the Government's proposals to enable that happen?

Lord Keen of Elie: With respect, I must say that it is our clear intention, which is reflected in the memorandum of understanding in the agreement, that we will engage with the devolved Administrations in the consideration of these framework agreements and their application. Of course, these matters will be taken into account at that stage. But I do not consider it appropriate to bring that sort of granular detail into this Bill, which is designed for a very specific purpose. I hear what the noble Lord says and, clearly, we wish to proceed on the basis of mutual respect and understanding with the other devolved Administrations.

In that context, I underline the point in response to a query raised by the noble and learned Lord, Lord Hope, speaking, I understand, on behalf of the Scottish Government who are not otherwise represented in this House. There is no question of this process under Clause 11 being somehow the thin end of the wedge so far as the devolution settlement is concerned. The devolution settlement is a reality of our constitutional situation and one that we extended under the 2016 Act, really quite recently, in light of the Smith review. We continue to respect, understand and wish to apply the devolution settlement. But it is a devolution settlement that has to work for everyone in the United Kingdom. I return to the point that it cannot work for everyone in the United Kingdom if one devolved Assembly or Government assume that they have the ability to exercise what amounts to a veto over legislation that is relevant, pertinent and important to the entirety of the United Kingdom.

I move on to address one or two additional points raised by noble Lords in respect of these matters. The noble and learned Lord, Lord Morris of Aberavon, referred to finance and whether the Welsh Government had missed a trick. I do not believe that they did for a moment. Indeed, they put themselves one step ahead by embracing this agreement and the amendment. But the noble and learned Lord raised a point about funding. He is right to point out that our agreement for the Welsh Government does not speak to funding but that is not to say that funding has been forgotten or put to one side. Clearly, it is a matter that will be addressed. We recognise the importance, for example, of the Barnett formula. We understand why there is concern, particularly about agricultural funding under CAP Pillar 1 under the current EU budget that runs to 2020. We have provided a degree of certainty by promising to continue to commit the same total cash funds for farm support across the UK until 2022. At present, the Secretary of State for the Environment is in close discussion with his counterparts in the Welsh and Scottish Governments on exactly how our agricultural systems should work outside of the EU. I stress that that is not a matter for this Bill. This is the Bill that provides for our exit and our exit alone, so I hope that the noble and learned Lord will accept that. He raised the question of public procurement—again, these issues are not for this Bill but we are clearly conscious of them and they will have to be addressed.

The noble Lord, Lord Griffiths, also raised the question of whether further areas might be the subject of reservation under the freezing provisions of the amendment. We have identified 24 areas for frameworks but a number of other areas that could be the subject of regulations going forward are still subject to discussion. I acknowledge that. Noble Lords may recollect that we published the list of frameworks and included not only the 24 areas I have referred to, but a further 12 where there is ongoing discussion about how they will be addressed and resolved.

I am conscious that I have not answered every question that has been posed. If noble Lords are concerned that I have not addressed a point that still concerns them about Clause 11, as amended, I would be content to receive their queries and write to them. In the event that I write to any noble Lords on this issue or any issue relating to this clause, I will place a copy in the Library. I seek to reassure noble Lords on that point. With that, I will formally move each amendment. I am sorry—the noble and learned Lord, Lord Hope, has to reply.

9.45 pm

Lord Hope of Craighead: My Lords, it is for me to say what will happen to my Amendment 89DAA, which is an amendment to Amendment 89DA, moved by the noble and learned Lord the Minister.

[Lord Hope of Craighead]

I want to make a few short points. First, I want to pick up on a remark made by the noble Lord, Lord Thomas of Gresford, that he will not accept the opprobrium that was visited on the Scottish Ministers for the way they conducted themselves in these negotiations. Having had discussions with Michael Russell and the Lord Advocate—like the noble and learned Lord, Lord Mackay of Clashfern—the points I put forward in my introduction to my amendment were sincerely held. Those points were not made to cause trouble. The Lord Advocate in particular gave advice on his reading of the Scotland Act; Michael Russell, for his part, was entirely genuine in his points about principle as well. That should be clearly understood.

When I was in practice at the Scottish Bar, I was junior to the noble and learned Lord, Lord Mackay of Clashfern. As he pointed out, if I appeared with him, I would speak first; it would then be his function, as my senior, to speak second. Quite frequently, I found that when he spoke, he refined the kind of argument that I was attempting to put forward. It took on a slightly different—rather more attractive, perhaps—appearance after he had refined it. As he pointed out in his speech, the points that I made about the construction of Section 30 and the other sections do not really apply in the situation with which we are dealing here. I was grateful for his remark that the situation is unique and not seeking in any way to undermine the devolution settlement. I am extremely grateful to the Minister for making the same point that there is no question of this being the thin end of the wedge or in any way seeking to undermine the devolution settlement, to which he wishes to adhere. These remarks should help a lot in reassuring those in Scotland on how they should approach the continuing discussions. I was glad to hear from the Minister that the door is still open; I think that the Scottish point of view still regards the door as open too.

Perhaps this debate has refined things and shown that the purist argument—that of principle—does not really apply here. This is not about trying to construct the market that we were trying to construct in 1998, which was done by separating out the bits that mattered for that market into Schedule 5 so that they were clearly identified. We are dealing with a different, rather more subtle, situation in trying, as the Minister said, to create a functioning internal market with what has come back to us from Europe. That requires a rather more subtle approach that is not really dealt with in the Scotland Act, for understandable reasons. That being so, I hope very much that the way forward will be pointed by our discussion this evening. Without any further ado, I beg leave to withdraw my amendment.

Lord Keen of Elie: My Lords, I intervene to raise a point that I have spoken to the clerk about. Noble Lords might recollect that earlier in the evening I gave a passing imitation of a rabbit in headlights. The reason for that was that it appeared to me that the amendments in group three had been moved and agreed without me speaking to them—which is absolutely ideal, as far as I am concerned. They are highly technical amendments, but I felt I should mention that to the House, lest any noble Lord wishes me to speak to them. As I said, they have been agreed, but noble Lords did not have an opportunity to hear my dulcet tones on the subject.

Amendment 89DAA, as an amendment to Amendment 89DA, withdrawn.

Amendments 89DAB to 89DAK, as amendments to Amendment 89DA, not moved.

Amendment 89DA agreed.

Amendments 89DB and 89DC

Moved by ***Lord Callanan***

89DB: Clause 11, page 8, line 40, leave out "(3)" and insert "(3C)"

89DC: Clause 11, page 8, line 41, at end insert—

"(4A) Part 1A of Schedule 3 (which imposes reporting obligations on a Minister of the Crown in recognition of the fact that the powers to make regulations conferred by subsections (1) to (3C) and Part 1 of Schedule 3, and any restrictions arising by virtue of them, are intended to be temporary) has effect.

(4B) A Minister of the Crown may by regulations—

(a) repeal any of the following provisions—

(i) section 30A or 57(4) to (15) of the Scotland Act 1998,

(ii) section 80(8) to (8L) or 109A of the Government of Wales Act 2006, or

(iii) section 6A or 24(3) to (15) of the Northern Ireland Act 1998, or

(b) modify any enactment in consequence of any such repeal.

(4C) Until all of the provisions mentioned in subsection (4B)(a) have been repealed, a Minister of the Crown must, after the end of each review period, consider whether it is appropriate—

(a) to repeal each of those provisions so far as it has not been repealed, or

(b) to revoke any regulations made under any of those provisions so far as they have not been revoked.

(4D) In considering whether to exercise the power to make regulations under subsection (4B), a Minister of the Crown must have regard (among other things) to—

(a) the fact that the powers to make regulations conferred by the provisions mentioned in subsection (4B)(a), and any restrictions arising by virtue of them, are intended to be temporary and, where appropriate, replaced with other arrangements, and

(b) any progress which has been made in implementing those other arrangements."

Amendments 89DB and 89DC agreed.

Amendment 90 not moved.

Amendments 90A to 90C

Moved by ***Lord Callanan***

90A: Clause 11, page 8, line 42, leave out "other"

90B: Clause 11, page 8, line 43, after "legislation" insert "not dealt with elsewhere"

90C: Clause 11, page 8, line 43, at end insert—

"(6) In this section—

"arrangement" means any enactment or other arrangement (whether or not legally enforceable);

"review period" means—

(a) the period of three months beginning with the day on which subsection (4C) comes into force, and

(b) after that, each successive period of three months."

Amendments 90A to 90C agreed.

Amendment 91

Moved by ***Lord Wigley***

91: Clause 11, page 8, line 43, at end insert—

"( ) This section may not come into effect until—

(a) the Scottish Parliament has passed a resolution approving the provisions in subsection (1);

(b) the National Assembly for Wales has passed a resolution approving the provisions in subsection (2); and

(c) the Northern Ireland Assembly has passed a resolution approving the provisions in subsection (3)."

Lord Wigley: My Lords, Amendment 91 stands in my name and those of the noble Lord, Lord Steel of Aikwood, and the noble and learned Lord, Lord Hope of Craighead. It would require the consent of each of the devolved parliaments to be obtained before Clause 11 comes into effect.

Amendments 107 and 108, standing in my name only, provide that none of this Act, except for this clause, would come into force until the Prime Minister was satisfied that resolutions signifying consent have been passed by the Scottish Parliament, the National Assembly for Wales and, unless direct rule is in place, the Northern Ireland Assembly. Both amendments deal in different ways with the element of consent relating to the Act. Both would enshrine the Sewel convention in law. The Sewel convention dictates that the UK Government shall not normally legislate in areas of devolved competence without consent. Consent is sought through a legislative consent Motion. Very rarely do the devolved Parliaments withhold consent. It has happened I believe—I can be corrected if I am wrong on this—only once in Scotland and once in Northern Ireland since 1999. Ironically, it has been used seven times by the National Assembly for Wales. I am not quite sure what that tells us.

The point I am underlining is that withholding legislative consent is not used lightly. It is treated with caution and respect. It is the only constitutional tool available to the devolved Parliaments to challenge the balance of power across the British Isles. However, we know from the Miller case on the Article 50 Bill that the Sewel convention is merely that: it is a convention. The UK Government are wholly within their rights to override any decision made by the devolved Parliaments in relation to this Bill or any other Bill deemed within devolved competence.

I have spoken at length on previous occasions about the need for the Sewel convention to be enshrined in law in relation to this Bill. This is the most wide-ranging constitutional Bill since the European Communities Act 1972. I have spoken at length about the need for the devolved Parliaments formally to consent to Clause 11—I shall not repeat those arguments. I will, however, point to the most recent developments whereby the Welsh Labour Government have implied consent to the Bill, having accepted the amendment to Clause 11 laid by the Government, although time will tell whether that will carry through the Assembly. Those same amendments are insufficient for the Scottish Government and every opposition party in Scotland except the Scottish Conservative Party. The main sticking point for these parties is consent.

The UK Government have tried to devise a new meaning for consent in relation to the functions of Clause 11. They seem quite deliberately to be confusing "consent" with a consent decision. There is a difference, but I think that everybody who reads about this matter in the generality may not be aware of it. The UK Government can impose restrictions on the National Assembly for Wales's competence as long as a consent decision has been made—not that consent has been obtained. The substance or result of that consent decision is immaterial. The UK Government can steam ahead even if a consent decision is not made. This, quite frankly, is a farce. I believe that there will be a lot of public discussion about that as matters move forward.

We have reached a point in history whereby the current constitutional arrangements, the political conventions underpinning the UK's intragovernmental relations, are under pressure and in danger of unravelling. In the way that the UK Government are handling consent, they are making it a concept whose understanding among the public is in some doubt and it is causing severe mistrust across the four nations. I urge the UK Government to act, to listen to the Scottish Government and to come to an agreement on consent and a new UK constitution.

Amendment 91 should be grasped by the House today and the Government should accept it to resolve the position in Scotland and to get out of the unholy mess in which they have landed in Wales. I beg to move.

Lord Hope of Craighead: My Lords, I have put my name down in support of the amendment. The arguments which led me to do that are those which I set out when I was moving my amendment earlier this evening, so I need not take up the time of the House in repeating them. What I said earlier is the full explanation as to why I put my name down.

Lord Keen of Elie: My Lords, I thank the noble Lord for his amendments, which are pertinent given the different positions of the Scottish and Welsh Governments and the imminent timing of votes in their legislatures that will address consent.

The Government have been clear that they wish to make the positive case for consent for this Bill. We have not just talked about our commitment to making that case but have shown it. We have engaged in extensive discussions with the devolved Administrations and have now introduced the amendment to Clause 11 that we have just discussed at some length to try to meet the expectations of the devolved legislatures. I hope that the noble Lord, Lord Wigley, will accept that our commitment to the legislative consent process is reflected in the agreement that we struck with the Welsh Government last week.

[Lord Keen of Elie]

This is the legislative consent process in action. We have put forward policy objectives; we have worked through the differences, and we have found an appropriate compromise. As a result, the Welsh Government have recommended that the National Assembly for Wales grant legislative consent to the Bill when it votes on this matter, I believe, on 15 May. The Welsh Government agree that our amendments now strike the right balance between providing legal certainty and maximising assurances to the devolved legislatures on how we will jointly manage the process of powers returning from the EU in otherwise devolved areas. Of course we are disappointed that we have not been able to reach the same agreement with the Scottish Government, but this, I suggest, is not for want of trying. I stress again that time remains for the Scottish Government to join this agreement, so that we can all demonstrate that we have done what we consider to be the responsible thing in this context.

10 pm

There comes a point where this Parliament, the United Kingdom Parliament, must take action to protect the interests of the United Kingdom as a whole, and of each of its constituent nations. We have already discussed at length the implications of one part of the United Kingdom, representing just one nation, having a veto over legislation that is designed to protect and work across the United Kingdom as a whole. Regrettably, the position of the Scottish Government is essentially to impose such a veto or remove Clause 11 in its entirety from the Bill. I suggest that no Government who govern in the interests of the whole of the country could agree to such terms.

These amendments would mean that the United Kingdom Government would be restricted, but more importantly that the United Kingdom Parliament would have a veto placed on its ability to act in the interests of those it represents. That cannot be right for a sovereign Parliament. Indeed, it is not the purpose of the Sewel convention. It is not the purpose of the legislative consent process. It is worth us noting that Amendments 107 and 108 go further than just Clause 11. Their effect would make it an absolute legal requirement for legislative consent to be secured before any part of the Bill can come into force. I suggest that that cannot be right. It would place the authority of this Parliament to determine how we leave the European Union below that of the devolved legislatures. It would allow them the final say on matters that fall outside their respective jurisdictions and their respective competence.

In a sense, it reminds one of a very important contribution made by the noble and learned Lord, Lord Mackay, in Committee, when he said that,

"powers which are effectively exercised within a single devolved area should be devolved immediately ... Powers the EU has which to be effective require to operate in more than one of the devolved areas should go to the UK Parliament".—[*Official Report*, 26/3/18; col. 625.]

That is the very purpose of the proposed amendment to Clause 11. That is where we should be. The amendments proposed by the noble Lord, Lord Wigley, would give the devolved legislatures the final say over those powers that operate in more than one of the devolved legislatures, and therefore we cannot accept them. At the end of the day, the Bill has to provide legal and administrative certainty. I therefore urge the noble Lord to consider again the appropriateness of these amendments.

Lord Wigley: I ask for one point of clarification from the Minister. Does he not accept that there is a real danger of confusion in the public mind between allowing a consent order and actually getting consent? In other words, the process can be one where consent is given, is not given or is refused, but whichever of those three outcomes it is, the process can still go on for a parliamentary resolution here by order; and we know that orders, in the House of Commons and here, go through on the nod most of the time. Is that not a deception, giving the impression that there is a consent mechanism when, in fact, it is a pretty meaningless one?

Lord Keen of Elie: I simply do not accept the noble Lord's characterisation of the matter. It is clearly the case that where consent, for example, was sought and not obtained, it would be necessary for the Minister of the Crown to address that, very clearly and specifically. There would be the opportunity, as there always is, for the devolved Administration to make their own views clear as to why they had declined consent. I do not believe that this is in any sense deceptive, misleading or a mirage. These are constitutional requirements that are adhered to and that will be adhered to. It would not be appropriate to introduce the sort of amendment moved by the noble Lord that would, in effect, tie the hands of this sovereign Parliament, so far as this exit process is concerned. Whatever view one might take about the merits of exit, that is neither here nor there. This is a constitutional principle with regard to the sovereign Parliament of the United Kingdom when it comes to legislate for the benefit of the entirety of the United Kingdom. I therefore urge the noble Lord to withdraw his amendment, and indicate that I would not expect to return to this matter at Third Reading.

Lord Wigley: I am very grateful to the Minister. I have heard that form of words from his colleagues in the past. Clearly, this is a matter on which there may be a difference of opinion. I realise the need for there to be coherence on a UK scale but there are matters which have a specific effect in Wales, Scotland or Northern Ireland where their interests need to be taken into account. Clearly, we are not going to make progress on this tonight. Therefore, on the basis of the discussion we have had, I beg leave to withdraw the amendment.

Amendment 91 withdrawn.

Amendment 92 not moved.

Amendment 92A

Moved by ***Lord Wigley***

92A: After Clause 11, insert the following new Clause—

"Joint Ministerial Committee

(1) The Joint Ministerial Committee is to consist of —

(a) one member appointed by the Prime Minister of the United Kingdom;

(b) one member appointed by the First Minister of Scotland;

(c) one member appointed by the First Minister of Wales; and

(d) one member appointed by the First Minister and Deputy First Minister of Northern Ireland,

or, if it is not possible to appoint four members, the member appointed by the Prime Minister under paragraph (a) and two members appointed under paragraphs (b) to (d).

(2) The persons referred to in subsection (1) may—

(a) appoint themselves to the Joint Ministerial Committee; and

(b) appoint different members for different meetings of the Committee.

(3) The Joint Ministerial Committee must be chaired by the member appointed by the Prime Minister.

(4) Where there is a proposal from any member of the Joint Ministerial Committee for a decision to be made on any question, that proposal must be approved only where—

(a) in the case of there being four appointed members, there is an affirmative vote by at least three of its members;

(b) in the case of there being three appointed members, there is an affirmative vote by at least two of its members.

(5) No recommendation is to be made to Her Majesty in Council to make an Order in Council under the provisions of section 11 of this Act without its having been first approved by the Joint Ministerial Committee.

(6) No UK framework providing for agreed action on matters which were, on the day immediately preceding exit day, devolved to Scotland, Wales, or Northern Ireland may take effect without its having been first approved by the Joint Ministerial Committee.

(7) In this section, "the Joint Ministerial Committee" means the body set up in accordance with Supplementary Agreement A of the Memorandum of Understanding on Devolution between Her Majesty's Government, the Scottish Government, the Welsh Government and the Northern Ireland Executive Committee."

Lord Wigley: The main purpose of Amendment 92A is to strengthen the position of the Joint Ministerial Committee on EU Negotiations in relation to the creation of UK frameworks.

The amendment is by no means complete and may lack some technical finesse, which the Government could put right in the other place if they were to accept this proposal. It does, however, propose practical ways around the devolution deadlock. We must remember that, at least in the Scottish situation, the court has yet to come to its conclusion, and if it finds in favour of the Scottish Government, the Scottish continuity Bill could remain a block to progress on implementing this measure. The amendment proposes an alternative to the restrictions placed on the devolved Parliaments through Clause 11 and by the Government's amendments to Clause 11. It proposes that we go beyond mere consultation rights for the devolved nations. I accept that this Bill might well not be the legislative vehicle we would choose to use to formalise such an important intergovernmental mechanism in law, but I want to draw the Government's attention to the alternatives to Clause 11 as amended.

The JMC already brings together representatives of the Governments of the United Kingdom, Scotland, Wales and Northern Ireland to discuss matters of common interest. However, at present the JMC has no power. It has no legislative underpinning. It is simply a discussion forum, for consultation and voluntary co-ordination. I remind noble Lords that no minutes are taken. It is an essentially informal arrangement. It meets on an ad hoc basis. There was no meeting last year for over six months. In the context of the European negotiations, that is totally inadequate.

As an alternative to Clause 11 to decide on areas which will require UK frameworks—a facility which the Government may well find they need—as things stand, the JMC is not fit for purpose. Strengthened and bolstered, however, it could provide a way of allaying the critics of Clause 11. It could provide a way of collaboratively deciding on areas that will require temporary legislative restrictions on devolved competences, including on England, which is not currently the case in the Bill—an omission which has already rung some alarm bells in Cardiff and Edinburgh.

This is not a new phenomenon. Dr Jo Hunt and Rachel Minto of the Wales Governance Centre have written extensively about the need for robust intergovernmental structures if the UK constitution is to operate effectively into the future. To achieve this, the JMC should be put on a statutory basis, with clear powers, membership and voting rights. This would replace the current—typically British—constitutional arrangement based on gradually evolving informal understandings.

The JMC should require majority voting. Having four members—appointed by the UK Government, Wales, Scotland and Northern Ireland—would imply the need for an affirmative vote of three members, or two out of three if the Northern Ireland Executive is suspended, or if one abstains. This in turn implies that the UK Government would need to secure support from most of the devolved authorities in order to achieve a decision in favour of their proposals. They would no longer be able simply to consult and then overrule them. The JMC would then effectively become a council of Ministers for the UK's own internal market.

Some colleagues may have noticed that when the Public Administration and Constitutional Affairs Committee visited Holyrood on Monday, Richard Leonard, leader of the Scottish Labour Party, William Rennie, leader of the Scottish Liberal Democrats, and the Green co-convener, Patrick Harvie, all expressed their objection to Clause 11 as it stands. William Rennie in fact alluded to needing a level playing field across the UK for the withdrawal Bill. He said:

"Westminster having the final say isn't sufficient. There needs to be some kind of mechanism, perhaps around qualified majority voting of some sort".

This concept is gaining ground and it might just result in consent.

This is a tool the Government need to get out of the predicament in which they find themselves. Even if it cannot be included in the Bill now, I hope the Government will look seriously at finding a greater role for the JMC and at some way of giving it a legislative underpinning. I beg to move.

Baroness Finlay of Llandaff (CB): My Lords, in my own profession when you make a mistake you stop, reflect and rectify. Fortunately, we have seen that

[Baroness Finlay of Llandaff]
happen with Clause 11 and I take this opportunity, having not spoken previously, to commend all players who have renegotiated the amendments that we have agreed to this evening. I pay particular tribute not only to Mark Drakeford but to Carwyn Jones, who has had a role in all this—much more quietly than Mark Drakeford, who has fronted it—and all the civil servants who have supported this process. I have certainly appreciated the interventions from the noble Lord, Lord Bourne of Aberystwyth, who has kept me up to date with some of the progress.

This amendment, as proposed by the noble Lord, Lord Wigley, takes us to the next stage because when you are in a completely new situation, you have to do the best you can. You have to learn from past mistakes and find a new way forward. We are facing a completely new, evolving situation. There really need to be new working arrangements between the devolved nations and Westminster, and they have to be on a much more level playing field than before. I can see that the way this amendment has been drafted is not for the Bill and I would not expect the Government to accept it. However, I hope that the principle of having a different framework whereby these discussions happen will be accepted and taken forwards. I also hope that, however the terms of reference for this group are written, they will be open for discussion and come out of discussion with all the nations involved, rather than being centrally generated and offered as something to be signed up to. There really is a need for ownership going forwards.

On rectifying what has happened as we enter the new partnership, which the noble Lord, Lord Wigley, spoke about previously, I thought it was telling that in the previous debate the noble and learned Lord, Lord Morris of Aberavon, mentioned money. One way the Government might like to help re-establish some of the working practices is to build on the debate we had the other day about the Swansea barrage, consider asking the National Assembly for Wales what it would like to do, and help it achieve whatever it feels is best for jobs and the future energy supply of Wales.

Lord Thomas of Gresford: My Lords, it is always a pleasure to follow the noble Baroness, Lady Finlay, and I agree with everything that she said. In the previous debate, I quoted paragraph 7.a. of the *Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks*. I will repeat it because it is worth repeating. It says:

"Building on the 'Deep Dive' process, which has been a collaborative effort between the governments, discussions will take place between the governments to seek to agree the scope and content of regulations. This process will continue to report",

into the JMC on EU Negotiations. This amendment, tabled by the noble Lord, Lord Wigley, allows us to discuss the very important issue of how those discussions are to take place, what decisions are to be taken and how they are to be taken over the formation of the UK framework agreements.

10:15 pm

The memorandum of understanding of October 2013, between the UK Government on the one hand and the Scottish Ministers, the Welsh Ministers and the Northern Ireland Executive—the devolved Administrations—on the other is not legally binding and does not create legal obligations between the parties. In particular, it explicitly does not create any rights for the devolved Administrations to be consulted on anything. However, supplementary agreement A to that MoU provided for a Joint Ministerial Committee whose purpose was stated to be to ensure uniform arrangements for relations between the UK Government and the devolved Administrations. It considers devolved matters only where the UK Government and the devolved Administrations so agree. Paragraph A1.lO of the MoU of 2013 says that it is a consultative body rather than an executive body, and will reach agreements rather than decisions. It may not bind any of the participating Administrations, who are free to determine their own policies while taking account of JMC discussions.

That might have been all very well in 2013, when we were within the architecture of the EU, but even so it failed. It met irregularly, it sat in private, and it published vague communiques. It had no permanent independent secretariat, so it decided to form an offshoot, the JMC (EN) with terms of reference—it is interesting to look at these—to discuss each Government's requirements for the future relationship with the EU and to seek to agree a UK approach to, and objectives for, the Article 50 negotiations, to provide oversight of the negotiations to ensure that outcomes agreed by all four Administrations were secured and to discuss issues stemming from the negotiation process. It spectacularly failed to meet from February to October of last year at the very most critical time in the Brexit timetable.

The frustrations about its operations were expressed by Mark Drakeford and Michael Russell, of whom we have heard a lot today, in a joint letter to David Davis on 15 June last year:

"We want to use JMC (EN) as a forum in which we can have meaningful discussions of key issues, aimed at reaching agreement rather than an opportunity to rehearse well-established public positions. Unfortunately, this was not our experience of the way the Committee operated prior to the Election."

That referred to the general election last May.

The JMC stumbled back into existence in October, and on 13 December, Mark Drakeford made a written statement to the Welsh Assembly on the discussions of the JMC (EN) of the previous day:

"Phase 2 of negotiations will determine the future relationship of the UK Government with the EU. The powers devolved to the Welsh Government and the National Assembly for Wales are deeply embedded in these discussions and we are absolutely clear that the devolved administrations must be fully engaged in the preparation of UK negotiating positions and the negotiations themselves. This is vital both for the proper and respectful representation of devolved issues but also so that the EU can be assured that the UK negotiating team is fully representative of the interest of the whole UK".

Of course, that is what was said by him to the JMC, but absolutely nothing happened; nothing has happened to include the devolved Administrations in the preparation of the negotiations that are currently going ahead.

There is, therefore, clearly a need to put the Joint Ministerial Committee on a statutory basis. It would require the four Administrations to meet regularly. It would be the forum for the discussions referred to in the memorandum of agreement recently made. It would lead to common UK-wide binding frameworks. It should

have a formal structure and an independent secretariat but, above all, it should have the power to take and implement decisions, rather than simply being a talking shop, as the JMC has been until now.

The noble Lord, Lord Wigley, set out his views of the membership of the JMC and suggests a process of qualified majority voting to avoid giving any one of the Administrations a veto over the others. The Welsh Government had suggested that the UK representative and one of the devolved Administration representatives would be sufficient. The noble Lord thinks three out of four would be the proper way of going about it. He also argues that the approval of the JMC should be given before any UK framework could take effect. These are all vital issues and it requires a much fuller debate than we can possibly have at this time of the evening and at this time of this Bill.

Supplementary agreement A3 to the current MoU of 2013 provides an elaborate set of dispute avoidance and resolution procedures. In 2013, the Government thought that they had better find a way of solving any problems that may arise, but then they went on to say:

"Like the MoU itself this agreement is a statement of intent, creating no legal obligations between the parties, and binding in honour only".

There has to be a dispute resolution mechanism in a statutory JMC. Whatever mechanism is chosen, it has to bind the UK Government and the devolved Administrations. We have a lot of work to do in this area.

Lord Adonis: I congratulate the noble Lord, Lord Wigley, on trying to rewrite the entire British constitution at 10 pm in one amendment to the European Union (Withdrawal) Bill. In his defence, the Government are rewriting the rest of the British constitution in the rest of the Bill, and we have frequently been debating that after midnight, so I do not think that the Government can complain in principle about what he is seeking to achieve.

I shall make two observations on the noble Lord's amendment and then I will have a question for the Minister. I think that the noble Lord, Lord Bourne, will be replying. That is part of the reason that I got to my feet, as I particularly want to ask him about consultation with local authorities in England.

My first point is that the noble Lord, Lord Wigley—he was quite open about it—is seeking effectively to introduce a formal federal constitution. Let us be clear: if this became law, effectively the devolved Administrations would have a veto over the United Kingdom Government in certain circumstances, depending on how the weighted voting worked. If that happened, this body would become a new second Chamber. We would then have two second Chambers: this body, which would act as one court of debate and veto over the United Kingdom Government; and the House of Lords as well. If we go down that route, which we may well have to go down eventually as we debate House of Lords reform and all the consequentials of Brexit, then we probably will at some stage end up with a proper federal second Chamber and a substantial rewriting of the United Kingdom constitution. I simply note that that is what the noble Lord is seeking to do, taking a significant step forward from the existing JMC.

The second point I am bound to make is that the word "England" does not appear in about 40 lines of proposed legislative change. Even though I am repeating this point at 10.23 pm, it is quite an important one. Some 53 million of the 63 million people who live in this state live in England. The one debate we have had in the entire proceedings on the European Union (Withdrawal) Bill regarding how the government of England will be improved as a result of this Bill was on an amendment moved, I seem to recollect, by the noble Lord, Lord Shipley, on what the consultation and institutional procedures are going to be after we withdraw from the Committee of the Regions. I seem to remember the Minister saying that he was going to meet local authority representatives in England soon and that he did not rule out—I pressed him on it and got a slightly vague answer, but he was trying to engage—establishing some institutional mechanisms for the formal consultation of local authorities in England to replace the arrangements in respect of the Committee of the Regions, which is of particular importance to the regions of England because of regional development policies hereafter, when the Regional Development Fund ceases to apply.

I see the noble Baroness, Lady Goldie, has her folder open. Is the noble Lord replying? He is. I wonder whether he could update us on how his consultations are going with local authorities in England. In particular, is it the Government's intention to introduce some formal machinery for developing consultation with local authorities in England?

Lord Wigley: To clarify, the amendment, as the noble Lord will no doubt have noticed, refers to,

"one member appointed by the Prime Minister of the United Kingdom".

I imagine that would be someone representing England, the point being that there is no Prime Minister of England equivalent to the First Minister of Scotland, the First Minister of Wales and the First Minister and Deputy First Minister of Northern Ireland, as specified in the amendment.

Lord Adonis: The noble Lord—I would like to call him my noble friend—gives the game away. He says that he imagines that this person might represent an English constituency. In fact, he might or might not. If the noble Lord, Lord Bourne, were Prime Minister, he comes, I understand, from Aberystwyth. He would then be the representative of the UK Government. In our lifetime, I served under one Scottish Prime Minister. I have never served under a Welsh Prime Minister, but there have been one or two Welsh candidates for that post in the past.

In England we are not very good at this rigorous constitutional thinking. Let us be clear, even if it were an English Member of Parliament or Minister, their role would be to represent the Government of the United Kingdom; it would not be their role to represent England, separate from the Government of the United Kingdom.

Finally, when the noble Lord produces his full draft of a new written constitution for the United Kingdom with his proposal for a federal senate, which I assume

[Lord Adonis]
will be his next amendment on Third Reading, could he please suggest some arrangements for how England will play a part in his federal arrangements?

Baroness Hayter of Kentish Town (Lab): My Lords, we have a lot of sympathy for the amendment. We agree with its aims in so far as they put the JMC on a statutory basis. The formula is not one for this House to write, but undoubtedly the objective of putting that on a statutory basis is one that we support.

I think there were different Ministers at the time of the Article 50 Bill, but we had an amendment at that stage that would have required the Government to set out the relationship with the devolved authorities, particularly over Brexit, obviously. We included at that stage formalising the Joint Ministerial Committee and I think it remains a good idea. At Second Reading, or certainly since, we raised the issue in the context of the Bill.

So we are very sympathetic to the objective of Amendment 92A. Our reservation is about its form. I do not think it is in the right form, but that is not for us to do. Even more importantly, this goes well beyond the Brexit Bill and it needs looking at. We urge the Government to look seriously at the objective of Amendment 92A and to discuss it with the devolved Administrations. If this or something similar found favour and everyone thought it would be a good idea to put it on to a statutory basis, I am sure this side of the House would be very amenable to making such a movement possible.

10.30 pm

The Parliamentary Under-Secretary of State, Ministry of Housing, Communities and Local Government and Wales Office (Lord Bourne of Aberystwyth) (Con): I thank noble Lords who have participated in the debate; we all agree it is very late in the evening for such an important issue. I thank the noble Lord, Lord Wigley, for bringing this to the attention of the House and putting his case very crisply. We have already debated possible structures for the UK Government and devolved Administrations to come together in consideration of common frameworks. I do not want to simply repeat those arguments, particularly at this time of the evening, so I will not.

It is important to note that the Government are currently reviewing the existing intergovernmental structures with the devolved Administrations, as agreed by the Prime Minister and First Ministers at the meeting of the JMC plenary on 14 March. It is important that the review closely aligns with our work on future common frameworks. That undertaking was given then, and it is something that we are looking at.

I note a certain irony in the proposal from the noble Lord, Lord Wigley, that, had this been on the statute book, I presume he would have been championing our agreement with the Welsh Government and saying that it was effective because two Administrations out of the three had agreed to it. Nevertheless, despite that very handy point, I must say that I cannot accept what he is arguing for—not for that reason, obviously, but for others.

We have shown that we are flexible in responding to the devolved Administrations' requests or concerns regarding the operation of the current structures, including on the management of meetings and the content of discussions. We have all benefited from that process. Why would we not want that to be the case? I believe the pragmatism and flexible approach that we have seen, particularly from the Welsh Government—but, yes, extending certainly to Mike Russell's approach—is something that has benefited us all. However, we do not agree that the solution would be for intergovernmental relations to be placed on a statutory footing, as suggested by the noble Lord, particularly in this amendment. In all fairness, I think he anticipated this point in saying that he realised that it would not perhaps find total favour with the Government, a point on which he is correct.

That said, we hear much of the failures of our intergovernmental structure and no doubt it could be improved, but we do ourselves a disservice if we do not also recognise its successes. I thank the noble Baroness, Lady Finlay, very much for her kind comments about the Government's approach and about me particularly; I am very grateful for that. She noted that the JMC (EN) has been very effective. It now meets frequently under the chairmanship of my right honourable friend the Chancellor of the Duchy of Lancaster, who has also continued to meet his counterparts frequently between meetings. Indeed, the committee has met today and has made some progress.

We should note that it is through the effective working of the committee that we have been able to make the progress that we have on Clause 11, and it is through this that we have reached agreement with the Welsh Government on the proposals before noble Lords today. Like other noble Lords, I place on record our thanks and our respect for Mark Drakeford, a competent Minister in the Welsh Assembly—not someone with whom I would agree politically on many occasions but he has shown a flexible, pragmatic and collaborative approach. This is grown-up politics in devolution days, and that is the way to move things forward. There was evidence of some of that approach in Scotland as well, to be fair, but ultimately, as we have noted, the JMC is not a decision-making forum. Its role is just to make an agreement that then goes elsewhere—for understandable reasons. That is something else on which I disagree with the noble Lord; I do not think it can be a decision-making body. I can see the use of bringing people together, which we are doing. It is flexible, and that is the way our constitution operates.

I note the points made by the noble Lord, Lord Thomas of Gresford. Some I would agree with, but I cannot really think of anything more chilling than putting it on an inflexible statutory basis, other than the earlier prospect when the noble Lord talked about his appearance in Aberdeenshire in a kilt. That was probably somewhere along the same lines—somewhat chilling. On a serious note, though, I have to say that although I agree it is good to have bodies where we can discuss these issues, flexibility, as this has demonstrated, is of great use.

We must, as we are doing, foster a culture of collaboration, close working and, yes, compromise, which we have seen in the discussions. That is the way

to move things forward in the sort of structure we have in our country, in the make-up of the four nations.

I agree with the noble Lord, Lord Adonis, that England is the dog that does not bark—or has not so far. I agree with him on the absence of the word "England" in the amendment of the noble Lord, Lord Wigley. Obviously, the Prime Minister of the United Kingdom, who, as we know with Gordon Brown, does not need to represent an English constituency, is Prime Minister of the whole of the United Kingdom. That perhaps exhibits the difference between me and the noble Lord, Lord Wigley, for whom I have the greatest respect. He perhaps let the cat out of the bag on that point: he or she is not Prime Minister of England but of the whole state.

That said, some important points that we will want to consider have been made this evening. I noted with seriousness the points made by the noble Baroness, Lady Hayter, and have sympathy with the need for some structure that underpins the union. As unionists, we would applaud that. I have always said that the noble Lord, Lord Wigley, is at the acceptable end of Plaid Cymru—he sees the sense of the workings of the union—and I thank him for his input, which I know is well made.

I turn to some points made by the noble Lord, Lord Adonis—off piste but I will happily pick them up—about the Committee of the Regions. Perhaps other noble Lords will confirm this, but I believe that I have written to noble Lords about a meeting that not I but my honourable friend in the other place, Rishi Sunak, had with leaders of local government. That meeting has taken place. If noble Lords have not received the letter yet, it means that it has not yet gone out, but it is certainly in the system. It indicates that it was a positive meeting and that there would be more.

Here we go into the devolved structures that are now very much part of our system. The noble Lord will appreciate that on devolved matters, the Welsh, Scottish and—when that part of the country is up and running with power-sharing—Northern Ireland local government leaders will be in discussion with the devolved Administrations. That is of course a matter for them to take forward. We are taking it forward with all local government leaders, but, in relation to Scotland, Wales and Northern Ireland, only on those matters that are reserved to us. It was a positive meeting—the letter will outline the progress made—but there are to be more meetings. I cannot remember saying anything other than that, and that is all I am able to convey at this stage.

With that, at this very late hour, I thank noble Lords for their contributions on serious issues. I will ensure that the noble Lord, Lord Thomas of Gresford, who made some very technical but, I am sure, valid points, gets a full response. I respectfully ask the noble Lord, who is my noble friend in personal terms, to withdraw the amendment.

Lord Wigley: I am very grateful to the noble Lord, Lord Bourne. I take the opportunity to thank him for—

Lord Bourne of Aberystwyth: I am very grateful to the noble Lord, Lord Wigley, for giving way. One thing I forgot to say, which I know he will be anticipating, is that we will not be coming back to this issue. I know that he was probably coming on to the fact that I had not said that, so let me say now that we will not be coming back to this at Third Reading, so if he wishes to press the issue, he should do so now.

Lord Wigley: My Lords, seeing the noble Lord, Lord Callanan, sitting next to the noble Lord, I took that as read at this stage of the debate.

I wanted to put on record my appreciation and thanks to the noble Lord, Lord Bourne, for the consultation and the opportunity to discuss various aspects of the Bill. I hope that we can take advantage of that in future. I also thank everyone who has taken part in the debate—the noble Baroness, Lady Finlay, the noble Lord, Lord Thomas of Gresford, the noble Lord, Lord Adonis, who has stood up so effectively for England, and the noble Baroness, Lady Hayter—for their contributions.

I have just a couple of quick points. Of course, there needs to be thought about how England comes into any such structure, but the same argument exists now as it probably did 100 years ago: whether it is England as a whole or England on a regional basis, and how that interplays when you have national units elsewhere. That needs to be thought through.

I will obviously withdraw the amendment in a moment, but I hope that out of this debate, two avenues of thought can proceed on the post-Brexit situation. One is, what will become the equivalent of the Council of Ministers when we have a multinational United Kingdom as a single market? Thought needs to be given to that, and it may be something that can be pursued outside.

Secondly, if we cannot put the JMC on a legislative basis, how can we at least make it much more formal and therefore more effective, so that it plays the role it has the potential to play? As the noble Lord, Lord Thomas, outlined, it has not always done so as effectively as it should. I hope that the noble Lord, Lord Bourne, might be able to sow the seeds of thinking on that in other parts of government, and that we do not allow the water just to run into the sand from this short debate tonight. On that basis, I beg leave to withdraw the amendment.

Amendment 92A withdrawn.

Schedule 3: Further amendments of devolution legislation

Amendment 92AA

Moved by ***Lord Callanan***

92AA: Schedule 3, page 28, line 29, leave out from "law" to end of line 37 and insert "and the modification is of a description specified in regulations made by a Minister of the Crown.

(5) But subsection (4) does not apply—

(a) so far as the modification would be within the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or

(b) to the making of regulations under Schedule 2 or 4 to the European Union (Withdrawal) Act 2018.

(6) A Minister of the Crown must not lay for approval before each House of the Parliament of the United Kingdom a draft of a statutory instrument containing regulations under subsection (4) unless—

(a) the Scottish Parliament has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Parliament having made such a decision.

(7) For the purposes of subsection (6) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Parliament first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(8) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (6) must—

(a) provide a copy of the draft to the Scottish Ministers, and

(b) inform the Presiding Officer that a copy has been so provided.

(9) See also paragraph 6 of Schedule 7 (duty to make explanatory statement about regulations under subsection (4) including a duty to explain any decision to lay a draft without the consent of the Parliament).

(10) No regulations may be made under subsection (4) after the end of the period of two years beginning with exit day.

(11) Subsection (10) does not affect the continuation in force of regulations made under subsection (4) at or before the end of the period mentioned in subsection (10).

(12) Any regulations under subsection (4) which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to the making, confirming or approving of subordinate legislation after the end of that period.

(13) Subsections (6) to (11) do not apply in relation to regulations which only relate to a revocation of a specification.

(14) The restriction in subsection (4) is in addition to any restriction in section (Status of retained EU law) of the European Union (Withdrawal) Act 2018 or elsewhere on the power of a member of the Scottish Government to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.

(15) In this section—

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the Scottish Ministers,

and, in calculating that period, no account is to be taken of any time during which the Parliament is dissolved or during which it is in recess for more than four days.""

Amendment 92AAA (to Amendment 92AA) not moved.

Amendment 92AA agreed.

Amendments 92AB to 92B

Moved by ***Lord Callanan***

92AB: Schedule 3, page 29, line 6, leave out from "law" to end of line 18 and insert "and the modification is of a description specified in regulations made by a Minister of the Crown.

(8A) But subsection (8) does not apply—

(a) so far as the modification would be within the Assembly's legislative competence if it were included in an Act of the Assembly, or

(b) to the making of regulations under Schedule 2 or 4 to the European Union (Withdrawal) Act 2018.

(8B) No regulations are to be made under subsection (8) unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, each House of Parliament.

(8C) A Minister of the Crown must not lay a draft as mentioned in subsection (8B) unless—

(a) the Assembly has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Assembly having made such a decision.

(8D) For the purposes of subsection (8C) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Assembly first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(8E) In subsection (8C)—

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the Welsh Ministers,

and, in calculating that period, no account is to be taken of any time during which the Assembly is dissolved or during which it is in recess for more than four days.

(8F) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (8B) must—

(a) provide a copy of the draft to the Welsh Ministers, and

(b) inform the Presiding Officer that a copy has been so provided.

(8G) See also section 157ZA (duty to make explanatory statement about regulations under subsection (8) including a duty to explain any decision to lay a draft without the consent of the Assembly).

(8H) No regulations may be made under subsection (8) after the end of the period of two years beginning with exit day.

(8I) Subsection (8H) does not affect the continuation in force of regulations made under subsection (8) at or before the end of the period mentioned in subsection (8H).

(8J) Any regulations under subsection (8) which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to the making, confirming or approving of subordinate legislation after the end of that period.

(8K) Subsections (8C) to (8I) do not apply in relation to regulations which only relate to a revocation of a specification.

(8L) The restriction in subsection (8) is in addition to any restriction in section (Status of retained EU law) of the European Union (Withdrawal) Act 2018 or elsewhere on the power of the Welsh Ministers to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.""

92AC: Schedule 3, page 29, line 29, leave out from "law" to end of line 44 and insert "and the modification is of a description specified in regulations made by a Minister of the Crown.

(4) But subsection (3) does not apply—

(a) so far as the modification would be within the legislative competence of the Assembly if it were included in an Act of the Assembly, or

(b) to the making of regulations under Schedule 2 or 4 to the European Union (Withdrawal) Act 2018.

(5) A Minister of the Crown must not lay for approval before each House of the Parliament a draft of a statutory instrument containing regulations under subsection (3) unless—

(a) the Assembly has made a consent decision in relation to the laying of the draft, or

(b) the 40 day period has ended without the Assembly having made such a decision.

(6) For the purposes of subsection (5) a consent decision is—

(a) a decision to agree a motion consenting to the laying of the draft,

(b) a decision not to agree a motion consenting to the laying of the draft, or

(c) a decision to agree a motion refusing to consent to the laying of the draft;

and a consent decision is made when the Assembly first makes a decision falling within any of paragraphs (a) to (c) (whether or not it subsequently makes another such decision).

(7) A Minister of the Crown who is proposing to lay a draft as mentioned in subsection (5) must—

(a) provide a copy of the draft to the relevant Northern Ireland department, and

(b) inform the Presiding Officer that a copy has been so provided.

(8) See also section 96A (duty to make explanatory statement about regulations under subsection (3) including a duty to explain any decision to lay a draft without the consent of the Assembly).

(9) No regulations may be made under subsection (3) after the end of the period of two years beginning with exit day.

(10) Subsection (9) does not affect the continuation in force of regulations made under subsection (3) at or before the end of the period mentioned in subsection (9).

(11) Any regulations under subsection (3) which are in force at the end of the period of five years beginning with the time at which they came into force are revoked in their application to the making, confirming or approving of subordinate legislation after the end of that period.

(12) Subsections (5) to (10) do not apply in relation to regulations which only relate to a revocation of a specification.

(13) Regulations under subsection (3) may include such supplementary, incidental, consequential, transitional, transitory or saving provision as the Minister of the Crown making them considers appropriate.

(14) The restriction in subsection (3) is in addition to any restriction in section (Status of retained EU law) of the European Union (Withdrawal) Act 2018 or elsewhere on the power of a Minister or Northern Ireland department to make, confirm or approve any subordinate legislation so far as the legislation modifies retained EU law.

(15) In this section—

"the relevant Northern Ireland department" means such Northern Ireland department as the Minister of the Crown concerned considers appropriate;

"the 40 day period" means the period of 40 days beginning with the day on which a copy of the draft instrument is provided to the relevant Northern Ireland department,

and, in calculating that period, no account is to be taken of any time during which the Assembly is dissolved or during which it is in recess for more than four days.""

92AD: Schedule 3, page 29, line 44, at end insert—

"PART 1A

REPORTS IN CONNECTION WITH RETAINED EU LAW RESTRICTIONS

Reports on progress towards removing retained EU law restrictions

3A_(1) After the end of each reporting period, a Minister of the Crown must lay before each House of Parliament a report which—

(a) contains details of any steps which have been taken in the reporting period by Her Majesty's Government (whether or not in conjunction with any of the appropriate authorities) towards implementing any arrangements which are to replace any relevant powers or retained EU law restrictions,

(b) explains how principles—

(i) agreed between Her Majesty's Government and any of the appropriate authorities, and

(ii) relating to implementing any arrangements which are to replace any relevant powers or retained EU law restrictions,

have been taken into account during the reporting period,

(c) specifies any relevant regulations, or regulations under section 11(4B), which have been made in the reporting period,

(d) in relation to any retained EU law restriction which has effect at the end of the reporting period, sets out the Minister's assessment of the progress which still needs to be made before it can be removed,

(e) in relation to any relevant power that has not been repealed before the end of the reporting period, sets out the Minister's assessment of the progress which still needs to be made before it can be repealed, and

(f) contains any other information relating to any relevant powers or retained EU law restrictions, or the arrangements which are to replace them, that the Minister considers appropriate.

(2) The first reporting period is the period of three months beginning with the day on which this Act is passed.

(3) Each successive period of three months after the first reporting period is a reporting period.

(4) A Minister of the Crown must provide a copy of every report laid before Parliament under this section—

(a) to the Scottish Ministers,

(b) to the Welsh Ministers, and

(c) either to the First Minister in Northern Ireland and the deputy First Minister in Northern Ireland or to the relevant Northern Ireland department and its Northern Ireland Minister.

(5) In sub-paragraph (4) "the relevant Northern Ireland department" means such Northern Ireland department as the Minister of the Crown concerned considers appropriate.

(6) This paragraph ceases to apply when no retained EU law restrictions have effect and all the relevant powers have been repealed.

Interpretation

3B_ In this Part—

"appropriate authority" means—

(a) the Scottish Ministers,

(b) the Welsh Ministers, or

(c) a Northern Ireland devolved authority;

"arrangement" means any enactment or other arrangement (whether or not legally enforceable);

"relevant power" means a power to make regulations conferred by—

(a) section 30A or 57(4) of the Scotland Act 1998,

(b) section 80(8) or 109A of the Government of Wales Act 2006, or

(c) section 6A or 24(3) of the Northern Ireland Act 1998;

"relevant regulations" means regulations made under a relevant power;

"retained EU law restriction" means any restriction which arises by virtue of relevant regulations."

92B: Schedule 3, page 31, line 24, at end insert—

"19A In Part 2 of Schedule 5 (specific reservations), in section C8 (product standards, safety and liability), for the words from "Technical standards and" to "EU law" substitute—

"The subject matter of all technical standards and requirements in relation to products that had effect immediately before exit day in pursuance of an obligation under EU law.""

Amendments 92AB to 92B agreed.

Amendment 92BA

Moved by ***Lord Callanan***

92BA: Schedule 3, page 31, line 34, leave out from "section" to end of line 35 and insert "30 insert—

"Section 30A	Type C"."

Amendment 92BAA (to Amendment 92BA) not moved.

Amendment 92BA agreed.

Amendment 92BB

Moved by ***Lord Callanan***

92BB: Schedule 3, page 32, leave out line 2 and insert—

""Section 57(4)	Type C"."

Amendment 92BBA (to Amendment 92BB) not moved.

Amendment 92BB agreed.

Amendments 92BC to 92F

Moved by ***Lord Callanan***

92BC: Schedule 3, page 32, line 2, at end insert—

"21A_ After paragraph 5 of Schedule 7 (procedure for subordinate legislation: special cases) insert—

"6_(1) This paragraph applies where a draft of an instrument containing regulations under section 30A or 57(4) is to be laid before each House of Parliament.

(2) Before the draft is laid, the Minister of the Crown who is to make the instrument—

(a) must make a statement explaining the effect of the instrument, and

(b) in any case where the Parliament has not made a decision to agree a motion consenting to the laying of the draft—

(i) must make a statement explaining why the Minister has decided to lay the draft despite this, and

(ii) must lay before each House of Parliament any statement provided for the purpose of this sub-paragraph to a Minister of the Crown by the Scottish Ministers giving the opinion of the Scottish Ministers as to why the Parliament has not made that decision.

(3) A statement of a Minister of the Crown under sub-paragraph (2) must be made in writing and be published in such manner as the Minister making it considers appropriate.

(4) For the purposes of this paragraph, where a draft is laid before each House of Parliament on different days, the earlier day is to be taken as the day on which it is laid before both Houses.

(5) This paragraph does not apply to a draft of an instrument which only contains regulations under section 30A or 57(4) which only relate to a revocation of a specification.""

92C: Schedule 3, page 32, line 8, at end insert—

"24A_ In section 13(5) (power of the Welsh Ministers to make provision about elections etc.)—

(a) omit paragraph (c) but not the "and" at the end of it, and

(b) in paragraph (d) omit ", European Parliamentary elections"."

92D: Schedule 3, page 32, line 14, at end insert—

"25A_ In section 16(3) (disqualification from being Assembly member) omit "(other than the United Kingdom)"."

92DA: Schedule 3, page 33, line 7, leave out sub-paragraph (7)

92DB: Schedule 3, page 33, line 20, at end insert—

"36A_ After section 157 (orders, regulations and directions) insert—

"157ZA Explanatory statements in relation to certain regulations

(1) This section applies where a draft of a statutory instrument containing regulations under section 80(8) or 109A is to be laid before each House of Parliament.

(2) Before the draft is laid, the Minister of the Crown who is to make the instrument—

(a) must make a statement explaining the effect of the instrument, and

(b) in any case where the Assembly has not made a decision to agree a motion consenting to the laying of the draft—

(i) must make a statement explaining why the Minister has decided to lay the draft despite this, and

(ii) must lay before each House of Parliament any statement provided for the purpose of this sub-paragraph to a Minister of the Crown by the Welsh Ministers giving the opinion of the Welsh Ministers as to why the Assembly has not made that decision.

(3) A statement of a Minister of the Crown under subsection (2) must be made in writing and be published in such manner as the Minister making it considers appropriate.

(4) For the purposes of this section, where a draft is laid before each House of Parliament on different days, the earlier day is to be taken as the day on which it is laid before both Houses.

(5) This section does not apply to a draft of an instrument which only contains regulations under section 80(8) or 109A which only relate to a revocation of a specification.""

92E: Schedule 3, page 33, line 26, at end insert—

"39A_ In Part 2 of Schedule 7A (specific reservations), in section C7 (product standards, safety and liability), for paragraph 77 substitute—

"77_ The subject matter of all technical standards and requirements in relation to products that had effect immediately before exit day in pursuance of an obligation under EU law.""

92EA: Schedule 3, page 34, line 34, at end insert—

"48A_ After section 96(4)(orders and regulations) insert—

"(4A) Regulations under section 6A or 24(3)—

(a) shall be made by statutory instrument, and

(b) shall not be made unless a draft has been laid before and approved by resolution of each House of Parliament."

48B_ After section 96 (orders and regulations) insert—

"96A Explanatory statements in relation to certain regulations

(1) This section applies where a draft of a statutory instrument containing regulations under section 6A or 24(3) is to be laid before each House of Parliament.

(2) Before the draft is laid, the Minister of the Crown who is to make the instrument—

(a) must make a statement explaining the effect of the instrument, and

(b) in any case where the Assembly has not made a decision to agree a motion consenting to the laying of the draft—

(i) must make a statement explaining why the Minister has decided to lay the draft despite this, and

(ii) must lay before each House of Parliament any statement provided for the purpose of this sub-paragraph to a Minister of the Crown by a relevant Minister giving the opinion of the relevant Minister as to why the Assembly has not made that decision.

(3) A statement of a Minister of the Crown under subsection (2) must be made in writing and be published in such manner as the Minister making it considers appropriate.

(4) For the purposes of this section, where a draft is laid before each House of Parliament on different days, the earlier day is to be taken as the day on which it is laid before both Houses.

(5) In this section "relevant Minister" means the First Minister and the deputy First Minister acting jointly or a Northern Ireland Minister.

(6) This section does not apply to a draft of an instrument which only contains regulations under section 6A or 24(3) which only relate to a revocation of a specification.""

92F: Schedule 3, page 34, line 42, at end insert—

"50A_ In Schedule 3 (reserved matters), in paragraph 38, for the words from "Technical" to "not" substitute "The subject matter of all technical standards and requirements in relation to products that had effect immediately before exit day in pursuance of an obligation under EU law, other than"."

Amendments 92BC to 92F agreed.

Consideration on Report adjourned.

Sanctions and Anti-Money Laundering Bill [HL]

Returned from the Commons

The Bill was returned from the Commons agreed to with amendments. It was ordered that the Commons amendments be printed.

House adjourned at 10.42 pm.