Evidence to the Finance and Constitution Committee
European Union (Withdrawal) Bill

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This submission is in response to the Committee’s call for evidence. It seeks to address some of the most pressing questions raised by the European Union (Withdrawal) Bill, which may be of relevant to the Committee’s inquiry. The submission is confined to comments on points of law.

A. Retained EU law in the UK legal order

1. The European Union (Withdrawal) Bill will introduce a new category of law into the law of the UK: ‘retained EU law.’ According to the definition in clause 6(7) of the Bill, retained EU law ‘means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of clause 2, 3 or 4 or sub-clause (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).’

2. It follows that retained EU law comprises three sub-categories: EU-derived domestic legislation (as per clause 2); direct EU legislation (as per clause 3); and rights under clause 2 (1) of the European Communities Act 1972 (as per clause 4).

3. EU-derived domestic legislation are domestic enactments (i.e. both primary and secondary legislation), which were either made under section 2 (2) of the European Communities Act 1972 (ECA) – these are statutory instruments typically adopted to transpose EU Directives – or for the same purpose or otherwise relating to the EU or the EEA.

4. This category is very broadly defined. The catch-all formulation in clause 2 (2) (d) ‘relating otherwise to the EU or EEA’ demonstrates this. This result is that apart from statutory instruments adopted under the ECA, this includes numerous Acts of Parliament adopted (partly or wholly) giving effect to EU Directives, such as the Equality Act 2010 or the Consumer Rights Act 2015. The definition also catches provisions of domestic law that pre-date an EU obligation, which mirrors them. An example would be the prohibition of disability discrimination (now) contained in the Equality Act, which is required by Directive 2000/78/EC, but has existed in UK law since 1995.

5. EU derived domestic legislation includes so-called gold plated legislation. Gold plating describes a phenomenon where an EU Directive prescribes minimum standards, but the Member State decides to over-implement the Directive and go

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beyond what is required. An example in the UK concerns parental leave. Under EU Directive 2010/18/EU parents of children up to the age of eight are entitled to parental leave whereas the UK’s Maternity and Parental Leave Regulations 1999 grant parental leave to parents of children up to the age of eighteen. Hence the UK regulations exceed the EU’s minimum requirement in this regard. Nonetheless, the effect of clause 2 of the Bill would appear to be that the Maternity and Parental Leave Regulations 1999 are to be considered ‘EU-derived domestic legislation’ in their entirety.

6. **Direct EU legislation** is EU legislation that has effect in EU law, i.e. which by virtue of EU law is directly applicable in the UK. The main examples are EU Regulations, which – in contrast to EU Directives - under the EU Treaties normally need no implementation in domestic law. Naturally there are myriad examples. A well-known EU Regulation is Regulation 261/2004 on flight cancellation (and delay) compensation.

7. **Rights under section 2 (1) ECA** are mainly rights under the EU Treaties, in particular the right to equal pay for women and men (Article 157 TFEU) and the rights of the single market, in particular those pertaining to free movement of goods; freedom to provide services; free movement of people; and free movement of capital. **Not included** are the rights flowing from the **EU Charter of Fundamental Rights** even though most of these rights also exist as general principles of EU law and they are retained, albeit in a modified form as they cannot be the basis for a right of action and their function is thus relegated to that of an interpretational aid. Furthermore, the right to claim state liability for failure of the UK (or any other public body attributable to the UK) to comply with EU law is not included.

B. **Supremacy and interpretation of retained EU Law**

8. There is a lack of clarity over the precise status of retained EU law, which may result in considerable problems for legal certainty. The Bill fails to clarify what type of legislation ‘retained EU law’ will be: primary legislation or secondary legislation. The distinction is not academic: secondary legislation is amenable to judicial review whereas primary legislation is not. The Bill makes it clear that ‘for the purposes of the Human Rights Act 1998’ any retained direct EU legislation is to be treated as primary legislation. This means that it cannot be struck down by a court for failure to comply with the Human Rights Act and only a declaration of incompatibility can be issued. It is not clear, however, what follows from this a) for the status of retained direct EU legislation in general; and b) for all other retained EU law.

9. This is compounded by the fact that retained EU law will continue to enjoy primacy (or supremacy) over domestic legislation including Acts of Parliament, provided

1 See clause 5(4 and 5) and Schedule 1 para 2 and 3.
2 See schedule 1 para 4.
that it was passed before exit day.\(^3\) It follows that UK courts will still have the power to disapply domestic legislation (including Acts of Parliament) if they contravene EU law. The consequence would seem to be a new hierarchy of norms in the UK. While the UK legal order has lived with the principle of supremacy/primacy since accession to the EEC in 1973, the novelty is that clause 5 itself decrees that primacy/supremacy applies. Hence retained EU law will be a superior category of law compared with all pre-Brexit legislation. Only post-Brexit legislation potentially takes priority over it even though there is a lack of clarity here.

10. Clause 5 (1 and 2) raises a **number of questions**, which – unless clarified in the Bill itself – may only receive an answer from the courts in litigation many years from now. Key points are:

11. Is the **principle of supremacy** of EU law – which is not laid down in the Treaties but only in the case law of the European Court of Justice (ECJ) – to be understood in the same way as in this case law?\(^4\) And if so, does this include the duty on all domestic courts – including the lowest such as Justices of the Peace – to disapply contradictory pre-exit statutes, which they (and all other courts) are normally not allowed to do?

12. There is the **further question** as to how ‘retained EU law’ ought to be understood in practice. It would make little sense to ignore the way retained EU law has been interpreted in the past both by domestic courts and by the ECJ. Clause 11 does not clearly mandate that the ECJ’s pre-Brexit case law must be followed when assessing whether a bill before the Scottish Parliament is compatible with retained EU law.\(^5\) Clause 6 deals with this question and mandates that the ECJ’s pre-Brexit case law must still be followed, but it is only addressed to courts and tribunals and not to the Scottish Parliament. However, given that any Act of the Scottish Parliament allegedly adopted *ultra vires* (i.e. in violation of retained EU law) is open to challenge by way of judicial review, this means that in practice the Scottish Parliament would be well-advised to take into account the ECJ’s case law as per clause 6 in order to avoid such challenges.

### C. Implied Repeal

13. How does clause 5 (1 and 2) relate to the **doctrine of implied repeal** and the limits to this doctrine? The doctrine of implied repeal says that ‘if Parliament has enacted successive statutes which on the true construction of each of them make irreducibly inconsistent provisions, the earlier statute is impliedly repealed by the later. The importance of the rule is, on the traditional view, that if it were otherwise the earlier Parliament might bind the later, and this would be repugnant to the principle of Parliamentary sovereignty’\(^6\).

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\(^3\) See clause 5(1 and 2).

\(^4\) It is only mentioned in the form of a legally non-binding declaration (Declaration no 17) to the Lisbon Treaty.

\(^5\) See Commons Library Briefing page 101.

14. Is clause 5 to be understood to have impliedly repealed all pre-Brexit Acts of Parliament that contradict retained EU law? And would that include so-called constitutional statutes which are immune from implied repeal? This would normally not be the case, but the express stipulation that they enjoy supremacy – a concept defined by EU law and unknown to domestic law – could at a stretch be interpreted as an express repeal (or something similar).

15. Furthermore, should the European Union (Withdrawal) Act itself be considered a constitutional statute? The House of Commons Library suggests it would be. And if so, what does this mean for a potential clash between a post-Brexit statute and retained EU law? While it is clear that retained EU law cannot override a piece of post-Brexit legislation by virtue of primacy, must one assume that post-Brexit legislation overrides all contradictory retained EU law by virtue of the doctrine of implied repeal? Or should that retained EU law be regarded as being protected by a constitutional statute and therefore be considered immune from implied repeal? And if so, how would a conflict be resolved?

D. Powers of amendment: in general

16. The European Union (Withdrawal) Bill confers far-reaching powers of amendment on the UK Ministers to make changes to retained EU law in three situations. First, in order to prevent, remedy or mitigate ‘deficiencies’ in retained EU law; second in order to comply with the UK’s international obligations (in particular any agreement on the future relationship between the EU and the UK); and third in order to implement the withdrawal agreement (which will presumably also deal with a transition from EU membership to the final future relationship).

17. These are very wide powers as they expressly allow ministers ‘to make any provision that could be made by Act of Parliament’ (so-called Henry VIII clause). The powers are particularly far-reaching because they are coupled with a very broad category of law – retained EU law – which, as shown above, includes numerous Acts of Parliament and legislation that was adopted independently of the UK’s EU law obligations and was only later made mandatory under EU law (see paragraphs 4 and 5). Moreover, when it comes to the implementation of the withdrawal agreement, clause 9 even allows ministers to make changes to the European Union (Withdrawal) Act itself.

18. One of the main concerns in this regard must be parliamentary scrutiny both at the Westminster and at the Scottish level. The main challenge in this regard will be

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7 First introduced in the Thoburn case (n 6) and since then endorsed (albeit in an obiter dictum) by the Supreme Court in R (HS2 Action Alliance Ltd) v Secretary of State for Transport [2014] UKSC 3, para 208.
time-pressure: even if appropriate mechanisms for effective scrutiny are found, the sheer time-pressure for effecting changes may render them ineffective. Time-pressure is likely to arise for two main reasons: first, because certain bits of retained EU law will need to be amended before exit day in order to function properly. And second, because the powers of amendment will expire after a certain time period: in case of clauses 7 and 8 within two years; and in case of clause 9 on exit day. This means that there is likely to be a minute rush to get statutory instruments through towards the end of these periods.

19. It should further be pointed out that in urgent cases, Schedule 7 para 3 allows for a statutory instrument to be made without prior scrutiny. All that is necessary is a declaration of urgency by the minister concerned. Only later parliamentary approval is needed within a month. But even failing that, there is nothing to prevent a minister from re-enacting the same statutory instrument using the same procedure for another month, and so on. There do not seem to be corresponding powers for the Scottish ministers.

20. Furthermore, the Sewel Convention does not apply to secondary legislation, i.e. if a UK minister uses powers under clauses 7-9 of the Bill concerning a devolved matter, the Scottish Parliament need not be consulted.

E. Consequences of the European Union (Withdrawal) Bill for the Scottish Parliament’s legislative competence

21. The Bill aims to retain currently existing limitations on the Scottish Parliament’s law-making powers stemming from EU law.

22. Clause 11 (1) of the Bill restricts the Scottish Parliament’s competence to legislate incompatibly with ‘retained EU law’ (see above). As the definition of ‘retained EU law’ includes Scottish legislation (primary and secondary) that was made for the purpose of complying with EU obligations – an example would be the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 – clause 11 (1) makes it clear that the Scottish Parliament will continue to be allowed to legislate on matters which it would have been able to legislate on before exit day.

23. This means that – broadly speaking – the powers of the Scottish Parliament remain the same as currently under the Scotland Act 1998.

24. However, the formulation of clause 11 can lead to a technical problem where a Scottish Minister has made use of his powers to remove a deficiency from retained EU law (using powers under Schedule 2) within the two-year period stipulated in clause 7. Once the two-year period is up, however, this power of amendment does not – as is the case at Westminster – revert to the Scottish Parliament, but instead it goes to Westminster. This is because clause 11 (1) (b) makes it impossible for the Scottish Parliament to modify retained EU law. This bar includes retained EU law that has been modified using the powers in clause 7 as is clear from clause 6 (7) of
the Bill. This leads to an oddity in the Bill where Scottish ministers are in effect given more powers than the Scottish Parliament.9

25. Furthermore, after the two-year period is up, the Scottish Parliament will have fewer powers over devolved matters than the Westminster Parliament over the same subject-matter. For instance, the Scottish Parliament will be able to make changes to environmental legislation that has been adopted to transpose an EU Directive into Scottish law. It remains, however, limited in what it can do by the original Directive. This is because it would not have been in its powers to do so ‘immediately before exit day.’ Interestingly therefore, the Scottish Parliament’s powers remain limited by EU law even if it is not classed as ‘retained EU law’ under the Bill. This stands in contrast to the powers the UK ministers (and the Westminster Parliament) will have to modify ‘retained EU law’, which will not be restricted in that manner.

26. There is one area where the Scottish Parliament’s powers will change, however, and this is fundamental rights. As pointed out above the Charter of Fundamental Rights will not be retained and therefore the Scottish Parliament will be in a position to legislate contrary to it in the future.10 In practice this will not always be of relevance given that the Scottish Parliament remains barred from legislation contrary to Convention Rights protected by the Human Rights Act 1998. Furthermore, the Charter currently only applies where the Scottish Parliament legislates within the scope of EU law. However, in some areas the Charter provides stronger protection than the European Convention on Human Rights. Examples include an express right to the protection of personal data, children’s rights, a more comprehensive right to a fair trial,11 and many social rights. It seems to result from paras 2 and 3 of Schedule 1 of the Bill that the retained general principles of EU law – which largely protect the same fundamental rights as found in the Charter and under the same conditions – cannot serve as a (enforceable) limit to the competence of the Scottish Parliament. This seems to follow from para 3 (2)(b) which says that no court or tribunal may ‘quash any conduct or otherwise decide that it is unlawful because it is incompatible with any of the general principles of EU law’.

27. It should further be noted that the solution found in the European Union (Withdrawal) Bill entails changes to the devolution settlement. Under s 29 of the Scotland Act 1998 the Scottish Parliament is competent to legislate on all matters that are not reserved matters. Reserved matters are found in schedule 5 of the Scotland Act. Most of the EU’s competences that will revert to the UK are also

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9 The same restriction does not apply to Scottish ministers during the two-year period as the definition of ‘devolved powers’ expressly excludes the limitation from EU law on the law-making powers of the Scottish Parliament, see Schedule 2, para 9 (1) (a).

10 Note that the insertion of subsection (4B) by clause 11 (1) (b) of the Bill does not change this because it only applies as an exception to (4A), which applies only with regard to ‘retained EU law.’

11 The latter became apparent in the case of Benkharbouche v Embassy of the Republic of Sudan; Janah v Lybia [2015] EWCA Civ 33.
reserved competences under Scotland’s devolution settlement. However, there are a number of areas – notably agriculture, fisheries within the Scottish zone, and the environment, but also others – which would ordinarily be devolved and in the absence of s 11 of the Bill would be within the competence of the Scottish Parliament.

28. There is obviously the option contained in clause 11 (1) (b) whereby the restrictions do not apply ‘so far as Her Majesty may by order in Council provide’, but this leaves changes to the future status quo – e.g. if a new framework for cooperation on these matters between the devolved legislatures and Westminster has been agreed – in the hands of the Westminster Government.

29. It is not the point of this submission to express a preference for either solution (these powers being either fully devolved or essentially reserved), but three points should be noted: first, the current powers of the Scottish Parliament will stay largely the same. Second, under the current framework legislation is made at three levels (Scotland, UK, EU). In the future it will be made at two levels (Scotland and UK). This is because the third (European) level of law-making will be eliminated by Brexit. Hence, the European Union (Withdrawal) Bill will result in a shift in balance between the powers Westminster has in practice and the powers Holyrood has in practice with Westminster’s powers being augmented and Holyrood’s staying the same. Third, UK ministers will be in a position to grant further powers to the Scottish Parliament if they so choose.

30. Unless active measures are taken in the aftermath of Brexit to re-design the devolution settlement, this might become the long-term solution. This is chiefly because clause 11 – in contrast e.g. to clause 7 of the Bill – does not contain a sunset clause.

31. It should further be noted, however, that even a future devolution of former EU powers to Scotland might not result in full Scottish autonomy to decide on matters such as agriculture or fisheries or the environment. This is because these areas are typically under a strong influence from international law. International obligations entered into by the UK – the competence is entirely with the central government here – reduce the practical scope for any domestic legislator and in particular a devolved legislator that has not got many means of influencing policy-making by the central government.

32. In the absence of external powers for Scotland complementing its internal legislative powers, formal powers in areas largely determined by international agreements lead to a ‘policy squeeze’, which may mean that the role for the Scottish Parliament

would in many fields be reduced to rubber stamping the implementation of international commitments entered into by the UK.

F. Powers of the Scottish Ministers

33. Schedule 2 of the European Union (Withdrawal) Bill confers similar powers to those contained in clauses 7 to 9 of the Bill on Scottish Ministers as far as they concern devolved competences.

34. However, Schedule 2 stipulates two important limitations in para 3: by contrast to a Westminster minister a Scottish minister will not be in a position to modify retained direct EU legislation (i.e. in particular EU Regulations carried over into UK law) even if the subject matter they deal with would ordinarily be devolved; and Scottish ministers may not modify anything which is retained by virtue of section 4 of the Bill, i.e. primarily Treaty rights. A further restriction can be found in para 7 (1) of Schedule 2. If a Scottish minister wanted to modify retained EU law pertaining to those areas, they would need to act jointly with a UK minister.\(^{13}\) Hence the corresponding powers of the Scottish ministers are asymmetrical to those of UK ministers.

35. It is not entirely clear why Scottish ministers should be categorically excluded from powers to modify direct EU legislation so far as it falls within the devolved competence. For instance, a number of private international law instruments (e.g. the Brussels Regulations) may need specifically Scottish adaptations given the separateness of Scots law and the Scottish judiciary. Hence at least for these cases a case could be made that powers to modify them should be exercised by Scottish ministers.

36. At the same time, it is the aim of the Bill to retain existing EU frameworks at the Westminster level, at least temporarily. The consequence is that the powers of Scottish Ministers remain broadly the same as they are now, while the powers of Westminster ministers are augmented considerably. Again, it is not the purpose of this submission to express a political preference as to how the distribution of powers between London and Scotland should be managed in the future, but it can be pointed out that by removing the EU level of law-making and replacing it with domestic frameworks, the balance in the power between Scotland and London is being tilted towards London.

G. Sewel Convention

37. There are good reasons to support and argument that the European Union (Withdrawal) Bill requires the consent of the Scottish Parliament under the so-called Sewel Convention. According to section 28 (8) of the Scotland Act ‘it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament’. Furthermore

\(^{13}\) Para 1 (2) of Schedule 2.
devolution guidance note 10 says that changes to the legislative competence of the Scottish Parliament also require its consent. Given that the Bill makes provision to retain numerous pieces of EU law that – under the current devolution settlement – would fall within the competence of the Scottish Parliament and given that it modifies the powers of the Scottish Parliament, the convention applies.

38. It should further be noted that the Sewel Convention continues to be politically – albeit not legally – binding despite the Supreme Court’s judgment in Miller. In that case the Supreme Court merely held that the Convention was not justiciable, i.e. judges ‘cannot give legal rulings on its operation or scope, because those matters are determined within the political world.’

39. A refusal by the Scottish Parliament to give legislative consent would consequently have political implications only, but not legal implications. Westminster would still be able to legislate as intended.

40. One further aspect of the Sewel Convention should be noted. It only applies to Acts of the UK Parliament, but not to secondary legislation. Hence statutory instruments made in accordance with the wide powers conferred on the UK Government by clauses 7 to 9 of the European Union (Withdrawal) Bill – which include so-called Henry VIII powers to make any provision that could be made by Act of Parliament – are not caught by it even if they concern devolved matters.

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14 R (on the application of Miller and another) v Secretary of State for Exiting the European Union [2017] UKSC 5.