

---

## European Union (Withdrawal) Bill

HL Committee Stage

February 2018

---

## European Union (Withdrawal) Bill

The Committee Stage on the EU Withdrawal Bill is due to commence in the House of Lords on 21 February 2018.

In summary, the Bill will:

- Repeal the European Communities Act 1972 (ECA 1972), which underpins the UK's membership of the European Union on 'exit day' – currently set to be 29 March 2019 at 11.00 p.m.
- Retain EU law as part of UK law we leave the EU, much of which would otherwise disappear overnight when the ECA 1972 is repealed.
- Mean that EU-derived equality, employment and health and safety standards will remain in place on the day we leave the EU. But there is nothing in the Bill to prevent a future government from repealing or watering down workers' rights in the future.
- Mean the EU Charter of Fundamental Rights would no longer form part of UK law when we leave the EU. Individuals would no longer be able to rely on the general principles of EU or to seek damages from the government if it removes or weakens their EU derived rights.
- Create unprecedented powers for Ministers to amend, repeal or weaken retained EU law including Acts of Parliament, without the need for full Parliamentary scrutiny.
- End the jurisdiction of the Court of Justice of the European Union (ECJ) in the UK.
  - UK courts will continue to take decisions of ECJ judgements made *before* exit day into account when interpreting retained EU law.
  - But UK courts will not be required to follow new ECJ decisions made *on or after* exit day.

### Outline of TUC views:

As we prepare to leave the European Union, the TUC is determined that workers' rights, jobs and livelihoods must be protected. Working people and our communities should not pay a price for Brexit. Central to these aims is the need to protect all the workplace rights which have been hard won by workers and their unions through our membership of the EU.

Congress House, Great Russell Street, London WC1B 3LS

t: 020 7636 4030 [www.tuc.org.uk](http://www.tuc.org.uk)

Parliamentary Officer: Sarah Ogilvie t: 020 7467 1243 m: 07920 784125 e: [sogilvie@tuc.org.uk](mailto:sogilvie@tuc.org.uk)

General Secretary: Frances O'Grady

These include equality laws protecting women, BME, LGBT+ and disabled workers from discrimination at work; rights to time off for working parents; holiday pay and protections from excessive working hours; equal treatment rights for part-time, fixed term and agency workers; information and consultation rights and health and safety standards.

The TUC is concerned that these rights will be at risk when the UK leaves the EU.

The government has promised that employment rights from the EU will be protected and even enhanced after Brexit. Ministers point to the European Union (Withdrawal) Bill as the vehicle by which these rights are to be incorporated or retained in UK law once we leave the EU.

But, the TUC is concerned **the Bill will not provide any effective protection for workers' rights. Instead it would provide Ministers with wide-ranging powers to repeal, dilute or limit hard-won employment rights.**

Recent statements by senior ministers also suggest that plans are already being put in place to scrap the Working Time Regulations, which provide key rights to holiday pay, rest breaks, and protection from excessive working hours. And this could just be the start, with rights for agency workers and outsourced workers being other potential early targets.

There is also a genuine risk the rights of UK workers will not keep pace with developments in EU equality and employment law – delivered through future EU standards or decisions of the ECJ.

## **EU negotiations and workers' rights**

It is vital that, after Brexit, UK employment law should be provided the strongest possible legal protections to ensure that workers' rights in the UK cannot fall behind their counterparts in Europe. The UK government will of course retain the ability to improve workers' rights in the future. But it is also important that any deal with the EU guarantees all workers can continue to enjoy not only the existing safety net of standards but also future improvements in EU employment rights.

Having tested all the available options for a trade deal against that requirement, the TUC continues to believe that staying in the single market after we leave the EU is currently the only realistic option that will provide a long-term guarantee for rights at work for which working people and their unions have campaigned long and hard. And it would protect jobs too.

It is worrying that the Secretary of State for Exiting the EU has pointed to the EU-Canada Comprehensive Economic and Trade Agreement (CETA) as the initial basis for a future UK-EU trade agreement. The TUC campaigned against the ratification of CETA, because it put protecting the rights of big corporations and foreign investors ahead of those of ordinary working people. Such agreements provide no guarantee for hard-won rights like equal pay for women, fair redundancies, time off for family emergencies and equal rights for part-time, fixed-term and agency workers.

While the TUC accepts that the single market and the customs union are not perfect, our analysis clearly shows that they are far better for workers' jobs and rights than any other trade models.

If the government is serious about protecting and enhancing workers' rights, then it should ensure all options remain on the table during negotiations on a future agreement between the UK and the EU.

Signing up to a guarantee on employment standards in any future UK-EU deal would also provide a level playing field for workers' rights, would stop unfair competition and ensure good employers are not undercut by the bad.

Similarly, the withdrawal agreement must confirm that EU employment law will continue to apply in the UK throughout any transition period. This will provide much asked for certainty for business and reassurance for working people that their rights will be protected.

### **Priorities for Amendments to the EU Withdrawal Bill**

Alongside seeking to influence the outcome of negotiations with the EU, the TUC believes that the EU Withdrawal Bill needs to be amended to provide increased protection for employment law.

The TUC has identified three priority areas for changes to the Bill. These are:

- Retaining the existing framework of employment and equality laws together with the same health and safety standards as we leave the EU.
- Ensuring that in the future workers' rights are not weakened and that UK standards do not fall behind those of our European partners.
- Ensuring Parliament can fully scrutinise any changes to workers' rights – including employment law, equality rights and health and safety standards.

#### **It would therefore be helpful if Peers supported amendments which**

- Rule out the use of delegated powers in the Bill to amend employment law, equality law and health and safety standards.
- Ensure that any future changes to employment law, equality law and health and safety standards would require an Act of Parliament, therefore ensuring Parliament can fully scrutinise and decide on any proposed changes.
- Ensure that UK courts have regard to both existing and new ECJ decisions once the UK leaves the EU.
- Retain the EU Charter of Fundamental Rights as part of UK law.
- Ensure that individuals can continue to bring free-standing legal challenges in UK courts on the basis that UK law breaches the principles of EU law.

### **Detailed consideration of the EU Withdrawal Bill**

This briefing summarises the main provisions in the EU Withdrawal Bill and explains TUC views on key amendments. The briefing follows the order in which Clauses and related amendments are due to be debated at Committee Stage.

## **Clause 9: Implementing the withdrawal agreement**

**Clause 9** would provide government Ministers with extensive powers to use secondary legislation to implement the withdrawal agreement negotiated with the EU under Article 50(2).

The content of any withdrawal agreement is far from clear, but it could cover issues linked to rights for EU citizens, the Irish border, any financial settlement, Euratom issues, and dispute resolution issues.

Ministers could use the clause 9 powers to plan for a transitional period, but not to implement the terms of a future agreement which determines the UK's long-term relationship with the EU. Clause 9 could not be used if the UK were to leave the EU without an agreement – i.e. to deal with the 'no deal scenario'.

### **Wide scope of clause 9**

If the UK negotiates a withdrawal agreement with the EU, then the scope for Ministers to use the clause 9 powers to amend UK law will be wide-ranging.

The government claims that broad-ranging powers are needed to give Ministers sufficient flexibility to implement the agreement – the terms of which are not yet known – within a short time period.

As with clause 7, there are some – albeit it limited – restrictions on the powers. **Clause 9(3)** states the powers cannot be used to:

- Impose or increase taxation
- Make retrospective legal changes
- Create relevant criminal offences
- Amend or repeal the Human Rights Act or any subordinate legislation made under it

Beyond these narrow exceptions, Ministers will be able to introduce regulations which amend or repeal Acts of Parliament or statutory instruments. The powers would extend to most areas of UK law, including all employment, equality and health and safety laws and statutes of constitutional significance. This includes the Northern Ireland Act which implements the Good Friday Agreement. Ministers would even be able to amend or repeal the EU Withdrawal Bill itself. Such changes could be made without full Parliamentary scrutiny.

Before deciding to introduce regulations, Ministers would not be required to demonstrate that any changes are **necessary**. It would be sufficient that a government Minister considers they are **appropriate** for the purposes of implementing the withdrawal agreement.

Clause 9 powers will be **time-limited**, and will cease to operate on exit day.

The Lord Constitution Committee has been highly critical of clause 9 concluding:

*“ 196 It would require the strongest of justifications for ministers to be given a broad power by regulations to alter as they think “appropriate” any existing law, including the Act providing the power, on the basis of the terms of the withdrawal agreement.*

*“197 As the clause 9 power cannot be used until a further Act has been passed—likely to be the withdrawal and implementation bill—we cannot see any justification for the inclusion of the power in this Bill. Parliament will be better placed to scrutinise the appropriateness of such a power, and the restrictions and safeguards it might require, when the terms of the withdrawal agreement are known. We recommend that clause 9 be removed from the Bill.”*

### **Changes to clause 9 made in the House of Commons**

During the Committee Stage in the House of Commons, Clause 9 was amended with the effect that the government can no longer use the power to implement a withdrawal agreement unless Parliament has first legislated so as to signal its approval of such an agreement.

Prior to the defeat in the Commons, the government had already committed in a written ministerial statement that it would not use its clause 9 power to implement a withdrawal agreement until Parliament had voted on the agreement. Ministers have also suggested that clause 9 would be used only in limited circumstances, and that a further piece of proposed legislation — the Withdrawal and Implementation Bill — will be the primary vehicle for implementing a withdrawal agreement.

### **Clause 9: Amendments and related New Clauses**

New Clauses and amendments have been tabled in relation to clause 9. Most seek to set tests for any future withdrawal agreement and to press the government into commitments that the UK will remain a member of the Customs Union, the EU Single Market, the EEA or various EU institutions or agencies, and arrangements such as the European Health Insurance card scheme, after we leave the EU.

Some amendments seek to strengthen the ability of the Houses of Parliament to scrutinise and to approve withdrawal agreement (Amendment tabled by **Baroness Hayter, Lord Wallace, Lord Hannay and Lord Patten**).

An amendment tabled by **Lord Monks, Lord Lea, Lord Campbell and Baroness Wheatcroft** calls for a right for Parliament to approve the government’s mandate for negotiations on the future relationship between the UK and the EU. The proposal mirrors practices adopted in the EU where both the EU Council and EU Parliament can debate and vote on the mandate of the EU27 negotiators before formal talks take place. Debates on this amendment would provide an important opportunity to press the government to be more transparent and accountable to Parliament on their objectives for the negotiations on the transition period and their vision for the future relationship between the UK and EU.

Other amendments would require Ministers to seek to an extension to any transition arrangements if the future relationship between the UK and EU is not agreed within two years. Others require Ministers to secure agreement from the devolved administrations before the withdrawal agreement can be implemented and that clause 9 powers cannot be used to undermine the devolution settlement in Scotland and Wales or to undermine the Good Friday Agreement. A new clause tabled by Lord Browne, Baroness Suttie, Lord Kerr and Baroness Wheatcroft seeks to give direct effect in UK law to the provisions relating to the Irish border in the agreement reached between the UK and EU27 during the 1<sup>st</sup> phase of the negotiations.

## **TUC views on negotiations on the withdrawal agreement**

The TUC respects the decision taken in the referendum that the UK should leave the EU. Our priority now is to ensure that working people do not pay a price in terms of their jobs and livelihoods for the decision.

We believe that in the negotiations on the withdrawal agreement:

- Unions should have a seat at the table, to ensure that working people's rights are protected.
- Jobs, investments and livelihoods must be protected through frictionless, tariff free, barrier free trade in goods and services with Europe.
- The government should seek a transitional period after leaving the EU in March 2019. During this period, the status quo should prevail. The UK should remain a member of the single market and customs union, as this is the best way to guarantee access to European markets, to ensure that workers are covered by EU workplace rights, and to prevent job-destroying disruption and uncertainty.

## **Protecting workers' rights**

Throughout this briefing we have highlighted how EU workers' rights secured have benefitted people working in the UK.

The TUC is calling for the Bill to be amended so that the delegated powers – including those in clause 9 - cannot be used to remove or weaken employment law, equality law and health and safety standards once we leave the EU.

## **Protecting EU citizens' rights**

**An amendment tabled by Baroness Smith and Baroness Ludford** would require Ministers to introduce regulations which maintain, preserve and protect the rights of EU citizens who were lawfully resident in the UK immediately before exit day. **A new clause tabled by Lord Adonis** would seek to protect the status and rights of Irish citizens in the UK after we leave the EU.

**The TUC supports these amendments.**

EU citizens' rights are central to the on-going negotiations with the EU on the withdrawal agreement. Any key legal changes are likely to be implemented using the clause 9 powers (see below) or through a future Immigration Bill. But it is also important that the government is not able to push through changes to EU Citizens' rights via clause 7.

In [joint statement](#) issued on 20 September 2017, the TUC and CBI called on the government to take early and unilateral action to guarantee the rights of EU citizens in the UK. The statement highlighted that:

*After 15 months of human poker, the uncertainty facing 4m European and UK citizens has become intolerable. It is a blight on the values of our nations. Millions of workers and thousands of firms are today united in their call to leaders on both sides to find an urgent solution. A clear guarantee of the right to remain for citizens in both the UK and EU27 is needed within weeks.*

*EU citizens account for 10% of registered doctors and 4% of registered nurses across the UK. Millions more work in the public and private sectors delivering public services and making a vital contribution to our economy. They need to hear that they will be allowed to remain in the UK, whatever the eventual outcome of negotiations. Not only is this important for our economy, it is the right thing to do."*

The TUC is also calling on the government to seek to negotiate the same arrangements to protect the rights of UK citizens to continue to work, live and study in the EU. **We therefore support the New Clause tabled by Lord Haskel and Baroness Jones.** We also support the New Clause tabled by the Earl of Clancarty which seeks to protect the rights of young people to travel visa free in the EU and to continue to participate in the Erasmus + programme on existing terms.

### **Erasmus programme**

The TUC supports the amendment tabled by **Baroness Garden, Lord Storey and the Earl of Clancarty** which proposes that the clause 9 cannot be used unless the government first sets out a strategy seeking to retain the UK's membership of the Erasmus + programme on the current terms.

Erasmus+ is a foreign exchange programme from within the European Union, involving many of the best universities and seats of learning on the continent. Erasmus + also covers vocational training opportunities. The National Agency for Erasmus+ in the UK is strongly committed to the UK's full participation in the scheme through to 2020, the end of the current budget plan, so that at least 250,000 people across the UK have the chance to study, train or volunteer abroad.

Students that participated in Erasmus+ report lower unemployment, a range of transferable and employability skills, higher self-confidence and more motivation and independence.

### **Mutual recognition of professional qualifications**

The TUC also supports the amendment tabled by **Lord Brooke of Alverthorpe** which calls on the government to seek on-going mutual recognition of 'professional qualifications' once the UK leaves the EU.

Existing EU arrangements for the mutual recognition of professional qualifications have proved particularly important in the NHS, where EU citizens account for 10% of registered doctors and 4% of registered nurses across the UK, as well as other service industries. The Chief Executive of NHS Employers **reported** to Parliament that the NHS also benefited from the mutual recognition of professional qualifications for doctors and other medically trained staff. Some 6% of the NHS workforce nationally, and 10% in London, were EU nationals. The NHS Confederation also noted that the UK was a "net importer of healthcare professionals qualified in other parts of the EU", and that mutual recognition had helped to "fast-track" EU health professionals "for registration with the General Medical Council, the Nursing Midwifery Council or other relevant regulatory body".

### **Creative industries**

The TUC also supports the amendment tabled by **Lord Puttnam and the Earl of Clancarty** which calls for on-going reciprocal arrangements for the creative industries post Brexit. The creative

industries contribute [£92 billion per year](#) to the UK economy. Unions organising in the creative industries, including Equity, the Musicians Union, and Bectu have all expressed concern about the impact restrictions on freedom of movement, including for self-employed performers in the wake of Brexit.

### **Limiting clause 9 powers**

As outlined above, the TUC is concerned that the clause 9 powers are too broad and could be used to weaken or remove the rights which millions of working people currently take for granted.

It is therefore welcome Peers have tabled amendments which would limit when and how the powers can be used. Many of the amendments mirror amendments proposed to clause 7. See the briefing on clause 7 for detailed discussion of the benefits of the proposed amendments.

**The TUC supports the following amendments.**

- **The amendments tabled by Lord Foulkes, Lord Goldsmith, Lord Wallace and Lord Cormack and Viscount Hailsham** which would mean that Ministers can only use clause 9 powers to amend retained EU law when it is necessary to implement the withdrawal agreement between the UK and EU – as opposed to where Ministers think it would be appropriate to do so.
- **The amendment tabled by Lord Judge, Baroness Hayter, Baroness Smith and Viscount Hailsham** which would mean that Ministers could not use clause 9 powers to amend or repeal the EU Withdrawal Bill itself, thereby circumventing Parliament's wishes.

The TUC is concerned that in the future the government could use the power to amend the Bill to:

- Remove the time-limits which currently restrict the powers contained in clause 7 and 9.
- Widen the scope of the clause 7 powers meaning Ministers could introduce regulations which make wide-ranging policy changes.
- Amend clause 6 to remove the requirement on UK courts to follow the decisions of ECJ issued before exit day - meaning that UK employment law could fall behind EU standards.
- Restrict or remove Parliament's already limited ability to scrutinise how ministers use the powers found in clauses 7, 8, 9 and 17.

In their [recent report](#) the DPRRC restated the view that the power to amend the EU Withdrawal Bill is 'wholly unacceptable' and called for the power to be removed from the Bill.

- An amendment tabled by Baroness Hamwee would require Ministers to consult stakeholders before introducing regulations under clause 9. The TUC particularly welcomes this proposal which would ensure that the social partners – the TUC and the CBI – were always consulted before the government proposed changes to workplace rights.
- The amendment tabled by **Lord Judge, Baroness Hayter, Baroness Smith and Viscount Hailsham** which would remove the Henry VIII powers in clause 9.



## **Clause 16 and Schedule 7: Regulations and Parliamentary scrutiny**

Clauses 7, 8 and 9 and clause 17 would provide Ministers with unprecedented powers to amend retained EU law, and UK legislation more generally, using secondary legislation. As discussed throughout the briefing, the powers will not be limited to minor technical changes but could be used as a vehicle for wide-ranging policy proposals.

**Clause 16** (and **schedule 7**) set out when and how Parliament will be able to scrutinise how Ministers decide to exercise the powers contained in **clauses 7 to 9** and **clause 17** of the Bill. The government's proposals would significantly limit the role for Parliament. [Politicians](#), [constitutional experts](#) and [civil society](#) have all labelled these plans as an unjustified 'power-grab' by the Executive from Parliament.

The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) has also expressed [concern](#) that

*"The law-making powers of Ministers are subject to little parliamentary scrutiny. Apart from the small number of cases where statutory instruments must adopt the affirmative procedure, the Government have an unfettered choice as to which procedure to adopt. This is a radical departure from the norm and one that we regard as wholly unacceptable."*

Central to the concerns is the use of the affirmative resolution procedure for regulations introduced under clauses 7 to 9 and clause 17 – will only be guaranteed in a limited range of circumstances.

Parliament will only be guaranteed the right to debate and vote on regulations which proposed to:

- Create a new public authority or to transfer powers currently exercised by EU institutions to a UK body
- Charge a fee for any services or activity
- Create or amend the scope of any criminal offences or
- Create or amend the power to legislate.

Beyond these narrow exceptions, Ministers are free to choose whether the affirmative or negative procedure should apply.

This means that Parliament will not be guaranteed a right to debate or vote on regulations which:

- Amend, weaken or remove workers' rights
- Amend primary legislation (Henry VIII powers) or
- Change statutes of constitutional significance.

## **Changes to Schedule 7 made in the House of Commons**

Two changes were made to schedule 7 during the Commons scrutiny of the Bill.

Firstly, the Bill was amended to require Ministers to publish explanatory statements alongside any regulations made under clauses 7 to 9 confirming whether the proposed changes would impact

on equality legislation and rights (Paragraph 22 of Schedule 7). The TUC recognises this amendment represents a step in the right direction. However, the duty to issue a statement will only apply to equality law and not wider workplace rights. Ministers will also only be required to issue a statement when the government is planning secondary legislation, but not primary legislation. There is also nothing to prevent Ministers from introducing legislation which weakens or removes equality rights.

Secondly, paragraph 3 of the schedule was amended to require that where Ministers propose that the negative resolution procedure should be used for regulations introduced to 'correct' retained EU law (clause 7), to implement international treaties and obligations (clause 8) or to implement the withdrawal agreement (clause 9) then the Minister must first lay a draft regulation before a sifting Committee of the House of Commons, along with a memorandum explaining the choice of procedure. The committee will have 10 sitting days to make a recommendation as to the appropriate procedure for the regulations. After receiving the recommendation, or after 10 sitting days without a recommendation, a Minister may either proceed with making a negative instrument, or decide that the affirmative procedure should be used instead.

Again, the TUC recognises this change represented an improvement. However the TUC is concerned that Ministers, rather than Parliament, will ultimately decide which procedure will be used.

### **Proposed amendments to Schedule 7**

The TUC agrees with the recommendations of the DPRRC that the Bill should be further amended to ensure that:

- The affirmative procedure should always apply where Ministers propose to use Henry VIII powers and introduce regulations under clauses 7, 8, 9 and 17 that amend or repeal primary legislation.
- That the proposed sifting procedure should be strengthened. Wherever Ministers are proposing that the negative resolution procedure should be used for any regulations introduced under clauses 7 to 9 and clause 17 then the relevant Parliament Committee should have a right to sift and review the regulations and make a recommendation on the appropriate procedure to be used. The recommendation of the Committee should apply unless it is rejected by a resolution of the Houses of Parliament.

In addition, the TUC believes that the Bill should be amended to confirm that if Ministers propose to use the powers in clauses 7 to 9 and clause 17 to amend, weaken or remove workplace rights, then the regulations must always be subject to the affirmative resolution procedure and must be debated and voted on in both Houses of Parliament. **We therefore fully support the amendment tabled by Lord Adonis to this effect.**

### **Clause 17: Consequential and transitional provision**

**Clause 17** contains some of the most worrying provisions in the EU Withdrawal Bill. It would give the government wide-ranging powers to introduce regulations which a Minister considers are

'appropriate in consequence of this Act'. Ministers will be able to use this power to amend or repeal either primary or secondary legislation.

The TUC has four main concerns about the powers.

- **Ministers could use the powers to make substantial policy changes, including repealing or watering down workers' rights.** Ministers will have the power to amend both primary or secondary legislation where they take the view that such changes are consequential to the provisions of this Bill. As the House of Lords Delegated Powers and Regulatory Reform Committee **pointed out** in their interim report, there would be nothing to prevent "A Minister ... at some point in the future rely[ing] on this to make substantive policy changes to retained EU law, going beyond remedying a defect. For example, the powers could be used to amend the Working Time Regulations on the basis that the changes are "appropriate" in consequence of the repeal of the 1972 Act and the UK no longer being under a duty to implement the Working Time Directive."
- **The powers are very broad.** Ministers would not need to demonstrate changes to retained EU law are **necessary**. It is sufficient that a government Minister *considers* such changes would be **appropriate**. The government will therefore have a wide discretion to use the power to make wide-ranging policy change which remove or reduce individuals' rights.
- **The powers would not be time-limited.** Clause 17 does not include a sunset clause. Ministers could use this power to amend retained EU law, long after we leave the EU.
- **Regulations introduced under clause 17 will be subject to limited Parliamentary scrutiny.** Parliament would not have a guaranteed right to debate or vote on any such regulations.

Clause 17 powers could not be used to amend or repeal any Act of Parliament passed *after* the end of the session when this Bill is passed. But, any Act of Parliament which is already on the statute book and any statutory instrument which was passed *before or after* the Bill will not be immune.

## **Clause 17: Amendments**

The TUC believes that the Bill should be amended to remove or significantly restrict the clause 17 powers.

To this end we support amendments tabled by Peers which seek to ensure that the powers should only be used where they are necessary as opposed to where Ministers consider any legislative changes appropriate.