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# The European Union (Withdrawal Agreement) Bill - Implications for Scotland

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This briefing examines the proposals in the European Union (Withdrawal Agreement) Bill focussing on those which relate to the role and powers of the Scottish Parliament and Scottish Government. It has been prepared to aid any Scottish Parliament consideration of the Bill and the Scottish Government's related Legislative Consent Memorandum.



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# Key Points

1. Despite the EU's previous insistence that negotiations on the Withdrawal Agreement could not be reopened, a new Protocol on Ireland/Northern Ireland was agreed between the UK and European Commission on the morning of 17 October 2019. No other substantive changes were made to the Withdrawal Agreement. A revised Political Declaration was also agreed.
2. The UK Government moved quickly to begin the UK's process of ratifying the new Withdrawal Agreement by introducing the [European Union \(Withdrawal Agreement\) Bill](#) (referred to as the "Withdrawal Agreement Bill") in the UK Parliament on 21 October 2019. The Withdrawal Agreement Bill is designed to give the Withdrawal Agreement domestic legal effect in the UK.
3. The European Union (Withdrawal) Act 2018 requires both the Withdrawal Agreement and the Political Declaration to be approved by the House of Commons before ratification by the UK (the so-called 'meaningful vote' process). This requirement, along with the requirements of the Constitutional Reform and Governance Act 2010 ([outlined in this House of Commons Library Briefing](#)), will be [removed under the proposed terms](#) of the European Union (Withdrawal Agreement) Bill.
4. The Bill makes provision for an implementation period (previously referred to as the transition period), initially to the end of 2020, during which EU law will continue to apply to the UK. Various general technical amendments are made to ensure that existing EU law will apply as envisaged during the implementation period even though the UK will no longer be a Member State.
5. The "backstop" aspect of the Protocol on Ireland/Northern Ireland has been removed and replaced by [substantive arrangements for trade in goods between Northern Ireland and the EU which will be in place subject to the ongoing consent of the Northern Ireland Assembly](#). The new arrangements essentially provide Northern Ireland with frictionless access to the Single Market compared to the rest of the United Kingdom whilst maintaining Northern Ireland's place in the UK's customs territory.
6. The Bill proposes an oversight role for the UK Parliament in three areas:
  - a. The European Union (Withdrawal) Act 2018 is amended to provide for additional UK parliamentary scrutiny for new EU legislation that is made or may be made during the implementation period. This role is specific to the UK Parliament and there is no reference either to consulting with or a role for the Devolved Legislatures.
  - b. The Withdrawal Agreement Bill provides that the UK Parliament's approval is required for UK Ministers to agree to an extension of the implementation period. The Bill does not set out a role for the Devolved Legislatures in approving any extension to the implementation period. There is no role defined for the UK Parliament if UK Ministers decide not to extend the implementation period beyond 2020.
  - c. The Withdrawal Agreement Bill sets out that the UK Government's negotiating objectives for the future UK-EU relationship must be approved by the House of Commons before formal negotiations can begin, and that UK Ministers will be

bound to try to achieve these objectives. The Bill however proposes that the objectives "must be consistent with" the Political Declaration of 17 October 2019.

7. The UK Government has said that elements of the Withdrawal Agreement Bill require the legislative consent of the devolved legislatures. In its Legislative Consent Memorandum on the Withdrawal Agreement Bill, the Scottish Government set out that it agrees legislative consent is required in the areas identified by the UK Government, but also added a number of other clauses which it believes require legislative consent.
8. The Withdrawal Agreement Bill confers new powers on Scottish Ministers to introduce subordinate legislation in devolved policy areas to ensure the proper implementation of the Withdrawal Agreement. The Bill also extends certain existing powers conferred on Scottish Ministers by the European Union (Withdrawal) Act 2018. The new powers conferred on Scottish Ministers are also conferred on UK Ministers to act alone or jointly with Scottish Ministers. As a result, the powers granted to UK Ministers in the Withdrawal Agreement Bill extend to the whole of the UK and relate to both reserved and devolved matters. Consequently, the powers allow UK Ministers, acting alone, to make provision in devolved policy areas. This approach mirrors the current arrangements outlined in the European Union (Withdrawal) Act 2018.
9. Alongside the new Withdrawal Agreement, the UK Government and the European Union also agreed a revised [Political Declaration on the Future Relationship](#). Whilst the Withdrawal Agreement (once ratified) will be legally binding on the EU and the UK, the Political Declaration has no such status. Instead, it is an agreement between the EU and the UK Government setting out high level aspirations for the nature of the future relationship after the UK has left the EU.
10. The revised Political Declaration shows a number of changes compared to the version agreed in November 2018. The key differences are that the aim of creating a free trade area has been replaced with the ambition of creating a Free Trade Agreement and the section on level playing fields (which refers to a set of arrangements designed to ensure that the regulatory environments in the UK and EU are similar in some respects) has been amended to reflect the fact that there are no longer level playing field provisions within the Withdrawal Agreement due to the changes to the Protocol on Ireland/Northern Ireland.

# The Article 50 process

On 29 March 2017, the UK Government notified the European Council of the UK's intention to withdraw from the European Union. The withdrawal process is set out in Article 50 of the Treaty on European Union (TEU).

## UK-EU negotiations

In November 2018, the UK and EU [agreed a Withdrawal Agreement](#) designed to facilitate the orderly withdrawal of the UK from the EU. The Agreement contained provisions:

- safeguarding EU citizen's rights in the UK;
- allowing for a financial settlement between the parties;
- providing for a implementation period during which a future relationship between the UK and EU could be negotiated; and
- including a Protocol on Ireland/Northern Ireland designed to protect the Belfast/Good Friday Agreement in the event that agreement on a future relationship was not reached by the end of the implementation period (the so-called "backstop").

SPICe published a [briefing providing an overview of the November 2018 Withdrawal Agreement](#). The Withdrawal Agreement (along with the Political Declaration) was twice rejected by the House of Commons (on 15 January and 12 March 2019) in so-called 'meaningful votes'. The Withdrawal Agreement on its own was rejected by the House of Commons on 29 March 2019.

In the absence of a ratified agreement facilitating an orderly withdrawal from the EU, the UK Government sought extensions to the Article 50 period, which were granted by unanimous decisions of the European Council (meeting in its EU27 format without the UK). The European Council agreed extensions to the Article 50 period, firstly to 12 April 2019 and then until 31 October 2019. However, in order to comply with the terms of the European Union (Withdrawal) (No.2) Act 2019 (known as the "Benn Act"), on the evening of 19 October 2019, the UK Government sent the Council of the European Union a [letter requesting an extension](#) to the Article 50 process to 31 January 2020. On 28 October 2019, the European Council agreed to this request for an extension.

After Boris Johnson became Prime Minister in July 2019, the UK Government sought to renegotiate the Ireland and Northern Ireland backstop. The UK Government also sought to renegotiate the Political Declaration which sets out a framework for a future relationship between the UK and the EU.

Despite the EU's previous insistence that negotiations on the Withdrawal Agreement could not be reopened, a new Protocol on Ireland/Northern Ireland was agreed between the UK and European Commission on the morning of 17 October 2019. No other substantive changes were made to the Withdrawal Agreement. A revised Political Declaration was also agreed.

The revised documents, plus a declaration from the UK Government on Northern Irish consent, were published on 17 October 2019:

1. [Revised Protocol to the Withdrawal Agreement](#)
2. [Revised Political Declaration](#)
3. UK Government's [Unilateral Declaration on Consent](#)

## The new Withdrawal Agreement

Much of the Withdrawal Agreement remains exactly as before. The provisions on safeguarding EU citizen's rights in the UK; financial settlement; transition period; judicial and police cooperation and governance arrangements all remain unchanged.<sup>i</sup>

All revisions (apart from two minor technical amendments) are confined to the Protocol on Ireland/Northern Ireland.

- The previous Protocol allowed for the future relationship between Northern Ireland and the EU to be negotiated during the implementation period, while including a “backstop” such that, if future arrangements were not in place by the end of the implementation period, then a set of pre-agreed provisions would be enacted. These provisions included the creation of a single EU-UK customs territory and level playing field commitments designed to ensure that the regulatory environments in the UK and EU custom territories are similar.
- The revised Withdrawal Agreement “removes the backstop” in the sense that it creates substantive arrangements (to come into force at the end of the implementation period) for trade in goods between Northern Ireland and the EU which will be in place provided consent is given by the Northern Ireland Assembly. Under these revised arrangements, Northern Ireland is legally part of the UK's customs territory but, in order to facilitate an open border on the island of Ireland, there will be customs and regulatory checks on goods crossing the Irish Sea (from Great Britain to Northern Ireland) and EU customs duties will apply to goods entering Northern Ireland from Great Britain or from outside the EU where there is a risk those goods may subsequently enter the Single Market. The level playing field commitments as they applied to the whole of the UK have been removed and are now referenced in the [Political Declaration](#).

Further information on the revised Protocol on Ireland/Northern Ireland is available from [SPICe Spotlight: The revised deal on the UK's withdrawal from the EU](#).

## A differentiated relationship for Northern Ireland?

Throughout the negotiations for the UK's withdrawal from the EU, the Irish border question occupied most attention with both the EU and the UK Government determined to avoid the imposition of a “hard border” on the island of Ireland after the implementation period ends.

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<sup>i</sup> For further information on these provisions see SPICe Briefing [SB 18-78 The UK's Departure from the European Union - An overview of the Withdrawal Agreement](#)



## The current situation on the Irish border

While both the United Kingdom and Ireland are Member States of the European Union there is no trading border between Ireland and Northern Ireland. This is because EU membership includes membership of the Single Market for goods, services, people and capital and also of the Customs Union.

Single Market membership means that in addition to providing tariff free access to EU markets, a common framework of regulations means companies in countries such as the UK, France, Italy or Poland have to abide by common standards - whether they trade across the EU or not. Compliance with common rules obviates the need for conformity checks at the border.

In addition, as a result of Customs Union membership, both the UK and Ireland operate the common customs tariff which applies to the import of goods into the European Union.

Given the UK Government's decision to leave both the Single Market and the Customs Union, without specific arrangements being put in place, both customs and regulatory checks would be required on goods entering the European Union from the UK (including from Northern Ireland to Ireland).

In the first Withdrawal Agreement, negotiated by the Theresa May government in November 2018, the Protocol on Ireland/Northern Ireland provided a "backstop" which set out the arrangements for ensuring the avoidance of a hard border between Ireland and Northern Ireland as a result of Brexit. These arrangements included provision for Northern Ireland to continue to abide by the EU's Customs Code and relevant Single Market in goods legislation to ensure free movement of goods across the Ireland and Northern Ireland border.

The November 2018 Protocol on Ireland/Northern Ireland proved unpopular with some UK Members of Parliament. Upon becoming Prime Minister, Boris Johnson aimed to renegotiate the backstop.

The new Withdrawal Agreement includes a revised Protocol on Ireland/Northern Ireland. The "backstop" aspect has been removed and replaced by [substantive arrangements for trade in goods between Northern Ireland and the EU which will be in place subject to the ongoing consent of the Northern Ireland Assembly](#). The consent process must first take place four years after the end of the implementation period. In the event that it is not possible to seek the view of the Assembly, the UK Government will undertake an alternative process in which consent can be provided by Members of the Legislative Assembly, outside the normal structures of the Assembly, with the same consequences <sup>1</sup>.

The new arrangements essentially provide Northern Ireland with frictionless access to the Single Market compared to the rest of the United Kingdom whilst maintaining Northern Ireland's place in the UK's customs territory. How this process will work in practice is set out in the [UK Government's explainer for the new protocol](#). <sup>1</sup>

The Scottish Government called for a differentiated relationship for Scotland - whereby Scotland remained in the Single Market and Customs Union after Brexit - when it published Scotland's Place in Europe in December 2016 <sup>2</sup>. This approach was not

reflected in the UK Government's negotiating position. The approach proposed for Northern Ireland in the new Withdrawal Agreement means Northern Ireland will remain within the UK's customs area and will not be part of the EU's customs union. This means that whilst the proposed solution for Northern Ireland is not the same as that proposed for Scotland by the Scottish Government, it does equate to a differentiated relationship for Northern Ireland.

Giving evidence to the Scottish Parliament's Finance and Constitution Committee on 21 October 2019, the Chancellor of the Duchy of Lancaster, Michael Gove, explained why Northern Ireland has secured a differentiated relationship compared to the rest of the United Kingdom:

“ The situation in Northern Ireland is specific and unique. In keeping with the spirit of the Belfast Good Friday agreement, we wanted to keep infrastructure of any kind away from the border, and there are principles of consent in the Belfast agreement that are part of the deal that we have concluded with the EU. It is important to stress, however, that Northern Ireland will be part of the customs territory of the whole United Kingdom and that we will be leaving as one UK, whole and entire. It is also the case, with respect to customs, that any future free-trade agreements that the UK concludes with any countries outside the EU will involve Northern Ireland reaping the benefits of those arrangements as well.”

Scottish Parliament, 2019<sup>3</sup>

## European Council endorsement

The European Council consists of the heads of state or government of EU Member States.

On 17 October 2019, the European Council met in EU27 format (i.e. without the UK) and agreed to support both the new Withdrawal Agreement and new Political Declaration. The [formal conclusions](#) stated that the European Council:

- **endorsed the revised Withdrawal Agreement**, and invited the other institutions in the EU with a role in the ratification process to "take the necessary steps to ensure that the agreement can enter into force on 1st November 2019, so as to provide for an orderly withdrawal".
- **approved the revised Political Declaration**, and restated the EU's "determination to have as close as possible a partnership with the United Kingdom in the future in line with the Political Declaration".

On 28 October 2019, the European Council agreed to a further extension of the Article 50 process to 31 January 2020.

## Ratification of the new Withdrawal Agreement

The Withdrawal Agreement requires ratification by both the UK and the EU before it can enter into force.



The UK Government moved quickly to begin the UK's process of ratifying the new Withdrawal Agreement by introducing the [European Union \(Withdrawal Agreement\) Bill](#) (referred to as the "Withdrawal Agreement Bill") in the UK Parliament on 21 October 2019. This Bill is designed to give the Withdrawal Agreement domestic legal effect in the UK. The Bill is also being used to give effect to the [EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens' Rights Agreement between the UK and Switzerland](#) <sup>4</sup>. These agreements reflect the change in the relationship between the UK and the European Free Trade Association countries as a result of the UK's departure from the EU.

The European Union (Withdrawal) Act 2018 requires both the Withdrawal Agreement and the Political Declaration to be approved by the House of Commons before ratification by the UK (the so-called 'meaningful vote' process). However, this requirement, along with the requirements of the Constitutional Reform and Governance Act 2010 ([outlined in this House of Commons Library Briefing](#)), will be [removed under the proposed terms](#) of the Withdrawal Agreement Bill.

Ratification of the Withdrawal Agreement by the EU requires both:

- conclusion by the Council of the European Union by 'super' qualified majority (at least 72 % of the participating Member States – 20 of the 27 – comprising at least 65 % of their population); and
- consent from the European Parliament.

# What does the Bill propose?

The European Union (Withdrawal Agreement) Bill 2019-20 is designed to give the Withdrawal Agreement domestic legal effect in the UK. It does this by:

- allowing for EU law to apply during an implementation period [Part 1].
- giving the Withdrawal Agreement (other than the implementation period provisions) direct effect and supremacy in UK law [Part 2].

Much of the rest of the Bill proposes how the directly-applicable provisions of the Withdrawal Agreement (and EEA-EFTA and UK-Swiss Citizen's Rights agreements) are implemented. Finally, the Bill proposes changes to the ratification process, parliamentary oversight of the future relationship negotiations and arrangements on workers rights.

On 22 October 2019, the House of Commons supported the Bill at Second Reading but voted to reject the UK Government's proposed timetable for the passage of the Bill. As a result, at the time of writing the Bill's progress is paused.

On 22 October 2019, the Scottish Government published its [Legislative Consent Memorandum](#) on the Bill.

Key proposals in the Bill, including from a Scottish devolved perspective, are outlined below.

## Implementation period

**Part 1** makes provision for an implementation period (previously referred to as the transition period) during which EU law will continue to apply to the UK. Various general technical amendments are made to ensure that existing EU law will apply during the implementation period even though the UK will no longer be a Member State.

The European Union (Withdrawal) Act 2018 repeals the European Communities Act 1972. However, Clause 1 of the Bill seeks to allow the European Communities Act to continue to apply during the implementation period; it does this by inserting a new section 1A into the 2018 Act which states:

“ The European Communities Act 1972, as it has effect in domestic law or the law of a relevant territory immediately before exit day, continues to have effect in domestic law or the law of the relevant territory on and after exit day so far as provided by subsections (3) to (5).”

UK Government, 2019<sup>5</sup>

Professor Kenneth Armstrong from the University of Cambridge has outlined why the resurrection of the European Communities Act is important throughout the Withdrawal Agreement Bill as it allows the UK Government to give effect to new EU rules during the transition period and meets the requirements set out in Article 4 of the Withdrawal Agreement ([discussed below](#)) <sup>6</sup> .

Part 1 of the Withdrawal Agreement Bill also provides "fixing" powers for UK and Scottish Ministers to address more detailed deficiencies in law within devolved competence that arise from withdrawal or from the ending of the implementation period.

## Direct effect of the Withdrawal Agreement

Other provisions of the Withdrawal Agreement are intended to have effect beyond the implementation period, for example in relation to citizens' rights. **Part 2, Clause 5** inserts a new section 7A into the European Union (Withdrawal) Act to give the "rights, powers, liabilities, obligations, restrictions, remedies and procedures" of the Withdrawal Agreement that apply from time to time, direct effect in UK law and provides for inconsistent or incompatible domestic legislation to be disapplied. This provision ensures the supremacy of the Withdrawal Agreement in domestic law and has been introduced to ensure the UK can comply with Article 4 of the Withdrawal Agreement which states that:

“ this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States.”

UK Government, 2019<sup>5</sup>

Professor Kenneth Armstrong of Cambridge University has set out how clause 5 seeks to replicate the provisions of the European Communities Act 1972 which currently give effect to EU law whilst the UK is a member of the European Union. Professor Armstrong wrote:

“ The European Union (Withdrawal) Act 2018 repeals the European Communities Act and so switches off this domestic legal mechanism for giving effect to rights and obligations derived from an EU legal source. The challenge for the WAB, therefore, is how to create something to replace Section 2(1) of the 1972 Act while also complying with Article 4 of the Withdrawal Agreement... ...The clear intention of the WAB is to replicate and reproduce in the 2018 Act the constitutional qualities of the 1972 Act. Accordingly, the WAB states that the Withdrawal Agreement is to be “recognised and available in domestic law” and “enforced, allowed and followed accordingly”. All of which is, no doubt, also to reassure the EU that the UK will – as it has done during membership – ensure that EU law is given its correct legal effect.”

Armstrong, 2019<sup>6</sup>

**Part 2, Clause 6** also implements the EEA EFTA Separation Agreement and UK-Swiss Citizen's Rights Agreement in the same way. The UK Government's explanatory notes describe how the general principles of EU law and CJEU case law is to be applied when interpreting and applying the Withdrawal Agreement <sup>4</sup> .

The UK Government does not intend to seek legislative consent from the Scottish Parliament for these provisions giving the Agreements direct effect. <sup>4</sup> However, the Scottish Government view is that legislative consent is required, arguing that:

“ Clause 5 provides a mechanism for the provisions of the Withdrawal Agreement (other than Part 4) to be directly recognised and enforced in domestic law. Every enactment (which will include an Act of the Scottish Parliament) is to be read subject to that provision, altering the competence of the Scottish Parliament and the Scottish Ministers. ”

Scottish Government, 2019<sup>7</sup>

## Citizens' rights

**Part 3** provide various powers for UK Ministers to make regulations as regards the implementation of citizens' rights, and alters deportation rules. Under the Bill, Scottish Ministers are provided with powers to make regulations on the [recognition of professional qualifications, coordination of social security systems and equal treatment](#), subject to the provisions set out in Schedule 1.

Part 3 also creates an Independent Monitoring Authority for the Citizens' Rights Agreements (IMA) to monitor the implementation of citizens rights in the UK. Schedule 2 sets out:

- Scottish Ministers' role in approving the appointment of a non-executive member of the IMA with knowledge of Scottish-specific conditions; the Scottish Government's view, as set out in its [Legislative Consent Memorandum](#), is that this role should include an appointment veto.
- that the IMA may carry out an inquiry in response to a request by Scottish Ministers.

It is worth noting that the Bill does not end freedom of movement for EEA nationals at the end of the implementation period - the UK Government has indicated it proposes to do this though the planned Immigration and Social Security Co-ordination (EU Withdrawal) Bill.

## **Further detail on citizens' rights in the European Union (Withdrawal Agreement) Bill**

Part 2 of the European Union (Withdrawal Agreement) Bill gives direct effect in UK law to the citizens' rights provisions contained in the Withdrawal Agreement, the EEA EFTA Separation Agreement and Swiss Citizens' Rights Agreement (the "Agreements").

The people whose rights are affected by the Bill are EU citizens and EEA-EFTA and Swiss nationals and their families who are resident in the UK prior to the end of the implementation period (plus a number of other cases). The UK Government's Explanatory Notes to the Bill refers to the citizens affected as the "protected cohort"<sup>4</sup>.

The Bill aims to protect the rights of the protected cohort so individuals may continue to live, work, study, and access public services on the same basis that they enjoy under EU law. The Bill also provides rights to equal treatment and non-discrimination, the mutual recognition of professional qualifications, and the coordination of social security systems with Member States to ensure people who are moving to the UK before the end of the implementation period are not disadvantaged.

By giving the Agreements direct effect in UK law, the Bill would allow the protected cohort to rely on the Agreements directly to assert their rights.

Rights in relation to entry and residence are verified through the 'EU Settlement Scheme' in the UK. In other words, the citizens' rights set out in the Agreements only come into effect if individuals are granted 'status' under the Scheme. Those who are not granted settled or pre-settled status, or who fail to register with the Scheme, do not enjoy the protections of the Agreements. This means that 'protected cohort' citizens who have not registered by the end of the transition period appear to risk deportation. The rights of EEA-EFTA citizens moving to the UK after the end of the transition period will be determined in future negotiations and legislation, notably the UK's post-Brexit immigration bill.

The rights of UK nationals living in the EU27 will be provided for by the Member States where those UK nationals live.

## **Further detail on the Independent Monitoring Authority**

The Bill provides for the creation of a new body, called the Independent Monitoring Authority, whose members will be appointed by the Home Secretary. The IMA will monitor the UK's implementation of the Agreements' citizens' rights provisions. The Bill includes the provision of a statutory appeals process that allows citizens to lodge complaints about their treatment. The IMA may initiate its own inquiries about implementation, and it can carry out inquiries in response to requests from Scottish Ministers, the Home Secretary or complaints from individuals. The IMA can also intervene in legal proceedings and apply for supervisory jurisdiction/judicial review. The IMA must report annually on implementation, including complaints received.

The European Commission will perform the same function, of monitoring and enforcing citizens' rights, for UK nationals in the EU27.

The Scottish Government expressed concerns about the Independent Monitoring Authority in its Legislative Consent Memorandum writing:

“ Not only will the IMA have functions in devolved areas in Scotland but it will also have significant powers over devolved public authorities and in areas of devolved interest. The IMA will consider both the rules which seek to implement Part 2, as well as how those rules are applied in practice by public authorities, including, in some areas, by devolved public authorities. The IMA should have accountability, credibility and authority in Scotland, in its exercise of devolved functions and in its relations with devolved authorities. To achieve this, the Scottish Government considers that the consent of the Scottish Ministers should be required for the appointment of the member of the IMA who is intended to know about relevant conditions in Scotland. As introduced, the Bill provides a requirement that UK Ministers ensure, so far as possible, that one of the non-executive members of the IMA include a member who knows about relevant conditions in Scotland. Before making that IMA board appointment intended to represent Scottish interests, UK Ministers must tell the Scottish Ministers who they propose to appoint and why. If Scottish Ministers approve, the appointment is made. If Scottish Ministers do not approve, then UK Ministers may choose to continue with the appointment regardless. If an appointment is made without Scottish Ministers' approval, UK Ministers must publish a statement explaining why. ”

Scottish Government, 2019<sup>7</sup>

## Separation issues, such as police and judicial cooperation

**Part 4** provides UK Ministers with general powers to implement Part 3 of the Withdrawal Agreement on a wide range of "separation issues" currently governed by EU law. These include goods placed on the market, customs procedures and data protection. The same powers are [given to Scottish Ministers for separation issues](#) within devolved competence - such as police and judicial cooperation in criminal and civil matters.

## Fixing deficiencies

The European Union (Withdrawal) Act 2018 has been described by the Institute for Government as enabling a "giant copy and paste" exercise bringing EU law into UK domestic law on exit day by preserving domestic EU-derived legislation and converting directly applicable EU law into domestic law <sup>8</sup> . **Part 4** amends the way that the 2018 Act operates:

- the "copy and paste" exercise is delayed, moving it from Exit Day to the end of the Implementation Period (clause 25).
- the powers created for UK and Scottish Ministers to "fix" EU law as it is pasted into UK domestic law to ensure the law continues to operate effectively are expanded to deal with deficiencies that arise from the implementation period (i.e. not just withdrawal). These clauses are discussed in more detail in the section on [Powers for Scottish Ministers](#).



- those powers will now expire 2 years after the end of the implementation period, rather than 2 years from Exit Day.
- Schedule 6 allows for the effect of any "fixing" regulations already made by UK and Scottish Ministers to be deferred to the end of the implementation period.

## Ireland/Northern Ireland

**Part 4**, clauses 21 and 22 provides UK Ministers (and [Scottish Ministers within devolved competences](#)) with general powers to implement the Protocol on Ireland/Northern Ireland. Certain protections for the Belfast Agreement are also proposed.

In its [Legislative Consent Memorandum](#), the Scottish Government expressed concern that these powers could be used to amend the Scotland Act 1998:

“...when broad or purposive powers allowing the amendment of primary legislation are included in UK Bills, significant constitutional legislation such as the Scotland Act 1998 should be protected from being amended under these powers. ”

Scottish Government, 2019<sup>7</sup>

Clause 23 and Schedule 3 provides that there shall be “no diminution of rights, safeguards or equality of opportunity” as set out in the relevant section of the Belfast/Good Friday Agreement, as a result of Brexit.

## Parliamentary oversight

**Part 4**, clauses 29-31 creates an oversight role for the UK Parliament in three areas:

1. Reviewing EU legislation during the implementation period.
2. Approving any extension of the implementation period.
3. Negotiations for the future relationship.

### Reviewing EU legislation during the implementation period

Clause 29 amends the European Union (Withdrawal) Act to provide for additional UK parliamentary scrutiny for new EU legislation that is made or may be made during the implementation period. This role is specific to the UK Parliament and there is no reference either to consulting with or a role for the Devolved Legislatures. In its Legislative Consent Memorandum the Scottish Government wrote:

“ It is the view of the Scottish Government that it would be inconsistent for the UK Parliament to be given any supervisory role over devolved laws in Scotland in the way envisioned by clause 29. The implementation of EU law in devolved areas, including during the Implementation Period, is the responsibility, principally, of the Scottish Government. It is accountable in this respect to the Scottish Parliament. We would expect the European Scrutiny Select Committee to avoid making reports or recommendations in respect of such matters. ”

“ It is not the intention of the Scottish Government to seek any formal role for the Scottish Parliament in this process as we expect the Scottish Parliament to have the primary role in scrutinising the implementation of EU law in devolved areas of Scotland during the Implementation Period, and for such arrangements to be agreed between the Scottish Government and Parliament.”

Scottish Government, 2019<sup>7</sup>

## **Approving any extension of the implementation period**

The Withdrawal Agreement provides for the Joint Committee to agree an extension of the transition period for up to one or two years. Clause 30 of the Withdrawal Agreement Bill provides that the UK Parliament's approval is required for UK Ministers to agree to an extension of the implementation period. The Bill does not set out a role for the Devolved Legislatures in approving any extension to the implementation period.

The implementation period (until the end of 2020) has not been changed from the first Withdrawal Agreement and a decision on extending the period by one or two years must be taken by 1 July 2020. As a result, there is very limited time to agree a new relationship before the implementation period ends or a decision is made about extending it. There is no prescribed role for the UK Parliament in the Withdrawal Agreement Bill to address a situation where the UK Government chooses not to extend the implementation period. This could mean that in the event the UK Government chooses not to extend the implementation period and the future trade relationship is not in place, the UK Parliament does not have a prescribed role if it wishes to avoid a further "cliff edge" change to the UK's relationship with the EU at the end of December 2020

## **Negotiating the future relationship**

Clause 31 sets out that the UK Government's negotiating objectives for the future UK-EU relationship must be approved by the House of Commons before formal negotiations can begin, and that UK Ministers will be bound to try to achieve these objectives. The Bill however proposes that the objectives "must be consistent with" the Political Declaration of 17 October 2019.

In addition, clause 31 requires that quarterly reports on the progress of the future relationship negotiations must be laid in the UK Parliament and provided to the Scottish Parliament and Scottish Ministers. Finally, the House of Commons will be required to approve any future relationship treaty before it can come into force. This provision replaces the ratification procedures of the Constitutional Reform and Governance Act 2010.

Apart from receiving quarterly reports on progress, there is no role in the negotiations on the future UK-EU relationship for the Scottish Parliament set out in the Withdrawal Agreement Bill.

## **Ratification process**

Part 4 removes the requirement for any further process (other than enactment of the Bill) ahead of ratification of the Withdrawal Agreement by the UK.

- Clause 32 removes the requirement for a "meaningful vote" in the UK Parliament on the Withdrawal Agreement and Political Declaration as a pre-condition to ratification. It does this by repealing Section 13 of the European Union (Withdrawal) Act.
- Clause 33 states that section 20 of the Constitutional Reform and Governance Act 2010 does not apply to the Withdrawal Agreement.

## Workers' rights

Schedule 4 is introduced by Clause 34 and creates requirements for:

- a 'statement of non-regression' on proposed UK legislation; and
- reports to the UK Parliament on new EU legislation made after the implementation period where that legislation relate to labour protection.

The previous Prime Minister, Theresa May committed to legislate in this way in a [statement to the House of Commons on 26 February 2019](#).

The 'statement of non-regression' is a requirement for UK Ministers to make a written statement before the UK Parliament when it considers a new Bill (but not when it is considering secondary legislation) that relates to workers' rights. This statement must say that the Bill will not result in the law failing to confer any "workers' retained EU right". If the Bill does propose to reduce any workers' right, the statement must indicate that, nevertheless, the Government wishes to proceed with the Bill.

The body of law that makes up "workers' retained EU rights" is listed in a table in the schedule. Such rights include fundamental rights at work, fair working conditions and employment standards, information and consultation rights and health and safety at work.

In the report to Parliament, the UK Government must state whether any EU workers' rights have been published since the last report. If so, the report must state whether the laws of England, Wales and Scotland confer the same rights. The report must also state whether the UK Government plans to take steps to implement the new EU workers' rights.

## Joint Committee

The Withdrawal Agreement establishes a Joint Committee which will be responsible for the implementation and application of the Agreement. The Joint Committee will be composed of representatives of the EU and of the UK.

Clause 35 of the Withdrawal Agreement Bill stipulates that only a UK Government Minister can exercise the functions in relation to the Joint Committee on behalf of the UK. There is no reference to any role for a Minister from a Devolved Administration in relation to the functions of the Joint Committee.

## Sovereignty

Part 5 clause 36 of the Withdrawal Agreement Bill sets out that the "Parliament of the United Kingdom is sovereign". According to the Explanatory Notes to the Bill:

“ Clause 36 addresses the relationship between the constitutional principle of Parliamentary sovereignty and ‘separation agreement law’ as it would apply in the UK after exit day by virtue of the Withdrawal Agreement (WA), EEA separation Agreement and Swiss Citizens’ Rights Agreement. The clause recognises that the application of this separation agreement law through the Withdrawal Agreement Bill does not constitute a derogation from the principle of Parliamentary sovereignty. ”

UK Government, 2019<sup>4</sup>

The Scottish Government challenged the parliamentary sovereignty clause in its Legislative Consent Memorandum stating that in Scotland, sovereignty lies with the people. The Explanatory Memorandum states:

“ The Scottish Government notes the claim in the Scottish constitutional tradition that sovereignty properly lies with the people. Sovereignty in the UK is traditionally said to lie with the Crown in Parliament, a claim that has never fully been accepted in Scotland...”

“ ...The Scottish Government considers that clause 36 does not, as it purports to do, recognise a widely-accepted principle. Instead, it represents a contested conception of the constitution, and fails to respect the different constitutional traditions that apply in and between the nations of the United Kingdom.”

UK Government, 2019<sup>4</sup>

Doubt has been cast as to the significance of clause 36. The House of Commons Library blog [Withdrawal Agreement Bill: Sovereignty, special status and the Withdrawal Agreement](#) suggests that "*Clause 36 on Parliamentary sovereignty is of doubtful legal significance.*" <sup>9</sup>

# The Sewel Convention

The Sewel Convention (relating to legislative consent from the devolved legislatures), states that the UK Parliament “[will not normally legislate with regard to devolved matters without the consent](#)” of the devolved parliaments. Since May 2016 this has been set out in section 28(8) of the Scotland Act 1998. The Sewel Convention applies when legislation:

- changes the law in a devolved area of competence.
- alters the legislative competence of a devolved legislature.
- alters the executive competence of devolved Ministers.

A [SPICe spotlight blog on legislative consent](#) was published in 2018.

In its explanatory notes to the European Union (Withdrawal) Bill the [UK Government accepted](#) that legislation to implement the UK's withdrawal from the EU required consent under the Sewel Convention because it changed the powers of the devolved bodies. In particular the Bill amended the limits on legislative and executive competence to reflect the new status the Bill gave to retained EU law on exit day. New section 30A added to the Scotland Act provided that regulations made by UK Ministers could specify areas of devolved retained EU law that were outside competence.

On 15 May 2018, [the Scottish Parliament withheld consent](#) for the UK Parliament to legislate in devolved areas through the European Union (Withdrawal) Bill, MSPs voted by 93 to 30 not to give consent. The UK Parliament enacted the European Union (Withdrawal) Bill without the Scottish Parliament's consent.

In 2017, the [UK Supreme Court ruled in the Miller case](#) that the Sewel Convention was a convention and not legally binding, stating that “policing the scope and manner of its operation does not lie within the constitutional remit of the judiciary”<sup>10</sup> and “that the Scottish Parliament and the Welsh Assembly did not have a legal veto on the United Kingdom's withdrawal from the European Union”<sup>11</sup>. The case law therefore held that Sewel was a political convention which has no justiciable status in law. The policing of its scope and manner of operation is not a matter for the courts.

## Legislative Consent for the Withdrawal Agreement Bill

The Explanatory Notes for the European Union (Withdrawal Agreement) Bill include an assessment by the UK Government of the requirement for legislative consent from the devolved legislatures. Annex A of the Explanatory Notes set out the areas where the UK Government believes legislative consent is required.

In its [Legislative Consent Memorandum on the Bill](#), the Scottish Government set out that it agrees legislative consent is required in the areas identified by the UK Government, but also added a number of other clauses which it believes require legislative consent:

“ The Explanatory Notes to the Bill set out the UK Government’s view that the legislative consent of the Scottish Parliament is required for the Bill and specify the particular provisions which require consent. The Scottish Government agrees consent is required for these provisions and considers that further clauses also require the Scottish Parliament’s consent, specifically clauses 3, 5, 6, 18, 20, 21, 25, 26 and 28. ”

Scottish Government, 2019<sup>7</sup>

The Scottish Government set out in the Legislative Consent Memorandum that it believed the Scottish Parliament should not give its consent to any part of the Bill writing:

“ The Scottish Government recommends that the Scottish Parliament should not consent to any part of the Bill, and should indicate its opposition to the UK’s withdrawal from the EU and to the Withdrawal Agreement. The Scottish Government does not therefore intend to lodge a legislative consent motion in relation to the Bill.”

Scottish Government, 2019<sup>7</sup>

Setting out its reasons for refusing consent, the Scottish Government highlighted that it continues to believe that remaining in the EU would be best for Scotland and the UK as a whole and that:

“ The changes to the revised Withdrawal Agreement and Political Declaration are, in the Scottish Government’s view, even more detrimental to Scotland’s future than the previously negotiated withdrawal agreement. The arrangements made in the Withdrawal Agreement place Scotland at a competitive disadvantage, and result in Scotland alone not having its democratic views respected and honoured.”

Scottish Government, 2019<sup>7</sup>

The Scottish Government highlighted the UK Government’s proposed timetable for consideration of the Bill suggesting that:

“ There is a significant degree of uncertainty as to what much of the Withdrawal Agreement might mean in practical terms yet no updated analysis has been provided on the terms and implications of the agreement by UK Government.”

Scottish Government, 2019<sup>7</sup>

The Scottish Government also reiterated its view that, in light of the UK Government’s decision to legislate in the European Union (Withdrawal) Act for matters within or affecting the responsibilities of the Scottish Parliament despite consent being refused, the Scottish Government should not seek consent of the Scottish Parliament “to UK legislation related to withdrawal from the EU, except in exceptional circumstances unless the UK Government has indicated it will respect the views of the Scottish Parliament” <sup>7</sup> . The Scottish Government notes that it has not received such an assurance in relation to this Bill.



# Powers for Scottish Ministers

The Withdrawal Agreement Bill confers new powers on Scottish Ministers to introduce subordinate legislation in devolved policy areas to ensure the proper implementation of the Withdrawal Agreement. The Bill also extends certain existing powers conferred on Scottish Ministers contained in the European Union (Withdrawal) Act.

The new powers conferred on Scottish Ministers are also conferred on UK Ministers to act alone or jointly with Scottish Ministers. As a result, the powers granted to UK Ministers in the Withdrawal Agreement Bill extend to the whole of the UK and relate to both reserved and devolved matters. Consequently, the powers allow UK Ministers, acting alone, to make provision in devolved policy areas. This approach mirrors the current arrangements outlined in the European Union (Withdrawal) Act 2018. On this issue, the UK Government's Delegated Powers Memorandum states that in respect of most of the powers set out below, whilst the UK Government can use these powers in areas of devolved competence, it will not normally do so without the agreement of the devolved administrations. This commitment is not provided for in clause 28 (fees and charges) or the Schedule 6 powers.

The powers granted to devolved administration ministers in the Withdrawal Agreement Bill relate only to making provisions within their areas of devolved competence.

To accompany the Withdrawal Agreement Bill, the UK Government has published a memorandum concerning the Delegated Powers in the Bill. The memorandum provides further information about the purpose of the proposals for delegated powers in the Bill, along with some examples of how the delegated powers might be used <sup>12</sup>.

A summary of the delegated powers conferred on Scottish Ministers by the Withdrawal Agreement Bill is provided below.

## **Clause 1 – saving for the European Communities Act 1972 during the implementation period**

Clause 1 saves the effect of the European Communities Act 1972 (“the ECA”), which is repealed by section 1 of the European Union (Withdrawal) Act 2018, for the implementation period.

In particular, it modifies the power exercisable by Scottish Ministers, to make regulations to implement EU law under section 2(2) of the ECA so that it functions to give effect to the UK's EU obligations in Part 4 of the Withdrawal Agreement on the implementation period.

## **Clause 4 - Powers corresponding to clause 3 involving devolved authorities:**

Clause 3 confers power on UK Ministers to make supplementary provision in connection with the implementation period to ensure that the domestic statute book fully reflects the UK's obligations under Part 4 (transition) of the Withdrawal Agreement. Paragraph 273 of the UK Government's Delegated Powers Memorandum for the Bill states that the UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.

The power allows UK Ministers to modify legislation for the purposes of ensuring that it continues to work for the time-limited implementation period. It also enables UK Ministers

to amend provisions of the Withdrawal Agreement in consequence of the repeal of the saving of the ECA at the end of the implementation period ([The Bill addresses the European Union \(Withdrawal\) Act 2018 repeal of the European Communities Act 1972 to allow it to continue to apply during the implementation period](#)).

Clause 4 confers a similar power on devolved authorities, and UK Ministers acting jointly with a devolved authority.

### **Clauses 12 to 14 – Citizens' rights**

Clauses 12 to 14 allow UK Ministers, Scottish Ministers, or both acting jointly (an “appropriate authority”) to make provision for the purpose of implementing provisions of the Withdrawal Agreement, the EEA EFTA Separation Agreement and the Swiss citizens’ rights agreement (together, “the Agreements”) on:

- the recognition of professional qualifications by a UK professional regulator (clause 12).
- co-ordination of social security systems (clause 13).
- non-discrimination, equal treatment and rights of workers in relation to entitlements to publicly funded benefits and services (clause 14).

Schedule 1 of the Bill contains certain restrictions on the powers of devolved authorities (i.e. the Scottish Ministers in Scotland) to make such regulations. The Scottish Ministers can only make such regulations if they would be within the devolved competence.

These powers are each considered in more detail below.

#### Clause 12(1)-(3): recognition of professional qualifications:

According to the Delegated Powers Memorandum:

“ this clause gives Ministers of the Crown and devolved authorities the power to make regulations to implement Chapter 3 of Title II of Part 2 of the Withdrawal Agreement (Professional Qualifications) and the relevant provisions of the EEA EFTA Separation Agreement (Article 26, 27 and 28) and the Swiss Citizens’ Rights Agreement (Article 23(4) so far as relates to recognition of professional qualifications and all Articles under Part 4).”

UK Government, 2019<sup>12</sup>

This approach should ensure that EU citizens and EEA EFTA nationals who are resident or frontier workers in the UK (a [frontier worker](#) is an EU, EEA or Swiss citizen who regularly commutes to the UK because they are employed or self-employed in the UK but live elsewhere). who hold professional qualifications which have been recognised, or are in the process of being recognised, by a UK professional regulator before the end of the implementation period, will continue to have their qualifications recognised in the UK. The clause allows these provisions to be extended to those in scope of the EU Settlement Scheme.

An appropriate authority may make the regulations apply not only to persons within the scope of the relevant provisions of the Withdrawal Agreement and the EEA EFTA Separation Agreement but also to persons outside the scope of those agreements who

have been granted leave to enter or remain in the UK under the residence scheme immigration rules.

According to the Delegated Powers Memorandum, a power has been provided to Scottish Ministers because:

“ The legislation that needs to be amended will include devolved secondary legislation and so a concurrent power has been conferred on the devolved authorities, to make regulations when it is within their competence to do so. The UK Government will not normally use the power in areas of devolved competence without the agreement of the relevant devolved authority.”

UK Government, 2019<sup>12</sup>

#### Clause 13(1)-(3): coordination of social security systems:

Under the Withdrawal Agreement, the EU Social Security Regulations will continue to apply in UK law. In addition, the UK will be required to update these Regulations if changes are made at EU level. According to the Delegated Powers Memorandum:

“ Clause 13 provides Ministers of the Crown and devolved authorities (separately or jointly) with a power to modify domestic legislation to implement Title III of Part 2 of the Withdrawal Agreement, Title III of Part 2 of the EEA EFTA Separation Agreement, and Part 3 and Article 23(4) of the Swiss Citizens’ Rights Agreement. It will enable Ministers of the Crown and devolved authorities to supplement the effect of the direct application of these EU Regulations into domestic law, for example through remedying any unforeseen inconsistencies with domestic legislation which may occur and give rise to unfair treatment. It also allows Ministers of the Crown and devolved authorities to make provision otherwise for the purposes of dealing with matters arising out of, or related to, that Title. The UK Government will not normally use the power in areas of devolved competence without the consent of the relevant devolved administration.”

UK Government, 2019<sup>12</sup>

Clause 13 provides powers to update domestic law to reflect future changes to the EU Regulations that take effect in domestic law under the Withdrawal Agreement. This will ensure that the UK can react to future changes and continue to meet its obligations under the Withdrawal Agreement.

#### Clause 14 (1)-(3) Non-discrimination, equal treatment and rights of workers etc:

Clause 14 seeks to ensure that UK law continues to be compatible with certain requirements for equal treatment and non-discrimination. In particular, it allows regulations to implement:

The following articles of the Withdrawal Agreement:

- 12 (prohibition of discrimination on the grounds of nationality).
- 23 (right to equal treatment).
- 24(1) and 25(1) (rights of workers and the self employed).
- 24(3) and 25(3) (rights of employed or self-employed frontier workers).

The following articles in the EEA EFTA Separation Agreement:

- 11 (prohibition of discrimination on the grounds of nationality).
- 22 (right to equal treatment).
- 23(1) and 24(1) (rights of workers and the self employed).
- 23(3) and 24(3) (rights of employed or self-employed frontier workers).

The following articles in the Swiss Citizens' Rights Agreement:

- 7 (prohibition of discrimination on the grounds of nationality).
- 18 (right to take up employment etc).
- 19 (rights of employed or self employed persons).
- 20(1) (rights of frontier workers).
- 23(1) (rights of persons providing services).

Paragraph 166 of the Delegated Powers Memorandum states that the UK Government will not normally use this power in areas of devolved competence without the agreement of the relevant devolved administration.

### **Clause 19 - Separation issues:**

Clause 19 provides Scottish Ministers with a power similar to that provided to UK Ministers (in Clause 18 of the Bill) to make provision to implement Part 3 of the Withdrawal Agreement (separation issues) and equivalent provisions of the EEA EFTA separation agreement. Paragraph 185 of the Delegated Powers Memorandum states that the UK Government will not normally use this power in areas of devolved competence without the agreement of the relevant devolved administration. According to the Delegated Powers Memorandum:

“ The provisions on the Other Separation Issues (OSIs) in the Withdrawal Agreement are about providing legal certainty for individuals and businesses as the UK winds down out of the current legal order. The nature of the UK's future relationship with the EU will ultimately determine how we can best transition from these separation provisions to future arrangements.”

UK Government, 2019<sup>12</sup>

According to the UK Government's Delegated Powers Memorandum, the OSIs all relate to areas currently governed by EU law <sup>12</sup> . They cover:

- goods placed on the market.
- ongoing customs procedures.
- ongoing VAT and Excise Duty matters.
- Intellectual Property.
- ongoing police and judicial cooperation in criminal matters.
- ongoing judicial cooperation in civil and commercial matters.

- data and information processed or obtained before the end of the implementation period or on the basis of the Withdrawal Agreement.
- ongoing public procurement and similar procedures.
- Euratom related issues.
- Union judicial and administrative procedures.
- administrative cooperation procedures.
- privileges and immunities. and
- other issues relating to the functioning of the institutions, bodies, offices and agencies of the EU.

Clause 19 amends Schedule 2 of the European Union (Withdrawal) Act 2018 to give Scottish Ministers and UK Ministers, acting individually or jointly powers to make regulations to implement Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement to ensure that EU law can be wound-down in areas of devolved competence.

Clause 19 places a restriction on the way in which Scottish Ministers can use the power by stating what it cannot do:

The power cannot be used to:

- a. impose or increase taxation or fees.
- b. make retrospective provision.
- c. create a relevant criminal offence.
- d. establish a public authority.
- e. amend, repeal or revoke the Human Rights Act 1998 (nor legislation made under it). or
- f. amend or repeal the Scotland Act 1998, (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to the EU (Withdrawal) Act 2018 or are amending or repealing any provision of those Acts which modifies another enactment).

#### **Clause 22 - Powers corresponding to section 21 involving devolved authorities:**

Clause 22 inserts a new Part 1C into Schedule 2 of the European Union (Withdrawal) Act 2018, providing a similar power to that at clause 21 for devolved authorities to make regulations in areas of devolved competence to implement the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement.

Among other things, the regulations may make provision facilitating the access to the market within Great Britain of qualifying Northern Ireland goods. They may make provision about the recognition within Great Britain of technical regulations, certificates, approvals and authorisations issued by the authorities of a member state, or bodies established in a member state, in respect of qualifying Northern Ireland goods.

The power can be exercised by Scottish Ministers acting alone or jointly with UK Ministers. Paragraph 233 of the Delegated Powers Memorandum states that the UK Government will not normally use this power in areas of devolved competence without the agreement of the relevant devolved administration.

There is no equivalent provision to the power in clause 21 conferred on UK Ministers acting alone requiring them to define “qualifying Northern Ireland goods” for the purposes of the European Union (Withdrawal) Act 2018.

### **Clause 27 - Dealing with deficiencies in retained EU law**

Clause 27 amends section 8 of the European Union (Withdrawal) Act 2018. Section 8 of the European Union (Withdrawal) Act confers a power on UK Ministers to correct deficiencies in retained EU law to ensure that the UK statute book functions on exit day when the UK ceases to be a Member State. The devolved authorities also have a corresponding power in Part 1 of Schedule 2 to the European Union (Withdrawal) Act 2018 to make corrections in time for exit day to ensure a functioning statute book where these fall within areas of devolved competence. According to the UK Government's Delegated Powers Memorandum:

“ As a result of the implementation period, the Bill will amend the EU (Withdrawal) Act 2018 so that EU law will not be retained and domesticated on the UK statute book until the end of the implementation period. For this reason, the Bill needs to also amend section 8 of the EU (Withdrawal) Act 2018 so that the power can be used to amend deficiencies arising in retained EU law as at the end of the implementation period.”

UK Government, 2019<sup>12</sup>

The changes made to section 8 of the European Union (Withdrawal) Act 2018 by clause 27 apply equally to the powers conferred on devolved authorities in Part 1 of Schedule 2 of the Withdrawal Act.

Paragraph 287 of the UK Government's Delegated Powers Memorandum states that the UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration <sup>12</sup> .

### **Clause 28 - Ancillary fee-charging powers**

The EU (Withdrawal) Act 2018 contains a power at Part 1 of Schedule 4 to provide for fees or charges in connection with functions given to public authorities by section 8 or section 9 of that Act. This enables UK Ministers and devolved authorities to create fees and charges in connection with functions that public bodies in the UK take on in connection with EU exit.

This clause extends this fee charging power by amending Schedule 4 of the European Union (Withdrawal) Act 2018 so it can also be used in connection with functions given to public authorities by new sections 8B (powers in connection with Part 3 of both the withdrawal agreement and EEA EFTA Separation Agreement on labour and social standards) and 8C (powers in connection with the Protocol on Ireland/Northern Ireland in the Withdrawal Agreement). This also applies to the corresponding powers for devolved authorities in new Part 1B and Part 1C of Schedule 2).



The UK Government's Delegated Powers Memorandum states that extending the fees and charging powers in this way allows for the mitigation of the burden on the general taxpayer to pay for the cost of functions created to deal with the implementation of the Withdrawal Agreement and the EEA EFTA Separation Agreement. An example cited by the UK Government (albeit in a largely reserved area) would be the costs of renewing certain intellectual property rights.

The time limit that exists for making certain provisions under the existing fees and charging power will not apply to the extended provisions. According to the UK Government's Delegated Powers Memorandum, this is because the duties to implement the Withdrawal Agreement and EEA EFTA Separation Agreement on other separation issues are not strictly time limited and it is therefore not possible to define the end point of the functions created in connection with those agreements. The Delegated Powers Memorandum states that the "Government recognises that the decision whether or not to charge for a particular function is a policy choice with impact on industry or individuals".

The Delegated Powers Memorandum does not give a guarantee that the UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.

#### **Paragraph 1-4 of Part 1, Schedule 6 Powers in relation to the general rule delaying exit day to implementation period completion day**

The European Union (Withdrawal) Act provided powers to UK Ministers (Section 8) and Scottish Ministers (Part 1 of Schedule 2) to correct deficiencies in retained EU law. These corrections were expected to come into force on Exit day (the day the UK leaves the EU). As a result of the proposed implementation period (IP) contained in the Withdrawal Agreement, EU law will continue to apply in the UK after Exit day and until the end of the implementation period.

Paragraph 1 (as further qualified in paragraphs 2 and 3) of Part 1(3) and (5) of Part 1, Schedule 6 of the Withdrawal Agreement Bill confers powers on UK and Scottish Ministers (acting individually or jointly) to make provision to adjust deficiency SIs and SSIs and other regulations which have already been made to prepare the statute book for exit day in order to accommodate the implementation period. This is achieved through general glosses (which make clear how EU terms on the UK statute book should be read during the implementation period) including substituting implementation period completion day for exit day. A number of technical powers are given to Scottish Ministers to make bespoke provision if these glosses are not appropriate.

The UK Government's Delegated Powers Memorandum notes that there may be cases where deficiencies etc. are in fact required for exit day but not all will have been identified at this point. Consultation by Scottish Ministers with UK Ministers is required in these cases.

Paragraph 4 confers powers on devolved authorities and makes the same provision as paragraph 1 but for primary legislation made by devolved authorities in preparation for exit day under the provisions in paragraph 41(3) to (5) of schedule 8 of the European Union (Withdrawal) Act 2018. Consultation with UK Ministers is not required.

The Delegated Powers Memorandum does not give a guarantee that the UK Government will not normally use the powers in paragraph 1(3) and (5) of schedule 6 to amend domestic legislation in areas of devolved competence without the agreement of the

relevant devolved administration. Nor does it cover the power in paragraph 4 of schedule 6 and so no such commitment is made in relation to that power either.

# Protected enactments

[Schedule 4 of the Scotland Act 1998](#) is concerned with 'protected provisions' or protected enactments. The schedule sets out provisions which cannot be modified by an Act of the Scottish Parliament. This means that an Act of the Scottish Parliament, or regulations under an Act of the Scottish Parliament cannot expressly or by implication amend, disapply or repeal any of the provisions listed.

At present, the list of protected provisions includes the [EU Withdrawal Act 2018](#). Some provisions within the European Union (Withdrawal Agreement) Bill will, if enacted, fall under the protected provisions of the Scotland Act 1998 because of their inclusion in the EU Withdrawal Act 2018.

Some provisions to be added to the 2018 Act will not be protected because they are excepted from Schedule 4 of the Scotland Act – these are listed in paragraph 21(3) of Schedule 6 of the Bill.

The Bill is not added to Schedule 4 of the Scotland Act. This means that its free-standing provisions, for example powers given to the Scottish Ministers to make regulations to implement workers' rights, are not protected. The Scottish Parliament will be able to modify these provisions (including altering the powers given to Ministers) with respect to devolved matters.

The Scottish Government's [legislative consent memorandum](#) states that the amendments which the Bill makes to the European Union Withdrawal Act 2018 which will be afforded protected enactment status) are:

- amendments introduced by clause 1 (new section 1A of EUWA) and clause 2 (new section 1B of EUWA with the exception of new section 1B(3) and (4) which will be carved out from the protection) which will maintain the effect of the ECA for the implementation period.
- amendments introduced by clause 5 (new section 7A into EUWA) which will provide for the general implementation of the Withdrawal Agreement into domestic law.
- amendments introduced by clause 6 (new section 7B into EUWA) which will replicate the approach in clause 5 in relation to the UK-EEA EFTA Separation Agreement and the UK-Swiss Citizens' Rights Agreement.
- amendments introduced by clause 25 (amendments to sections 2, 3, 4 and 5 and schedule 1 of EUWA, inserts new section 5A) which will retain saved EU law at the end of the implementation period.
- amendments introduced by clause 26 (amends section 6 EUWA and inserts new section 7C) which will provide an interpretation of retained EU law and relevant separation agreement law.
- amendments introduced by clause 27 (amends section 8 and schedule 2 of EUWA) which will provide for amendments to the deficiencies power at section 8 of EUWA so that it can operate on deficiencies which result at the end of the implementation period or as a result of Part 4 of the Withdrawal Agreement.

- amendments introduced by clause 28 (amends the scope of the fee charging powers in Schedule 4 of EUWA) which will amend the scope of these powers which are conferred on devolved authorities as 'appropriate authorities'.
- amendments introduced by clause 35 (new section 18B into EUWA) which provide that functions of UK's co-chair of the Joint Committee are to be performed by a Minister.
- amendments introduced by Schedule 6 will continue to be protected to the extent that they make amendments to EUWA and other enactments already protected (with the exception of amendments inserting paragraphs 8A to 8H into Schedule 7 of EUWA).

The Scottish Government's position is that if provisions are given protected enactment status, this will, in effect, be "constraining further the Parliament's competence without its consent".<sup>13</sup>

The Scottish Government's [legislative consent memorandum](#) to the [EU \(Withdrawal Agreement\) Bill](#) states that:

“ Certain provisions of the Bill, once enacted, will be made protected enactments under the Scotland Act 1998 by virtue of their inclusion in the EU (Withdrawal) Act 2018. The Scottish Government does not agree with the protection of EUWA as it constrains the competence of the Scottish Parliament, and the Parliament withheld its consent to this provision. The Scottish Government similarly disagrees with the limitation of legislative competence that will follow once certain provisions in the current Bill are included in this protected enactment status.”

Scottish Government, 2019<sup>7</sup>

The Scottish Government is of the view that the protected enactment status of the EU Withdrawal Act should be removed.

# What has changed in the Political Declaration?

Alongside the new Withdrawal Agreement, the UK Government and the EU also agreed a revised [Political Declaration on the Future Relationship](#)<sup>14</sup>. Whilst the Withdrawal Agreement (once ratified) will be legally binding on the EU and the UK, the Political Declaration has no such status. Instead, it is an agreement between the EU and the UK Government setting out high level aspirations for the nature of the future relationship after the UK has left the EU. It is possible that when negotiations on the future relationship begin, both sides may wish to go further than the ambitions set out in the Political Declaration. Alternatively the negotiations may result in a less ambitious future relationship than that set out in the Political Declaration. Negotiations on the future relationship will begin once the UK has left the EU.

As with the previous Political Declaration, the new version is structured to cover the following areas:

- Part I - initial provisions.
- Part II - economic partnership.
- Part III - security partnership.
- Part IV - institutional and other horizontal arrangements.
- Part V - forward process.

The initial provisions section describes some core values, rights and data protection arrangements as the basis for co-operation. This includes a commitment to incorporate the UK's "continued commitment to respect the framework of the European Convention on Human Rights (ECHR)" into any future relationship. It also includes a commitment to:

“ establish general principles, terms and conditions for the United Kingdom’s participation in Union programmes, subject to the conditions set out in the corresponding Union instruments, in areas such as science and innovation, youth, culture and education, overseas development and external action, defence capabilities, civil protection and space.”

UK Government, 2019<sup>14</sup>

The economic partnership section covers ambitions for a Free Trade Agreement and provides details on the approach for goods, services, movement of people, transport, energy, fishing, global co-operation and level playing field provisions.

The security partnership section covers joint ambitions for co-operation in criminal matters, foreign policy, security and defence.

The institutional arrangements section describes a joint desire for an overarching framework for governance. This includes mechanisms for dialogue and strategic direction.

The revised Political Declaration shows a number of key changes compared to the version agreed in November 2018. The key differences are:

- The aim of creating a free trade area has been replaced with the ambition of creating a Free Trade Agreement.
- Given the single UK-EU customs territory provided for in the previous Withdrawal Agreement has been removed, reference to this in the new Political Declaration has been removed and replaced with reference to the Free Trade Agreement. There is also now reference to consideration of [rules of origin](#) as a result of there no longer being a single UK-EU customs territory.
- The paragraph on implications for checks and controls has been amended to reflect the absence of a single UK-EU customs territory and potential extent for alignment of rules has been replaced with a reference to the extent for regulatory cooperation.
- The section on level playing field has been amended to reflect the fact that there are [no longer level playing field provisions](#) within the Withdrawal Agreement.
- The Security Partnership section has been amended to remove reference to the role of the Court of Justice of the European Union (CJEU) in the interpretation of Union law.
- The institutional arrangements section has been amended to remove reference to the dispute resolution mechanism based on that agreed in the previous Withdrawal Agreement.

Whilst the Political Declaration is not legally binding, as discussed [earlier in the briefing](#), the European Union (Withdrawal Agreement) Bill proposes that the negotiating objectives for the future UK-EU relationship (which must be approved by House of Commons before formal negotiations can begin) "must be consistent with" the Political Declaration of 17 October 2019. Therefore the content of the Political Declaration could potentially set the direction of the UK's negotiating mandate for the future relationship.

## Ambition for a Free Trade Agreement

With the removal of the Ireland and Northern Ireland backstop which would have created a single UK-EU customs territory, the new Political Declaration sets out the ambition to negotiate a Free Trade Agreement (FTA).

Economic analysis suggests that a move towards negotiating an FTA will have negative economic consequences when compared to either the UK's current arrangements as a member of the EU or a relationship whereby the UK and EU form a single customs territory. A blog by the House of Commons Library on the economic impact of the Brexit deal stated that "the terms of any future UK-EU trade agreement will play a crucial role in determining Brexit's impact on the UK economy over the longer term". The blog highlighted the UK Government's own economic analysis conducted in 2018 which suggested that:

“ a Free Trade Agreement scenario with the EU would see GDP between 4.9% and 6.7% lower compared with staying in the EU, depending on immigration policy. Trade with the EU under this scenario is estimated to be 25% lower – and 5% higher with non-EU countries – than if the UK remained in the EU.”

Harari, 2019<sup>15</sup>



The reasons for the potential difference in GDP are likely to be due to additional non-tariff barriers with the EU (differing technical standards and regulations). The UK Government's analysis showed only minimal positive effects on GDP from changes to domestic regulatory policy and new trade agreements with a number of other countries (including the US, China and India).

## **What a Free Trade Agreement means for goods and services compared to the UK's current position as a member of the EU**

### Goods

Whilst a Free Trade Agreement would remove all tariffs on goods traded between UK and EU, the new Political Declaration does not assume a single UK-EU customs territory and does not envisage regulatory alignment with EU standards. Therefore, the frictionless trade in goods that occurs inside the EU could not happen between UK and EU even if tariffs disappear. This is because: (a) the origin of the goods traded would have to be verified, and (b) so would their compliance with the rules of the importing country.

1. Without an EU-UK customs union, each party could adopt different external trade policies, like imposing different tariffs on goods from third countries. Goods travelling within the EU-UK FTA would need to be checked for provenance, to police tariff circumvention (e.g. US goods entering the FTA where tariffs are lower, then travelling freely across it).
2. After leaving the EU single market, the UK could pass rules diverging from the EU regulations, and refuse to recognise EU standards as equivalent to its own. Since regulatory coherence across UK and EU would no longer be assumed, checks on imports would be necessary to ensure compliance with the importing country's standards (on health, safety, labelling, etc). The UK has removed the commitment, appearing in the 2018 Declaration, to consider "aligning with Union rules in relevant areas."

To minimise the trade disruption caused by these checks, the UK and EU has committed to engage in "deep regulatory and customs cooperation."

### Services

EU law guarantees the freedom to travel across the EU to work and to establish a commercial presence abroad (for instance, opening a travel agency). Services and service providers, therefore, move freely within the single market. The envisaged UK-EU Free Trade Agreement would restrain this freedom, mostly in two ways:

(a) the UK Government has rejected the freedom of movement of persons

The EU and UK would have to agree on a new scheme of mobility for their citizens. On service providers and investors, the Political Declaration simply notes the plan to enter into yet-to-be-defined arrangements regulating the "temporary entry and stay of natural persons for business purposes in defined areas."

(b) UK and EU would have to negotiate case by case market access to foreign services.

In the Political Declaration, the EU and UK have committed to open their services market "well beyond [their] WTO commitments," and building on recent Free Trade Agreements concluded by the EU. The Political Declaration refers to the EU's FTAs for aspiration, but the EU agreements with Canada and Japan did not contain sizeable concessions regarding services and government procurement (see [SPICE Briefing](#)

[Anatomy of Free Trade Agreements](#) for more information). The Political Declaration sets higher ambitions and offers a list of sectors in which liberalisation is desirable. These sectors are:

- professional and business services.
- telecommunications services.
- courier and postal services.
- distribution services.
- environmental services.
- financial services.
- transport services.
- other services of mutual interest.

Ultimately, rules on trade in services will have to be built anew. The UK and the EU can pick which sectors to open and how deeply, building on their pre-existing WTO commitments. The potential divergence of rules after Brexit would hinder circulation of services, without special arrangements. The UK and the EU have identified the field of financial services as one requiring specific attention. Accordingly, they have committed to examine each others rules to assess whether they are comparably effective ("equivalent"). If so, the operation of financial services providers (for instance, UK banks) across the UK-EU Free Trade Agreement would be facilitated.

## Level playing field, including environmental standards

"Level playing field" refers to a set of arrangements designed to ensure that the regulatory environments in the UK and EU are similar in some respects.

These arrangements aim to prevent companies in the UK or EU benefiting from an unfair competitive advantage by virtue of having access to each other's markets whilst operating within different tax and regulatory regimes. This "advantage" would typically be gained due to the lowering or non-enforcement of regulatory standards or as a result of different taxation or state aid practices.

The Political Declaration agreed in November 2018 stated that:

“ The future relationship must ensure open and fair competition. Provisions to ensure this should cover state aid, competition, social and employment standards, environmental standards, climate change, and relevant tax matters, **building on the level playing field arrangements provided for in the Withdrawal Agreement** and commensurate with the overall economic relationship. The Parties should consider the precise nature of commitments in relevant areas, having regard to the scope and depth of the future relationship. These commitments should combine appropriate and relevant Union and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement as part of the future relationship”

UK Government, 2018<sup>16</sup>

The reference to "building on" the Withdrawal Agreement arrangements referred to the [level playing field provisions in six policy areas](#) that were set out in the Ireland/Northern Ireland 'backstop'. One of these policy areas - environmental protection - is devolved to the Scottish Parliament.

The arrangements in the previous Withdrawal Agreement for a level playing field in environmental protection included:

- a "non-regression" clause applicable to the common environmental protections as they stand at the end of the implementation period.
- maintaining EU environmental principles (for example the "polluter pays" principle) in environmental legislation.
- establishing an equivalent of the EU Emissions Trading System in the UK.
- power for the Joint Committee to set targets for in atmospheric pollution.
- creating an independent body, able to bring legal action, to monitor and enforce the arrangements, and to ensure effective administrative and judicial proceedings are available.

The level playing field provisions on environmental protection do not appear in the new Withdrawal Agreement. <sup>17</sup>

The new Political Declaration makes similar political commitments on a level playing field in the future relationship as the previous Political Declaration. However the new Declaration does not refer to "building on" the Withdrawal Agreement arrangements, as these no longer form part of the new Withdrawal Agreement.

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