



HOUSE OF LORDS

Select Committee on the Constitution

2nd Report of Session 2019

**European Union
(Withdrawal
Agreement) Bill:
interim report**

Ordered to be printed 4 November 2019 and published 5 November 2019

Published by the Authority of the House of Lords

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CONTENTS

	<i>Page</i>
Chapter 1: Introduction	3
Overview	3
The Withdrawal Agreement and related Agreements	4
The European Union (Withdrawal) Act 2018	5
Chapter 2: Implementation (Parts 1 & 2)	7
Territorial extent	7
Part 1: Implementation period	7
Delegated powers in Part 1	9
Part 2: Remaining implementation of Withdrawal Agreement etc.	10
Chapter 3: Citizens' rights (Part 3)	12
Introduction	12
Specific clauses	12
Chapter 4: Other separation issues and financial provision (Part 4)	15
Chapter 5: Devolution	17
Introduction	17
Legislative consent	17
Future relationship negotiations	17
Northern Ireland	18
Part 4, clauses 21–24	19
Chapter 6: Other provisions (Parts 4 & 5)	22
The relationship to the European Union (Withdrawal) Act 2018	22
Parliamentary oversight	22
Workers' rights	24
Parliamentary sovereignty	25
Supplementary and final provisions	25
Appendix 1: List of Members and declarations of interest	27

European Union (Withdrawal Agreement) Bill: interim report

CHAPTER 1: INTRODUCTION

Overview

1. The European Union (Withdrawal Agreement) Bill (“the Bill”) was introduced in the House of Commons on 21 October 2019 and received its second reading on 22 October. The Bill passed second reading, but the programme motion setting the timetable for further consideration in the House of Commons was not approved. The Bill made no further progress ahead of the dissolution of Parliament on 6 November.
2. The purpose of this report is to provide an interim explanation and analysis of the Bill and the constitutional issues it engages. We will report further with conclusions and recommendations should this or any similar bill that is introduced in the next parliament. We do not pass judgement on the policy issues in the Bill or those related to the United Kingdom’s withdrawal from the European Union (EU) more broadly. We do not know whether a bill in this form will be introduced in the next parliament, but any bill giving effect to a withdrawal agreement with the EU will need to engage with many of the technical legal challenges that this Bill seeks to address. It is therefore valuable to explore them at an early stage—something we sought repeatedly to do over the last year by asking the Government for a copy of the Bill in draft.¹
3. The Bill implements the Withdrawal Agreement as agreed between the United Kingdom and the European Union on 17 October 2019. It also implements two related agreements, the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens’ Rights Agreement between the UK and Switzerland (“the Agreements”).
4. The Bill is of the highest constitutional significance, given its intended effect. It builds on, but also amends and departs in significant ways from, the European Union (Withdrawal) Act 2018 (“the 2018 Act”). It is a complex piece of legislation containing specific provisions relating to:
 - the Withdrawal Agreement’s implementation period
 - giving effect to three separate but related international agreements
 - citizens’ rights and workers’ rights
 - the Ireland/Northern Ireland protocol to the Withdrawal Agreement
 - several broad secondary law-making powers

¹ See, for example, [Letter from the Chairman to Lord Callanan, Minister of State for Exiting the European Union on the European Union Withdrawal Agreement and subsequent legislation](#), 5 December 2018 and [Letter from the Chairman to Rt Hon Steve Barclay MP, Secretary of State for Exiting the European Union, on the European Union \(Withdrawal Agreement\) Bill](#), 1 May 2019

- a complex ongoing relationship to EU law both during the implementation period to 31 December 2020 and for the life of the Withdrawal Agreement. This has implications for the relationship between the Bill and the status of “retained EU law” in the 2018 Act and for parliamentary sovereignty, a principle expressly recognised by the Bill.
5. The Bill should therefore be read alongside the Withdrawal Agreement and related Agreements, and with the 2018 Act. A brief introduction to these is below.

The Withdrawal Agreement and related Agreements

6. The UK Government and the European Commission published a draft Withdrawal Agreement on 14 November 2018. The text of this Agreement, together with a Political Declaration on the framework for future EU–UK relations, was endorsed by EU leaders at a European Council meeting on 25 November 2018.² Following further negotiations in 2019, a revised Withdrawal Agreement and Political Declaration were published on 19 October 2019.³
7. The Withdrawal Agreement provides for the ongoing relationship between the UK and the EU during the implementation period up to 31 December 2020 and for the legal obligations which arise from this. The two related Agreements—the EEA EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein,⁴ and the Swiss Citizens’ Rights Agreement between the UK and Switzerland⁵—were concluded on 20 December 2018.
8. The Agreement contains six parts and three protocols:
- Part 1 Common Provisions
 - Part 2 Citizens’ Rights
 - Part 3 Separation Provisions
 - Part 4 Transition
 - Part 5 Financial Provisions
 - Part 6 Institutional and Final Provisions
 - Protocol on Ireland/Northern Ireland and Annexes to Ireland/Northern Ireland protocol
 - Protocol on Sovereign Base Areas of UK in Cyprus
 - Protocol on Gibraltar

2 HM Government, *Withdrawal Agreement and Political Declaration*, 25 November 2018: <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> [accessed 30 October 2019]

3 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019: <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> [accessed 30 October 2019]

4 HM Government, *EEA EFTA Separation Agreement*, 20 December 2018: <https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer> [accessed 30 October 2019]

5 HM Government, *Swiss Citizens’ Rights Agreement*, 20 December 2018: <https://www.gov.uk/government/publications/swiss-citizens-rights-agreement-and-explainer> [accessed 30 October 2019]

9. The annexes contain more detail on various areas of EU law where cooperation will continue during the implementation period. They also provide rules of procedure for the Joint Committee and Specialised Committees that are created to regulate the implementation of the Agreement and rules of procedure for dispute settlement.

The European Union (Withdrawal) Act 2018

10. The 2018 Act was passed on 26 June 2018. Its purpose is to provide a functioning statute book when the UK leaves the EU. The 2018 Act repeals the European Communities Act 1972 (ECA) and seeks to address comprehensively the wide-ranging impact on the law of the United Kingdom of exit from the European Union. It preserves existing EU law as it applies to the UK when it leaves the EU by converting it into domestic law. To this end it introduces the concept of “retained EU law” and provides in detail for its status and interpretation (sections 2–7). It gives extensive delegated powers to ministers (sections 8–9) and provides for equivalent powers in relation to the devolved authorities (sections 10–12). Section 13 of the 2018 Act requires parliamentary approval of the outcome of negotiations with the EU.
11. We produced three reports on this legislation. The first, published in March 2017, before notification of intention to withdraw under Article 50 of the Treaty on European Union had been issued, anticipated the constitutional issues which were likely to be raised by the “Great Repeal Bill” the Government had promised as the centrepiece of its legislation to deliver Brexit.⁶ Following publication of the European Union (Withdrawal) Bill, we produced a second (interim) report to coincide with the Bill’s second reading in the House of Commons,⁷ assessing the Bill in light of our earlier recommendations and drawing attention to the fact that many of the problems we had anticipated were manifest in that Bill.⁸
12. We then conducted an inquiry into the Bill and produced a final report ahead of second reading in the Lords.⁹ We explored the implications of the creation by the Bill of retained EU law, its status and interpretation, the delegated powers for ministers and the interaction of these powers with the devolved institutions and their competences. Members of the Committee and others in the House of Lords pressed the Government on these points during the committee stage of the Bill and, following discussions with ministers, the Government tabled amendments on several key issues. These included amendments to provide clarity on how UK courts should treat the case law of the Court of Justice of the European Union; to define the status of retained EU law in relation to its future modification; and to impose requirements on ministers to justify and explain their use of the regulation-making powers in the Bill.¹⁰ We were critical of the range and scope of delegated powers in the Bill. These were amended to provide for strengthened scrutiny and to create

6 Constitution Committee, *The ‘Great Repeal Bill’ and delegated powers* (9th Report, Session 2016–17, HL Paper 123)

7 Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19)

8 We concluded that the Bill was “highly complex and convoluted in its drafting and structure” and that it left “multiple and fundamental constitutional questions” unanswered. Constitution Committee, *European Union (Withdrawal) Bill: interim report* (3rd Report, Session 2017–19, HL Paper 19), summary

9 Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69)

10 European Union (Withdrawal) Bill [Bill 5 (2017–19)], *Second Marshalled List of Amendments to be Moved on Report*, HL Bill 79-R-II, amendments 23–25, 83C, 83F, 83H and 83

a sifting mechanism whereby parliamentary committees could review draft statutory instruments and recommend the level of scrutiny to which they should be subject.¹¹

11 European Union (Withdrawal) Act 2018, [schedule 7](#)

CHAPTER 2: IMPLEMENTATION (PARTS 1 & 2)

Territorial extent

13. The Bill extends to the whole of the United Kingdom.¹² Various provisions including clause 1, relating to repeal of the ECA, also extend to the Isle of Man, the Channel Islands and Gibraltar.¹³

Part 1: Implementation period

14. The Bill provides a legal scheme for the continued operation of existing EU law during the “implementation period”. The Withdrawal Agreement calls this the “transition period”,¹⁴ but in this report we use “implementation period”, as that is the term in the Bill. This will last until 31 December 2020.¹⁵ The Withdrawal Agreement provides that European Union law “shall be applicable to and in the United Kingdom during the transition period”.¹⁶ During that period, Union law shall have “the same legal effects” in the United Kingdom as it produces within the European Union and its Member States, “and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.”¹⁷
15. The provisions in this part of the Bill must be read alongside the European Union (Withdrawal) Act 2018. Section 1 of the 2018 Act remains in place. This means that on “exit day”, the ECA will be repealed. However, in order to comply with Article 127, the Bill “saves” the terms of the ECA for the implementation period.
16. The Bill amends the 2018 Act in relation to retained EU law. The provisions for converting EU law into retained EU law (sections 2–4) and relating to the primacy of retained EU law (sections 5–7) in domestic law will now take effect at the end of the implementation period.¹⁸
17. Clause 1 inserts a new section 1A into the 2018 Act to save the effects of the ECA for the implementation period. New section 1A(2) provides that the ECA will continue to have effect despite its repeal by the Bill. This is done by inserting Part 4 of the Withdrawal Agreement (other than as it relates to the Common Foreign and Security Policy) into the definition of EU law and “the Treaties” in the ECA.¹⁹
18. Although the UK will have left the EU, and the ECA will be repealed, the ECA framework will continue to apply until the end of 2020 to ensure the effective primacy of EU law during this period. This means that during the implementation period EU rules will apply in the United Kingdom as at present, including the operation of directly applicable EU law made before the end of 2020. This rule also applies to any international agreement concluded by the EU and entering into force during the implementation

12 European Union (Withdrawal Agreement) Bill [Bill 7 (2019)], [clause 40](#)

13 European Union (Withdrawal Agreement) Bill, [clause 40\(3\)](#)

14 The Preamble and Article 126 include the phrase “transition or implementation period”, otherwise “transition period” is used throughout the rest of the Withdrawal Agreement.

15 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 126. There is the possibility of a single extension for up to one or two years if adopted by the Joint Committee before 1 July 2020. See Article 132 and clause 37 of the Bill.

16 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 127

17 *Ibid.*, Article 4 and Article 127(3)

18 European Union (Withdrawal Agreement) Bill, [clauses 25–27](#)

19 European Union (Withdrawal Agreement) Bill, [clause 1, inserted section 1A\(3\)](#)

period. To reinforce the continuity principle, new section 1A(3)(e) provides that EU rules on customs duties and the Common Agricultural Policy (CAP) continue to apply as they do at present. This is made explicit “to avoid any suggestion that the Bill merely preserves CAP arrangements and customs duties etc. as they had effect at the moment of withdrawal.”²⁰

19. New section 1A(3)(d) modifies section 3(1) of the ECA to bring the Withdrawal Agreement within the purview of the rules of interpretation and the primacy of Court of Justice (CJEU) decisions on matters of EU law. The Government explains that this will “ensure that EU rules are interpreted and applied consistently in both the UK and the EU for the duration of the implementation period,”²¹ and “[d]uring the implementation period, the UK will maintain the same recourse to the EU’s judicial review structures as a Member State.”²² To this end, the Bill amends section 6 of the 2018 Act so that its provisions which end the jurisdiction of the CJEU will take effect only at the end of the implementation period.²³
20. Although the UK’s obligations in relation to EU law will apply through the Withdrawal Agreement rather than as a Member State, the effect on citizens will be the same. One consequence of the “same legal effects” provision is that “legal or natural persons will be able to rely directly on some of the provisions of the Withdrawal Agreement before the UK courts.”²⁴
21. Under the Agreement, the United Kingdom is permitted during the transition period “to negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive competence of the Union” but these agreements may not “enter into force or apply during the transition period, unless so authorised by the Union”.²⁵
22. Since new section 1A(3) (in clause 1) in effect inserts Part 4 of the Withdrawal Agreement into the definition of “the Treaties” in the ECA, the duty of officials and courts to give effect to EU law, and how they interpret EU law, will seem unchanged. The ECA will continue to be their point of reference, and the interpretive rules that have built up since the 1970s will presumably continue to apply.
23. The continued effect of ECA primacy also applies to devolved institutions and devolved legislation, each of which is subject to EU law primacy under current arrangements. The restrictions on devolved competence which currently refer to the ECA will be preserved for the duration of the implementation period.
24. Clause 2 inserts a new section 1B into the 2018 Act. This saves “EU-derived domestic legislation” for the duration of the implementation period. “EU-derived domestic legislation” is UK law that has been made to give effect to EU law.
25. This provision is necessary due to the modification and effective suspension of the retained EU law provisions in the 2018 Act (clauses 25–27, discussed below). In effect, clause 2 seeks to replicate section 2 of 2018 Act, and the

20 [Explanatory Notes to the EU \(Withdrawal Agreement\) Bill](#), para 88(f)

21 *Ibid.*, para 26

22 *Ibid.*, para 27

23 European Union (Withdrawal Agreement) Bill, [clause 26\(1\)](#)

24 [Explanatory Notes to the EU \(Withdrawal Agreement\) Bill](#), para 29

25 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 129(4)

definition of “EU-derived domestic legislation” in new section 1B (7) mirrors that in section 2 of the 2018 Act.

26. There is no need to make equivalent provision for “direct EU legislation”²⁶ or “rights, powers, liabilities, obligations, restrictions, remedies and procedures” under section 2(1) of the ECA²⁷ because each of these categories is specifically saved by clause 1 of the Bill through which, in effect, the ECA continues to operate.
27. New section 1B(3) contains a number of “glosses” to make sure that EU-derived domestic legislation is to be interpreted in light of any changes in EU law or modifications of its terms that have occurred since the ECA came into force.²⁸ New section 1B(4) provides that any new EU-derived domestic legislation that is made or passed during the implementation period is to be read in light of the “glosses” in new section 1B(3).
28. The effect of Part 1 is that, in essence, the relationship between domestic law and EU law will remain the same until 31 December 2020 or until the end of any extension of the implementation period as provided for in the Agreement.

Delegated powers in Part 1

29. The Bill contains a range of delegated powers to give effect to the Withdrawal Agreement. In this report we explain the operation of these powers, but we leave it to the Delegated Powers and Regulatory Reform Committee to assess their appropriateness and the scrutiny processes to which they will be subject, including the proposed sifting system in clause 29. The main delegated powers are as follows.
 - Clause 2, which inserts new section 1B into the 2018 Act, makes EU-derived domestic legislation subject to delegated powers of ministers for the implementation period.²⁹
 - Clause 3 inserts a new section 8A into the 2018 Act to give ministers a supplementary power in connection with the implementation period. This extends existing powers under section 8 of the 2018 Act. This new power relates principally to clause 2 and through it to new section 1B of the 2018 Act.
 - New section 8A(1) of the 2018 Act gives a minister the power to add “glosses” in relation to EU-related terms or to disapply the glosses set out in new section 1B(3) and, subsequently, the interpretational requirement in new section 1B(4).
 - New section 8A also contains Henry VIII powers. One permits repeal of provisions in the 2018 Act to reflect changes in the Bill concerning

26 European Union (Withdrawal) Act 2018, [section 3](#)

27 European Union (Withdrawal) Act 2018, [section 4](#)

28 “Glosses” are defined in the explanatory notes to the Bill as: “Specific modifications to make clear the way that EU law terms should be read on the UK statute book, so that our laws continue to work during the implementation period. For example, the glosses will ensure that across the UK statute book, references to ‘EU citizens’, will be read as including UK nationals for the duration of the implementation period.”

29 “Subsections (2) to (4) are subject to any regulations made under section 8A or 23 or Part 1A of Schedule 2 or otherwise under this Act or under the European Union (Withdrawal Agreement) Act 2019.” European Union (Withdrawal Agreement) Bill, [clause 2, inserted section 1B\(5\)](#)

“Implementation Period (IP) completion day”—i.e. the end of the transition period.³⁰ The other is a broad power “to make such provision ... as the Minister considers appropriate for any purpose of, or otherwise in connection with, Part 4 of the Withdrawal Agreement.”³¹

- The broadest Henry VIII power in the provision is new section 8A(2): “The power to make regulations under subsection (1) may (among other things) be exercised by modifying any provision made by or under an enactment.” This does not extend to modifying primary legislation passed after the implementation period completion day.³²
 - There is a sunset clause in relation to new section 8A(1): “No regulations may be made under subsection (1) after the end of the period of two years beginning with IP completion day.”³³ This sunset clause does not apply to the broad Henry VIII power in new section 8A(2).
30. Clause 4 inserts a new Part 1A, “supplementary power in connection with implementation period”, into schedule 2 to the 2018 Act. This is the schedule which gives powers to devolved authorities in relation to the section 8 powers of UK ministers. The purpose of new Part 1A is to reflect the changes made to the 2018 Act by clause 3. It provides for the making of regulations by devolved authorities, defines devolved competence in a similar way to other provisions in schedule 2 and provides for the making of regulations jointly by a UK minister and a devolved authority.
31. The amendment to schedule 2 provides: “No provision may be made by a devolved authority acting alone in regulations under this Part unless the provision is within the devolved competence of the devolved authority.”³⁴ Any other regulation must be made jointly with UK ministers.³⁵
32. These broad powers are intended to serve the same purpose as the Bill itself, which is to give effect to the Withdrawal Agreement and the two related international agreements. Under Part 1 of the Bill, these powers are constrained by the terms of these Agreements in a similar way to that in which section 2 powers under the ECA are constrained by the terms of EU law. However, they are more narrow and specifically circumscribed than the ECA section 2 powers. If these powers are used to make statutory instruments which are considered to be contrary to the terms of the Agreement they would be open to legal challenge.

Part 2: Remaining implementation of Withdrawal Agreement etc.

33. Clause 5 is a general provision designed to give effect to Article 4 of the Withdrawal Agreement relating to its implementation. It inserts a new section 7A into the 2018 Act (section 7 of the 2018 Act is concerned with the status of retained EU law).
34. Article 4(1) of the Withdrawal Agreement states:

“The provisions of this Agreement and the provisions of Union law made applicable by this Agreement shall produce in respect of and in

30 European Union (Withdrawal Agreement) Bill, [clause 3, inserted section 8A\(1\)\(d\)](#)

31 *Ibid.*, [clause 3, inserted section 8A\(1\)\(e\)](#)

32 *Ibid.*, [clause 3, inserted section 8A\(3\)](#)

33 *Ibid.*, [clause 3, inserted section 8A\(4\)](#)

34 *Ibid.*, [clause 4, inserted para 11B\(1\)](#)

35 *Ibid.*, [clause 4, inserted para 11B\(2\)](#)

the United Kingdom the same legal effects as those which they produce within the Union and its Member States.

Accordingly, legal or natural persons shall in particular be able to rely directly on the provisions contained or referred to in this Agreement which meet the conditions for direct effect under Union law.”

35. Clause 5 does not apply to Part 4 of Article 4, which is provided for in clauses 1–4. Clause 5 is a safety provision to ensure that the rules in the Agreement concerning the direct applicability of the Agreement in UK law,³⁶ the requirement that the Agreement be interpreted in line with EU law,³⁷ and to ensure the legal supremacy of the Agreement, apply in relation to all aspects of the Agreement through, if necessary, the disapplication of “inconsistent or incompatible domestic provisions”.³⁸ There is also a provision that will remain effective after the end of the implementation period:

“the United Kingdom’s judicial and administrative authorities shall have due regard to relevant case law of the Court of Justice of the European Union handed down after the end of the transition period.”³⁹
36. New section 7A(1) gives effect to this in a formula similar to section 2 of the ECA. All rights etc. under the Withdrawal Agreement “are without further enactment to be given legal effect or used in the United Kingdom.” Under subsection (2) these rights etc. are to be recognised and enforced in domestic law⁴⁰ and “[e]very enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)”.⁴¹
37. Clause 5 offers different interpretive instructions from section 6 of the 2018 Act in relation to retained EU law. This is because it is concerned with the Agreement which is transitional in nature and works on the assumption that section 6 of the 2018 Act will apply in relation to retained EU law at the end of the implementation period.
38. Clause 6 concerns the general implementation of the EEA EFTA and Swiss agreements. It mirrors clause 5 in attempting to ensure a uniform approach to implementation of the three Agreements. It does so by inserting a new section 7B into the 2018 Act.
39. New section 7B(3) provides that in the event of any conflict between the EEA EFTA Agreement and the Swiss Citizens’ Rights Agreement and the Withdrawal Agreement, the latter is to take precedence.
40. These clauses reiterate the general thrust of Part 1 of the Act, which is the continuity in practice of the existing relationship between domestic law and EU law for the duration of the implementation period.
41. Not all of the Bill’s provisions are time-limited; in a number of areas, such as citizens’ rights, its effect will continue after 2020. Those areas covered by time-limited provisions may need to be legislated for subsequently, further to the outcome of negotiations with the EU on the future relationship.

36 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 4(1)

37 *Ibid.*, Article 4(3) and 4(4)

38 *Ibid.*, Article 4(2)

39 *Ibid.*, Article 4(5)

40 European Union (Withdrawal Agreement) Bill, [clause 5, inserted section 7A\(2\)](#)

41 Clause 37 states that an enactment means “an enactment whenever passed or made”.

CHAPTER 3: CITIZENS' RIGHTS (PART 3)

Introduction

42. Part 2 of the Withdrawal Agreement (Articles 9–39) provides a scheme for ensuring that those exercising EU rights in the UK prior to withdrawal may continue to enjoy certain core rights to reside, work and otherwise remain indefinitely in the UK after withdrawal. The rights are guaranteed indefinitely by the Withdrawal Agreement and under the Bill, though references to the Court of Justice will end eight years after the expiry of the implementation period. The same is true of Title 2 of both the EEA EFTA Separation Agreement and of the Swiss Citizens' Rights Agreement. The primary way the Bill ensures citizens' rights is by giving these provisions direct effect and supremacy through the operation of clause 5. The function of Part 3 of the Bill (clauses 7–17) is to provide further additional powers of implementation for those provisions of the Agreements which require it.
43. Clauses 7–9 and 11–14 each create a delegated powers scheme, each accompanied by a Henry VIII clause. These regulation-making powers are constrained by the terms of the Agreements and the direct effect of many of their provisions through Part 2 of the Bill. Clause 15 creates an Independent Monitoring Authority (IMA), a new body with a complex mandate and structure which merits further careful scrutiny. Schedule 2 makes further provision about the IMA.

Specific clauses

44. Clause 7 provides an illustration of how the regulation-making powers are circumscribed topically and legally by the provisions of the Agreements. Article 18 of the Withdrawal Agreement (and corresponding provisions of the other agreements) permits a host state to require a person exercising residence rights to apply for documentation. Clause 7(1)(a) empowers a minister to “make such provision as the Minister considers appropriate for ... specifying the deadline that applies for the purposes of ... the first sub-paragraph of Article 18(1)(b).” That sub-paragraph of Article 18(1)(b) specifies that “the deadline for submitting the application shall not be less than 6 months from the end of the transition period, for persons residing in the host State before the end of the transition period.” The regulation-making power in clause 7(1)(a) is therefore the power to set a deadline, subject to the requirement in the Withdrawal Agreement which itself has direct effect and supremacy. The powers under clause 7(1)(a) will be unable to derogate not only from Article 18(1)(b) but from any of the other provisions of the Withdrawal Agreement, Part 3 of which, covering citizens' rights,⁴² spans 48 pages of the published Withdrawal Agreement.
45. This degree of specificity, and the relevance of the other provisions of the Agreements, are for the most part mirrored in the other delegated powers provisions of the Bill, except where specified in the analysis below. It further illustrates the point made in relation to Part 1 of the Bill that, although various delegated powers in the Bill appear to be very broad, the role they play in giving effect to directly effective obligations under the Agreement circumscribes their practical effect in important ways.

42 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Articles 7–39

46. Clause 7(1)(b)–(d) provides a regulation-making power to provide protection to EU citizens in the period prior to the deadline for the submission of applications for new residence status. Clause 7(1)(e)–(g) extends protection to those applying for such residence status. The first regulations issued under clause 7(1)(b)–(g) are subject to the affirmative procedure in paragraph 1 of schedule 5.
47. Clause 7(2)–(3) is intended to extend the protection afforded by the Agreements to EU citizens to persons not in that category but which have acquired rights as family members thereof under the *Surinder Singh* principle.⁴³ Clause 7(4) confers a Henry VIII power to modify any provision made under an enactment. The first regulations made under this clause are subject to the affirmative procedure where they amend or repeal primary legislation or retained direct principal EU legislation.⁴⁴ Otherwise, the first exercise of these powers is subject to the negative resolution procedure. Later exercises of the power, even where they modify primary legislation, are subject to negative procedure.
48. Clause 8 confers powers to extend protection to frontier workers in line with Articles 24(3) and 25(3) of the Withdrawal Agreement, which guarantee the right to enter and exit the state and enjoy the rights they exercised there if they meet certain conditions specified in Directive 2004/38/EC.⁴⁵ The Henry VIII power in clause 8(3) is limited to modifying any provision made by or under the Immigration Acts—which includes the power to amend the Immigration Acts themselves.⁴⁶
49. Clause 9 provides powers to restrict rights of entry and residence as specified in Article 20(1), (3) and (4) of the Withdrawal Agreement. That article incorporates chapter VI of EC Directive 2004/38/EC, Articles 27–33 of which contain detailed provisions covering permissible grounds of public policy for restricting entry or exit for Union citizens and their family members. The powers in clause 9 must be exercised in conformity with those provisions. Clause 9(4) provides that regulations may modify any primary legislation.
50. Clause 10 (retention of existing grounds for deportation) is unique in Part 3 of the Bill insofar as it provides for amendments to the Immigration Acts rather than for regulation-making powers.
51. Clause 11(1) provides powers to make provision for appeals against citizens’ rights decisions. Clause 11(3) extends analogous powers in connection with reviews (and judicial reviews) of decisions relating to “any other decision made in connection with restricting the right of a relevant person to enter the United Kingdom”.⁴⁷ The scheme suggests that the judicial review procedure can be extended but does not imply that such powers could operate to circumscribe access to judicial review that is otherwise available under the common law.
52. Clause 12 provides powers to ministers and devolved authorities, acting jointly or separately, to make provision for the recognition of professional

43 [Explanatory Notes to the EU \(Withdrawal Agreement\) Bill](#), para 144

44 [European Union \(Withdrawal Agreement\) Bill](#), [schedule 5, para 1\(1\)\(a\)](#)

45 [Directive 2004/38/EC](#) concerns “the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States”.

46 Schedule 1 to the Interpretation Act 1978 states that the “Immigration Acts” has the meaning given by section 61(2) of the UK Borders Act 2007.

47 Those set out in [clause 11\(2\)\(g\)](#).

qualifications in accordance with the provisions of Articles 27–29 of the Withdrawal Agreement (and analogous provisions of the other Agreements). Those articles of the Agreements themselves incorporate several provisions from applicable EU law standards. Clause 12(6) is a Henry VIII power allowing the amendment or repeal of any enactment, but the sunset clause in clause 12(7) prevents it from applying to primary legislation passed after the implementation period.

53. Clause 13 similarly provides for a scheme to implement social security coordination. The Explanatory Notes indicate that these powers are intended to be operated in conjunction with a planned Immigration and Social Security Co-ordination (EU Withdrawal) Bill.⁴⁸ Clause 13(5) provides Henry VIII powers to modify any provision made by or under an enactment. There is no sunset clause limiting the operation of the powers in clause 13. In light of the detailed statutory scheme that will be provided in a future bill, it is not clear why the powers in clause 13 are required beyond the implementation period.
54. Clause 14 provides delegated powers empowering central and devolved authorities to implement articles of the Agreements relating to prohibiting discrimination on grounds of nationality, the right to equal treatment, and rights of workers, frontier workers and the self-employed. The articles detailing such rights are less technical and constrained than most of the other citizens' rights articles of the Agreements. The Henry VIII power is not accompanied by a sunset provision. The powers are intended to supplement and further protect the enumerated rights, rather than condition or restrict them.
55. Clause 15 creates a new corporate body, the Independent Monitoring Authority. Schedule 2 sets out its powers and functions. This body is established pursuant to Article 159 of the Withdrawal Agreement. The structure, independence and remuneration provisions of this body may be constitutionally significant, as may be its provisions for appointing members with knowledge of conditions in devolved areas (see paragraph 5 of schedule 2). Its primary functions include keeping the adequacy of the UK legislative framework securing citizens' rights under review and conducting inquiries on request from central or devolved government, in response to a complaint or on its own initiative. Paragraph 27 provides that where an inquiry is held, the IMA will report and the relevant public authority must publish a response, indicating what action it plans to take. Schedule 2 raises several important if localised constitutional questions relating to the creation, independence and functions of an independent complaints and monitoring body, as well the relationship between the IMA and the court system as well as between the IMA and the devolved authorities.
56. Clause 16 provides that any power to implement a provision of the Agreements includes a power to supplement the effect of section 7A of the 2018 Act (a new section inserted by clause 5 of the Bill).

48 [Explanatory Notes to the EU \(Withdrawal Agreement\) Bill](#), para 138

CHAPTER 4: OTHER SEPARATION ISSUES AND FINANCIAL PROVISION (PART 4)

57. Clause 18 inserts a new section 8B into the 2018 Act. This provides a wide power to implement Part 3 of the Withdrawal Agreement. This part of the Agreement concerns other separation issues, for example how goods which enter the UK or EU market before the end of the implementation period are to be treated after this period. One aim of this part of the Agreement is to ensure an orderly transition—for example, to allow these goods to continue to circulate. There are 13 such separation issues covered in Part 3 of the Withdrawal Agreement. It aims to provide a technical basis for winding down ongoing processes and arrangements for cooperation in areas such as customs procedures, VAT and Excise Duty matters, intellectual property, police and judicial cooperation etc.
58. New section 8B(1) inserted through clause 18 provides that a minister may make regulations, subject to the appropriateness test which is the general test in section 8 of the 2018 Act, to implement Part 3 of the Withdrawal Agreement and to supplement the effects of new section 7A (inserted by clause 5) together with a broad “sweeping up” power in relation to Part 3 (new section 8B(1)(c)). New section 8B(2) makes similar provision in relation to the EEA EFTA Agreement.
59. The powers in clause 18 are wide. New section 8B(3) is notable: “Regulations under this section may make any provision that could be made by an Act of Parliament.” The provision therefore enables the creation of tertiary legislation.
60. There are restrictions to the scope of these powers. Under new section 8B(5), they may not 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 or any subordinate legislation made under it, or (f) amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to this Act or are amending or repealing any provision of those Acts which modifies another enactment).”
61. These powers permit some things to be done by negative procedure that could be done only by affirmative procedure under the 2018 Act.⁴⁹ These include creating or widening the scope of a criminal offence and making provision relating to the fees charged by public bodies. We leave it to the Delegated Powers and Regulatory Reform Committee to comment on these provisions.
62. Clause 19 inserts a new Part 1B into schedule 2 to the 2018 Act. This provides corresponding powers for devolved authorities to those in clause 18. It provides that these powers can be exercised by a minister. This is also a broad power: “Regulations under this Part may make any provision that could be made by an Act of Parliament.”⁵⁰ As is familiar with schedule 2

49 European Union (Withdrawal) Act 2018, [schedule 7, para 1\(1\)](#)

50 European Union (Withdrawal Agreement) Bill, [clause 19, inserted para 11G \(5\)](#)

powers, devolved authorities acting alone can make regulations only within devolved competence.⁵¹

63. Clause 20 relates to financial provision. It allows for payments to be made to the EU for the purposes of complying with any Withdrawal Agreement obligations:

“Any sum that is required to be paid to the EU or an EU entity to meet any obligation that the United Kingdom has by virtue of the Withdrawal Agreement is to be charged on and paid out of the Consolidated Fund or, if the Treasury so decides, the National Loans Fund.”⁵²

64. Clause 1(3)(c) removes section 2(3) of the ECA with its provision for payment of EU costs. This is superseded by clause 20.
65. Clause 20(2) provides that payments authorised under the standing service provision in subsection (1) will cease on 31 March 2021, “other than sums required to be paid in respect of the traditional own resources of the EU”. Clause 20(7) provides that a minister may by regulations amend this date. Such regulations are subject to the affirmative procedure.⁵³

51 *Ibid.*, [clause 19, inserted para 11H \(1\)](#)

52 *Ibid.*, [clause 20\(1\)](#)

53 *Ibid.*, [schedule 5\(5\)](#)

CHAPTER 5: DEVOLUTION

Introduction

66. The Bill affects devolution arrangements in several ways, with distinct implications for Northern Ireland.
67. The Bill makes technical changes to the devolution statutes.⁵⁴ Clause 22, which inserts a new Part 1C to the schedule 2 to the 2018 Act, extends further regulation-making powers to the devolved authorities. There are also modifications of devolved competence to give effect to clauses 12, 13 and 14.

Legislative consent

68. Under the Sewel convention the UK Parliament does not “normally” legislate for matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly without consent. It is also standard practice for the UK Government to seek consent of the relevant legislature where there are alterations to devolved competence.
69. The territorial extent and application of the Bill in the United Kingdom is set out in Annex A to the explanatory notes. The UK Government has sought the legislative consent of the Scottish Parliament⁵⁵ and the National Assembly for Wales for the Bill.⁵⁶ On 21 October 2019 the Scottish and Welsh First Ministers wrote to the Prime Minister and the European Council President urging them to agree more time for scrutiny of the Bill.⁵⁷ Legislative consent had not been given at the point that this report was published. The Scottish Government had recommended that consent be refused.⁵⁸

Future relationship negotiations

70. Clause 31 provides for parliamentary oversight of negotiations towards the future relationship between the UK and the EU. There is no reference to a role for the devolved administrations, though any future relationship will inevitably affect important areas of devolved competence.
71. A minister must report on progress made in negotiations on any future relationship by the end of each reporting period, and provide a copy of that report to the Presiding Officer of each of the devolved legislatures, and to the First Ministers of Scotland and Wales and the First Minister and Deputy First Minister or Executive Office in Northern Ireland.⁵⁹
72. In our report *Parliamentary Scrutiny of Treaties* we said:

“As part of its treaty-making after the UK leaves the European Union, the UK Government must engage effectively with the devolved institutions on treaties that involve areas of devolved competence.

54 *Ibid.*, [schedule 6](#)

55 Memorandum from the Scottish Government, 22 October 2019, <https://www.parliament.scot/parliamentarybusiness/Bills/113267.aspx> [accessed 30 October 2019]

56 Legislative Consent Memorandum for the Withdrawal Agreement Bill, 23 October 2019, <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IIId=26719> [accessed 30 October 2019]

57 Scottish Government, *Withdrawal Agreement Bill*, 21 October 2019, <https://www.gov.scot/news/withdrawal-agreement-bill/> [accessed 30 October 2019]

58 Legislative Consent Memorandum for the Withdrawal Agreement Bill, 23 October 2019, https://www.parliament.scot/S5_Environment/Meeting%20Papers/SPLCM-S05-28.pdf [accessed 30 October 2019]

59 European Union (Withdrawal Agreement) Bill, [clause 31, inserted section 13C\(6\)\(b\)](#)

The UK Government will need to consult the devolved governments about their interests when opening negotiations, not just to respect the competences of those governments but also in acknowledgement of the important role devolved administrations may play in the implementation of new international obligations.”⁶⁰

This conclusion remains pertinent and applies to the relevant provisions of the Bill.

Northern Ireland

73. The Withdrawal Agreement contains a Protocol on Ireland/Northern Ireland, which is a matter of political controversy. The Government states that the Protocol “provides arrangements that seek to ensure that the UK (including Northern Ireland) does not remain in a customs union with the European Union.”⁶¹ The Protocol states: “Northern Ireland is part of the customs territory of the United Kingdom”.⁶² However, Article 5 of the Protocol creates bespoke customs, VAT and related arrangements for Northern Ireland.⁶³ These are put in place for a potentially open-ended period and are to be regulated by the Joint Committee established by the Agreement (comprising representatives of the UK and the EU and which will govern the implementation and application of the Agreement) and a “Specialised Committee”⁶⁴ (comprising representatives of the European Union and representatives of the United Kingdom, responsible for issues related to the implementation of the Agreement).⁶⁵ The United Kingdom is obliged to give legal effect to these arrangements.⁶⁶
74. Perhaps the most controversial area in this Protocol is Article 18, which concerns “democratic consent within Northern Ireland”. Although the Protocol references the principle of consent in the Belfast/Good Friday Agreement, the future of these customs arrangements, after the initial period provided for in the Protocol (four years after the end of the implementation period), may be subject to a four-year continuation “on the basis of a majority of Members of the Northern Ireland Assembly, present and voting.”⁶⁷
75. The principle of consent is enshrined in the Belfast/Good Friday Agreement, wherein the signatories:
- “recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of

60 Constitution Committee, *Parliamentary Scrutiny of Treaties* (20th Report, Session 2017–19, HL Paper 345), paras 140–141

61 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 219

62 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Ireland/Northern Ireland Protocol, Article 4

63 All in the context of protecting the UK internal market: “Nothing in this Protocol shall prevent the United Kingdom from ensuring unfettered market access for goods moving from Northern Ireland to other parts of the United Kingdom’s internal market.” HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 6(1)

64 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 165(1)(c)

65 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Ireland/Northern Ireland Protocol, Article 14, supplemented by a “joint consultative working group” composed of representatives of the European Union and the United Kingdom (Article 15).

66 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Ireland/Northern Ireland Protocol, Article 12

67 *Ibid.*, Article 18(5)

consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.”⁶⁸

76. The Protocol recognises this principle:

“This Protocol is without prejudice to the provisions of the 1998 Agreement in respect of the constitutional status of Northern Ireland and the principle of consent, which provides that any change in that status can only be made with the consent of a majority of its people.”⁶⁹

77. This principle is also reflected in the design of “power sharing” in the devolved institutions’ decision-making mechanisms. This is evident at executive level, which includes the joint office of First Minister and Deputy First Minister, each holding equal powers, and a multi-party executive. At legislative level, Northern Ireland Assembly decisions require cross-community support on certain designated issues or if 30 members of the Assembly request such a level of assent (through a petition of concern). In such cases decisions are based on cross-community majority support including a majority of designated nationalists and designated unionists or a weighted majority (60%) of Members of the Legislative Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting.⁷⁰ The arrangement in the Withdrawal Agreement that allows for simple majority decision-making in the Assembly precludes the exercise of a petition of concern on the issue of customs and related arrangements.

78. The Government has published a Unilateral Statement on Consent to supplement the Withdrawal Agreement in which it lays out additional steps it will take to try to achieve broad consent on the issue of the customs arrangements. This also reiterates that consent can be given by a majority of the members of the Assembly, present and voting.⁷¹

Part 4, clauses 21–24

79. Clauses 21–24 of the Bill make provision for powers in relation to this Protocol. Clause 21 inserts a new section 8C into the 2018 Act which contains broad delegated powers. New section 8C(1) gives ministers, by way of regulations, power to implement the Protocol and to supplement its provisions. The delegated powers in new section 8C(1) are subject to the “appropriateness” test equivalent to section 8(1) of the 2018 Act.

80. These powers are also designed to facilitate the new customs arrangements that will apply in relation to Northern Ireland goods.⁷² They give ministers

68 Belfast/Good Friday Agreement, 10 April 1998, Article 1(ii): <https://www.gov.uk/government/publications/the-belfast-agreement> [accessed 30 October 2019]

69 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Ireland/Northern Ireland Protocol, Article 1(1)

70 Northern Ireland Act 1998, section 42. This mechanism was intended to be a “safeguard to ensure that all sections of the community can participate and work together”. Belfast/Good Friday Agreement, para 5.

71 HM Government *Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland*, paras 3 and 6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf [accessed 30 October 2019]

72 European Union (Withdrawal Agreement) Bill, [clause 21, inserted section 8C\(3\)–\(4\)](#)

powers to define “qualifying Northern Ireland goods” for the purpose of the Bill.⁷³ New section 8C(7) applies these regulation-making powers to the Protocol as a whole or to “any provision of EU law which is applied by, or referred to in, the Protocol”.⁷⁴

81. In general, the delegated powers in new section 8C align with those in section 8 of the 2018 Act and are largely subject to comparable levels of scrutiny to the equivalent powers in the 2018 Act. Where the power in new section 8C(1) is used to amend, repeal or revoke primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply. Otherwise negative resolution procedure applies.
82. There is one significant difference between powers under new section 8C and those under 8B(5) that were discussed in chapter 4. There is no restriction on 8C powers being used to impose or increase taxation or fees, make retrospective provision, create a relevant criminal offence (i.e. with a penalty exceeding two years imprisonment), establish a public authority, amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it, or amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.
83. New section 8C(2), which supplements new section 8C(1), contains much broader powers. Under this provision, regulations “may make any provision that could be made by an Act of Parliament (including modifying this Act).” This is an extensive Henry VIII power. Potentially it allows for significant changes to the domestic legal regime applying to the Protocol. As mentioned above, it is not subject to restrictions equivalent to new section 8B(5) inserted by clause 18. In our report on the European Union (Withdrawal) Bill, we concluded in relation to an equivalent power in clause 9 of that Bill:

“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.”⁷⁵
84. The powers in clause 21 for ministers to amend or repeal this Bill once enacted are broad and require further detailed scrutiny. As with the other powers in this Bill, we await the assessment of the Delegated Powers and Regulatory Reform Committee.
85. Clause 22 gives powers to devolved authorities, including in Scotland and Wales, to implement the Ireland/Northern Ireland Protocol. It does so by inserting a new Part 1C of schedule 2 to the 2018 Act. As in the 2018 Act itself, the wide powers for ministers are mirrored at devolved level.
86. In new Part 1C, new paragraph 11N(1) provides that no provision may be made by a devolved authority acting alone in regulations under this Part unless the provision is within the devolved competence of the devolved authority. New paragraph 11M(2) provides that, otherwise, regulations under the schedule can only be made jointly by a UK minister and a devolved authority.

73 *Ibid.*, [clause 21, inserted section 8C\(6\)](#)

74 *Ibid.*, [clause 21, inserted section 8C\(7\)\(b\)](#)

75 Constitution Committee, *European Union (Withdrawal) Bill*, (9th Report, Session 2017–19, HL Paper 69), para 196

87. If the devolved institutions in Northern Ireland remain in abeyance, these joint decision powers cannot be exercised. This will lead the UK Government to make unilateral decisions under new section 8C(1) as it considers appropriate, even if this concerns devolved matters.
88. Clause 23 gives effect to schedule 3, which seeks to embody the “no diminution” commitment under Article 2(1) of the Protocol:
- “The United Kingdom shall ensure that no diminution of rights, safeguards or equality of opportunity, as set out in that part of the 1998 Agreement entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union, including in the area of protection against discrimination, as enshrined in the provisions of Union law listed in Annex 1 to this Protocol, and shall implement this paragraph through dedicated mechanisms.”
89. Clause 24 provides safeguards in relation to another important dimension of the Belfast/Good Friday Agreement: North–South co-operation. The UK Government may not agree to any recommendation by the Joint Committee under Article 11(2) of the Protocol that would alter the arrangements of North–South co-operation in the Belfast/Good Friday Agreement, establish a new implementation body or alter the functions of an existing implementation body. Clause 24 appears to provide stronger protection of the North–South dimension of the Belfast/Good Friday Agreement than is provided by the Protocol to the principle of consent in the Northern Ireland Assembly.
90. The Ireland/Northern Ireland Protocol is of the highest importance. It is skeletal in places. We look forward to the assessment by the Delegated Powers and Regulatory Reform Committee of the appropriateness of the delegated powers in the Bill to implement it. We note that many of the provisions relating to Northern Ireland are not temporary, as they will last beyond the end of the implementation period. These are issues that require further careful consideration.

CHAPTER 6: OTHER PROVISIONS (PARTS 4 & 5)

The relationship to the European Union (Withdrawal) Act 2018

91. Clause 25 provides for the retention of saved EU law at the end of the implementation period. Sections 2–7 of the 2018 Act provided a scheme for the retention of the EU law that was effective in UK law prior to exit day, and extended the supremacy ordinarily enjoyed by EU law to such retained EU law and to certain modifications of retained EU law after exit day.⁷⁶ Clause 25 is meant primarily to substitute “IP [implementation period] completion day” for the original “exit day” as the operative date under which this conversion of EU law into UK law takes place. Clause 25(5) amends section 5 of the 2018 Act to insert a new section 5A, entitled “savings and incorporation: supplementary”. This complex provision clarifies that that certain legal measures that were time-limited by reference to the implementation period may nevertheless be given indefinite effect on and after the implementation period completion day by virtue of section 2, 3 or 4 of the 2018 Act. The explanatory notes provide no examples of the provisions to which this expression may apply. The Government has not clarified which measures it anticipates being given the special status of retained EU law under this provision.
92. Clause 26 amends section 6 of the 2018 Act and inserts a new section 7C: “Interpretation of relevant separation agreement law.” It provides that the various sister provisions of the Agreements shall, wherever possible, be given an interpretation that is harmonious as between the various agreements. This is a measure designed to secure greater legal certainty. However, the Government may wish to clarify the intention and effect of section 7C(2).
93. Clause 27 amends section 8 of the 2018 Act. That section empowers a minister to make regulations to prevent, remedy or mitigate, in respect of retained EU law, any deficiency in retained EU law or any failure of retained EU law to operate effectively arising out of the UK’s withdrawal from the EU. Clause 27 provides primarily for technical amendments or the substitution of “IP completion day” for “exit day”. However, clause 27(2)(c) and 27(6) amend section 8 to insert vague and potentially important new categories of deficiencies which would trigger the broad ministerial powers conferred by the 2018 Act. Neither the Explanatory Notes nor the Delegated Powers Memorandum make clear why such provisions are required. Section 8 of the 2018 Act lies at the heart of the concerns we expressed in our reports on the European Union (Withdrawal) Bill.⁷⁷ Any expansion of the powers under section 8 must be justified, and no such justification has yet been provided by the Government.

Parliamentary oversight

94. Clauses 29–33 provide for parliamentary oversight of EU law-making, any extension of the implementation period and negotiations on the future relationship, and for the repeal of section 13 of the 2018 Act and disapplication of the regime for parliamentary scrutiny of treaty-making in section 20 of the Constitutional Reform and Governance Act 2010.

⁷⁶ European Union (Withdrawal) Act 2018, [section 2\(2\)–\(3\)](#)

⁷⁷ Constitution Committee, *European Union (Withdrawal) Bill: Interim Report* (3rd Report, Session 2017–19, HL Paper 19); Constitution Committee, *European Union (Withdrawal) Bill* (9th Report, Session 2017–19, HL Paper 69)

95. Clause 29 provides for parliamentary oversight of EU law-making in the implementation period. It provides that if the European Scrutiny Select Committee of the House of Commons reports that any such legislation raises “a matter of vital national interest to the United Kingdom”, confirms that it has taken such evidence as it considers appropriate and has consulted any departmental Commons committee with an interest, and sets the wording of a motion to be moved in the Commons by a minister, a minister must move that motion within 14 sitting days. This is unusual in making such detailed provision in a statute for the workings of a select committee and its relationship with the House as whole. Such matters are usually regulated by the standing orders and practice of each House. Clause 29 does not make similar provision for the House of Lords European Union Select Committee nor any committees of the devolved legislatures.
96. Clause 30 provides for an extension of the implementation period. Article 132 of the Withdrawal Agreement provides that “the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years.” Clause 30 provides that a minister may agree to an extension only if the Government has laid a statement before each House setting out the length of the proposed extension and a motion is passed by the House of Commons agreeing to the proposed extension. A motion for the House of Lords to take note of the statement would have to be tabled in that House by a minister. Consent of the Lords is not required.
97. Clause 31 provides for parliamentary oversight of the negotiation of the future relationship by inserting a new section 13C into the 2018 Act. It requires a minister to make a statement to the House of Commons on objectives for the future relationship with the EU and empowers the minister to make a revised statement at any time. The statement must be consistent with the Political Declaration of 17 October 2019, published alongside the Withdrawal Agreement. Section 13C(4) forbids a minister from engaging in negotiations with the EU unless the aforementioned statement has been approved by the House of Commons and a motion to take note of the statement has been moved in the House of Lords. Section 13C(5) requires that in conducting negotiations on the future relationship with the EU, a minister “must seek to achieve the objectives set out in the most recent statement on objectives” approved and moved under subsection (4). At the end of each reporting period of three months, the minister must lay a report before both Houses indicating the extent to which the outcome of negotiations is “likely to reflect the most recent statement on objectives” and the minister’s assessment of why, if applicable, the outcome of negotiations is not likely to reflect that statement. Subsections (7)–(9) provide a mechanism for parliamentary approval of a negotiated future relationship treaty. Subsection (9) provides that the treaty may be ratified only if it has been approved by a resolution of the House of Commons on a motion moved by a minister and either that the House of Lords has not resolved against the treaty within 14 sitting days of it being laid before it, or that it has so resolved but a minister has indicated by statement why it will nevertheless be ratified.
98. Insofar as this scheme provides an upstream role for both Houses of Parliament in the treaty-negotiating process, and imposes no compressed time limit on the House of Commons’ ability to decide whether to approve the treaty, it is consistent with the recommendations in our report *Parliamentary Scrutiny of*

Treaties.⁷⁸ Apart from the duty to provide a report to the devolved authorities and legislatures under subsection 13C(6)(b) there is no provision for their involvement.

99. Clause 32 repeals section 13 of the 2018 Act since the Bill would be enacted alongside the ratification of the Agreements and would provide for a scheme of “meaningful votes” going forward.
100. Clause 33 states that section 20 of the Constitutional Reform and Governance Act 2010, stipulating that treaties must be laid in Parliament for 21 days before their ratification, does not apply to the ratification of the Withdrawal Agreement. The reason appears to be that the passage of the Bill itself constitutes approval of the treaty.⁷⁹

Workers’ rights

101. Clause 34 gives effect to schedule 4, which inserts a new schedule 5A into the 2018 Act. The primary protection for workers’ rights after the implementation period is expected to be achieved through the retention of EU law standards in the area and will be subject to further negotiations on the future relationship. Schedule 4 introduces certain procedural obligations designed to ensure that any departure from existing EU standards in the area of workers’ rights is clearly signalled and addressed in consultation with representatives of employers and workers. Schedule 4 is largely identical to the provisions published by the previous Government in March 2019.⁸⁰
102. Schedule 4 is composed of three parts. Part 1 creates a scheme for ministers in charge of a relevant bill to report to either House at second reading of the bill. The minister must either make a “statement of non-regression” (i.e. that the provisions of the bill will not result in the law of the relevant part of the UK failing to confer workers’ retained EU rights) or a statement that the minister is unable to make a statement of non-regression but wishes to proceed with the bill anyway. This scheme is similar to that providing for ministerial statements of compatibility with the European Convention on Human Rights (ECHR) in section 19 of the Human Rights Act 1998. However, in the case of this Bill, paragraph 1(3) requires the minister to consult representatives of workers and employers and any other persons the minister considers it appropriate to consult in advance of making the statement. The scheme in this Bill is also different insofar as that in the Human Rights Act 1998 is in the context of the UK’s continuing obligations under the ECHR and accountability to UK courts and the European Court of Human Rights for departures from such obligations. Under the Bill, by contrast, there is at present no planned international treaty arrangement protecting such workers’ rights in the UK after the implementation period completion date.
103. Part 2 of schedule 4 requires the Secretary of State to publish reports on whether UK law diverges from “new EU workers’ rights” conferred by EU regulations or directives after the implementation period completion day. The Secretary of State is required to lay reports before Parliament clarifying whether there have been any new such rights created by the EU in a previous

78 Constitution Committee, *Parliamentary Scrutiny of Treaties* (20th Report, Session 2017–19, HL Paper 345), paras 76 and 116

79 See to similar effect, [clause 31, inserted section 13C\(10\)](#)

80 House of Commons Library, *Withdrawal Agreement Bill: Protection for workers’ rights*, 22 October 2019

period. Where there have been, the report must either include a “statement of non-divergence” from existing UK law or a statement that the Secretary of State is unable to make one. Paragraph 2(4) requires that the Secretary of State, if unable to confirm non-divergence, to indicate in the report whether any action is to be taken, and if so in what form. A minister must make arrangements for motions allowing the House of Commons and the House of Lords to approve the reports.⁸¹

104. Part 3 of the schedule relates to its interpretation. The concept of “new EU workers’ rights” (operative for Part 2 of the schedule) is defined by reference to directives and regulations published in the Official Journal of the European Union relating to an enumerated set of general areas of labour rights (e.g. fundamental rights at work, fair working conditions, health and safety, among others). “Workers’ retained EU rights” (operative for Part 1 of the schedule, providing for the duty to lay statements of non-regression) is defined in the schedule by reference to a list of directives in a table in paragraph 4. The list in the table is not exhaustive of what might be regarded more generally as a workers’ right under EU law, including in the jurisprudence of the Court of Justice of the EU. It is evident from the schedule that this list of directives is not intended and cannot be read to limit the scope of workers’ rights that otherwise would have effect in the UK as retained EU law under the 2018 Act (as amended and supplemented by this Bill).

Parliamentary sovereignty

105. Clause 36(1) states: “It is recognised that the Parliament of the United Kingdom is sovereign.” This provision is in some respects analogous to section 18 of the European Union Act 2011, which stated that directly applicable or directly effective EU law “falls to be recognised and available in law in the United Kingdom only by virtue of [the European Communities Act 1972] or where it is required to be recognised and available in law by virtue of any other Act.”⁸² In our report on the 2011 Bill, we found that the provision was “self-evident” and that it “restates, but does not change, the law.”⁸³
106. Clause 36 goes further than section 18 of the 2011 Act in that it refers simply to Parliament being “sovereign”, rather than the legal mechanism through which EU law takes domestic effect, and clause 36(2) makes direct reference to new sections of the 2018 Act inserted by this Bill. Clause 36(2) provides that Parliament’s sovereignty “subsists” notwithstanding these provisions, while clause 36(3) states that “nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom.”
107. Parliamentary sovereignty is central to the constitution. We will consider the effects and implications of clause 36 in more detail in a subsequent report.

Supplementary and final provisions

108. Clause 38 provides that schedule 5, containing provision about regulations under the Bill, has effect. The standard test for the use of the powers across the Bill is “appropriateness” rather than “necessity” and the default

81 European Union (Withdrawal Agreement) Bill, [schedule 4, new schedule 5A, para 2\(5\)](#)

82 European Union (Withdrawal Agreement) Bill, [clause 36](#)

83 Constitution Committee, [European Union Bill](#), (13th Report, Session 2010–2012, HL Paper 121), para 58. The European Union Act 2011 is due to be repealed in its entirety by the 2018 Act.

scrutiny procedure for instruments not amending primary legislation or retained EU law is the negative procedure.⁸⁴ There is no sifting procedure adopted in respect of the instruments that would be made exclusively under the provisions of the Bill and, in some cases, it is not clear that the sifting procedure provided for in the 2018 Act would apply to instruments made under powers inserted by the Bill into that Act.

109. Clause 39 provides for consequential and transitional provisions. It empowers a minister by regulations to make such provision as the minister considers appropriate “in consequence of this Act”. Such regulations permit the modification of any provision of any enactment and are subject to the negative procedure. This Henry VIII power, contained in clause 39(2), is subject to clause 39(3), which limits its application to primary legislation passed or made prior to implementation period completion day. That time limit nevertheless permits the amendment or repeal of any Act of Parliament passed before completion of the implementation period. Consequential powers are construed strictly by the courts,⁸⁵ so the operation of clause 39 in general will be, despite its broad terms, constrained. As with the other delegated powers in this Bill, we await the assessment of the Delegated Powers and Regulatory Reform Committee.

84 European Union (Withdrawal Agreement) Bill, [schedule 5, para 7](#)

85 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 338

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Beith
 Baroness Corston
 Baroness Drake
 Lord Dunlop
 Lord Faulks*
 Baroness Fookes*
 Lord Hennessy of Nympsfield*
 Lord Howarth of Newport*
 Lord Howell of Guildford**
 Lord Pannick
 Baroness Taylor of Bolton (Chair)
 Lord True*
 Lord Wallace of Tankerness

* Member of the Committee since 1 July 2019

** Member of the Committee since 29 October 2019

Declarations of interest

Lord Beith
Honorary Bencher of the Middle Temple

Baroness Corston
No relevant interests

Baroness Drake
No relevant interests

Lord Dunlop
No relevant interests

Lord Faulks
No relevant interests

Baroness Fookes
No relevant interests

Lord Hennessy of Nympsfield
No relevant interests

Lord Howarth of Newport
No relevant interests

Lord Howell of Guildford
No relevant interests

Lord Pannick
Represented Ms Gina Miller, in R (Miller) v Secretary of State for Exiting the European Union [2017], and in R (Miller) (Appellant) v The Prime Minister (Respondent) & Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland) [2019]

Baroness Taylor of Bolton (Chair)
No relevant interests

Lord True
No relevant interests

Lord Wallace of Tankerness
No relevant interests

A full list of members' interests can be found in the Register of Lords' Interests:

<http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/>

Professor Jeff King, University College London, and Professor Stephen Tierney, University of Edinburgh, acted as legal advisers to the Committee. They both declared no relevant interests.