

HOUSE OF LORDS

Select Committee on the Constitution

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1st Report of Session 2019–21

# European Union (Withdrawal Agreement) Bill

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## CONTENTS

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	<i>Page</i>
<b>Chapter 1: Introduction</b>	<b>3</b>
Overview	3
The Withdrawal Agreement and related Agreements	4
The European Union (Withdrawal) Act 2018	5
<b>Chapter 2: Implementation (Parts 1 &amp; 2)</b>	<b>7</b>
Territorial extent	7
Part 1: Implementation period	7
Delegated powers in Part 1	9
Part 2: Remaining implementation of Withdrawal Agreement etc.	11
<b>Chapter 3: Citizens' rights (Part 3)</b>	<b>13</b>
Introduction	13
Specific clauses	13
<b>Chapter 4: Other separation issues and financial provision (Part 4)</b>	<b>17</b>
<b>Chapter 5: Devolution</b>	<b>19</b>
Introduction	19
Legislative consent	19
Northern Ireland	19
Part 4, clauses 21–24	22
<b>Chapter 6: Other provisions (Parts 4 &amp; 5)</b>	<b>24</b>
Relationship to the European Union (Withdrawal) Act 2018	24
Parliamentary oversight	27
Other matters	28
Parliamentary sovereignty	29
Interpretation, supplementary and final provisions	29
<b>Appendix 1: List of Members and declarations of interests</b>	<b>31</b>



# The European Union (Withdrawal Agreement) Bill

## CHAPTER 1: INTRODUCTION

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### Overview

1. The European Union (Withdrawal Agreement) Bill (“the Bill”) was introduced in the House of Commons on 19 December 2019 and received its second reading the following day. The Bill was passed by the Commons unamended on 9 January 2020 and sent to the House of Lords the same day.<sup>1</sup> An earlier version of the Bill was introduced towards the end of the previous session and received second reading in the House of Commons but made no further progress before Parliament was dissolved ahead of the general election in December 2019.<sup>2</sup>
2. 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”).
3. 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, or giving effect, to:
  - the Withdrawal Agreement’s implementation period
  - three separate but related international agreements
  - citizens’ rights
  - the Ireland/Northern Ireland protocol to the Withdrawal Agreement
  - several broad secondary law-making powers
  - a complex ongoing relationship with 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.
4. The Bill should therefore be read alongside the Withdrawal Agreement and related Agreements, and with the 2018 Act. A brief introduction to these is set out in the following section.

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1 [European Union \(Withdrawal Agreement\) Bill](#) [HL Bill 16 (2019–20)]

2 [European Union \(Withdrawal Agreement\) Bill](#) [Bill 7 (2019)]

5. In November 2019 we published an interim report which analysed the previous Bill and the constitutional issues it engaged.<sup>3</sup> It examined the implications of the complex ongoing relationship between UK law and EU law during the implementation period, the provisions on citizens' and workers' rights, the Ireland/Northern Ireland Protocol and the broad secondary law-making powers in the Bill. The purpose of this report is to expand on our earlier work and identify the areas of the revised Bill that require scrutiny and amendment.
6. This Bill contains several new provisions that did not feature in its previous form. These are:
- Reporting on the use of certain dispute procedures relating to the work of the Joint Committee, which will oversee implementation of the Withdrawal Agreement (new clause 30)<sup>4</sup>
  - Prohibiting an extension of the implementation period (new clause 33)
  - Prohibiting UK ministers from using the written procedure to take decisions in the Joint Committee (new clause 35)
  - Repealing unnecessary or spent enactments, including parts of the European Union (Withdrawal) Act 2018 and European Union (Withdrawal) (No. 2) Act 2019 (new clause 36)
  - Removing the Government's existing obligations (under the 2018 Act) regarding unaccompanied children seeking asylum who have family members in the UK and replacing them with a duty to make a policy statement to Parliament within two months of the Bill passing (new clause 37).
7. Several provisions that featured in the earlier version of this Bill have been removed in this iteration:
- Parliament's role in approving any extension of the implementation period (old clause 30)
  - Parliament's oversight of the negotiations on the future relationship with the EU (old clause 31)
  - Protection for workers' rights (old clause 34 and old schedule 4).
8. Other modifications to the Bill include changes to when UK courts may depart from Court of Justice (CJEU) case law (clause 26), revised proposals for parliamentary scrutiny of EU law made during the implementation period (clause 29) and changes to the arrangements for the proposed Independent Monitoring Authority (schedule 2).

### **The Withdrawal Agreement and related Agreements**

9. 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

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3 Constitution Committee, *European Union (Withdrawal Agreement) Bill: interim report* (2nd Report, Session 2019, HL Paper 21)

4 References in this report are to the bill as sent to the House of Lords (HL Bill 16) unless stated otherwise.

relations, was endorsed by EU leaders at a European Council meeting on 25 November 2018.<sup>5</sup> Following further negotiations in 2019, a revised Withdrawal Agreement and Political Declaration were published on 19 October 2019.<sup>6</sup>

10. 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,<sup>7</sup> and the Swiss Citizens’ Rights Agreement between the UK and Switzerland<sup>8</sup>—were concluded on 20 December 2018.
11. 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.
12. 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**

13. 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 in 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 to domestic law. To this end it introduces the concept of “retained EU law” and provides in detail for its

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5 HM Government, *Withdrawal Agreement and Political Declaration*, 25 November 2018: <https://www.gov.uk/government/publications/withdrawal-agreement-and-political-declaration> [accessed 13 January 2020]

6 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019: <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> [accessed 13 January 2020]

7 HM Government, *EEA EFTA Separation Agreement*, 20 December 2018: <https://www.gov.uk/government/publications/eea-efta-separation-agreement-and-explainer> [accessed 13 January 2020]

8 HM Government, *Swiss Citizens’ Rights Agreement*, 20 December 2018: <https://www.gov.uk/government/publications/swiss-citizens-rights-agreement-and-explainer> [accessed 13 January 2020]

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.

14. 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.<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup>
15. We then conducted an inquiry into the Bill and produced a final report ahead of its second reading in the Lords.<sup>12</sup> 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 clarify how UK courts should treat the case law of the CJEU; 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.<sup>13</sup> 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 a sifting mechanism whereby parliamentary committees could review draft statutory instruments and recommend the level of scrutiny to which they should be subject.<sup>14</sup>

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

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

11 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

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

13 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

14 European Union (Withdrawal) Act 2018, *schedule 7*

## CHAPTER 2: IMPLEMENTATION (PARTS 1 & 2)

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### Territorial extent

16. The Bill extends to the whole of the United Kingdom.<sup>15</sup> Various provisions including clause 1, relating to repeal of the ECA, also extend to the Isle of Man, the Channel Islands and Gibraltar.<sup>16</sup>

### Part 1: Implementation period

17. 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”,<sup>17</sup> but in this report we use “implementation period”, as that is the term in the Bill. This will last until 31 December 2020.<sup>18</sup> The Withdrawal Agreement provides that European Union law “shall be applicable to and in the United Kingdom during the transition period”.<sup>19</sup> 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.”<sup>20</sup>
18. 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.
19. 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.<sup>21</sup>
20. 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.<sup>22</sup>
21. 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

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15 [European Union \(Withdrawal Agreement\) Bill](#), clause 42

16 *Ibid.*, clause 42(3)

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

18 HM Government, *New Withdrawal Agreement and Political Declaration*, 19 October 2019, Article 126. <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration> [accessed 13 January 2020] 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 (under Article 132); however clause 33 of the Bill prohibits a minister from agreeing any such extension.

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

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

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

22 *Ibid.*, clause 1, inserted section 1A(3)

concluded by the EU and entering into force during the implementation 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.”<sup>23</sup>

22. 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 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,”<sup>24</sup> and “[d]uring the implementation period, the UK will maintain the same recourse to the EU’s judicial review structures as a Member State.”<sup>25</sup> 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.<sup>26</sup>
23. 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.”<sup>27</sup>
24. 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”.<sup>28</sup>
25. 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.
26. 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.
27. 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.
28. 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

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

24 *Ibid.*, para 27

25 *Ibid.*, para 28

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

27 [Explanatory Notes to the EU \(Withdrawal Agreement\) Bill](#), para 30

28 HM Government, *New Withdrawal Agreement and Political Declaration*, Article 129(4)

below). In effect, clause 2 seeks to replicate section 2 of 2018 Act, and the definition of “EU-derived domestic legislation” in new section 1B(7) mirrors that in section 2 of the 2018 Act.

29. There is no need to make equivalent provision for “direct EU legislation”<sup>29</sup> or “rights, powers, liabilities, obligations, restrictions, remedies and procedures” under section 2(1) of the ECA<sup>30</sup> because each of these categories is specifically saved by clause 1 of the Bill through which, in effect, the ECA continues to operate.
30. New section 1B(3) contains a number of “glosses” to make sure that EU-derived domestic legislation is interpreted in light of any changes in EU law or modifications of its terms that have occurred since the ECA came into force.<sup>31</sup> 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).
31. The effect of Part 1 is that the relationship between domestic law and EU law will remain the same until the end of the implementation period on 31 December 2020.

#### *Delegated powers in Part 1*

32. The Bill contains a range of delegated powers to give effect to the Withdrawal Agreement. The Delegated Powers and Regulatory Reform Committee (DPRRC) has assessed the appropriateness of these powers and the scrutiny processes to which they will be subject.<sup>32</sup> We refer to its recommendations throughout this report. The main delegated powers are:
  - 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.<sup>33</sup>
  - Clause 3, which 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).

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

30 *Ibid.*, [section 4](#)

31 “Glosses” are defined as: “Non-textual modifications to legislation (i.e. reading X as Y). For example used 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. This includes ensuring that across the UK statute book, references to ‘EU citizens’, will be read as including UK nationals for the duration of the implementation period.” [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), Annex B, page 89

32 Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Agreement\) Bill](#) (1st Report, Session 2019–20, HL Paper 3)

33 “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 2020.” [European Union \(Withdrawal Agreement\) Bill](#), clause 2, inserted section 1B(5)

- New section 8A also contains Henry VIII powers. One permits repeal of provisions in the 2018 Act to reflect changes in the Bill concerning “Implementation Period (IP) completion day”—i.e. the end of the transition period.<sup>34</sup> 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.”<sup>35</sup>
  - 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.<sup>36</sup>
  - 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.”<sup>37</sup>
33. 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.
34. 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.”<sup>38</sup> Any other regulation must be made jointly with UK ministers.<sup>39</sup>
35. 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, given their more restricted purpose they are narrower and more circumscribed than the ECA section 2 powers. If these powers were used to make statutory instruments which are considered to be contrary to the terms of the Agreements they would be open to legal challenge.
36. The Delegated Powers and Regulatory Reform Committee observed that the general approach in the Bill is that the affirmative procedure is mandatory where regulations modify primary legislation or retained direct principal EU legislation; otherwise the negative procedure prevails. It said:
- “The Government have not sought to justify this departure from the approach taken in the 2018 Act. Regulations that are otherwise of minor importance but amend one provision of primary legislation will trigger the affirmative procedure. By contrast, significant regulations that

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

35 *Ibid.*, clause 3, inserted section 8A(1)(e)

36 *Ibid.*, clause 3, inserted section 8A(3)

37 *Ibid.*, clause 3, inserted section 8A(4)

38 *Ibid.*, clause 4, inserted para 11B(1)

39 *Ibid.*, clause 4, inserted para 11B(2)

do not happen to amend either primary legislation or retained direct principal EU legislation merely trigger the negative procedure.”<sup>40</sup>

37. The DPRRC recommended replicating the sifting mechanism found in schedule 7 to the 2018 Act to allow for regulations that do not otherwise qualify for the affirmative procedure to be upgraded.<sup>41</sup> **We agree with the DPRRC that, given the importance and potential breadth of these powers, they should be subject to a sifting mechanism as part of their parliamentary scrutiny.**

### Part 2: Remaining implementation of Withdrawal Agreement etc.

38. 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 concerns the status of retained EU law).

39. 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 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.”

40. 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,<sup>42</sup> the requirement that the Agreement be interpreted in line with EU law,<sup>43</sup> and the legal supremacy of the Agreement, apply to all aspects of the Agreement through, if necessary, the disapplication of “inconsistent or incompatible domestic provisions”.<sup>44</sup> 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.”<sup>45</sup>

41. 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 law<sup>46</sup> and “[e]very enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2)”.<sup>47</sup>

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40 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–20, HL Paper 3), para 13

41 *Ibid.*, para 16

42 HM Government, *New Withdrawal Agreement and Political Declaration*, Article 4(1)

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

44 *Ibid.*, Article 4(2)

45 *Ibid.*, Article 4(5)

46 *European Union (Withdrawal Agreement) Bill*, clause 5, inserted section 7A(2)

47 Clause 39 (interpretation) states that an enactment means “an enactment whenever passed or made”.

42. 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.
43. 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.
44. New section 7B(3) provides that in the event of any conflict between the EEA EFTA Agreement or the Swiss Citizens' Rights Agreement and the Withdrawal Agreement, the latter is to take precedence.
45. These clauses reiterate the general thrust of Part 1 of the Bill, which is the continuity in practice of the existing relationship between domestic law and EU law for the duration of the implementation period. 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.

## CHAPTER 3: CITIZENS' RIGHTS (PART 3)

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### Introduction

46. 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 CJEU 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 the Swiss Citizens' Rights Agreement. The primary way the Bill ensures citizens' rights is by giving these provisions direct effect and supremacy through clause 5. Part 3 of the Bill (clauses 7–17) provides additional powers of implementation for those provisions of the Agreements which require it.
47. Clauses 7–9 and 11–14 each create a delegated powers scheme, each accompanied by a Henry VIII power. 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) to oversee the citizens' rights agreements.

### Specific clauses

48. 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) cannot be used to derogate from Article 18(1)(b) nor any other provision of the Withdrawal Agreement, Part 3 of which, covering citizens' rights,<sup>48</sup> spans 48 pages of the published Withdrawal Agreement.
49. 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.
50. Clause 7(1)(b)–(d) creates 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

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48 HM Government, *New Withdrawal Agreement and Political Declaration*, Articles 7–39

clause 7(1)(b)–(g) are subject to the affirmative procedure (see paragraph 1 of schedule 4).

51. 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.<sup>49</sup> Clause 7(4) confers a Henry VIII power to modify any provision made under an enactment. Regulations made under this clause are subject to the affirmative procedure where they amend or repeal primary legislation or retained direct principal EU legislation.<sup>50</sup>
52. 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.<sup>51</sup> 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.<sup>52</sup>
53. 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.
54. Clause 10 (retention of existing grounds for deportation) is unique in Part 3 of the Bill in that it amends the Immigration Acts rather than creates regulation-making powers.
55. 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 “any other decision made in connection with restricting the right of a relevant person to enter the United Kingdom”.<sup>53</sup> 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.
56. Clause 12 provides powers to ministers and devolved authorities, acting jointly or separately, to make provision for the recognition of professional qualifications in accordance with 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

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49 “*Surinder Singh* established the principle that nationals of Member States should not be deterred from leaving their country of origin to pursue an economic activity in another Member State. They would be so deterred if on returning to the Member State of which they are a national they did not enjoy conditions at least equivalent to those they would enjoy under community law in the territory of another Member State. In this case in respect of family reunification rights.” [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), para 136.

50 [European Union \(Withdrawal Agreement\) Bill](#), schedule 4, para 1(1)(b)

51 [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”.

52 [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.

53 See clause 11(2)(g).

or repeal of any enactment, but clause 12(7) prevents it from applying to primary legislation passed after the implementation period.

57. 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.<sup>54</sup> Clause 13(5) provides a Henry VIII power 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. The Government should explain why these powers are necessary beyond 31 December 2020 or include a sunset clause in the Bill such that they expire at the end of the implementation period.**
58. 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 to implement the enumerated rights, rather than condition or restrict them. **As with the powers in Part 1, and in line with the view of the DPRRC, we recommend these powers should be subject to a sifting mechanism.**
59. 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. Its primary functions include keeping the adequacy of the UK legislative framework for 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. Paragraphs 27 and 28 of schedule 2 provide 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.
60. Paragraph 39 of schedule 2 enables the Secretary of State by regulations to transfer the IMA's functions in their entirety to a new person or body. Although schedule 2 sets out a range of powers and criteria relating to appointments and the independence of appointed members, the transfer power contains no guarantee that such standards would be carried over to any transferee. It provides that the Secretary of State must "have regard to the need to ensure" that the transferee has "operational independence" and can make "impartial assessments", and that the transferee has "appropriate funding", but these are weaker requirements than the scheme set out for the IMA in the rest of schedule 2. Paragraph 39(1)(b) provides that the Secretary of State may, in view of any transfer of functions, "make any modification that the Secretary of State considers appropriate to the constitutional or funding arrangements of the transferee." The Delegated Powers Memorandum states that the powers will allow the Secretary of State to "improve the efficiency, effectiveness or economy" of the functions of the IMA.<sup>55</sup>

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54 [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), para 130

55 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 181

61. **The Independent Monitoring Authority is an important part of the scheme for protecting citizens' rights in the Withdrawal Agreement. Its composition, independence and functions will be significant in discharging its complex mandate. The relationships between the IMA and the courts and with the devolved authorities will need to be monitored once it is in operation.**
62. **Paragraph 39 of schedule 2 effectively empowers the minister to dispense with the detailed scheme to establish the IMA in schedule 2 and substitute it with another. Such a power may create an impression that the body lacks adequate independence from Government. Given the importance of the IMA's mandate and that it not only be independent, but be seen to be independent, we recommend that any transfer of its functions or alteration of its constitutional arrangements be carried out by primary rather than secondary legislation.**
63. **We agree with the Delegated Powers and Regulatory Reform Committee that, while the regulation-making powers in Part 3 are constrained by the terms of the Agreements and the direct effect of many of their provisions through Part 2 of the Bill, their significance warrants their exercise being subject to a sifting procedure.**
64. 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).

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

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65. 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.
66. 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.
67. 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.
68. 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).”
69. These powers permit some things to be done by negative procedure that could be done only by affirmative procedure under the 2018 Act.<sup>56</sup> These include creating or widening the scope of a criminal offence and making provision relating to the fees charged by public bodies. As the DPRRC noted, the Government has “not sought to explain why matters requiring the affirmative procedure under the 2018 Act have now been relegated to the negative procedure under this Bill.”<sup>57</sup> **We agree with the recommendation of the DPRRC that the powers in clause 18 should be subject to a sifting mechanism equivalent to that in the 2018 Act.**
70. 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.

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<sup>56</sup> European Union (Withdrawal) Act 2018, [schedule 7, para 1\(1\)](#)

<sup>57</sup> Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–20, HL Paper 3), para 15

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.”<sup>58</sup> In line with other schedule 2 powers, devolved authorities acting alone can make regulations only within devolved competence.<sup>59</sup> **As with clause 18, such powers should be subject to a sifting mechanism.**

71. 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.”<sup>60</sup>

72. New section 1A(3)(c) of the 2018 Act, inserted by clause 1 of the Bill, removes section 2(3) of the ECA with its provision for payment of EU costs. This is superseded by clause 20.
73. 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”. In the previous iteration of the Bill, clause 20 provided that a minister might by regulations amend this date. This power does not feature in the current Bill.

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

59 *Ibid.*, clause 19, inserted para 11H(1)

60 *Ibid.*, clause 20(1)

## CHAPTER 5: DEVOLUTION

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### Introduction

74. The Bill affects devolution arrangements in several ways, with distinct implications for Northern Ireland.
75. The Bill makes technical changes to the devolution statutes.<sup>61</sup> 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

76. 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.
77. 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 sought the legislative consent of the Scottish Parliament and the National Assembly for Wales for the previous iteration of the Bill<sup>62</sup> and has done so again for this Bill.<sup>63</sup> 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 previous version of the Bill.<sup>64</sup> The Scottish Government had earlier decided in principle to withhold consent from all bills to deliver Brexit<sup>65</sup> and subsequently recommended against consent for the current Bill,<sup>66</sup> a position agreed by the Scottish Parliament after debate.<sup>67</sup> The Welsh Government has recommended against consent to the Bill in its current form,<sup>68</sup> though the Welsh Assembly has yet to make its decision on consent.

### Northern Ireland

78. The Withdrawal Agreement contains a Protocol on Ireland/Northern Ireland, which is a matter of political controversy. The Government states that the

61 *Ibid.*, schedule 5

62 Memorandum from the Scottish Government, 22 October 2019, <https://www.parliament.scot/parliamentarybusiness/Bills/113267.aspx> [accessed 13 January 2020]; Welsh Government, Legislative Consent Memorandum for the Withdrawal Agreement Bill, 23 October 2019, <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?IID=26719> [accessed 13 January 2020]

63 Memorandum from the Scottish Government, 20 December 2019, <https://www.parliament.scot/parliamentarybusiness/Bills/113984.aspx> [accessed 13 January 2020]; Welsh Government, Legislative Consent Memorandum, European Union (Withdrawal Agreement) Bill, 3 January 2020, <https://www.assembly.wales/laid%20documents/lcm-ld12940/lcm-ld12940%20-e.pdf> [accessed 13 January 2020]

64 Scottish Government, *Withdrawal Agreement Bill*, 21 October 2019, <https://www.gov.scot/news/withdrawal-agreement-bill/> [accessed 13 January 2020]

65 BBC News, ‘Holyrood ‘won’t approve any Brexit bills’’, 22 June 2018: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44565070> [accessed 13 January 2020]. The Scottish Government did recommend consent to the bill which became the Healthcare (European Economic Area and Switzerland Arrangements) Act 2019, citing “exceptional circumstances”. Constitution Committee, *Healthcare (International Arrangements) Bill* (18th Report, Session 2017–19, HL Paper 291)

66 Memorandum from the Scottish Government, 20 December 2019

67 Scottish Parliament, Minutes of Proceedings, 8 January 2020: [https://www.parliament.scot/S5\\_BusinessTeam/Chamber\\_Minutes\\_20200108.pdf](https://www.parliament.scot/S5_BusinessTeam/Chamber_Minutes_20200108.pdf) [accessed 13 January 2020]

68 Welsh Government, Legislative Consent Memorandum, European Union (Withdrawal Agreement) Bill, 3 January 2020

Protocol “provides arrangements that seek to ensure that the UK (including Northern Ireland) does not remain in a customs union with the European Union.”<sup>69</sup> The Protocol states: “Northern Ireland is part of the customs territory of the United Kingdom”.<sup>70</sup> However, Article 5 of the Protocol creates bespoke customs, VAT and related arrangements for Northern Ireland.<sup>71</sup> 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”<sup>72</sup> (comprising representatives of the European Union and of the United Kingdom, responsible for issues related to the implementation of the Agreement).<sup>73</sup> The United Kingdom is obliged to give legal effect to these arrangements.<sup>74</sup>

79. 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.”<sup>75</sup>

80. 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 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.”<sup>76</sup>

81. 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.”<sup>77</sup>

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69 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 223

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

71 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)

72 HM Government, *New Withdrawal Agreement and Political Declaration*, Article 165(1)(c)

73 HM Government, *New Withdrawal Agreement and Political Declaration*, 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).

74 *Ibid.*, Ireland/Northern Ireland Protocol, Article 12

75 *Ibid.*, Article 18(5)

76 HM Government, *Belfast/Good Friday Agreement*, Cm3883, 10 April 1998, Article 1(ii): <https://www.gov.uk/government/publications/the-belfast-agreement> [accessed 13 January 2020]

77 HM Government, *New Withdrawal Agreement and Political Declaration*, Ireland/Northern Ireland Protocol, Article 1(1)

82. 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.<sup>78</sup> There have been concerns expressed about the way that the petitions of concern had been used in the Northern Ireland Assembly. The Northern Ireland Affairs Committee said:

“We were consistently told that the petition of concern mechanism had been abused in the past. Instead of addressing a power imbalance, this veto mechanism has seemingly strengthened the imbalance. In doing so, it has stifled legislative progress. Reform to the petition of concern mechanism is long overdue.”<sup>79</sup>

The recent agreement for re-establishing power sharing government in Northern Ireland states that “the parties have agreed that the use of the petition of concern should be reduced, and returned to its intended purpose ... [used] only in the most exceptional circumstances and as a last resort.”<sup>80</sup>

83. 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. 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 to the customs arrangements. This reiterates that consent can be given by a majority of the members of the Assembly present and voting.<sup>81</sup>
84. **The arrangements for continuing customs and tax arrangements in the Withdrawal Agreement are different to those that characterise decision-making in Northern Ireland, based on the structures of the Belfast/Good Friday Agreement and embedded in the Northern Ireland Act 1998. They allow for simple majority decision-making in the Assembly and do not require the cross-community decision-making processes that otherwise apply to important political and constitutional matters in Northern Ireland. We call on the**

78 Northern Ireland Act 1998, s.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

79 Northern Ireland Affairs Committee, *Devolution and democracy in Northern Ireland – dealing with the deficit* (Third Report, Session 2017–19, HC 613), para 141

80 Northern Ireland Office, *New Decade, New Approach*, (9 January 2020), para 9: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856998/2020-01-08\\_a\\_new\\_decade\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856998/2020-01-08_a_new_decade_a_new_approach.pdf) [13 January 2020]

81 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840232/Unilateral_Declaration_on_Consent.pdf) [accessed 13 January 2020]

**Government to explain the rationale for the simple majority voting mechanism.**

*Part 4, clauses 21–24*

85. Clauses 21–24 of the Bill make provision 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 an “appropriateness” test equivalent to section 8(1) of the 2018 Act.
86. These powers are also designed to facilitate the new customs arrangements that will apply in relation to Northern Ireland goods.<sup>82</sup> They give ministers power to define “qualifying Northern Ireland goods” for the purpose of the 2018 Act.<sup>83</sup> 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”.<sup>84</sup>
87. 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.
88. 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.
89. 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.”<sup>85</sup>
90. The DPRRC described clause 21 as “a significant new provision” and the powers in section 8C(1) as “the most potent form of Henry VIII clause,

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

83 *Ibid.*, clause 21, inserted section 8C(6)

84 *Ibid.*, clause 21, inserted section 8C(7)(b)

85 Constitution Committee, [European Union \(Withdrawal\) Bill](#) (9th Report, Session 2017–19, HL Paper 69), para 196

allowing regulations to modify their parent Act in addition to creating a new legal regime that would otherwise require one or more Acts of Parliament.”<sup>86</sup>

**We agree with the DPRRC that the powers in clause 21 to modify the 2018 Act should be limited to the minimum necessary and that the purpose of the power should be made clear. The Government must justify the powers in new section 8C(1)–(2) and explain why they are not subject to the same limits as those in section 8 and new section 8B of the 2018 Act.**<sup>87</sup>

91. 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 in schedule 2 to the 2018 Act. As in the 2018 Act itself, the wide powers for ministers are mirrored at devolved level.
92. 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. Otherwise there is a joint decision mechanism: new paragraph 11M(2) provides that regulations under the schedule may only be made jointly by a UK minister and a devolved authority.
93. 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.”
94. 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.
95. The Ireland/Northern Ireland Protocol is of the highest importance. It is skeletal in places, to be supplemented with details that are subject to further negotiation and agreement. In addition, many of the provisions relating to Northern Ireland are not temporary, as they will last beyond the end of the implementation period. These factors highlight the need for detailed parliamentary scrutiny in future both at Westminster and Stormont.

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86 Delegated Powers and Regulatory Reform Committee, *European Union (Withdrawal Agreement) Bill* (1st Report, Session 2019–20, HL Paper 3), para 18

87 *Ibid.*, paras 21–23

## CHAPTER 6: OTHER PROVISIONS (PARTS 4 & 5)

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### Relationship to the European Union (Withdrawal) Act 2018

96. 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.<sup>88</sup> 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) inserts a new section 5A into the 2018 Act, 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 should clarify which measures it anticipates being given the special status of retained EU law under new section 5A of the 2018 Act.**
97. Clause 26(1) amends section 6 of the 2018 Act to introduce significant new ministerial powers on how courts may depart from CJEU interpretations of retained EU law.<sup>89</sup> Under section 6(1) of the 2018 Act, after “exit day”, UK courts and tribunals cease to be bound by the jurisdiction of the CJEU. However, section 6 further provides that retained EU law is to be interpreted in line with any retained EU case law—namely those interpretations of the CJEU which were applicable on or before exit day. After exit day, the 2018 Act provides that only the Supreme Court or the Scottish High Court of Justiciary have jurisdiction to depart from CJEU interpretations of retained EU law, and in so doing the UK courts would apply the rules they exercise in departing from their own previous case law in relation to UK law.
98. The new scheme in clause 26(1) provides a minister with the power to make regulations setting the terms on which departures can be authorised. First, such regulations may designate a court or tribunal other than the Supreme Court and High Court of Justiciary as having the power to depart from CJEU interpretations. Second, the minister may specify “the extent to which, or circumstances in which,” the court or tribunal “is not to be bound by retained EU law.” Third, they can set out the test which a relevant court or tribunal “must apply” in deciding whether to depart from any retained EU law. Fourth, they can specify considerations which “are to be relevant” to the courts in coming to such decisions.
99. Retained EU law is the substantial body of EU law captured by the “snapshot” taken at the point of the UK’s departure from the EU and transferred into UK law by the 2018 Act. The power of the Supreme Court and the High Court of Justiciary under section 6 of the 2018 Act to depart from the interpretations given in retained EU case law would likely have been exercised sparingly, and with due regard for any legitimate expectations, legal certainty and other rule of law considerations that apply to the departure from precedent. Such powers are invariably exercised with the alternative

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88 European Union (Withdrawal) Act 2018, [section 2\(2\)-\(3\)](#)

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

of legislative amendment in mind. The new powers under clause 26(1) will empower ministers to require courts to depart from such considerations and instead apply ministerial guidelines that do not enact new law but declare how previously enacted law should be re-interpreted. There is no indication in clause 26 or the Explanatory Notes as to what the content of such guidelines might be.

100. Ministers may use these regulations to achieve various additional effects. First, such regulations may instruct courts on when and on what grounds to depart from domestic (i.e. UK) and not only EU judicial interpretations of retained EU law.<sup>90</sup> Second, a minister may sub-delegate the power to determine what the applicable tests are for departing from previous interpretations to any from among a list of senior judges.<sup>91</sup>
101. The Bill contains safeguards in respect of these powers in clause 26(1). The regulation-making powers are subject to the affirmative resolution procedure and the powers cannot be used to reduce the rights and obligations arising under the Withdrawal Agreement itself. There is also a sunset clause restricting the making of regulations to the implementation period, though regulations made under such powers will endure beyond the implementation period.
102. The substantive justification for the powers in clause 26(1) is set out in the Delegated Powers Memorandum. It states that the approach:
- “in the EU (Withdrawal) Act 2018 was taken before negotiations with the EU were concluded. The negotiations on the Withdrawal Agreement having concluded, there is now greater clarity on how EU law will be treated after the UK’s exit from the EU. In relation to the [Other Separation Issues], citizens’ rights, and the Northern Ireland Protocol, the Withdrawal Agreement provides a limited and clearly defined role for CJEU case law.”<sup>92</sup>
103. However, retained EU law concerns considerably more than just the issues relating to the Withdrawal Agreement, and no further light has been shed on its meaning than was apparent during the adoption of the 2018 Act or when the predecessor European Union (Withdrawal Agreement) Bill was first published in October 2019. The Delegated Powers Memorandum continues:
- “there is no international law obligation to treat CJEU law in a particular way. This is an entirely domestic matter. Given that we are leaving the jurisdiction of the CJEU, it is right that UK courts should be able to decide to depart from the rulings of a Court whose jurisdiction, in most cases, is no longer relevant.”<sup>93</sup>
104. The powers in clause 26(1) go considerably beyond what is required to attain this goal, which has already been effected by section 6 of the 2018 Act by ending the jurisdiction of the CJEU and providing UK courts with the power to depart from retained EU case law in defined circumstances.
105. **Clause 26(1) raises substantial constitutional concerns. If the meaning of UK law, as retained EU law will become after exit day, is to be**

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90 *Ibid.*, clause 26(1)(d), new subsection 5B(b)

91 *Ibid.*, clause 26(1)(d), new subsection 5B(d)

92 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 364

93 *Ibid.*, para 365

**altered, it should be for Parliament to change, not for ministerial guidelines to reinterpret.**

106. **We do not believe it is appropriate for courts other than the Supreme Court and the Scottish High Court of Judiciary to have power to depart from the interpretations of EU case law. Allowing lower courts to reinterpret EU case law risks causing significant legal uncertainty that would be damaging to individuals and companies. It would also increase court workloads as judgments involving departures are contested on appeal.**
107. **We do not believe the proposed consultation with senior members of the judiciary on the applicable tests for departures is an adequate substitute for the determination of such issues in adversarial proceedings in open court, open to interventions and with the assistance of counsel.**
108. **We cannot see the case for such broad and constitutionally significant regulation-making powers, and are not convinced by the rationale offered by the Government. We recommend that clause 26(1)(d) be removed from the Bill.**
109. Clause 26(2) inserts new section 7C into the 2018 Act. This new section states that “Any question as to the validity, meaning or effect of any relevant separation agreement law is to be decided, so far as they are applicable” in accordance with the Withdrawal Agreement and other Agreements and “having regard to” the desirability of consistency between their provisions. The following subsection commences with the phrase “See (among other things)—” and lists various provisions of the Agreements. This subsection has no operative legal effect—it does not change the law nor clarify the meaning of any terms. The Explanatory Notes describe the provision as a “signpost”.<sup>94</sup> While it may be helpful for the interpreter of the statute, it is content that is more appropriately suited to explanatory notes rather than statutory provision. **We recommend that new section 7C(2) is removed from the Bill and its contents added to the Explanatory Notes.**
110. Clause 27 amends section 8 of the 2018 Act. That section empowers a minister to make regulations to prevent, remedy or mitigate 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.<sup>95</sup> **Any expansion of the powers under section 8 requires substantial justification. The Government should explain why the powers in clause 27(2)(c) and 27(6) are necessary, and if unable to do so, should remove them from the Bill.**

<sup>94</sup> [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), para 291

<sup>95</sup> 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)

### Parliamentary oversight

111. Clauses 29–32 provide for parliamentary review of EU law-making during the implementation period, certain dispute procedures under the Withdrawal Agreement, 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.
112. Clause 29 deals with 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. While there was no analogous role for the House of Lords or its European Union Select Committee in the predecessor Bill, the current Bill provides an equivalent procedure for the EU Select Committee of the House of Lords.
113. Clause 30 inserts a new section 13B into the 2018 Act regarding certain dispute procedures under the Withdrawal Agreement. It provides a scheme under which each House of Parliament is notified when a party has triggered a request to have an arbitration panel appointed to resolve a dispute and when the CJEU gives a ruling on an issue at the request of an arbitration panel convened to resolve such a dispute. It also requires the Government to report each year following the end of the implementation period on the number of times that the Joint Committee has been notified that dispute resolution negotiations had commenced.
114. The scheme gives no role to each House other than to be notified. As such there is a weaker role for Parliament than the previous version of the Bill, which contained a clause providing for parliamentary oversight of negotiations on the future relationship between the UK and the EU. That clause required a minister to report to Parliament on progress made in negotiations on any future relationship by the end of each reporting period and to 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.<sup>96</sup> In our interim report, we observed at paragraph 98 that the (now-removed) clause providing the scheme of consultation with Parliament was broadly consistent with recommendations outlined in our report on Parliamentary Scrutiny of Treaties, in which 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. 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

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96 European Union (Withdrawal Agreement) Bill [Bill 7 (2019)], [clause 31, inserted section 13C\(6\)\(b\)](#)

important role devolved administrations may play in the implementation of new international obligations.”<sup>97</sup>

The removal of this clause without any substitute commitment is therefore a matter of regret.

**115. We recommend the Government set out before the Bill’s report stage what its process for consultation and engagement with Parliament and with the devolved authorities will be in respect of the future relationship negotiations with the European Union.**

116. Clause 31 repeals section 13 of the 2018 Act, which provided for “meaningful votes” on the Withdrawal Agreement.

117. Clause 32 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 Withdrawal Agreement. The reason appears to be that the passage of the Bill itself constitutes approval of the treaty.

### Other matters

118. Clause 33 inserts a new section 15A into the 2018 Act to forbid a minister from agreeing in the Joint Committee to an extension of the implementation period. Article 132 of the Agreement, which allows for a single extension of the implementation period for up to one or two years, is unchanged, but a minister would be unable to agree to any such extension.

119. Clause 34 provides that the functions of the co-chair of the Joint Committee established under Article 164 of the Withdrawal Agreement are to be exercised personally by a minister.

120. Clause 35 inserts a new section 15C into the 2018 Act to provide that “The United Kingdom’s co-chair of the Joint Committee may not consent to the Joint Committee using the written procedure provided for in Rule 9(1) of Annex VIII of the withdrawal agreement.” This means that decisions made by the Joint Committee must be made by a minister in person. The Government explains that the purpose of this provision “is to ensure there is full ministerial accountability, including to Parliament, for all decisions made in the Joint Committee.”<sup>98</sup>

121. Clause 36 repeals “unnecessary or spent enactments”. This includes repeal of both the European Union (Withdrawal) Act 2019 and the European Union (Withdrawal) (No. 2) Act 2019. Each of these statutes placed a duty on the Government to seek extensions of the Article 50 period in certain circumstances. The repeal of the latter Act removes the ongoing duties placed on the Government to report on the progress of negotiations on the UK’s future relationship with the EU.

122. Some provisions of those Acts will remain in effect courtesy of paragraph 65 of schedule 5. This provision saves amendments to section 20(4) of the 2018 Act,<sup>99</sup> which provides for regulations to be made amending the

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

98 [European Union \(Withdrawal Agreement\) Bill, Explanatory Notes](#), para 326

99 Amendments made by section 2 of the [European Union \(Withdrawal\) Act 2019](#) and section 4 of the [European Union \(Withdrawal\) \(No. 2\) Act 2019](#).

definition of exit day. Those amendments sought to ensure that ministers give legal effect to any changes to exit day agreed with the EU. The inclusion of this provision is surprising given the prohibition on extending the implementation period set out in clause 33.

123. Clause 37 amends section 17 of the 2018 Act, which requires the Government to seek an agreement with the EU to ensure that an unaccompanied child who has made a claim for international protection in a Member State can come to the UK to join a relative, and that an unaccompanied child in the UK can join a relative in the EU in equivalent circumstances. Clause 37 removes this obligation to seek to negotiate such an agreement and replaces it with a requirement to make a statement to Parliament. This statement must be made within two months of the passage of the Bill and must set out the Government's policy on the matter.

### Parliamentary sovereignty

124. Clause 38(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." 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."<sup>100</sup>
125. Clause 38 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 38(2) makes direct reference to new sections of the 2018 Act inserted by this Bill. Clause 38(2) provides that Parliament's sovereignty "subsists" notwithstanding these provisions, while clause 38(3) states that "nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom."
126. **Parliamentary sovereignty is central to the constitution. We welcome the Government's recognition that Parliament is sovereign, though we note that this clause has no legal effect.**

### Interpretation, supplementary and final provisions

127. Clause 39 is an interpretation provision. It provides, among other things, that "IP completion day" means 31 December 2020 at 11.00 pm.
128. Clause 40 provides that schedule 4, containing provision about regulations under the Bill, has effect. The standard test for the use of the powers in the Bill is "appropriateness" rather than "necessity" and the default scrutiny procedure for instruments not amending primary legislation or retained EU law is the negative procedure.
129. Clause 41(1) provides for 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

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<sup>100</sup> 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.

are subject to the negative procedure.<sup>101</sup> This Henry VIII power, contained in clause 41(2), is subject to clause 41(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,<sup>102</sup> so the operation of clause 41(1) in general will be, despite its broad terms, constrained. **The DPRRC nonetheless recommended that the affirmative procedure should apply to regulations under clause 41(1) which modify primary legislation.**<sup>103</sup> We agree.

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101 [European Union \(Withdrawal Agreement\) Bill](#), schedule 4, para 6

102 [European Union \(Withdrawal Agreement\) Bill, Delegated Powers Memorandum](#), para 332

103 Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Agreement\) Bill](#) (1st Report, Session 2019–20, HL Paper 3), para 11

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTERESTS

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### 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

### 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.