

LEGISLATIVE CONSENT MEMORANDUM

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL

Introduction

1. The European Union (Withdrawal Agreement) Bill (“the Bill”) was introduced into the House of Commons on 21 October 2019. It is intended to implement the terms of the agreement on the UK’s withdrawal from the EU concluded by the UK and the EU on 17 October 2019¹ (“the Withdrawal Agreement”). The House of Commons has agreed not to approve the Withdrawal Agreement unless and until the Bill implementing it completes its parliamentary passage.

2. The Scottish Government considers that this is a relevant Bill under Rule 9B.1 of the Parliament’s Standing Orders. This memorandum has been lodged by Michael Russell, Cabinet Secretary for Government Business and Constitutional Relations, in accordance with Rule 9B.3.1(a). The Bill and supporting documents can be found at: <https://services.parliament.uk/Bills/2019-20/europeanunionwithdrawalagreement/documents.html>

3. This memorandum relates to the Bill as introduced.

4. The Scottish Government believes that the best option for the UK as a whole, and for Scotland, is to remain in the EU, as voted for by the people of Scotland. The Scottish Government supports a further referendum with the option to remain in the EU included on the ballot paper.

5. The Scottish Government cannot support a Bill that would withdraw Scotland, as part of the UK, from the EU. It cannot recommend that the Scottish Parliament consent to a Bill to give effect to a withdrawal agreement which it considers will do significant damage to Scotland. And the Scottish Government cannot support a Bill of such significance being rushed through without the opportunity for proper parliamentary scrutiny in either the UK or Scottish Parliaments. Given the extremely limited opportunity available for both essential scrutiny, based on evidence and impact assessment, and for the public to understand the implications of the Withdrawal Agreement, the Scottish Government believes that this legislation should not be progressed. The responsible step now would be to legislate for a further referendum to allow the electorate to decide.

6. The Scottish Government recommends that the Scottish Parliament should not consent to any part of the Bill, and should indicate its opposition to the UK’s withdrawal from the EU and to the Withdrawal Agreement. The Scottish Government does not

¹ <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>

therefore intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of the Standing Orders, the Scottish Government's reasons for not including a draft motion are set out in paragraphs 31 – 42 below.

Background

Withdrawal from the European Union

7. The UK Government notified the EU of its intention to withdraw from the Union on 29 March 2017. As the Withdrawal Agreement previously concluded between the UK and the EU on 25 November 2018 was not approved by the UK Parliament, the two-year period set out in Article 50 of the Treaty on European Union was twice extended by agreement of EU Member States and the UK. Under the terms of the European Union (Withdrawal)(No. 2) Act 2019, a letter issued from the Prime Minister on 19 October 2019 requesting that a further extension until 31 January 2020 be granted. The European Council has not yet indicated if such an extension, or a proposed alternative, will be offered. However, in the absence of a further extension or other agreements, the UK will leave the EU as a matter of law on 31 October 2019 ("exit day"), when the UK will cease to enjoy the rights and obligations of the EU Treaties.

8. The European Union (Withdrawal) Act 2018 ("EUWA"), passed in June 2018, provides in domestic law for the consequences of the UK leaving the EU. It ensures that current EU law (as it stands on exit day) continues to have domestic effect following exit day, and provides Ministers with powers to ensure this retained EU law works effectively. Powers under EUWA have also been used to ensure that the exit day in domestic law is consistent with the current exit day under Article 50². EUWA required the legislative consent of the Scottish Parliament under the Sewel Convention. This was refused by the Parliament on 15 May 2018³. However, the UK Government and UK Parliament passed the Bill without amendments to reflect the views of the Scottish Parliament, in breach of the Sewel Convention.

The Withdrawal Agreement and Political Declaration

9. The Scottish Government considers that the revised Withdrawal Agreement, if ratified, and Political Declaration on the Framework for the Future Relationship between the EU and UK would be damaging to Scotland, politically, economically and socially. Scotland voted to remain but this deal would take Scotland out of the EU, out of the Single Market and out of the Customs Union.

² http://www.legislation.gov.uk/ukxi/2019/718/pdfs/ukxi_20190718_en.pdf

http://www.legislation.gov.uk/ukxi/2019/859/pdfs/ukxi_20190859_en.pdf

³ See <https://www.parliament.scot/parliamentarybusiness/Bills/105997.aspx>

10. The Withdrawal Agreement covers matters such as citizens' rights, outstanding financial obligations, and makes arrangements for Northern Ireland alone to continue to benefit from unfettered access to the EU's market based on regulatory alignment for goods and application of EU customs rules to relevant trade. It also establishes an implementation period during which EU Treaties will largely apply to the UK as if it were still a member state.

11. Alongside the revised Withdrawal Agreement there is a Political Declaration⁴ setting out the framework for the future relationship between the UK and EU, to be negotiated during the implementation period, covering an economic partnership, a security partnership and agreements on areas of shared interest. This longer term relationship would come into force following negotiation of a full treaty or treaties providing for a future relationship and at the expiration of the implementation period, in 2020, unless otherwise extended. The Political Declaration has no legal effect, unlike the Withdrawal Agreement which is a treaty binding in international law.

12. The Scottish Government considers that the Withdrawal Agreement has the effect that Scotland alone of the UK nations is being effectively taken out of the EU against the wishes of its people since both England and Wales voted Leave and will get to Leave, Northern Ireland is getting a special deal and the right to decide their own future, while Scotland voted Remain but is being forced to leave with no say over its future relationship with European Union.

13. The Scottish Government considers that the Withdrawal Agreement represents a hard Brexit deal that will damage jobs and living standards in both Scotland and the wider UK. It will take Scotland out of the European Single Market, a market eight times the size of the UK alone. Modelling by the Scottish Government finds that a basic trade agreement of the type envisaged by the Political Declaration will cost people in Scotland an average of £1,600 per person compared with EU membership⁵.

14. The Withdrawal Agreement does not end the possibility of No Deal. If no future relationship is agreed the possibility of a no-deal exit at the end of the Implementation Period remains. The UK Government's refusal to rule this possibility out could result in having to undertake further extensive preparations for a potential outcome which may or may not materialise.

15. The devolved administrations were given no opportunity by the UK Government to consider or contribute to either the Withdrawal Agreement or Political Declaration before they were agreed, even once it became clear that the Withdrawal Agreement and Political Declaration originally agreed between the previous Prime Minister and

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840231/Revised_Political_Declaration.pdf

⁵ <https://www.gov.scot/publications/scotlands-place-europe-people-jobs-investment/>

the European Union in November 2018 could not attract the support of a majority in the House of Commons.

Scrutiny of the Withdrawal Agreement and the Bill

16. The previously concluded Withdrawal Agreement and Political Declaration twice failed⁶ to be approved by the House of Commons in a meaningful vote and the UK Government was also unsuccessful⁷ in obtaining the approval of the Commons on a vote on the Withdrawal Agreement alone.

17. On 5 December 2018, the Scottish Parliament agreed that both a no-deal exit from the EU and the Withdrawal Agreement and political declaration, as then presented to the House of Commons by the Prime Minister, would damage Scotland and the nations and regions of the UK as a whole, and therefore recommended that they be rejected and that a better alternative be taken forward.⁸

18. On 5 March 2019, both the Scottish Parliament and the National Assembly for Wales passed motions rejecting the previously concluded Withdrawal Agreement and the possibility of leaving without a deal, at any point.⁹

19. On 19 October 2019 the UK Government once again failed to obtain a positive meaningful vote on its Withdrawal Agreement. Instead, the House of Commons voted to amend the Government's motion to withhold consent until the implementing legislation has been passed.

20. In its ruling on R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland), concerning the purported prorogation of the UK Parliament, the Supreme Court made clear the importance of parliamentary scrutiny and the accountability of the executive to the legislature during the process of EU exit. Scrutiny by the devolved legislatures of the Bill is also a legislative act, since it invites their consent to changes to their competence and to changes to the law that would be within their competence. The UK Government's intention appears to be to allow less than two weeks' scrutiny for one of the most important pieces of legislation ever considered by the UK Parliament, the Scottish Parliament and National Assembly for Wales with far-reaching implications for the whole of the United Kingdom.

⁶ On 15 January and 12 March 2019, the UK Government's motions seeking approval of the Withdrawal Agreement and Political Declaration in meaningful votes were defeated by 432 votes to 202 and 391 votes to 242, respectively.

⁷ On 29 March 2019 the UK Government held a vote on the Withdrawal Agreement only, which did not constitute a meaningful vote under section 13(1) of EUWA, but was defeated again by 344 votes to 286.

⁸ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11826&mode=pdf>

⁹ <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11976&mode=pdf>

21. Section 13 of EUWA set out steps that must be taken before the United Kingdom could ratify any withdrawal agreement, including approval by the House of Commons (the “meaningful vote”) and passage of a Bill implementing the agreement in domestic law.¹⁰ It stated that the UK could not, therefore, leave the EU under the terms of the Withdrawal Agreement without this Bill being passed by the UK Parliament. This Bill removes the requirements under section 13. The Bill would also disapply the requirements of the Constitutional Reform and Governance Act 2010 (“CRAG”) to the Withdrawal Agreement, which would remove the need for a further statutory process in both Houses of Parliament before ratification could proceed.

22. The UK Government’s approach is now that the House of Commons should be asked for its support of the Withdrawal Agreement as a whole through the passage of the Bill itself - and on a severely truncated timetable - rather than a separate meaningful vote on the agreement and the Political Declaration.

Content of the Bill

23. The Explanatory Notes¹¹ accompanying the Bill set out the UK Government’s view of its purpose and main functions. The UK Government describes the principal purpose of the Bill as to give effect to the Withdrawal Agreement, the EEA/EFTA Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens’ Rights Agreements between the UK and Switzerland.

24. Detail of the structure and provisions of the Bill is at **Annex A**. However, the main provisions of the Bill are as follows:

Part 1 – Implementation Period

This Part maintains the effect of the European Communities Act 1972 (ECA) for the agreed implementation period, while modifying the ECA to reflect that the UK will no longer be a Member State. It will ensure that EU-derived domestic UK legislation continues to operate effectively where references in that legislation are dependent on EU membership.

Part 2 – Withdrawal and related separation agreements

This Part provides for the Withdrawal Agreement’s direct application, direct effect and supremacy in UK law. The effect of this Part is to ensure the same domestic legal effect of EU law as has been provided by the ECA. To achieve this, this Part contains provision which replicates the language of sections 2(1) and 2(4) of ECA. Similar provision is made in relation to the EEA/EFTA and Swiss agreements.

¹⁰ s.13(1) of the European Union (Withdrawal) Act 2018.

¹¹ <https://publications.parliament.uk/pa/bills/cbill/2019-2020/0007/en/20007en.pdf>

Part 3 and Schedules 1 and 2 – Citizens’ Rights

This Part provides for the rights of EU (and EEA EFTA and Swiss) citizens in the UK as set out in the Withdrawal Agreement (and corresponding EEA EFTA and Swiss agreements). This Part and Schedule 2 establish an Independent Monitoring Authority to monitor the implementation and application of these citizens’ rights Agreements in the UK and set out its constitution and functions, including a requirement, so far as possible, for one of the non-executive members of the IMA to know about conditions in Scotland relating to relevant matters. This Part also provides powers for regulations to be made in connection with:

- Rights related to residence: application deadline and temporary protection;
- EU, EEA EFTA and Swiss frontier workers who are economically active in, but not resident in, the UK at the end of the implementation period;
- Rights in relation to entry and residence;
- Retention of existing grounds for deportation;
- Appeals etc. against citizens’ rights immigration decisions;
- Recognition of professional qualifications;
- Coordination of social security systems;
- Non-discrimination, equal treatment and rights of workers.

Schedule 1 sets out the powers of devolved authorities in relation to recognition of professional qualifications, coordination of social security systems and equal treatment.

Part 4 and Schedules 3 and 4 – Separation issues

This Part amends EUWA to provide for Ministerial powers to implement Part 3 of the Withdrawal Agreement and the EEA EFTA Separation Agreement. Corresponding powers are conferred on devolved authorities, with a definition of devolved competence in relation to these powers. It also amends EUWA so the creation of retained EU law takes place at the end of the implementation period; and broadens section 8 of the EUWA so that new Statutory Instruments (SIs) can also be laid at the end of the implementation period. This Part provides financial provision which will enable the UK to make payments to the EU for the purposes of complying with the Withdrawal Agreement.

This Part amends EUWA to provide for Ministerial powers to implement the Northern Ireland Protocol. Corresponding powers are largely conferred on devolved authorities.

This Part also provides for parliamentary oversight of the future relationship negotiations and a parliamentary role for the review of any new EU legislation during the implementation period.

Part 5 and Schedules 5 and 6 – General provision

This Part makes general provision, including sections on Interpretation and consequential and transitional provision. Schedule 5 sets out more detail on regulations to be made under the Bill, including procedures relating to those. Schedule 6 includes provision to defer SIs made under section 8 of the EUWA (and other EU Exit SIs and Scottish SIs) so they take effect at the end of the implementation period. This Part also makes provision on the sovereignty of the UK Parliament.

Requirement for legislative consent

25. The Bill is a relevant Bill within Rule 9B.1.1 of Standing Orders, as it makes provision applying to Scotland for purposes within the legislative competence of the Parliament, and alters that legislative competence and the executive competence of the Scottish Ministers. The clauses for which the Scottish Government considers legislative consent is required are set out in the table at **Annex B**.

26. The Explanatory Notes to the Bill¹² set out the UK Government's view that the legislative consent of the Scottish Parliament is required for the Bill and specify the particular provisions which require consent. The Scottish Government agrees consent is required for these provisions and considers that further clauses also require the Scottish Parliament's consent, specifically clauses 3, 5, 6, 18, 20, 21, 25, 26 and 28.

Provisions altering the legislative competence of the Parliament and the executive competence of the Scottish Ministers

27. Many provisions of the Bill modify the application of EU law during the implementation period, and so alter the limits of executive and legislative competence through the current EU law restriction.¹³ Clause 1, for example, modifies the powers, including the powers of Scottish Ministers, to make regulations to implement EU law under section 2(2) of the ECA, as well as generally saving the effect of the ECA in domestic law for the duration of the implementation period.

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

¹² See Annex A, p.118 of <https://publications.parliament.uk/pa/bills/cbill/2019-2020/0007/en/20007en.pdf>

¹³ s.29(2)(d) of the Scotland Act 1998

to that provision, altering the competence of the Scottish Parliament and the Scottish Ministers.

29. Other provisions modify the executive competence of the Scottish Ministers, either because they expressly confer powers on Ministers, or because they alter existing powers. For example, clause 25, which makes amendments to various provisions in EUWA by substituting existing references to “exit day” with references to “Implementation Period completion day”, alters the executive competence of the Scottish Ministers in relation to existing powers which they have to deal with legislative deficiencies.

Purposes within the legislative competence of the Parliament

30. The principal purpose of the Bill is to implement the Withdrawal Agreement, an international treaty. While international relations is reserved, the implementation of international obligations is not.¹⁴ Provisions implementing the Withdrawal Agreement in devolved areas would therefore be within the legislative competence of the Scottish Parliament. Such provisions include the supplementary power conferred on UK Ministers by clause 3 in connection with the implementation period, which apply to the law in devolved areas; to that extent, the powers in clause 3 would have a devolved purpose and require legislative consent. Similar considerations apply to clauses 18, 21 and 26.

Scottish Government view

Withdrawal from the EU and the Withdrawal Agreement

31. In the referendum of 2016 Scotland voted, overwhelmingly, to remain in the European Union. The majority of both the Scottish Parliament and Scotland’s members of the House of Commons favour remaining in the EU. The Scottish Government is firmly of the view that remaining in the EU would be best for Scotland and the UK as a whole. The Scottish Government also believes that it has a democratic duty to take all the steps it can to secure that outcome.

32. Nevertheless, the Scottish Government recognises that, as a responsible government, it should prepare for withdrawal from the EU, including any necessary legislative steps. The Scottish Government has therefore worked with the UK Government on withdrawal legislation, primary and secondary, in the attempt to ensure that it was legally effective and reflected, as far as possible, Scottish interests and concerns.

¹⁴ Paragraph 7 of Schedule 5 of the Scotland Act 1998

33. Similarly the Scottish Government engaged with the UK Government during the development of the Bill in anticipation of its planned introduction to implement the previously concluded Withdrawal Agreement. That work was undertaken on the assumption that the Bill would only be introduced after a meaningful vote in favour of the Withdrawal Agreement in the House of Commons in line with the statutory requirement in EUWA.

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

35. With the new arrangements only having been concluded on 17 October 2019, there has been no time for the ramifications of this new deal to be fully scrutinised or understood in their entirety. There is a significant degree of uncertainty as to what much of the Withdrawal Agreement might mean in practical terms yet no updated analysis has been provided on the terms and implications of the agreement by UK Government. The Scottish Government therefore does not believe that this legislation should proceed.

36. In these circumstances, the Scottish Government believes that the responsible course of action is to use the time afforded by an extension to halt plans for withdrawal from the EU, and to have a further referendum with the option to remain in the EU, rather than make legislative preparations for a Withdrawal Agreement that is damaging to Scotland, and indeed the rest of the UK.

37. The Scottish Government therefore believes that the Scottish Parliament should not agree legislative consent to the Bill, but should take a firm stance against withdrawal, against the Withdrawal Agreement, and against the Bill.

The Sewel Convention

38. During the passage of the European Union (Withdrawal) Bill, the UK Government sought consent from the Scottish Parliament, in line with the Sewel Convention. The Scottish Parliament voted overwhelmingly (by 93 votes to 30) to refuse consent. The UK Government then decided, for the first time since devolution, to continue with the Bill and legislate for matters within or affecting the responsibilities of the Scottish Parliament without its agreement. The UK Government has demonstrated that it is prepared to proceed with legislation relating to the UK's withdrawal from the EU without the consent of the Scottish Parliament, even where that consent is required and sought.

39. The Scottish Government's view is that it should not seek consent from the Scottish Parliament to UK legislation related to withdrawal from the EU, except in exceptional circumstances, unless the UK Government has indicated it will respect the views of the Scottish Parliament. The UK Government has not given such an assurance in relation to this Bill.

The devolution settlement

40. Up until May 2019 the UK Government engaged with the devolved administrations over the preparation of the Bill intended to implement the previously-concluded Withdrawal Agreement. That engagement allowed the Scottish Government to make representations to the UK Government over how best to reflect the devolution settlement in the Bill's provisions. However, there has been no discussion since then and the speed of introduction of the Bill following the newly concluded Withdrawal Agreement has meant that engagement on the terms of the current version of the Bill was limited to sight of the Bill in its final form the day before introduction, with no scope to make formal representations to the UK Government.

41. The Scottish Government considers that much of the Bill is a domestic legal expression of the terms of the Withdrawal Agreement, and in particular the legal changes required to give effect to the Implementation Period. However, the Bill nevertheless does not fully respect the devolution settlement. In particular, the Scottish Government considers that changes to the design of the Independent Monitoring Authority would ensure that it has authority, accountability and legitimacy when operating in devolved areas. The Scottish Government is also concerned at the prospect of provisions being given protected enactment status, constraining further the Parliament's competence without its consent. Details of the Scottish Government's view of the Bill's provisions and their compatibility with the devolution settlement is set out in **Annex C**.

42. While the Scottish Government does not recommend that the Parliament consents to the Bill, it will continue to seek changes to the Bill to ensure that, if passed, these concerns are addressed.

Sovereignty of the UK Parliament

43. Clause 36 of the Bill purports to recognise that the Parliament of the United Kingdom is sovereign. The Scottish Government notes the claim in the Scottish constitutional tradition that sovereignty properly lies with the people. Sovereignty in the UK is traditionally said to lie with the Crown in Parliament, a claim that has never fully been accepted in Scotland.¹⁵ However, the meaning and modern relevance of

¹⁵ See, for example, the scepticism expressed by Lord President Cooper in *MacCormick v Lord Advocate*, 1953 SC 396 at 411, the Claim of Right 1989 which "acknowledge[s] the sovereign right of

the ‘Crown in Parliament’ is contested, as recent debates on the conventions surrounding Royal Assent and respective roles of the Commons and the UK Government have demonstrated.¹⁶ There have also been debates about the effects of EU membership, human rights and devolution on the practical meaning of parliamentary sovereignty,¹⁷ a debate perhaps illustrated by the terms of this provision and similar sections in the devolution settlements.

44. The Welsh Government recently published proposals which endorsed the idea of the United Kingdom as an association “based on the recognition of popular sovereignty in each part of the UK” and concluded that “the traditional doctrine of the sovereignty of Parliament no longer provides a firm foundation for the constitution of the UK”¹⁸.

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

Citizens’ Rights

46. The Scottish Government remains clear that the rights of EU citizens should be guaranteed by the UK Government, without those rights being dependent on the passage of this Bill. The Scottish Government has always been clear that EU citizens should not need to apply to maintain rights they already have and that the EU Settlement Scheme should be declarative. The UK Government has the power to provide EU citizens with clarity and certainty about their future rights by introducing separate primary legislation to clearly set out and protect the rights of EU citizens who are resident in the UK at the point of leaving the EU.

the Scottish people to determine the form of Government best suited to their needs”, and the recent report of the Smith Commission, paragraph 20: “Reflecting the sovereign right of the people of Scotland to determine the form of government best suited to their needs, as expressed in the referendum on 18 September 2014, and in the context of Scotland remaining within the UK, an enhanced devolution settlement for Scotland will be durable, responsive and democratic.”

¹⁶ Examples of the extensive commentary on these matters include:

<https://policyexchange.org.uk/wp-content/uploads/2019/09/Parliamentary-Sovereignty-and-the-Politics-of-Prorogation3.pdf>

<https://judicialpowerproject.org.uk/debating-the-supreme-courts-prorogation-judgment/>

<https://policyexchange.org.uk/wp-content/uploads/2019/03/Endangering-Constitutional-Government.pdf>

<https://ukconstitutionallaw.org/?s=Royal+Assent>

¹⁷ See, for example:

<https://publiclawforeveryone.com/2012/09/13/the-british-constitution-devolution-and-doublethink/>

<https://publiclawforeveryone.com/2016/02/23/parliamentary-sovereignty-and-european-union-law-a-short-reading-list/>

<https://commonslibrary.parliament.uk/parliament-and-elections/parliament/parliamentary-sovereignty-and-the-european-convention-on-human-rights/>

¹⁸ Welsh Government, *Reforming our Union: Shared Governance in the UK*, 10 October 2019

Draft Legislative Consent Motion

47. Under Rule 9B.3.3(d) of the Parliament's Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum, the Memorandum must explain why not. Paragraphs 31 – 42 above set out the Scottish Government's reasons for not including a draft motion in this memorandum for the purposes of that rule.

Conclusion

48. The Scottish Government believes that withdrawal from the EU will have widespread detrimental effects on Scotland and the rest of the UK. The evidence for this has increased since 2016. There is also evidence that withdrawal on the terms of the UK Government's Withdrawal Agreement will be damaging to Scotland's interests, especially with Scotland being put at a competitive disadvantage to Northern Ireland. The Scottish Government therefore supports a further referendum with the option to remain on the ballot paper, and immediate revocation of notification under Article 50 if the alternative is leaving the EU without an agreement.

49. The UK Government's Withdrawal Agreement does not yet have the support of the House of Commons, and has not been approved under the statutory requirements set down in existing legislation. That support will be determined by the passage of this Bill.

50. Following the breach of the Sewel Convention on EUWA, the Scottish Government will not recommend consent to EU related UK primary legislation, other than in exceptional circumstances, without an assurance the UK Government will respect the views of the Scottish Parliament. No such assurances have been given. Moreover, given the Scottish Government's views on the Withdrawal Agreement which this Bill aims to implement, those assurances will not be sought in relation to this Bill.

51. The Scottish Government therefore recommends that the Scottish Parliament does not give legislative consent to the European Union (Withdrawal Agreement) Bill.

Scottish Government

October 2019

ANNEX A

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL – STRUCTURE AND PROVISIONS

PART 1

Implementation Period

Saved law for implementation period

Clause 1 Saving of ECA for implementation period

The clause would amend EUWA by inserting provision to maintain the effect of the ECA for the implementation period, meaning that nearly every aspect of EU law will continue to apply in the UK during that period. As a result, significant changes are made to EUWA by this clause so that the effect of the ECA does not end on exit day, as currently provided by that Act.

Clause 2 Additional saving for implementation period

The clause would amend EUWA by inserting provision to ensure that EU-derived domestic UK legislation continues to operate effectively on and after exit day for the duration the implementation period and that EU-related references continue to operate properly during that period. The clause also contains sunset provision to ensure these saving provisions cease to have effect from the end of the implementation period.

Supplementary powers

Clause 3 Supplementary power in connection with implementation period

Clause 4 Powers corresponding to section 3 involving devolved authorities

These clauses would amend EUWA by inserting provision to provide supplementary powers for UK Ministers and devolved authorities in connection with the implementation period to ensure saved EU-derived domestic legislation operates effectively.

PART 2

Remaining implementation of Withdrawal Agreement etc.: General

Withdrawal Agreement

Clause 5 General implementation of remainder of Withdrawal Agreement

This clause would amend EUWA by inserting provision to provide for the general implementation of the Withdrawal Agreement into domestic law. It would provide for all rights, powers, liabilities, obligations, restrictions, remedies and procedures created or provided for by the Withdrawal Agreement (other than by Part 4) to be directly recognised and enforced in domestic law, and for the supremacy of the Withdrawal Agreement in domestic law.

Related EEA EFTA and Swiss agreements

Clause 6 General implementation of EEA EFTA and Swiss separation agreements

This clause would amend EUWA by inserting provision to replicate the approach in clause 5 in relation to the UK-EEA EFTA Separation Agreement and the UK-Swiss Citizens' Rights Agreement.

PART 3

Citizens' rights

Rights in relation to entry and residence

- Clause 7 Rights related to residence: application deadline and temporary protection
- Clause 8 Frontier workers
- Clause 9 Restrictions of rights of entry and residence
- Clause 10 Retention of existing grounds for deportation
- Clause 11 Appeals against citizens' rights immigration decisions

These clauses would provide regulation making powers to allow UK Ministers to make provision for the citizens' rights aspects of the Withdrawal Agreement including specifically powers to make provision about (i) deadlines for application and temporary protection in relation to residence rights; (ii) rights of frontier workers; (iii) restrictions on rights of entry and residence; (iv) grounds for deportation; and (v) appeals against citizens' rights immigration decisions.

Professional qualifications

- Clause 12 Recognition of professional qualifications

Co-ordination of social security systems

Clause 13 Co-ordination of social security systems

Equal treatment etc.

Clause 14 Non-discrimination, equal treatment and rights of workers etc.

These clauses would confer powers on UK Ministers and the devolved authorities to implement the aspects of the Withdrawal Agreement relating to (i) the recognition of Professional Qualifications; (ii) the coordination of social security systems; and (iii) non-discrimination, equal treatment and rights of workers' provisions, as well as the equivalent provisions of the EEA EFTA separation agreement and the Swiss citizens' rights agreement.

Independent Monitoring Authority

Clause 15 Independent Monitoring Authority for the Citizens' Rights Agreements

This clause would establish the Independent Monitoring Authority ('IMA') to monitor the implementation and application of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA Separation Agreement. The clause introduces schedule 2 which makes further provision about the IMA, including its status, membership, appointments, staffing and functions.

General

Clause 16 Regulations: supplementary

Clause 17 Interpretation: Part 3

PART 4

Other subject areas

Other separation issues

Clause 18 Main power in connection with other separation issues

Clause 19 Powers corresponding to section 18 involving devolved authorities

These clauses would amend EUWA by inserting provision to confer powers on UK Ministers (with corresponding powers for the devolved authorities) to implement the other separation issues in Part 3 of the Withdrawal Agreement. Those issues include matters such as the continued circulation of goods placed on the market before the end of the implementation period, ongoing VAT and excise duty matters; ongoing protection of intellectual property rights; ongoing police and judicial cooperation in

criminal matters; ongoing judicial cooperation in civil and commercial matters; ongoing protection of personal data; and ongoing cases before the Court of Justice of the EU, as well as ongoing administrative procedures

Main financial provision

Clause 20 Financial provision

This clause would make provision as to how sums are to be paid into or out of the consolidated fund or, if the Treasury so decides, the National Loans Fund.

Northern Ireland

Clause 21 Main power in connection with Ireland/Northern Ireland Protocol

Clause 22 Powers corresponding to section 22 involving devolved authorities

These clauses would amend EUWA by inserting provision to introduce powers for UK Ministers to implement the Protocol on Ireland / Northern Ireland in the Withdrawal Agreement. There would be corresponding powers for the devolved authorities, as well as powers for UK Ministers acting jointly with devolved authorities.

Clause 23 Protection for certain rights, safeguards etc. in Belfast Agreement

This clause would introduce schedule 3 of the Bill which contains amendments to the Northern Ireland Act 1998, which are intended to give effect to the 'dedicated mechanisms' necessary to monitor and enforce the UK's compliance with the no diminution commitment in Article 24 of the Protocol. Article 24 of the Protocol sets out that the UK must ensure that EU exit does not result in a diminution of rights, safeguards and equality of opportunity as set out in the relevant part of the 1998 Agreement. This is to be implemented by way of 'dedicated mechanisms'.

Clause 24 No alteration of North-South co-operation

This Clause would insert new provision into EUWA to clarify that a Minister of the Crown may not agree to the making of a recommendation by the Joint Committee under Article 11(2) of the Protocol in relation to recommendations as to North-South cooperation which would have the effect of (a) altering the arrangements of North-South cooperation as provided for by the Belfast Agreement; (b) establishing new implementing bodies; or (c) altering the functions of an existing implementation body.

Relationship to EUWA

Clause 25 Retention of saved EU law at end of implementation period

Clause 26 Interpretation of retained EU law and relevant separation agreement law

Clause 27 Dealing with deficiencies in retained EU law

EUWA converts EU law to domestic law on exit day (currently 31 October 2019), and most secondary legislation made under it also takes effect on that day. These clauses, clause 39 and schedule 6 would amend the EUWA so that the conversion of EU law into domestic law would take place at the end of the implementation period. Amendments are also made to the deficiencies power at section 8 of the EUWA so that it can operate on deficiencies which result at the end of the implementation period or as a result of Part 4 of the Withdrawal Agreement. Furthermore, provisions in schedule 6 will adjust the coming into force date of EU Exit SIs and SSIs so that such secondary legislation is generally brought into effect at the end of the implementation period in December 2020, instead of on exit day.

Clause 28 Ancillary fee-charging powers

This clause would amend the scope of the fee charging powers in schedule 4 to the EUWA, which are conferred on devolved authorities as ‘appropriate authorities’.

Parliamentary oversight

Clause 29 Review of EU legislation during implementation period

This clause sets out how the UK Parliament can scrutinise new EU laws to be given effect in UK domestic law during the Implementation Period by introducing a new section 13A into EUWA. It prescribes that a Minister of the Crown must make arrangements for a motion to be debated in circumstances where the European Scrutiny Select publishes a reporting on EU legislation which, meets certain requirements including that, in the Committee’s opinion, the legislation raises a matter of vital national interest to the United Kingdom. There is no provision prescribing that the Committee takes the views on devolved administrations or legislatures into account when considering legislation within the legislative competence of those legislatures.

Clause 30 Approval of extension of implementation period

This clause provides for the process required to agree any extension to the Implementation Period by introducing a new section 13B into EUWA which requires a Minister to in effect seek the consent of the House of Commons to any decision to extend the implementation period. There is no role for devolved administrations or legislatures in this process.

Clause 31 Oversight of negotiations for future relationship

This clause would introduce a new section 13C into EUWA and set out the parliamentary process to oversee progress towards the future relationship between the UK and the EU. Specifically, it establishes a statutory requirement for Ministers to make a statement on objectives for the future relationship with the EU within 30 sitting days from exit day. It also provides that those objectives can be revised at any time, and that should UK Ministers diverge from those objectives they must report the reasons for that divergence. A treaty resulting from the 'future relationship' negotiations would need to be approved by the House of Commons prior to ratification. In such scenarios, the ratification obligations under CRAGA would not apply. There is no indication of a formal role for the Scottish Government or Scottish Parliament, albeit copies of reports on progress are to be provided to devolved legislatures.

Clause 32 Repeal of section 13 of EUWA

This clause would remove section 13 of EUWA in its entirety. Amongst other things this means there would be no requirement that a positive Meaningful Vote under section 13(1)(b) is required before the Bill can be passed and the Withdrawal Agreement ratified.

Clause 33 Requirements in Part 2 of CRAGA

Section 20 of the Constitutional Reform and Governance Act 2010 makes provision regarding the conditions which must be met before treaties can be ratified. This clause would allow ratification of the Withdrawal Agreement to take place without the conditions of section 20 having been met.

Other matters

Clause 34 Protection for workers' rights

This clause would provide for the insertion of a new schedule 5A into the EUWA which would require a UK Minister in charge of a relevant Bill (that is, a Bill related to workers' rights) to make a statement as to whether that Bill reduces workers' rights as compared to what those rights were at the end of the implementation period. There are corresponding consultation and reporting requirements. In situations where new EU legislation in relation to workers' rights is made following the implementation period, a minister will be required to make a statement before Parliament on whether or not equivalent workers' rights exist in domestic law. Schedule 5A lists the EU directives which are relevant for determining workers' retained EU rights for the purposes of the duty to make a statement under paragraph 1.

Clause 35 Ministerial co-chair of the Joint Committee

This clause would provide that the functions of the UK's co-chair are to be performed by a Minister rather than delegated to a senior official.

PART 5

General and final provision

Parliamentary sovereignty

Clause 36 Parliamentary sovereignty

This clause recognises the common law principle of parliamentary sovereignty, setting out areas in which this might be called into question.

Interpretation

Clause 37 Interpretation

Supplementary and final

Clause 38 Regulations

Clause 39 Consequential and transitional provision etc.

Clause 40 Extent, commencement and short title

Schedule 1 – Powers of devolved authorities under sections 12, 13 and 14

Schedule 2 – Independent Monitoring Authority for the Citizens' Rights Agreements

Part 1 – Constitution, proceedings etc.

Part 2 – Functions of the IMA etc.

Part 3 – Further provisions

Schedule 3 – Protection for certain rights, safeguards etc. in Belfast agreement

Schedule 4 – Protections for workers' rights

Schedule 5 – Regulations under this Act

Part 1 – Procedure

Part 2 – General provision about powers under Act

Schedule 6 – Consequential and transitional provision etc.

Part 1 – General consequential provision

Part 2 – Specific consequential provision etc.

Part 3 – Transitional, transitory and saving provision

ANNEX B

CLAUSES FOR WHICH LEGISLATIVE CONSENT IS REQUIRED

Clause/ Schedule	Effect
1	Saves the effect of the ECA in domestic law on or after exit day for the implementation period. Modifies the definition of “the Treaties” and “the EU Treaties” and section 2(2) of the ECA to reflect Part 4 of the Withdrawal Agreement dealing with the implementation period.
2	Saves EU-derived domestic legislation in domestic law on and after exit day for the implementation period.
3	EUWA is amended to provide UK Ministers supplementary powers to address deficiencies in domestic law as a result of withdrawal.
4	EUWA is amended to confer supplementary powers corresponding to clause 3 on Scottish Ministers and other devolved administrations.
5	Provides for the general implementation of the Withdrawal Agreement into domestic law. Provides for all rights, powers, liabilities, obligations, restrictions, remedies and procedures created or provided for by the Withdrawal Agreement (other than Part 4) to be directly recognised and enforced in domestic law.
6	Replicates the approach in clause 5 to the EEA EFTA Separation Agreement.
12	Recognition of professional qualifications powers conferred on Scottish Ministers.
13	Coordination of social security systems powers conferred on Scottish Ministers.
14	Prohibition of discrimination and equal treatment powers conferred on Scottish Ministers.
15	Establishes a body corporate called the Independent Monitoring Authority for the Citizens’ Rights Agreement. The IMA will monitor implementation of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA separation agreement.
16	Makes supplementary provision in relation to the powers in clauses 7, 8, 9 and 14 to implement provisions of the Withdrawal Agreement and provides that those powers include power to supplement the effect of section 7A EUWA (inserted by clause 5) in relation to the relevant provisions of the Withdrawal Agreement.

18	Inserts new powers into EUWA for UK Ministers to make provision to implement Part 3 of the Withdrawal Agreement (separation issues) and equivalent provisions of EEA EFTA separation agreement. Part 3 issues include devolved matters.
19	Confers powers on Scottish Ministers, and on UK Ministers acting jointly with Scottish Ministers to make provision to implement Part Three of the Withdrawal Agreement (separation issues) and equivalent provisions of EEA EFTA separation agreement.
20	Provides powers in connection with fees and charges, and provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill.
21	Provides powers to UK Ministers to implement the protocol on Ireland / Northern Ireland in the Withdrawal Agreement.
22	Powers in connection with Ireland/Northern Ireland conferred on Scottish Ministers and on UK Ministers acting jointly with Scottish Ministers.
25	Makes amendments to specified provisions of EUWA, for example, by substituting various references to “exit day” so that they are references to “IP completion day”. This is to ensure that the conversion of EU law into ‘retained EU law’ will now take place at the end of the implementation period.
26	Makes further amendments to substitute references to ‘exit day’ so that they refer to ‘IP completion day’. This clause also defines the term ‘relevant separation agreement law’ and sets out rules of interpretation so that, so far as applicable, that body of law is interpreted in accordance with the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.
27	Amends the deficiency power in section 8 and schedule 2 of EUWA to enable these provisions to work in light of the implementation period.
28	Ancillary fee charging power amends scope of fee charging powers in Schedule 4 to EUWA, which are conferred on the DAs as ‘appropriate authorities’.
37	Interpretation
38	With regard to regulations made under the Bill, provision is made in relation to exercise of executive function by Scottish Ministers.
39	With regard to consequential and transitional provision, the powers provided are capable of being exercised within devolved competence.
Sch 1	Provisions in relation to exercise by Scottish Ministers of their powers

	relating to MRPQ, coordination of social security and equal treatment and non-discrimination.
Sch 2	The IMA will monitor implementation for Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA separation agreement - some of that implementation will take place within devolved competence and by means of regulations by Scottish Ministers.
Sch 5	With regard to Regulations made under the Bill, the Schedule provides for Scottish Ministers to exercise various powers.
Sch 6	Consequential, transitional, transitory and saving provision. Schedule requires consent to the extent that it includes provisions in relation to exercise by DAs of various powers, makes amendments to legislation within devolved competence (e.g. ILRA 2010) and amends the devolution statutes in ways that modify legislative and executive competence.

ANNEX C

SCOTTISH GOVERNMENT VIEW OF THE BILL IN RELATION TO THE DEVOLUTION SETTLEMENT

The Independent Monitoring Authority

1. Part 3 and schedule 2 of the Bill establish an Independent Monitoring Authority for the Citizens' Rights Agreements (the "IMA") to monitor the implementation and application of the EU-UK citizens' rights agreements, mainly focusing on systemic issues which might arise. Not only will the IMA have functions in devolved areas in Scotland but it will also have significant powers over devolved public authorities and in areas of devolved interest. The IMA will consider both the rules which seek to implement Part 2, as well as how those rules are applied in practice by public authorities, including, in some areas, by devolved public authorities. The IMA should have accountability, credibility and authority in Scotland, in its exercise of devolved functions and in its relations with devolved authorities.

2. To achieve this, the Scottish Government considers that the consent of the Scottish Ministers should be required for the appointment of the member of the IMA who is intended to know about relevant conditions in Scotland. As introduced, the Bill provides a requirement that UK Ministers ensure, so far as possible, that one of the non-executive members of the IMA include a member who knows about relevant conditions in Scotland. Before making that IMA board appointment intended to represent Scottish interests, UK Ministers must tell the Scottish Ministers who they propose to appoint and why. If Scottish Ministers approve, the appointment is made. If Scottish Ministers do not approve, then UK Ministers may choose to continue with the appointment regardless. If an appointment is made without Scottish Ministers' approval, UK Ministers must publish a statement explaining why.

3. The Scottish Government does not consider this provision fully respects devolved interests and remains of the view that consent of the Scottish Ministers to the appointment would be preferable. It is also the view of the Scottish Government that UK Ministers should be required to consult the Scottish Ministers before removing from the IMA the person appointed in respect of Scotland.

4. Given the impact the chair will have on the overall constitution of the IMA, and the length of appointments envisaged (up to five years), the Scottish Government's view is that the UK Government should consult devolved authorities when appointing the chair of the IMA

Protected enactment status

5. Certain provisions of the Bill, once enacted, will be made protected enactments under the Scotland Act 1998 by virtue of their inclusion in the EU (Withdrawal) Act 2018. The Scottish Government does not agree with the protection of EUWA as it constrains the competence of the Scottish Parliament, and the Parliament withheld its consent to this provision. The Scottish Government similarly disagrees with the limitation of legislative competence that will follow once certain provisions in the current Bill are included in this protected enactment status. It is the view of the Scottish Government that the protected enactment status of EUWA should be removed and that the status afforded to the elements of EUWA introduced by this Bill is unnecessary and unsuitable since the relevant 'protected' provisions which the Bill inserts into the EU (Withdrawal) Act are implementing an international agreement which, in devolved areas, it would otherwise be the obligation of the Scottish Government and Parliament to implement. There is no reason to think either the Scottish Government or Parliament will not take seriously their responsibilities to implement all international obligations in devolved areas.

6. The amendments to EUWA which will be introduced by the Bill and will continue to be afforded protected enactment status are as follows:

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

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

Powers to amend the Scotland Act 1998

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

7. This has been done for some powers in the Bill: for example, the new power amended into EUWA by clause 18 concerned with other separation issues. The power in clause 21, to make provision in connection with the Ireland / Northern Ireland protocol, and the corresponding power for devolved authorities in clause 22, do not contain any restrictions of this sort. It is the position of the Scottish Government that these powers should not be able to amend the Scotland Act 1998.

Review of EU legislation during implementation period

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

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

This Legislative Consent Memorandum relates to the European Union (Withdrawal Agreement) and was lodged with the Scottish Parliament on 22 October 2019

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL – LEGISLATIVE CONSENT MEMORANDUM

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