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BRIEFING PAPER

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Constitutional implications of the Withdrawal Agreement legislation

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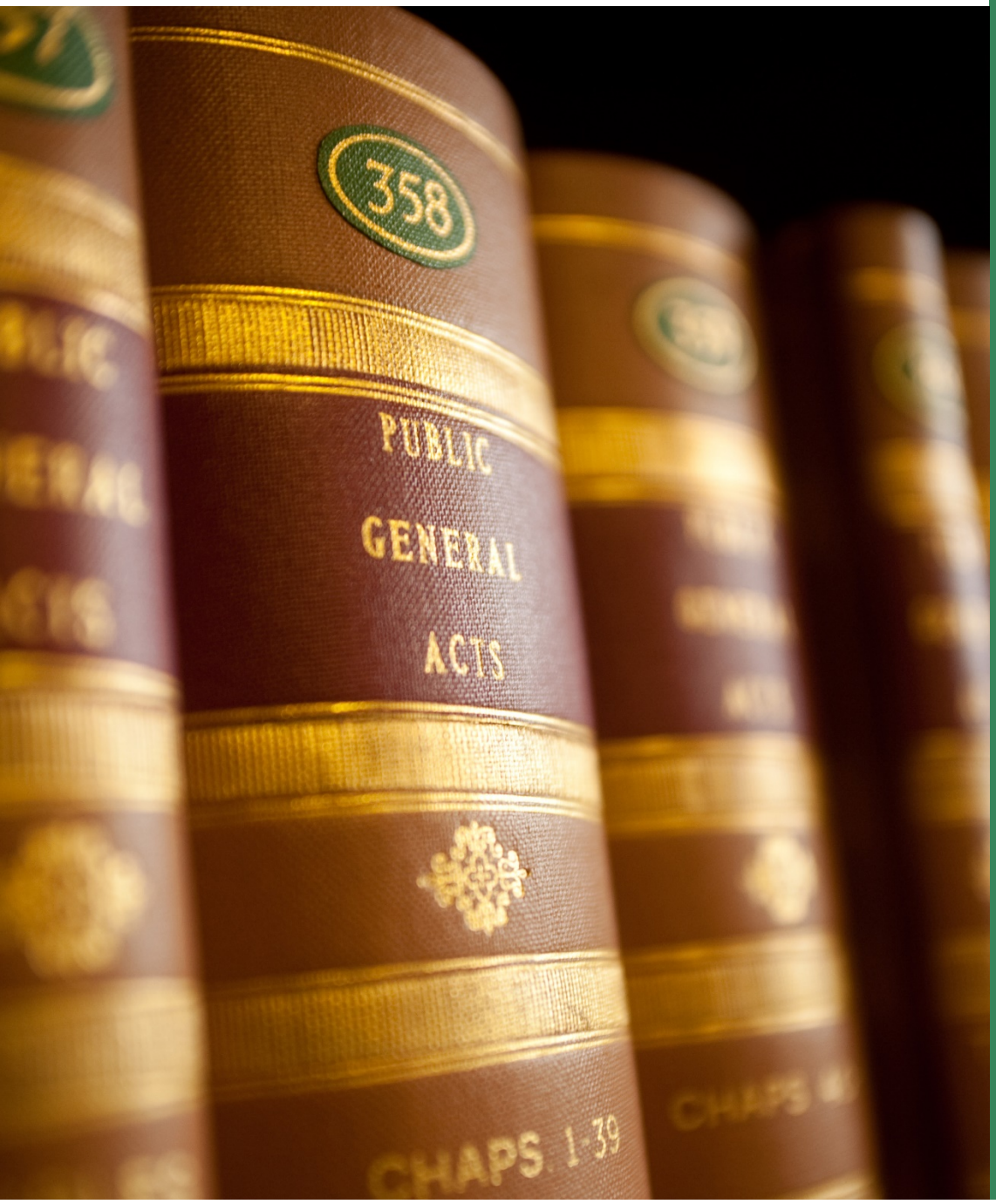

Contents:

Contents

Summary

The UK ceased to be a Member State of the European Union with the coming into force of the Withdrawal Agreement (WA) on 31 January 2020 at 11pm GMT. That treaty governs the current relationship between the UK and the EU regarding several matters, while negotiations on more permanent arrangements about trade, security and political cooperation are undertaken.

This change in relationship with the European Union has had major domestic and constitutional consequences for the United Kingdom.

This briefing paper explains the changes in domestic law brought about by this new settlement, and their constitutional significance. It focuses especially on the relationship between two Acts of the UK Parliament: the *European Union (Withdrawal) Act 2018* (EUWA) and the *European Union (Withdrawal Agreement) Act 2020* (WAA). It explains:

- how the "transition or implementation period" (hereafter "transition" or "the transition period") is being implemented;
- what powers the UK Government (and devolved institutions) have for the purposes of implementing the Withdrawal Agreement;
- what powers the UK Government (and devolved institutions) have regarding retained EU law after the transition period has ended;
- what role Parliament has in scrutinising the implementation of the Withdrawal Agreement and subsequent stages of UK-EU negotiations;
- what continuing role the Court of Justice of the European Union (CJEU) will have on UK law in light of the terms of EU exit; and
- what withdrawal from the EU means in a broader sense for the fundamental principles of the UK constitution, such as the sovereignty or legislative supremacy of Parliament.

The paper also addresses constitutional issues that have resulted from the *process* of legislating for Brexit itself. Leaving the EU, and legislating for it, have had knock-on effects for:

- devolution, devolved competence and the legislative consent convention;
- Parliament's role in scrutinising and approving constitutionally significant treaty change; and
- the ability of Parliament to scrutinise and constrain the delegation of decision-making from itself to Government Ministers and executive agencies.

1. Overview

Summary

The UK left the EU on 31 January 2020 on the terms negotiated under a Withdrawal Agreement treaty. The fact and terms of withdrawal made it necessary to change fundamental parts of domestic law. The treaty covers a diverse range of issues, some of which required existing arrangements to be preserved (in some form) after exit, but others which required new measures to be put into place.

The task of legislating for Brexit has happened in two stages. This reflected the need to prepare for the possibility of a no-deal exit (while negotiations were ongoing but incomplete) and then to prepare for and give effect to a negotiated exit (with a Withdrawal Agreement).

The first stage concerned the fundamentals of ceasing to be a Member State, including: converting EU law into domestic law; ending dynamic alignment with EU law; and providing the basis for departing from EU law once no longer bound by it and the shared EU institutions.

The second stage concerned what was actually negotiated as the terms of the UK's exit, concerning the UK's obligations during the transition period and in respect of shared arrangements in specific areas thereafter. This includes citizens' rights and the Protocol on Ireland/Northern Ireland.

In specific areas, the UK Government has also sought to introduce bespoke primary legislation. These areas, such as agriculture, customs and immigration, are those mostly likely to require or result in major policy divergence between the UK and the EU after the transition period has ended.

The constitutional issues raised by these changes are myriad. They affect, among other things, the relationships between:

- primary and secondary legislation;
- executive flexibility on policy-making and legislative accountability;
- the UK courts and tribunals and the Court of Justice of the European Union; and
- the UK Government and the devolved institutions in Scotland, Wales and Northern Ireland.

The scrutiny of the Brexit Bills has also prompted questions about what the role of Parliament should be in subsequent stages of the Brexit process. This included oversight of:

- the Withdrawal Agreement itself;
- policy (divergence) in areas no longer governed by EU law; and
- the UK's future relationship negotiations with the EU and other countries.

1.1 The UK-EU Withdrawal Agreement[1]

The Withdrawal Agreement (WA) treaty that came into force on 31 January 2020 governs a range of issues. Some of these are temporary or short-term in character and effect; others are more permanent or long-term.

For the rest of 2020, the UK will continue to follow most of EU law as though it were still a Member State, but it will not have the institutional representation and voting rights that normally come with membership. This is known as the "transition" or "implementation" period. There are

[1] For further reading on the Withdrawal Agreement itself and the Political Declaration, see Commons Library Briefing Papers: The UK's EU Withdrawal Agreement, 08453, 8 July 2019; The October 2019 EU-UK Withdrawal Agreement, 08713, 17 October 2019; The Political Declaration on the Framework for Future EU-UK Relations, 08454, 30 November 2018; Revisions to the Political Declaration on the framework for future EU-UK relations, 08714, 18 October 2019

some areas in which EU law will not apply to the UK, but they are set out in the WA itself.

The treaty also settles other matters, including among other things:

- the rights of EU and UK citizens in each other's respective territories after transition;
- a specific Protocol on Ireland/Northern Ireland intended to avoid a "hard border" on the island of Ireland as a result of the UK's withdrawal from the EU's single market and customs union after transition;
- a range of other "separation issues" which will arise at the end of transition unless and to the extent that a future relationship treaty overcomes them;
- the liabilities of the UK regarding EU expenditure, both during transition and beyond; and
- the joint governance arrangements for enforcing the treaty itself.

1.2 European Union (Withdrawal) Act 2018 (EUWA)

In June 2018, the then UK Parliament passed a major constitutional statute to prepare for the UK's exit from the EU. EUWA was drafted in such a way as to anticipate what should happen if the UK left the EU without a withdrawal agreement at the end of the Article 50 process. This was the default position given that, at that time, negotiations on the terms of the UK's withdrawal were ongoing and Article 50 has a time limit, albeit one that can be extended by unanimous agreement.

EUWA arranged for the repeal of the key domestic legislation that honoured the UK's terms of membership of the EU (most notably the *European Communities Act 1972*) as and when it formally left the EU. However, it also arranged to "retain" or "convert" much of EU law into domestic law. This was intended to minimise the immediate impact for individuals and organisations whose lives and activities were regulated by EU-wide arrangements. Crucially, however, this approach would take a snapshot of EU law as it was "on exit day" and would not track changes in EU law on a dynamic basis as the UK did previously.

This "conversion" process was expected to be a complex task: some of the retained law would be unsuitably drafted for implementation in a country that was no longer an EU Member State. For example, the law may refer to shared arrangements or public bodies of which the UK would no longer be part, and in which it was unable to participate.

The Government's intended solution was a two-fold approach of delegated powers and primary legislation. Broad "Henry VIII" powers in EUWA would be used to make regulations to change UK law where "deficiencies" might arise as a result of the UK's withdrawal. But where sector-wide arrangements needed significant alteration (such as in agriculture, customs and immigration) there would be dedicated Acts of Parliament to replace common EU arrangements.

Leaving major aspects of this process to Ministers raised several fundamental constitutional concerns: it would reduce and place greater pressure on Parliamentary oversight of major changes to UK law.

The Bill also gave Parliament the opportunity to assert a role in the Brexit process, in terms of both scrutiny and approval of UK Government activity. Amendments to the Bill secured the "meaningful vote" process and a new type of "sifting" of statutory instruments where the Government proposed to use the negative procedure.[2]

1.3 European Union (Withdrawal Agreement) Act 2020 (WAA)

In January 2020, the current UK Parliament passed a further Act, which substantially modified and supplemented the *EU (Withdrawal) Act 2018*. The *EU (Withdrawal Agreement) Act 2020* (the WAA) reflected the new legal reality: that a WA had in fact been reached and that the UK and EU were expected to ratify that treaty. The treaty would then come into force on the expiry of the Article 50 deadline.

For a variety of reasons, EUWA was unsuitable, on its own, to implement the WA that the UK Government and the EU had negotiated. EUWA did not take account of the possibility that the UK would leave the EU but continue to follow EU law dynamically during a transition period. Moreover, it ended the existing mechanism by which the UK would honour financial obligations to the EU after exit day.

Although EUWA anticipated that domestic legal authority would be needed to implement the WA, the powers contained within it were inadequate for that purpose. The "general" implementing powers in section 9 could not be used before Parliament had passed another Act approving the terms of a withdrawal agreement nor could it be used after exit day.[3] Even if those powers had not been so constrained, EUWA did not anticipate that the WA would have to be given a special domestic status beyond the transition period. A further Act was therefore inevitable given the form and content of the WA negotiated.

The political background to the WAA is important. Two attempts were made to pass an *EU (Withdrawal Agreement) Bill* in some form. The first (and unsuccessful) attempt was made in October 2019 (i.e. during the last Parliament) whereas the second (and successful) attempt was made after the December 2019 General Election. Although most of the text in the two Bills was similar (and in many places identical) the respects in which they differed were of considerable constitutional importance.

Overall, the Act as passed confers a significantly lesser role for Parliament in the next stages of the Brexit process than the original Bill would have done, had it reached the statute book.

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2 Commons Library Briefing Papers, A User's Guide to the Meaningful Vote, 08424, 25 October 2018; The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7), 08329, 9 July 2018

3 This constraint was imposed by MPs when Dominic Grieve's amendment was made during Report stage in the House of Commons in December 2017.

Like EUWA, the WAA confers significant and widely defined Henry VIII powers on Ministers. However, for the most part they are conferred in a different context and are tied explicitly to the implementation of international obligations. By contrast, those in the original EUWA were concerned primarily with converted law that no longer implements the UK's international obligations.

1.4 Other Brexit Bills

Substantial areas of UK public policy have been governed or influenced by EU law and institutions in its time as a Member State. After leaving the EU, the UK ceases to participate in these common arrangements except to the extent provided by the WA. For instance, the UK will not participate in the Common Agricultural or Fisheries Policies after the transition period and will no longer be a member of the EU's single market or customs union.

This means that the UK needs distinct arrangements and legislative frameworks in these policy areas, even if those arrangements are similar in form and substance to those adopted by the EU regarding its remaining Member States. To replicate or replace these arrangements, the UK Government has proposed (and in some places, already managed to pass) primary legislation in those policy areas, often setting out framework arrangements analogous to those in EU law.

An additional complication is that some of these areas involve matters of public policy which are devolved in one or more of Scotland, Wales and Northern Ireland. These Bills, and other secondary legislation, are expected to underpin "common frameworks" for cooperation and coordination between the UK and devolved governments.

The 2017-19 Parliament

In the 2017-19 Parliament, five Acts of this kind were passed:

- *Sanctions and Anti-Money Laundering Act 2018*
- *Nuclear Safeguards Act 2018*
- *Haulage Permits and Trailer Registration Act 2018*
- *Taxation (Cross-border Trade) Act 2018*
- *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019*

An additional six Bills were introduced, but fell on prorogation in October 2019, not having completed their stages in both Houses:

- *Trade Bill*
- *Agriculture Bill*
- *Fisheries Bill*
- *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*
- *Animal Welfare (Sentencing) Bill*
- *Financial Service (Implementation of Legislation) Bill*

A draft *Environmental Principles and Governance Bill* was also published in December 2018, but was not formally introduced.

The current Parliament

Most of the above Bills were, at various points, described by the Government as necessary (or at least highly desirable) in anticipation of a "no-deal" exit outcome at the end of the Article 50 process. Many of them are likely to be reintroduced in the current Parliament, but in a different context. They will now be proposed so that the UK can prepare for the end of the transition period. The Bills will introduce replacements for common EU arrangements in the relevant policy areas.

The *Agriculture Bill 2019-21* was introduced into the House of Commons on 16 January 2020.[4]

The *Fisheries Bill 2019-21* was introduced into the House of Lords on 29 January 2020.

The *Environment Bill 2019-21* was introduced into the House of Commons on 30 January 2020.

An additional item of primary legislation, the *Direct Payments to Farmers (Legislative Continuity) Act 2020*, received Royal Assent on 30 January 2020.[5] This makes special arrangements in connection with the Common Agricultural Policy, and its interaction with the WA. Since payments are made in arrears, and the UK will not (as things stand) participate in the EU's post-2020 multi-annual financial framework, specific domestic legal authority is needed to make relevant payments to UK farmers during the transition period.[6]

Two other Bills related to aspects of the UK's withdrawal from the EU have also been introduced in the new session, namely:

- the *Extradition (Provisional Arrest) Bill* (introduced in the House of Lords on 7 January 2020); and
- the *Medical Devices Bill* (introduced in the House of Commons on 13 February 2020).

Other Brexit-related Bills mentioned in the Queen's Speech include:

- a *Trade Bill*;
- an *Immigration and Social Security Co-ordination (EU Withdrawal) Bill*;
- a *Financial Services Bill*; and
- a *Private International Law (Implementation of Agreements) Bill*.

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4 Commons Library Briefing Paper, The Agriculture Bill 2019-20, 08702, 30 January 2020

5 Regulations were, almost immediately thereafter, made under that Act. See *The Rules for Direct Payments to Farmers (Amendment) Regulations 2020* and *The Financing, Management and Monitoring of Direct Payments to Farmers (Amendment) Regulations 2020*

6 Commons Library Briefing Paper, Direct Payments to Farmers (Legislative Continuity) Bill 2019-20, 08795, 15 January 2020

However, at the time of writing none of these have been published in draft or introduced.

1.5 Devolved institutions

All three devolution settlements have been affected by Brexit legislation and the Brexit process more broadly. At first instance, the competencies of devolved institutions have been affected. During EU membership devolved institutions' competences were limited by a requirement to legislate and act compatibly with EU law. The powers of devolved authorities have also been affected by the need to modify and prepare retained EU law in devolved areas for a post-exit (and post-transition) scenario.

Through EUWA, WAA and the other Brexit Bills the UK Government has, at various points, legislated (or sought to legislate) in ways that affect either devolved matters or the competencies of the devolved institutions. Moreover it has sought to do so on more than one occasion without the consent of one or more of the devolved legislatures.[7] That the UK Parliament has (with EUWA and WAA) proceeded to legislate notwithstanding the withholding of legislative consent has been a matter of constitutional and political controversy, and a departure from "normal" practice under the Sewel Convention.

Most of the Brexit process has happened in the absence of a functioning Northern Ireland Executive, power sharing having first broken down in January 2017 and only having been restored in January 2020. This has impacted the representation of Northern Ireland's devolved institutions in both the legislative and inter-governmental parts of the Brexit process. The legislative consent process has been unable to operate without an Executive to produce consent memorandums and a fully functioning Assembly to report or vote on the matter. The Executive has also gone for a prolonged period without Ministerial representation in the inter-governmental Joint Ministerial Committees (JMCs). The JMC has been developing proposals for common frameworks in policy areas where EU law will no longer apply after the transition period.

The Protocol on Ireland/Northern Ireland in the WA itself, and the broad delegated powers conferred by the WAA, will also have a significant bearing on the devolution settlement in Northern Ireland. The restoration of power-sharing prompts wider questions about the role of Stormont in scrutiny and decision-making of both decisions of the UK Government and the Joint Committee structure created by the WA.

[7] The *EU (Withdrawal) Bill* was denied consent by the Scottish Parliament and the *EU (Withdrawal Agreement) Bill* was denied consent by all three of the Scottish Parliament, the National Assembly for Wales and the Northern Ireland Assembly.

2. Legislating for a default "no deal" exit

Summary

The Government legislated for the UK's withdrawal from the EU in two distinct stages. Having commenced the Article 50 process in March 2017, the new legal default was that the UK would leave the EU on 29 March 2019 even if without a withdrawal agreement. Therefore, the UK would no longer be bound by the EU Treaties, and the *European Communities Act 1972* (ECA) would no longer give effect to obligations under those treaties. The first stage had to reflect that new reality.

To avoid (or mitigate) the uncertainty that this change would bring about, it was necessary to pass primary legislation. The *EU (Withdrawal) Act 2018* (EUWA) is a significant "tidying-up" exercise of the UK statute book to that end. It repeals the ECA, the purpose of which would have been superseded by the fact of withdrawal. However EUWA also sought to preserve the effect of (most of) EU law as it was in force immediately before the UK left the EU. This would become a form of domestic law, "retained EU law", with its own rules about how it could be amended in the future, and how the UK's courts and tribunals were to interpret it.

One of the most constitutionally controversial elements of EUWA is that it confers on Government Ministers broad powers to change the law, including primary legislation, using statutory instruments. The main purpose for these delegated powers is to correct "deficiencies" in UK law arising as a result of EU withdrawal and the process of "converting" EU law into domestic law. Concerns were raised both as to how widely these powers were to be drawn and how Parliament was effectively to scrutinise and constrain their exercise. This was especially important given that Ministers could override Acts of Parliament and types of law that previously could only be changed by the EU institutions.

2.1 Article 50 process

Article 50 of the Treaty on European Union governs the process by which an EU Member State becomes a third country outside of the EU. Once a Member State has decided to withdraw (in accordance with its own constitutional requirements) and notified the EU of its intention to withdraw, a two-year process begins. The Member State's departure can then happen in one of two ways: by way of agreeing a withdrawal agreement treaty, or by the expiry of the Article 50 process.

Although the process can be extended with the unanimous agreement of the departing Member State and the European Council, the default outcome is that the EU Treaties cease to apply to the Member State on a specific date and that it becomes a third country thereafter.

This means that the EU's laws and institutions no longer apply to or bind the country in question. Whether, how and to what extent that country seeks to align or diverge with EU law, which they had thus far, would become a matter for them.

2.2 Repealing the 1972 Act

As a dualist (rather than a monist) state, the UK's international obligations do not automatically form part of, change, or take precedence over domestic law. Specific provision must be made in domestic law to **implement** treaties.

In its time as a Member State of the EU, the UK implemented the EU Treaties primarily by way of primary legislation, including the EU law principles of supremacy, direct applicability and direct effect. This meant not just that applicable EU law would have effect in UK law, conferring rights, powers, liabilities, obligations and restrictions as and when required. It also meant that EU law was given priority over other inconsistent domestic law, regardless of whether that other domestic law was created before or after the UK's accession to the EEC.

The ECA gave precedence to EU law on a dynamic basis: i.e. UK law would not just incorporate EU law as it stood on a particular date, but would also keep pace with subsequent developments in EU law. For example, if the Court of Justice of the European Union (CJEU) ruled on the interpretation of EU law, in a case involving parties from another Member State, UK courts would be bound by that precedent, and if the Council of the European Union and the European Parliament adopted a set of EU regulations, those would then form part of UK law without any further domestic legislation having to be made.

The ECA also enabled Ministers and devolved authorities to implement EU law (including Directives) using broad delegated powers and provided specific legal authority for the Government to make payments so as to discharge its financial obligations under the EU Treaties.

As and when it became a third country, and except as otherwise provided by a withdrawal agreement, the UK would no longer have any obligations in connection with the EU Treaties. Therefore, provisions giving effect to EU law and empowering domestic authorities to take steps to meet EU law obligations would have been "spent". The first major change made by EUWA (section 1) was to repeal the *European Communities Act 1972* and some other related enactments concerned with the UK's membership of the European Union.

2.3 Retaining EU law as a domestic equivalent

A simple repeal of the ECA would have had disruptive consequences across a broad range of policy areas presently impacted by the existence and enforcement of EU law. Legal persons would no longer be able to rely on the rights, powers, liabilities, obligations and restrictions brought about by EU law except to the extent that existing and unrepealed UK laws already gave effect to them. The repeal of the ECA would also bring about the revoking of secondary legislation made under it.

The combined effect would have created significant legal uncertainty immediately after the UK's EU exit. To avoid (or at least to minimise) this risk EUWA also "retained" sources of law connected with the UK's EU obligations. EUWA would take a snapshot of this law just before the UK formally left the EU and convert it into a type of domestic law.

Some of this law would have remained on the statute book anyway. For example, repealing the ECA would not in itself repeal the *Equality Act 2010* even though it, among other things, implements the EU's Equal

Treatment Directive.[8] Other sources of EU law, however, would not automatically form part of UK law. EU regulations and Treaty-based rights, for example, often would not have accompanying implementing legislation since they were enforced automatically under the ECA.

Sections 2-4 of EUWA combine to ensure that, save as otherwise explicitly provided, other key sources of EU law continue to have a status in domestic law after the full repeal of the ECA.[9] However, this also meant giving a new "status" to these sources of law insofar as they could not already be categorised under the UK's traditional distinction between primary and secondary legislation. EUWA therefore also provides new rules as to the hierarchy of retained EU law (in section 7). This explains the circumstances in which retained legislation and laws can be modified or dispensed with completely.[10]

2.4 Interpreting retained EU law

When a Member State of the EU, the UK gave effect to the supremacy of EU law through section 2(4) of the ECA. All enactments, regardless of when passed and regardless of whether primary or secondary legislation, would be read and interpreted subject to and compatibly with the UK's EU law obligations. The UK also gave direct applicability and effect to EU law under section 2(1) of the ECA. Individuals could enforce rights conferred by the EU Treaties, regulations and decisions through the domestic courts without domestic implementing legislation having been passed. This arrangement created a hierarchy between EU law and UK domestic law. UK courts would be bound by the judgments of the Court of Justice of the European Union (CJEU).

The same arrangement could not be used in the absence of an EU treaty to give domestic effect. This meant that there would need to be new, domestic-only, arrangements to define the relationship between "retained" EU law and the rest of UK law, and to guide the courts as to how to interpret them. Section 5 of EUWA formally ends the supremacy of EU law for new Acts of Parliament. Section 6 of EUWA ends the binding nature of future CJEU judgments and sets out the extent to which the UK courts would have to interpret retained EU law compatibly with retained CJEU caselaw. The original approach was to require lower courts to follow retained EU caselaw but to allow the Supreme Court (and High Court of Justiciary in Scotland) exceptionally to depart from it in the same way that they would depart from existing Supreme Court (or High Court of Justiciary) precedent.

2.5 Correcting converted EU law

Even once EU law has been retained/converted into domestic law it needs to be updated to reflect the context of the UK not being a Member State. For example, EU institutions or common arrangements may no longer be shared, but may still be referred to in retained EU law.

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8 2006/54/EC

9 Notable exclusions include the Charter on Fundamental Rights and the availability of *Francovich*-style damages

10 See Commons Library Briefing Paper, The status of "retained EU law", 08375, 30 July 2019

Retained EU law may also refer to "Member States", where a reference to "Member States and the UK" may thereafter be more appropriate. In some cases, the retained law may in substance be redundant, as rights and obligations contained in them depend on a form of reciprocation between the EU's Member States and the UK which no longer exists.

This led to section 8 of EUWA, which conferred a "correcting" power on Government ministers. This broad power enabled the Government to prevent, remedy or mitigate the consequences of "deficiencies" in retained EU law arising because of the UK's withdrawal from the EU.

This power was notably broad because Ministers would adopt an "appropriateness" test rather than a "necessity" test when deciding whether and how to make changes to retained EU law. The power would also be able to be used for up to two years after UK had left the EU. The power could not be used to create new public bodies (e.g. to replace EU-wide ones) but could be used to transfer the existing powers of EU institutions and agencies to existing public bodies .

The House of Lords and its Committees, and external commentators, expressed concerns about what was to become section 8.[11] During the passage of the *EU (Withdrawal) Bill*, concerns arose about:

- the breadth of (what would become) the section 8 power;
- the expected volume of statutory instruments to be made under it in a short space of time; and
- the default expectation that regulations would be made without the guarantee of a debate or vote in either House of Parliament.

Seeking to address these concerns, the Government proposed to introduce "sifting" arrangements for statutory instruments made under the Act. A committee of each House could recommend "upgrading" these instruments from negative to affirmative instruments, but those recommendations would not be legally binding.[12]

Some commentators have suggested that the "correcting deficiencies" power has been used to give effect to policy changes, the like of which normally would be done with greater prior consultation and scrutiny and under the specific authority of an Act of Parliament.[13]

2.6 Parliamentary interventions

Although the primary focus of EUWA was to prepare domestic law for the legal default of a no-deal exit, in practice it was also an opportunity for MPs and Peers to influence the ongoing negotiations between the UK Government and the EU.

Several sections of the final bill were a direct result of Parliamentary pressure, most notably but not exclusively in the House of Lords.

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11 House of Lords Constitution Committee, European Union (Withdrawal) Bill, HL Paper 69, 29 January 2018; House of Lords Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal) Bill, HL Paper 22, 28 September 2017

12 Commons Library Briefing Paper, The European Union (Withdrawal) Act 2018: scrutiny of secondary legislation (Schedule 7), 08329, 9 July 2018

13 Alexandra Sinclair and Joe Tomlinson, Brexit Delegated Legislation: Problematic Results, UK Constitutional Law Association, 9 January 2020

Parliament's "meaningful vote"

Section 13 of EUWA, gave Parliament, and especially the MPs, a proactive role in the approval of any withdrawal agreement. It also gave Parliament a role if a withdrawal agreement was not reached by a certain point, or in the event that the House of Commons withheld approval for a deal provisionally agreed between Ministers and the EU.

Protecting EU standards after exit

Other amendments sought to constrain, or to seek greater clarity on Government proposals for, policy areas to be covered by retained EU law in the future. Section 16 of EUWA required the Government to publish the draft *Environmental Principles and Governance Bill* within 6 months of Royal Assent (i.e. by late December 2018).

Mandating certain negotiating objectives

Section 17 of EUWA imposed a negotiating objective on the UK Government about asylum seeking children and family reunification. This was the only explicit example in EUWA (as enacted) that sought to require the Government proactively to pursue a particular set of ends in its negotiations with the EU.

Mandated reporting on negotiating objectives

Section 18 of EUWA further imposed a reporting requirement on the Government. It said that by the end of October 2018 it had to:

> lay before each House of Parliament a statement in writing outlining the steps taken by [the] Government, in negotiations under Article 50(2) of the Treaty on European Union, to seek to negotiate an agreement, as part of the framework for the United Kingdom's future relationship with the EU, for the United Kingdom to participate in a customs arrangement with the EU.

This led to a written statement from Dominic Raab, the then Secretary of State for Exiting the European Union, made on 25 October 2018, setting out and reiterating the Government's position on the customs arrangement it would seek to secure.[14]

Future involvement in/shadowing of EU approaches

Section 19 of EUWA, a declaratory provision, was inserted by the House of Lords at Report stage. It stated that nothing in EUWA prevented the UK from replicating EU law in domestic law made on or after exit day, or from continuing to participate in, or have a formal relationship with, EU agencies after exit day.

Backbench provisions mostly repealed by WAA

Sections 13, 16, 18 and 19 of EUWA were repealed by section 36 of the *EU (Withdrawal Agreement) Act 2020* as "unnecessary" or "spent". Section 17 was also substantively amended by section 37 WAA.[15]

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14 EU Exit, HCWS1031, 25 October 2018

15 For an explanation of the changes made by section 37 of the WAA, see Commons Library Insight, Family reunion rights and the EU (Withdrawal Agreement) Bill, 23 December 2019

3. Legislating for a Withdrawal Agreement

Summary

The *EU (Withdrawal) Act 2018* was essential but insufficient legislation if the UK was to leave the EU with a negotiated withdrawal agreement. This was not just because the Government needed further legislation to **ratify** the agreement. It was also because that legislation was incompatible with, and therefore could not **implement**, the key terms of the WA.

In particular, the default settlement created by EUWA (as enacted):

- lacked functioning powers under secondary legislation to implement the treaty;
- was incompatible with the transition period;
- was incompatible with an ongoing role for the Court of Justice of the EU (CJEU); and
- posed problems for the Government if it was to meet its financial obligations under the treaty.

Additionally, there was (some) uncertainty as to whether the Protocol on Ireland/Northern Ireland was compatible with section 55 of the *Taxation (Cross-border Trade) Act 2018*. This uncertainty could most clearly be put beyond doubt by the passage of further primary legislation.

Two attempts were made to pass an *EU (Withdrawal Agreement) Bill* for the above purposes. The first attempt was made in late October 2019, during the 2017-19 Parliament. Although that Bill received Second Reading, it did not receive Commons approval for a programme motion. This led to the 2019 General Election and the Bill fell on dissolution.

The second attempt was made in December 2019, after the Conservative Party had won an overall majority at the election. The Bill as introduced in December, although similar in many respects to its predecessor, differed in several important respects. The provisions that implemented the WA itself were largely unchanged. Where significant differences were made was to the surrounding constitutional apparatus which would support Parliament's role in subsequent parts of the Brexit process.

3.1 Limits of the EU (Withdrawal) Act 2018

Leaving aside the question of whether the Government could **ratify** the Withdrawal Agreement negotiated with the EU in October 2019, it was inevitable that there would be further primary legislation to **implement** the WA. This was known at least as far back as December 2017, when the then Secretary of State for Exiting the European Union (David Davis) told MPs in a written statement that there would be further primary legislation in the form of a "Withdrawal Agreement and Implementation Bill".[16]

EUWA provided a legislative framework for a no-deal exit but was unsuitable for the implementation of a deal, for several reasons which are elaborated upon below.

No useable general power to implement the Withdrawal Agreement

The original *EU (Withdrawal) Bill* introduced by the Government included a clause to delegate very broad powers of implementation if a

[16] Procedures for the Approval and Implementation of EU Exit Agreements, HCWS342, 13 December 2017

withdrawal agreement was to be reached. One of the first major Parliamentary defeats for the Government during the 2017-19 Parliament was in December 2017 in connection with this clause.[17]

Many MPs were concerned that, if this power were conferred on the Government **before the negotiations had been concluded**, it could then legally implement a withdrawal agreement without first securing Parliamentary approval for it. Dominic Grieve's amendment at Report stage meant that this power could only be used after a further Act, approving the terms of a withdrawal agreement, had been passed. This effectively rendered section 9 of EUWA a dead letter.

Therefore, the *EU (Withdrawal Agreement) Bill* needed either to enable the section 9 powers to be used, or to replace that section with other implementing powers.[18]

No basis for implementing a transition period

It was widely understood before EUWA had received Royal Assent that any withdrawal agreement was likely to include a transition period.[19] Such an arrangement requires the UK to continue to follow (most of) EU law as though it were a Member State even though it has formally ceased to be a Member State and therefore no longer has the relevant institutional representation and voting rights. It would also have to preserve the existing powers of reference to the Court of Justice of the EU until the transition period had expired.

By default many of the changes to be brought about by EUWA would have happened on or after "exit day". Although the definition of "exit day" could be (and was on three occasions) amended by statutory instrument, it was not possible to do this for the purposes of a transition period. The statute only allowed for "exit day" to be modified to reflect a change in date on which the EU Treaties themselves would cease to apply to the UK (i.e. to reflect an extension to the Article 50 process).[20]

Primary legislation was therefore needed to ensure that the ECA, or an arrangement like it, would continue to operate until at least the end of December 2020, and to delay the creation of EU law's domestic-only "retained" equivalent. The Government acknowledged this in its July 2018 white paper, Legislating for the Withdrawal Agreement.[21]

No basis for a continuing role for the Court of Justice of the European Union after transition

The Withdrawal Agreement provides that, in certain circumstances even after the transition period has ended, judicial references may be made to, or rulings must be requested from the Court of Justice of the EU (CJEU). Two notable contexts in which this arises concern:

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17 HC Deb 13 December 2017 Vol 633 cc521-525

18 s. 36(a) *EU (Withdrawal Agreement) Act 2020* repeals s. 9 of EUWA, because its purpose has been superseded by the other delegated powers in the 2020 Act.

19 It formed part of the draft Withdrawal Agreement text published in March 2018.

20 s. 20(1)-(4) EUWA

21 Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, Cm 9674, July 2018, paras 60-61

- where a UK court considers it needs a decision from the CJEU on the interpretation of the citizens' rights provisions in Part 2 of the Withdrawal Agreement in order to give judgment; and
- where an arbitration panel has been asked to settle a Joint Committee dispute which turns on the interpretation of EU law.

In the former case, the jurisdiction of the CJEU needs to be recognised in UK law for up to 8 years after the transition period has come to an end. In the latter case, the jurisdiction is theoretically indefinite.

In the absence of the *EU (Withdrawal Agreement) Act*, it would not have been possible for domestic courts to make a reference in relation to citizens' rights. This is because section 6(1) of EUWA 2018 (as enacted) prohibited references of that kind after exit day.

No guaranteed basis for honouring financial obligations under the Withdrawal Agreement

The repeal of the ECA required by EUWA included section 2(3) of the ECA. This standing service provision ensured that, by default, the UK Government would have the legal authority to make any payments required of it by EU law, such as those to EU institutions or those to other parties arising because of what EU law requires.[22]

Unless section 2(3) of the ECA was to be in some way preserved or replaced, any sums falling due under a withdrawal agreement would have to be met through the supply and estimates process: the annual mechanism by which Parliament authorises expenditure for each Government Department.

This meant that primary legislation of some kind would be required if the UK were to be confident that it could meet its financial obligations under any withdrawal agreement. From an early stage, the Government was clear this would take the form of a new standing service provision, and therefore would require primary legislation.[23]

Uncertainty about the status of *section 55 of the Taxation (Cross-border Trade) Act 2018*

During the passage of the above Act (also known as the *Customs Act*) an amendment was passed to prohibit the UK Government from entering into certain types of arrangement on the international plane.

Section 55(1) states that:

> It shall be unlawful for Her Majesty's Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain.

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22 Commons Library Briefing Paper, Brexit: the financial settlement, 08039, 19 December 2019, p. 4

23 Legislating for the Withdrawal Agreement between the United Kingdom and the European Union, Cm 9674, July 2018, para 130

This provision sought to demonstrate to the (then) May Government that most MPs would not support any withdrawal agreement if it included provisions which would subdivide the UK's customs territory.

It was disputed whether the negotiated WA, and in particular its Protocol on Ireland/Northern Ireland, would amount to an arrangement of the kind section 55 sought to prohibit.[24] In the absence of subsequent primary legislation – making clear that Parliament wished for the UK to enter into the negotiated WA regardless of what section 55 says – there may have been legal uncertainty as to whether the WA was validly concluded as a matter of UK law.

3.2 The October Bill 2019

The first attempt to pass an Act to implement the WA was made in October 2019. Although MPs had declined (for reasons of timing, as much as substance) to approve the WA on 19 October, the Government sought in any case to pass the *EU (Withdrawal Agreement) Bill*.

This Bill did not just represent the bare minimum necessary to implement the terms of the WA. It also included a much wider package of constitutional reforms, setting out the role of Parliament in a variety of matters including its role:

- in any extension of transition (clause 30);
- in the UK Government's negotiating mandate for the future relationship treaty negotiations (clause 31);
- in the ratification of any future relationship treaty (clause 31);
- in scrutinising developments in EU law coming into effect during transition (clause 29);
- in protecting EU-derived workers' rights after the transition period (clause 34); and
- as a sovereign legislature in the UK's constitution (clause 36).

The October 2019 version of the Bill did not reach the statute book. Although the Commons approved the Bill on second reading, it rejected the Government's programme motion, to accelerate the timetable for the remaining stages in the lower House. Parliament dissolved for an early general election at the beginning of Wednesday 6 November 2019, with the poll taking place on Thursday 12 December 2019.[25] The Bill formally "fell" on dissolution.

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24 In *Maugham v Advocate General for Scotland* [2019] CSOH 80, Lord Pentland described the petitioner's argument that the draft withdrawal agreement was incompatible with section 55 as "at best a weak one" but also dismissed the case for other reasons.

25 *Early Parliamentary General Election Act 2019*

3.3 The December Bill 2019[26]

The Conservative and Unionist Party campaigned in the 2019 General Election on a manifesto commitment to implement the WA. It secured an overall majority and introduced for a second time a *European Union (Withdrawal Agreement) Bill* on Thursday 19 December 2019. The Bill received its Commons Second Reading on Friday 20 December 2019 and completed its remaining stages in both Houses in January 2020.

The December 2019 iteration of the Bill, though similar in many respects to the October 2019 version, differed in several fundamentally important respects. Most of the provisions directly concerned with implementing the Withdrawal Agreement were essentially unchanged, save for minor revisions as to drafting.

There were three different types of change to the Bill:

- provisions in the October version that were omitted in the December version;
- provisions not included in the October version that were included in the December version; and
- provisions that were substantially modified between the October and December versions.

Provisions omitted from the December Bill

The December Bill left out the October Bill's:

- Clause 30 (Parliament's veto over the extending of transition)
- Clause 31 (Oversight of negotiations for the future relationship)
- Clause 34 and Schedule 4 (Workers' rights provisions)[27]

Provisions added to the December Bill

The December Bill included the following new clauses, all of which formed part of the final Act:

- Clause 30 (Parliamentary oversight of Withdrawal Agreement disputes in the Joint Committee)
- Clause 33 (Prohibition on Ministers extending transition)
- Clause 35 (Prohibition on UK Ministers using written procedure in the Joint Committee)
- Clause 36 (Repeal of unnecessary or spent enactments)
- Clause 37 (Arrangements with the EU about unaccompanied children seeking asylum)

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[26] See also Commons Library Briefing Paper, The New EU Withdrawal Agreement Bill, 08776, 6 January 2020 and Commons Library Insight, The new EU (Withdrawal Agreement) Bill: What's changed?, 19 December 2019

[27] The Government has indicated that provision will be made in a separate *Employment Bill*, but this has not yet been introduced. See Commons Library Insight, Removal of workers' rights in the new EU (Withdrawal Agreement) Bill, 20 December 2019

Substantial modifications in the December Bill

There were (at least) four other notable changes to the Bill between its October and December 2019 iterations.

Clause 20 – Obligations under the financial settlement

Clause 20(7) in the October WAB would have allowed a Minister of the Crown to extend the life of the standing service provision (under which the UK would make financial payments to the EU) beyond March 2021. The Government removed the power to extend that provision in the December version of the Bill.

Clause 26(1) – UK courts and CJEU caselaw after transition

The December 2019 version of the *EU (Withdrawal Agreement) Bill* included a new subsection (1) in clause 26 (which amends section 6 of EUWA). This provision allows Ministers, by regulations, to specify when (and by what criteria) lower courts can depart from the rulings of the Court of Justice of the European Union (CJEU) after transition. Without this new provision, lower courts would follow the UK Supreme Court's rulings (and the High Court of Justiciary's rulings in Scotland) on retained EU law, but otherwise would have to follow CJEU rulings unless and to the extent that the substance of domestic law changed.

Clause 29 – Review of EU legislation during transition

The October version of the Bill included a role for the House of Commons' European Scrutiny Select Committee in relation to developments in EU law of "vital national interest" to the UK during the transition period. It could force debates on the floor of the House of Commons in certain circumstances, albeit those debates would have no effect on the validity of any development in EU law.

The October Bill made no provision for the House of Lords in this regard. New subsections 3-4 in the December 2019 Bill gave an equivalent role to the EU Select Committee of the House of Lords.

Schedule 2 – Delegation and transfer of IMA functions

The content of Schedule 2 of the *EU (Withdrawal Agreement) Bill* changed slightly between its October and December 2019 iterations. Old paragraph 10 was left out, and new paragraph 39 was added.

Schedule 2 makes detailed arrangements for the Independent Monitoring Authority, the body overseeing UK enforcement of the citizens' rights provisions in the WA.

By omitting the October version's paragraph 10 from the December Bill, it means the IMA can now delegate certain of its functions (whereas under the October version it could not delegate those functions). Affected functions included any decision to conduct an inquiry or to intervene in legal proceedings.

Including new paragraph 39 in the December version of the Bill enabled the Government to transfer the functions of the IMA to other public bodies using secondary legislation, whereas previously this would likely only have been possible with a further Act of Parliament.

4. Ratifying the Withdrawal Agreement

Summary

Normally, treaties must undergo some form of Parliamentary process before they can be ratified by the UK Government. Typically, one of two routes are followed. Either Part 2 of the *Constitutional Reform and Governance Act 2010* (CRAG) applies, or else another statute provides an alternative, typically more procedurally onerous, process.[28]

The Withdrawal Agreement was unusual, in that Parliament imposed a ratification process **in addition to** rather than **instead of** the CRAG process. The UK Government could not ratify this treaty unless and until it had satisfied (or otherwise secured Parliamentary authority to dispense with) the conditions in both CRAG and section 13 of EUWA.

Section 31 of the *EU (Withdrawal Agreement) Act 2020* repealed section 13 of EUWA, thereby dispensing with the need for a "meaningful vote" to approve the WA.

Section 32 of the same Act disapplied CRAG insofar as it relates to the ratification of the WA, but not in relation to any modifications to the WA to which its parties might subsequently agree.

The combined effect of these sections was to enable the UK Government to ratify the WA. By voting for a Bill that contained these provisions, Parliament had in effect entitled the Government to act as though those legal obstacles had never been imposed in the first place.

4.1 Constitutional Reform and Governance Act 2010 – Part 2

Under CRAG, there are two routes to the ratification of a treaty. The default route, under section 20, requires the Government to lay a copy of the treaty before Parliament and it then must wait for 21 sitting days[29] during which time either House of Parliament might object to ratification. If the House of Commons objects, the Government cannot ratify the treaty, although it may make further attempts under the Act. If only the House of Lords objects, the Government may proceed to ratify, though it must explain why it has done so despite that objection.

This provision is of limited impact in terms of the role it gives to Parliament. There is no obligation for the Government to make time for a debate on the floor of the House of Commons on the matter of a treaty it has laid. There are no examples since this Act came into force of a treaty having been blocked from ratification by the House of Commons by way of a resolution under the CRAG procedure.

In "exceptional cases" the Government can dispense with the requirement to wait for 21 sitting days before ratifying a treaty.

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28 EU Treaties typically have had bespoke ratification procedures in UK law. Under s. 2 *European Union Act 2011*, both the treaty providing for the accession of Croatia to the EU and the Protocol on the concerns of the Irish people (a supplement to the Lisbon Treaty) had to be approved by an Act of Parliament before the UK Government could ratify them. See the *European Union (Croatian Accession and Irish Protocol) Act 2013*.

29 For this purpose, a "sitting day" is defined as one in which both the House of Commons and the House of Lords is sitting.

Section 22 requires a Minister to explain why, in his or her view, those "exceptional" circumstances apply.

CRAG is therefore best understood as a **passive** form of Parliamentary approval: in practice and, in the absence of objection, it at most delays, rather than prevents the ratification of a treaty.[30]

4.2 European Union (Withdrawal) Act 2018 – Section 13

Parliament imposed on the UK Government an additional hurdle before it could ratify the WA. Had only CRAG applied, the UK Government could (in theory at least) have ratified a withdrawal agreement without either a debate in Parliament or a further Act of Parliament to be passed after the treaty's contents had been agreed in principle. In practice it seems likely that further primary legislation would have been needed anyway, since the Government would have been in no position to ratify a treaty which it lacked the domestic powers to implement.

Nevertheless, section 13 of the *EU (Withdrawal) Act 2018* imposed four pre-requisites before a withdrawal agreement could be ratified:

- Three documents must be laid before Parliament;
  - a statement that political agreement had been reached (between the UK and EU);
  - the negotiated withdrawal agreement (a draft treaty); and
  - the framework for the future relationship (a joint political declaration forming the basis for further negotiations)
- MPs must adopt a resolution (resulting from a Government motion) approving both the draft treaty and the political declaration (the so-called "meaningful vote");
- Peers must have the chance to debate a Government motion taking note of the draft treaty and the political declaration (but need not resolve to "approve" it); and
- Parliament must pass a further Act of Parliament implementing the WA in domestic law.

Section 13 of EUWA gave Parliament, in legal and practical terms, a more significant and **active** role than CRAG. Not only did it guarantee MPs a legally binding debate on whether to approve the treaty (i.e. a veto over ratification) but the Government also could not circumvent that veto by citing "exceptional circumstances". Moreover, the requirement to pass a further Act of Parliament made the ratification of the WA similar to arrangements for ratifying major EU treaty change in the past, such as with the Lisbon and Maastricht Treaties.

Section 13 also provided a role for Parliament if a deal was not reached by a certain point, or if MPs rejected a deal brought back by the Government. Parliament could not use this process directly to alter the

[30] See also Commons Library Briefing Paper, Parliament's role in ratifying treaties, SN05855, 17 February 2017

negotiated terms of either the "negotiated withdrawal agreement" or "the framework for the future relationship". However, the provision secured Parliamentary time for key debates through which MPs could seek to influence the Government's policy in the absence of a ratifiable withdrawal agreement treaty.[31]

4.3 Sections 31 and 32 of the WAA

There were two ways that the Government could ratify the Withdrawal Agreement, given the existence of these requirements in primary legislation. For each Act it could either seek to:

- meet the statutory conditions; or
- repeal or otherwise disapply those provisions in a further Act of Parliament.

The previous Government had already indicated its intention to disapply CRAG, rather than to meet it, as early as March 2019.[32] However, both versions of the *EU (Withdrawal Agreement) Bill* went further.

Section 31 of the final Act repeals the entirety of section 13 of EUWA. The restrictions it placed on ratifying a withdrawal agreement, including the requirement for a "meaningful vote", no longer exist. Passing the *EU (Withdrawal Agreement) Act 2020* was therefore effectively a proxy for meeting the conditions of the "meaningful vote".

Section 32 of the final Act disapplies Part 2 of CRAG to the ratification of the WA, but not to any subsequent agreement between the UK and EU to modify its provisions. This meant that the Government did not have to lay a copy of the final treaty before Parliament and then wait 21 sitting days before ratifying it.[33]

4.4 Ratification

On 24 January 2020, Boris Johnson (UK Prime Minister), Charles Michel (the new President of the European Council) and Ursula von der Leyen (the new President of the Commission) formally signed the treaty at separate ceremonies in London and Brussels. On 29 January, Tim Barrow, the UK's Ambassador to the EU, gave written notice to the Council's Secretary General, confirming the UK had ratified the treaty.

Also on 29 January, the European Parliament voted to agree to the WA by 621 votes to 49, with 13 abstentions. The Council of the EU approved the treaty on 30 January 2020 by written procedure, completing the EU's ratification requirements.

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31 See also Commons Library Briefing Paper, A User's Guide to the Meaningful Vote, 08424, 25 October 2018

32 HC Deb Vol 12 February 2019 654 cc 744-746

33 The Government could, alternatively, have invoked the "exceptional circumstances" exemption under section 22 of CRAG, and thereby avoided having to wait 21 sitting days. It is not clear from the Explanatory Notes to the Bill why it chose instead to disapply Part 2 of CRAG outright to the ratification of the Withdrawal Agreement.

5. Parliament's role in future EU-UK treaties

Summary

The Government's original proposals in the October 2019 version of the *EU (Withdrawal Agreement) Bill* would have given MPs a veto over UK Ministers starting negotiations on the future relationship with the EU, and could approve or reject the Government's "statement of objectives" which it would have been bound to follow. The Bill also proposed to give MPs a guaranteed and legally binding vote on whether any future relationship treaty, once negotiated, should be ratified.

These provisions did not appear in the December 2019 version of the Bill and do not form part of the final Act. This means only the CRAG Act process applies: MPs are not guaranteed a debate or vote on the ratification of any future relationship treaty. Primary legislation may be needed to implement such a treaty, but this cannot be known for certain unless and until its terms have been agreed and published.

5.1 Default role

By default, Parliament has a relatively limited role in law on major treaty negotiations. The CRAG Act provides MPs with a theoretical veto over the ratification of a treaty once it has been negotiated and laid before Parliament, but one which is difficult to exercise without the guarantee of Parliamentary time to debate the treaty in question.

To the extent that a treaty cannot reasonably be implemented without primary legislation, Parliament can at least be said to have a de facto veto to the extent those elements form part of a treaty. Although there was no formal Parliamentary power of veto over the UK's accession treaty to the EEC in our constitutional arrangements, it would have been unthinkable in practice for the Government of the day to ratify that treaty without the prior passage of the ECA to give effect to those new rights and obligations in domestic law.

Nevertheless, Parliament's role traditionally has come at the end of the process of a negotiation, rather than at the beginning or during it. This is because the prerogative of foreign affairs rests with the executive rather than the legislature. Section 13 of EUWA represented a rare, if not unprecedented, example of Parliament seeking directly to influence treaty negotiations. Although Parliamentary committees can and do scrutinise the Government's activities in international negotiations and can bring political pressure to bear on particular matters of interest, the legislature typically has not directly approved or controlled the terms on which international negotiations have taken place.

5.2 The October Bill's proposals

The Government had proposed a significant departure from this position in its original version of the *EU (Withdrawal Agreement) Bill*. Clause 31 would have provided MPs with "vetoes" at key stages of the next stage of negotiations on the future UK-EU relationship.[34]

[34] See Commons Library Insight, Withdrawal Agreement Bill: Parliament's role in the future UK-EU relationship, 22 October 2019

It was proposed that, before the UK Government could even begin its negotiations with the EU, it would have to secure House of Commons approval of its "statement of objectives" for the negotiations. It would then have to pursue negotiations consistently with the mandate MPs had given it, and report to Parliament at regular intervals as to the progress being made towards those objectives. Where it seemed unlikely that the objectives would be secured, a Minister would have to explain to Parliament why this was the case and (it was anticipated) would have to seek an updated mandate from MPs for the negotiations.

The clause also proposed that, for future relationship treaties reached, the House of Commons would have a more proactive role in ratification than it does under Part 2 of CRAG. The Government would have to secure a resolution of the House of Commons endorsing any such treaty, rather than take Parliamentary inaction as deemed approval.

This second part of clause 31 was similar (though not identical to) the "meaningful vote" provisions in EUWA. Although there was no explicit requirement in clause 31 for an implementing Act for future treaties, it seems likely, in practice, at least some implementing primary legislation would be needed in most cases.

5.3 No enhanced role in the final 2020 Act

Clause 31 of the October Bill was not included when the Johnson majority Government reintroduced its proposals in December 2019. Parliament's role in the future relationship is therefore that set out in Part 2 of CRAG, and is (formally at least) weaker than its role was for:

- the Withdrawal Agreement;
- EU treaty-changes under the *European Union Act 2011*;
- all earlier major EU treaty-changes, including the Lisbon and Maastricht Treaties.[35]

There are no domestic constraints as to when, how and on what terms the Government wishes to pursue the future relationship negotiations. Neither too is there a dedicated Parliamentary mechanism by which MPs could seek to influence the Government's policy if a future relationship treaty has not been agreed and ratified by the end of the transition period. Although Committees can scrutinise, take evidence on and report about the Government's negotiations and policy, there is no "special" role for Parliament in these negotiations.

In practice, Parliament may have more of a role than this formal position would suggest, since future relationship treaties of a certain kind are likely to require at least some primary legislation to implement provisions as to trade, security or political cooperation. Whether this primary legislation will be specific to the treaty or treaties on the future relationship, or alternatively those treaties will be treated in the same way as (e.g.) trade agreements with other countries remains to be seen.

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35 On each occasion an Act of Parliament was needed. See the *European Communities (Amendment) Act 1993* and the *European Union (Amendment) Act 2008*.

6. Domestic legal status of the separation agreements

Summary

One of the notable features of the UK's membership of the EU was the impact it had on the constitutional principle of Parliamentary sovereignty. To be a Member State of the EU is to accept to be bound by the principle of supremacy of EU law, and to give effect to EU law notwithstanding any contrary provisions in domestic law that may have existed either before or after accession. This included binding domestic courts to the rulings given by the Court of Justice of the European Union (CJEU).

The UK gave effect to this membership requirement under section 2 of the ECA 1972. Some critics of the EU argued that this arrangement, in practice if not in theory, unduly restricted the core principle of the UK constitution that Parliament is sovereign and can make or unmake any law, which the domestic courts are then bound to enforce.

The UK will no longer be bound either by most of EU law or the CJEU after the transition period has ended but its terms of withdrawal provide a continuing role for EU law and the CJEU thereafter. Special arrangements must therefore be made for (e.g.) citizens' rights, separation issues and the Protocol on Ireland/Northern Ireland. This is because Article 4 of the WA requires that:

> 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.

Sections 5 and 6 of the *EU (Withdrawal Agreement) Act 2020* insert sections 7A and 7B into the *EU (Withdrawal) Act 2018*. These provisions grant the WA, and two related separation agreements, a similar status to that which was previously enjoyed by the EU Treaties under the ECA. This reflects, among other things the need for the UK to produce, within its territory, the same legal effects for the WA as EU law has in the remaining Member States.

The WA grants a continuing role for the Court of Justice of the European Union in the UK after Brexit. This includes a role during transition (that is very similar to the one it had when the UK was a Member state) and one for narrower purposes thereafter. This role is implemented in UK law by new sections 7A-7C of EUWA and overrides for those purposes section 6 of EUWA.

The WA has similar implications for Parliamentary sovereignty as the EU Treaties by which the UK was bound as a Member State. Section 38 of the WAA seeks to recognise and assert Parliament's sovereignty "despite" the constraints on domestic legislation that are imposed by that treaty arrangement. However, the House of Lords Constitution Committee and others have doubted whether this statutory provision has any legal effect.

6.1 Article 4 of the Withdrawal Agreement

Supremacy and Direct Effect

Article 4 of the Withdrawal Agreement is the most constitutionally significant provision of the treaty for the United Kingdom. It states:

> 1. 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.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and

> administrative authorities to disapply inconsistent or incompatible domestic provisions, through domestic primary legislation.

EU law requires Member States to give effect to the EU Treaties and laws made under them (including treaties made under Article 50 TEU) regardless of other provisions of domestic law. This is the principle of "supremacy" of EU law. Member States must also enable individuals to enforce legal rights arising from the EU Treaties and EU law in domestic courts providing certain conditions are met. Those rights should be available regardless of whether domestic law has implementing legislation to support them. This is the principle of "direct effect".

Since the UK must produce "the same legal effects" for the WA as those produced in the Member States, the expectation in this context, is that the WA should "trump" inconsistent UK law. Moreover, relevant rights, powers, liabilities, obligations, restrictions, remedies and procedures arising from the WA and relevant EU law should be enforceable in UK courts (i.e. they should have "direct effect"). Where and to the extent the WA refers to EU law, concepts or provisions, they:

> 3. … shall be interpreted and applied in accordance with the methods and general principles of Union law.

Where the WA incorporates EU law by reference, that law, to the extent applicable, would then also have supremacy over UK law.

What EU law does the Withdrawal Agreement incorporate?

The WA incorporates, by reference, important elements of EU law in a range of areas. For example, during the transition period, it requires the UK (subject to specific exceptions) to abide by EU law as though it were still a Member State. Article 131 of the WA also provides that:

> During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and to natural and legal persons residing or established in the United Kingdom.

Three notable parts of the WA also incorporate extensive parts of EU law by reference with effects that last beyond the end of the transition period:

- Part 2 on Citizens' Rights;
- Part 3 on Separation Issues; and
- The Protocol on Ireland/Northern Ireland.

6.2 Court of Justice of the EU – future role

Although the Withdrawal Agreement is given a similar constitutional status in UK law now (by virtue of the WAA) as the EU Treaties were given during the UK's membership of the EU (by virtue of the ECA), the context is different in at least one important respect. The WA envisages a more restricted role for the Court of Justice of the European Union (CJEU) in the UK after the transition period.

For an overview of what this role will be, see the recent Commons Library Insight, Brexit next steps: The Court of Justice of the EU and the UK, 7 February 2020

Article 4 – "Conformity" or "Due Regard"?

Article 4 WA provides two specific rules for UK courts in relation to rulings of the CJEU, depending upon whether the rulings were handed down before or after the end of the transition period. Paragraph 4 provides:

> The provisions of this Agreement referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union handed down before the end of the transition period.

This means the UK courts must follow any rulings of the CJEU handed down before the end of the transition period.

Paragraph 5 imposes an additional obligation on the UK courts regarding CJEU judgments handed down thereafter. It says:

> In the interpretation and application of this Agreement, 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.

For a UK court to "have regard to" CJEU caselaw is a more permissive requirement than resolving matters "in conformity with" it. However, this duty may restrict in practice the extent to which UK courts diverge from the CJEU's interpretation of the WA or of EU law co-opted by it.

Role for the purposes of transition

Continuation of CJEU jurisdiction during transition

During the transition period, UK courts must continue to recognise the jurisdiction of the CJEU both as to its transitional obligations and as to the interpretation and application of the WA as a whole. Article 131 WA provides:

> In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.

Preliminary references continue to happen

One necessary consequence of Article 131 is that UK courts must continue to be able to make preliminary references to the CJEU.

The preliminary reference procedure (under Article 267 TFEU) requires that questions of interpretation of EU law can, and sometimes must, be referred by domestic courts to the CJEU, where clarity is needed to resolve the domestic legal dispute. Member States have to follow the rulings made by the CJEU.

Enforcement re UK conduct during transition

Under Article 87 of the WA, the European Commission can continue to initiate judicial enforcement proceedings against the UK, where it believes the UK has not complied with its obligations under the Treaties

or Part 4 of the WA during the transition period. The Commission would act in the same way as it can for a Member State alleged to have breached the WA or EU law (under Article 258 TFEU). This would involve cases coming before the CJEU if non-compliance persisted.

Proceedings of this kind can be brought against the UK up to four years after the transition period has ended. The UK is bound by any decision of the CJEU under these provisions (under Article 89 of the WA).

Pending cases at the end of transition

If proceedings have been brought by or against the UK before the end of the transition period, but are not completed before it, they must, as required by Article 86 of the WA, be able to be completed, and have effect in UK law in the same way as proceedings undertaken before the end of that period. The same applies to any case where a request for a preliminary reference has been made by a UK court or tribunal before the end of transition but has not been completed until after it.

Role for purposes beyond transition

Beyond the transition period, the WA gives a continuing role to the CJEU for much more limited but nevertheless important purposes.

Part 2 – Citizens' rights

For up to 8 years after the transition period, preliminary references must be allowed from UK courts to the CJEU for the purposes of Part 2 of the WA (on citizens' rights). This additional commitment was considered necessary to ensure clear and consistent interpretation of those provisions, given the importance of the rights that Part 2 confers on EU citizens continuing to live in the UK. This is required under Article 158 of the WA.

Protocol on Ireland/Northern Ireland

On an indefinite basis, the CJEU will have jurisdiction similar to that it has now with regard to the matters covered by Articles 5 and 7-10 of the Protocol on Ireland/Northern Ireland including in relation to relevant EU law. Those parts concern:

- Customs and movement of goods (Article 5 of the Protocol);
- Technical regulations, assessments, registrations, certificates, approvals and authorisations (Article 7 of the Protocol);
- VAT and excise (Article 8 and Annex 3 of the Protocol);
- Single electricity market (Article 9 and Annex 4 of the Protocol); and
- State aid (Article 10 and Annex 5 of the Protocol).

Article 12(4) of the Protocol states that, regarding these provisions:

> the institutions, bodies, offices, and agencies of the Union shall in relation to the United Kingdom and natural and legal persons residing or established in the territory of the United Kingdom have the powers conferred upon them by Union law. In particular, the Court of Justice of the European Union shall have the jurisdiction provided for in the Treaties in this respect. The second and third

> paragraphs of Article 267 TFEU shall apply to and in the United Kingdom in this respect.

This means that, if it considers the UK is not properly applying the Protocol or relevant EU law, the Commission will be able to commence infringement proceedings against the UK regarding the Protocol in much the same way as it can with Member States generally (under Article 258 TFEU). Additionally, UK courts can and sometimes must make preliminary references (as they previously have done under Article 267 TFEU) to the CJEU for the purposes of interpreting these parts of the Protocol (and relevant EU law).

Article 13(2) of the Protocol further provides that:

> Notwithstanding Article 4(4) and (5) of the Withdrawal Agreement, the provisions of this Protocol referring to Union law or to concepts or provisions thereof shall in their implementation and application be interpreted in conformity with the relevant case law of the Court of Justice of the European Union.

This means the Protocol takes the same approach as Article 4(4) of the WA and goes further than the general provision in Article 4(5) of the WA applying after transition. UK courts will be bound by CJEU caselaw concerning the Protocol, not just under a duty to "have regard to" it.

Part 5 – Financial Settlement

There is a limited role for the CJEU in relation to the financial settlement provisions in Part 5 of the WA. It relates to the interpretation of EU law incorporated by reference in Articles 136 and 138 of the WA (which address issues arising out of the UK's participation in the Multi-Annual Financial Framework between 2014 and 2020).

Article 160 of the WA provides that the Commission can take the UK to the CJEU if it suspects non-compliance with Articles 136 and 138 of the WA, and that on these provisions, the preliminary reference procedure will continue to apply with regard to UK courts, even after the transition period. The UK would have to comply with any decision made by the CJEU as to the interpretation of those provisions.

Dispute resolution

Save for those aforementioned matters (where a specific role for the CJEU is envisaged), the WA is to be enforced, at first instance, through the Joint Committee structure. Article 167 of the WA states:

> The Union and the United Kingdom shall at all times endeavour to agree on the interpretation and application of this Agreement, and shall make every attempt, through cooperation and consultations, to arrive at a mutually satisfactory resolution of any matter that might affect its operation.

Article 169 of the WA then provides the basis on which either party can formally raise a dispute on which to consult. Following the transition period, if a satisfactory solution is not reached within 3 months either party (the UK or the EU) can then refer the dispute to an arbitration panel. (Article 170 of the WA). Alternatively, the parties can agree, before then, to refer a matter to the arbitration panel.

The arbitration panel cannot itself rule on the interpretation of the EU law that is referenced by the WA. It must refer any questions on points of EU law to the CJEU where a dispute turns on it. It must then follow the decision taken by the CJEU as to how that provision is to be interpreted (Article 174 of the WA). Both the EU and the UK are then bound by any decision of the arbitration panel, and there are remedies set out in the WA if either the UK or EU does not comply (Articles 178-179 of the WA).

Challenges made through other Member States

Not all CJEU rulings on the interpretation of the WA need necessarily emerge through the UK courts, or because of actions taken by, against or on behalf of, the UK.

For example, preliminary references may be made by the domestic courts of Member States. If this happens, Article 161 of the WA provides that the UK shall be notified of the fact, and shall be able to participate in those proceedings in the same way as a Member State.

Additionally, if any of the Member States or the Commission, Council or European Parliament believe that the EU has taken decisions that are incompatible with EU law when acting in the WA's Joint Committee, they can commence a so-called action for annulment under Article 263 TFEU. They would ask the CJEU to declare an EU act (in this case, a decision taken by the Council on a proposal from the Commission setting the EU's position in the Joint Committee) void in respect of the EU because it is contrary to EU law. It is unlikely that the EU will take decisions that are incompatible with the EU Treaties in this context, but should there be any doubt, any Member State or other EU institution can ask the CJEU to rule on the matter.

6.3 How the WAA confers a special status on the separation agreements

New section 7A inserted into EUWA

Section 5 of the WAA contains the necessary provision to honour the UK's obligations under Article 4 of the Withdrawal Agreement, and by extension the relevant provisions of the WA governing the continuing jurisdiction and role of the Court of Justice of the European Union in relation to UK domestic law. Section 6 of the WAA (inserting section 7B into EUWA) makes similar provision for the other two separation agreements.

An old mechanism repurposed

The mechanism chosen by the Government to give direct effect and supremacy to the WA (and relevant provisions of EU law) is very similar to the one originally contained in the ECA (see Box 1 below). The provision inserted by section 5 of the WAA is in section 7A of EUWA.

Box 1: Recreating direct effect and supremacy for the Withdrawal Agreement	
European Communities Act 1972	**European Union (Withdrawal) Act 2018**
Direct Applicability and Effect Section 2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.	**Direct Applicability and Effect** Section 7A(1-2) (1) Subsection (2) applies to— (a) all such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the withdrawal agreement, and (b) all such remedies and procedures from time to time provided for by or under the withdrawal agreement, as in accordance with the withdrawal agreement are without further enactment to be given legal effect or used in the United Kingdom. (2) The rights, powers, liabilities, obligations, restrictions, remedies and procedures concerned are to be— (a) recognised and available in domestic law, and (b) enforced, allowed and followed accordingly.
Supremacy Section 2(4) … any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section…	**Supremacy** Section 7A(3) Every enactment (including an enactment contained in this Act) is to be read and has effect subject to subsection (2).

In both the ECA and EUWA, the relevant provisions gave direct applicability (and, where its triggering conditions were met, direct effect)[36] to treaty rights, powers, liabilities, obligations, restrictions, remedies and procedures "without further enactment". This ensures domestic courts would enforce them regardless of whether further detailed domestic provision had been made. Also in both cases, and giving effect to the "supremacy" of relevant treaty law, domestic law was to be interpreted and given effect "subject to" the relevant treaty provisions and the directly effective law that they incorporate.

[36] Namely where a relevant provision of EU law was 'clear, precise and unconditional', as defined in Case 26/62 *Van Gend En Loos v Nederlandse Administratie der Belastigen* [1963] ECR 1

Notable differences compared to section 2 ECA

The main difference between the provisions in EUWA and the original provisions it imitates from the ECA is that they give effect to different treaties, which have different, albeit overlapping, "baskets" of rights, powers, liabilities, obligations, restrictions, remedies and procedures.

One additional and important restriction applies to the scope of section 7A of EUWA. Its excludes Part 4 of the WA, to the extent that the "saved effect" of the ECA already addresses those matters. Given that section 1A of EUWA already gives effect to the transition period, this provision seeks to avoid any risk of a conflict between transition and non-transition arrangements.

Overriding existing rules on the role of the CJEU

Section 6 of EUWA provides that:

> A court or tribunal—
>
> (a) is not bound by any principles laid down, or any decisions made, on or after IP completion day by the European Court, and
>
> (b) cannot refer any matter to the European Court on or after IP completion day.

However, this provision now must, per section 7A of the same Act, be "read and have effect subject to" "all such remedies and procedures from time to time provided for by or under the withdrawal agreement".

To the extent section 6 would otherwise prevent the CJEU from performing the role required of it by the WA, therefore, section 7A ensures that it is not so prevented. This affects both:

- whether and when UK courts are bound by CJEU judgments; and
- whether the CJEU can hear cases from the UK for some purposes.

6.4 Three separation agreements

Although most of the attention regarding the UK's withdrawal from the EU has been paid to the WA – its bilateral treaty with the European Union – it is not the only treaty that governs the manner of the UK's departure from the European institutions. Two further treaties were negotiated by the Government back in December 2018, which reflect the close ties that certain European countries have had with the EU despite not being full Member States. The citizens of Iceland, Norway, Liechtenstein and Switzerland have all exercised, on a reciprocal basis, certain rights in the European Union (including in the UK) by virtue of their own treaty relationships with the EU. The two parallel "separation agreements" include analogous provisions to some of those in the WA, most notably in the area of citizens' rights, and are given effect to in UK law in a similar way.

Section 7B of EUWA, inserted by section 6 of WAA, gives a similar status in UK law to those two agreements as section 7A gives to the WA itself.

6.5 "Relevant separation agreement law"

Not all matters concerned with the separation agreements involve provisions that are directly applicable or directly effective. The treaties in question will partly be implemented using secondary legislation (on which, see Section 7 of this briefing paper). For the UK to honour its obligations under the separation agreements, all the domestic law that implements them, not just the directly effective parts, must be interpreted in a consistent manner.

Section 26(2) of WAA (inserting section 7C into EUWA) is directed towards this end. Subsection 7C(3) classifies both the directly applicable and directly effective provisions of the separation agreements, and the associated domestic legislation that implements it, as "relevant separation agreement law". The "relevant" separation agreement law includes both provisions of the WAA itself (notably those concerned with implementing citizens' rights and the financial settlement) and anything done under the WAA's key implementing delegated powers. "Relevant separation agreement law" is so defined as to distinguish it from "retained EU law". The difference between them is that:

- relevant separation agreement law is domestic law in order to implement new obligations in international law; whereas
- retained EU law is domestic law originating with the UK's obligations as an EU Member State (or during transition) but continues to exist despite the absence of obligations in international law underpinning it.

Subsection 7C(3) having defined "relevant separation agreement law", subsection 7C(1) sets out how it is to be enforced. It requires 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—
>
> (a) in accordance with the withdrawal agreement, the EEA EFTA separation agreement and the Swiss citizens' rights agreement, and
>
> (b) having regard (among other things) to the desirability of ensuring that, where one of those agreements makes provision which corresponds to provision made by another of those agreements, the effect of relevant separation agreement law in relation to the matters dealt with by the corresponding provision in each agreement is consistent.

This provision can therefore be understood to have two distinct objectives. Firstly, it seeks to ensure that, to the extent the WA is supported by or requires further implementing UK legislation (over and above sections 7A and 7B), that legislation is interpreted consistently with the WA.

Secondly, it seeks to avoid inadvertent inconsistencies between the implementation of, on the one hand, the WA and the two connected separation agreements on the other. The House of Lords Constitution Committee described this aim in the following terms:

> [New section 7C] provides that the various sister provisions of the Agreement shall, wherever possible, be given an interpretation that is harmonious as between the various agreements. This is a measure designed to secure greater legal certainty.[37]

6.6 Implications for Parliamentary sovereignty

One common criticism made of the UK's membership of the EU was the constitutional impact of the supremacy of EU law, and its requirement that domestic law be interpreted and applied "subject to" it. As the Government put it in its white paper in February 2017:

> The sovereignty of Parliament is a fundamental principle of the UK constitution. Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that.[38]

The Withdrawal Agreement and its implementing legislation appears to recreate, albeit in a narrower and partly time-limited context, the kind of role for EU institutions and laws to which some had objected in the context of the UK's time as a Member State.

This may partly explain why both versions of the *EU (Withdrawal Agreement) Bill* included a declaratory provision on Parliamentary sovereignty. It now forms section 38 of the WAA.

"Recognising" constitutional norms

Subsection 38(1) states:

> It is recognised that the Parliament of the United Kingdom is sovereign.

The statutory provisions to which this is most similar are those contained in section 2 of each of the *Scotland Act 2016* and *Wales Act 2017*. Those two statutes "recognise" that the UK Parliament will not normally legislate with regard to devolved matters without the consent of the devolved legislature (under the legislative consent or Sewel convention).[39] The language of "recognising" something in a statute must be distinguished from provisions purporting to "create" a legal rule or principle or to "confer" something that previously was absent.

The UK Supreme Court has already ruled, in *R (Miller) v Secretary of State for Exiting the EU*, that "recognising" a convention in statute does not convert it into a legal rule or give it justiciable effects.[40] The position may be less clear (and has not been tested) with regard to section 38, however, as what is being recognised in it is a fundamental principle of UK constitutional law, rather than a constitutional convention.

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37 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill: interim report, HL Paper 21, 5 November 2019, para 92

38 The United Kingdom's exit from and new relationship with the European Union, Cm 9417, February 2017, para 2.1

39 See Commons Library Briefing Paper, Brexit: Devolution and legislative consent, 08274, 29 March 2018

40 [2017] UKSC 5 paras 145-146

"Notwithstanding" the limits on domestic law

Subsection 38(2) goes on to list several provisions in EUWA (as amended by WAA). These provisions, in much the same way as section 2 of the ECA, might reasonably be understood as restricting the practical exercise of sovereignty by the UK Parliament.[41]

These provisions concern:

- the transition period (sections 1A and 1B)
- the provisions giving direct effect and supremacy to the separation agreements (sections 7A and 7B); and
- the provisions requiring other domestic legislation to be interpreted, so far as applicable, in accordance with the separation agreements (section 7C).

Subsection 38(2) identifies these provisions so as to state explicitly that Parliamentary sovereignty survives "notwithstanding" them.

This provision is similar to, but not quite the same as, the now repealed section 18 of the *European Union Act 2011*. That section stipulated that the reason EU law had effect in UK law, during the UK's time as a Member State, was because, and only because, domestic law explicitly recognised and gave effect to it. The implication of this was that the recognition in question could be expressly revoked.

Criticism of section 38 WAA

Lack of legal effect

The Lords Constitution Committee said the recognition that Parliament is sovereign was "welcome" but that the clause has no legal effect.[42]

Mike Gordon, Professor of Constitutional Law at the University of Liverpool, agreed with this assessment when the provision first appeared in the October version of the Bill:

> It is tempting to regard it as essentially political window dressing, asserting the absence of any derogation from parliamentary sovereignty in consequence of the mechanisms introduced by the EU (Withdrawal Agreement) Bill. Yet while that message may appeal to some sceptics of an ongoing relationship between the UK and the EU, it is difficult to see that it has any practical effect in terms of diminishing the actual legal status of the obligations flowing from the Withdrawal Agreement in domestic law. It may therefore be an affirmation of parliamentary sovereignty which fails to satisfy its primary audience – Parliament may well retain its legal sovereignty, despite having exercised that sovereignty in such a way as to give enhanced domestic status to rules contained in a treaty agreed with the EU (again).[43]

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41 At least to the extent that Parliamentary sovereignty was also seen as limited by the supremacy of EU law recognised and given effect to under the *European Communities Act 1972*.

42 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 126

43 Mike Gordon, The European Union (Withdrawal Agreement) Bill: Parliamentary Sovereignty, Continuity and Novelty, UK Constitutional Law Association, 22 October 2019

Non-recognition of the Sewel convention

In the Lords, clause 38 of the *EU (Withdrawal Agreement) Bill* was amended. This was subsequently overturned by the Commons, alongside all of the other amendments the Lords had made to the Bill.

The view of the Lords was that the clause (and therefore also the section in the final Act) inadequately reflected the constitutional context in which Parliament exercises sovereignty, especially considering the devolution settlements and the Sewel convention. The amended clause would have said:

> It is recognised that, acting in accordance with the conventions relating to devolved power set out in —
>
> (a) section 28(8) of the Scotland Act 1998, and
>
> (b) section 107(6) of the Government of Wales Act 2006,
>
> the Parliament of the United Kingdom is sovereign.

7. Implementing powers

Summary

The UK Government lacks any power, independently of statute, to change EU law to implement treaty obligations. Normally they are implemented through a combination of primary and secondary legislation. The latter is often preferred for the detail of implementation, as it provides greater flexibility to change arrangements in the future, and with less onerous Parliamentary scrutiny.

In the case of the Withdrawal Agreement, general implementation provisions in primary legislation were necessary but insufficient. Although the WA has a clear legal status in domestic law, its provisions require supplementation as to the manner in which the UK gives effect to its obligations under it.

Whereas under EUWA the Government's original intention appeared to be to make implementing legislation under one broad delegated power, the WAA provides a different approach. A series of powers are delegated to Ministers, but refer directly to particular parts of the WA, specifying what needs to be implemented.

This section summarises the delegated powers conferred under the WAA, explaining what parts of the WA they enable the Government to implement and what the limits are on those legal powers. It also identifies parts of the WAA which implement parts of the WA directly, rather than by delegation.

7.1 Why implementing powers are needed

It is often insufficient for implementing legislation simply to provide that the provisions of a treaty "have effect" in domestic law. The treaty itself will rarely prescribe, in full, the domestic institutional arrangements that must be made to give effect to treaty rights and obligations.

Detailed implementation arrangements can be set out in primary legislation. Key parts of the UK's EU obligations, for example, had been implemented through the *Equality Act 2010* and the *Data Protection Act 2018*. This allowed Parliament to have a detailed say on how (as distinct from if) international obligations were to be given effect to.

In practice, however, many of the UK's EU law obligations typically have been implemented through secondary legislation. Section 2(2) of the ECA was a broad delegated power, allowing both UK Ministers and devolved authorities to make domestic provision where they considered it "appropriate" for the purposes of implementing the EU treaties.

7.2 Section 9 of EUWA – a dead letter

At first, the Government's preferred approach to the implementation of the WA appeared to be to take a single and broad delegated power, very similar in kind to the one in section 2(2) of the ECA. Section 9 of EUWA contained a power to:

> make such provision as the Minister considers appropriate for the purposes of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before exit day.

This was also a "Henry VIII" power, meaning that it could amend not just secondary legislation, but also Acts of Parliament and Acts of the devolved legislatures. There were several key limitations on this power,

however, which meant it likely would not have been sufficient on its own to implement the WA in full.

Firstly, this power could not be used after exit day unless a subsequent Act was passed. It is unlikely that the UK Government would have all of the secondary legislation it expected to have to pass ready before exit day. In practice we now expect much of the implementing legislation for the WA to be made during the transition period, and possibly for that legislation to be supplemented or modified after it.

Secondly, the power could not be used to:

- impose or increase taxation;
- make retrospective provision;
- create a relevant criminal offence; or
- amend, repeal or revoke the *Human Rights Act 1998* or any subordinate legislation made under it.

Thirdly, the power could not be used unless a further Act of Parliament had been passed approving the terms on which the UK was to withdraw from the EU (i.e. approving the WA itself).

One possible explanation for this power having been drawn in broad and general terms is that, when the *EU (Withdrawal) Bill* was introduced in 2017, the UK and EU negotiators had yet to agree even a detailed structure for the WA. This meant it would be difficult to identify more specific and narrowly drafted implementing powers at that stage. In any case, section 9 was repealed by the WAA, being regarded as "unnecessary" in light of the other implementing powers conferred by that Act.

7.3 Delegated implementing powers in WAA

The *EU (Withdrawal Agreement) Act 2020* took a different approach to implementing powers from EUWA. It proposed a much longer list of powers but was more specific as to the purposes for which each of them could be used. These powers closely reflect the key Parts of the Withdrawal Agreement, under which in many cases the UK is expected to achieve a particular result in domestic law but given some flexibility as to how to achieve those outcomes. An overview of these powers, what they can be used for, and what their limits are, is shown below.

Part 2 of the WA (Citizens' Rights)[44]

The citizens' rights provisions of the Withdrawal Agreement are unusual, in that they have equivalent provision in two parallel treaties with the EEA countries (Iceland, Norway and Liechtenstein) and with Switzerland. For ease of reading, the explanations below refer only to the provisions of the WA that each section implements, and not those of the other two separation agreements.

[44] See also Commons Library Briefing Paper, Citizens' rights provisions in the European Union (Withdrawal Agreement) Bill 2019-20, 08772, 3 January 2020

The delegated powers in this part of the WAA are notable because they are closely tied to specific obligations in the WA. They are also notable because (in general) they are not time limited, typically are Henry VIII powers, and can be used in ways that the section 9 power in EUWA could not have been.

For the most part, the House of Lords Constitution Committee recognised that these powers were drawn in a proportionate and context sensitive way:

> 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.[45]

Section 7(1) – Residency rights (Article 18 WA)

A Minister may make regulations considered "appropriate" to implement Article 18 WA (on the rights of residence of EU citizens).

Ministers can use this power to require those affected by the Citizens' Rights part of the separation agreements to apply for a UK immigration status (e.g. Settled Status) by a specific deadline. Although section 7(1) of the WAA does not say so explicitly, that deadline cannot be less than six months after the transition period has ended. This is because Article 18 WA itself prohibits an earlier deadline.

The regulations can also ensure applicants continue to enjoy residence rights in the UK pending conferral of "Settled Status".

Section 7 powers can be used to confer rights on people who would not be entitled to rights under the WA. For example, regulations can cover family members under the "Surinder Singh" principle, where an EEA citizen has lived in another EEA country with a British citizen and can move back to the UK with that British citizen while benefitting from the Part 2 rights.

The power in section 7 is a Henry VIII power as it can be used to modify other enactments. It has no sunset clause.

Section 8(1) and (2) – Frontier workers' rights (Articles 24-26 WA)

A Minister can make regulations considered "appropriate" to implement Articles 24(3), 25(3) and 26 WA (re frontier workers' rights).

Ministers may establish a permit scheme for frontier workers (i.e. those economically active in, but not resident in, the UK). These are to take effect after the transition period. This would enable documentation to be issued to frontier workers proving their status and eligibility for relevant rights enjoyed under the separation agreements.

Section 8 of WAA is a Henry VIII power as it can be used to modify the *Immigration Acts* (but not other Acts). It has no sunset clause.

Section 9(1) – Restricting rights of entry/residence (Article 20 WA)

A Minister can make regulations considered "appropriate" to implement Article 20 WA (re restrictions on rights of entry and

[45] para 49

residence). The permissible restrictions themselves are set out in the Agreement itself (which incorporates by reference Chapter IV of EC Directive 2004/38/EC), but are implemented using this power.

Section 9 is a Henry VIII power as it can be used to modify both the Immigration Acts and any other enactments.[46] It has no sunset clause.

Section 11(1) – Citizens' rights appeals (Articles 18, 20, 21)

The power in section 11 allows a Minister to make regulations "[providing] for, or in connection with, appeals against citizens' rights immigration decisions". This includes a power to supplement (but not to replace) the availability of judicial review at common law regarding those decisions. It therefore gives effect, more broadly, to the rights of appeal contained in Articles 18, 20 and 21 of the WA with regard to those rights.

The Government's Delegated Powers Memorandum states that this power will be used to allow these appeals to be integrated into the work of the First-tier Tribunal (Asylum and Immigration Chamber) with a right of appeal on a point of law to the Upper Tribunal. This would mean a similar appeals process would exist for these types of decision as for other immigration decisions.

The power in section 11 is a Henry VIII power as it can be used to modify any enactment. Subsection 11(5) provides an example of what this might involve, in terms of co-opting or adapting existing statutes connected with immigration appeals. It has no sunset clause.

The Public Law Project has criticised the fact that this power leaves much of this scheme to Ministerial initiative in secondary legislation. In its October 2019 briefing, it said:

> PLP is concerned that clause 11 does not go far enough. In particular, it does not impose an obligation on Ministers to make such Regulations or to provide for appeal rights for all applicants under the Scheme. A failure to do so in respect of those falling within the scope of the Withdrawal Agreement would be incompatible with the directly effective rights in the Agreement. EU citizens should not have to rely on those rights to secure a right of appeal and the Bill should be amended to provide on its face for a right appeal, rather than leaving the matter to Ministerial discretion and secondary legislation.[47]

The Immigration (Citizen's Rights Appeals) (EU Exit) Regulations 2020 were made using this power on 27 January 2020.

Section 12 – Professional qualifications (Articles 27-29)

A Minister can make regulations considered "appropriate" to implement Chapter 3 of Title 2 of Part 2 of the WA. Articles 27-29 concern the continued mutual recognition of professional qualifications.

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46 It is not clear why the Government distinguished in this section between the Immigration Acts and enactments generally, but it appears not to make any practical difference.

47 Public Law Project, Preliminary Briefing on the European Union (Withdrawal Agreement) Bill, 22 October 2019, para 11

The power is a Henry VIII power, as it can modify any enactment unless it would amend an Act of Parliament passed after IP completion day.

Section 13 – Social security co-ordination (Articles 30-36)

A Minister can make regulations considered "appropriate" to implement (or support the implementation of) Title 3 of Part 2 of the WA. This title, containing Articles 30-36, concerns the arrangements for continued co-ordination between social security systems.

The power is a Henry VIII power, as it can be used to modify any enactment. It has no sunset clause. The House of Lords Constitution Committee questioned why these provisions were not time-limited:

> 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.[48]

Section 14 – Equality provisions (Articles 12, 23-25)

A Minister (or a devolved authority) can make regulations considered "appropriate" to implement the following Articles of the WA:

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

The power is a Henry VIII power as it can be used to modify any enactment. It has no sunset clause.

Part 3 of the WA (Separation Issues)

Sections 18 and 19 – General power on Separation Provisions

Part 3 of the WA sets out in detail arrangements for thirteen distinct matters. This part of the WA aims to provide clarity and continuity in the days and months immediately following the end of the transition period.

For example, it sets out how goods, which have entered the UK or EU markets before the end of transition, are to be treated immediately after it. It provides a technical basis for winding down ongoing processes and arrangements for cooperation in matters of customs, VAT and Excise Duty, intellectual property and police and judicial cooperation.

Section 18 inserts section 8B into EUWA. It confers a general power for Ministers, by way of regulations, to make "appropriate" provision in connection with the implementation of Part 3 of the WA.

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[48] House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 57

Section 19 grants devolved authorities equivalent powers, so far as the implementation of Part 3 concerns areas that would otherwise fall within devolved competence.

Both of these powers are Henry VIII powers, because they can make any provision that could otherwise be made by an Act of Parliament. Neither has a sunset clause. However, the powers are limited in similar ways to the powers in section 8 of EUWA, as they cannot be used to:

- impose or increase taxation;
- make retrospective provision;
- create a relevant criminal offence;
- establish a public body;
- amend, repeal or revoke the *Human Rights Act* or subordinate legislation made under it; or
- amend or repeal (parts of) the devolution statutes (with limited exceptions).

Part 4 of the WA (Transition Period)

There are two senses in which section 1 of the WAA contains a delegated power connected with implementation of the WA. One power is entirely new, and is addressed directly in the Government's Delegated Powers Memorandum. The other is more subtle, and concerns the effective retention and modification of an existing delegated power that would otherwise have lapsed.

Section 1 - the power to exclude international agreements from the definition of EU treaties

It is possible that the UK Government might conclude treaties:

- during the transition period;
- with third countries (with whom the EU has an analogous treaty); and
- which the EU agrees should be able to enter into force before the end of the transition period.

Since section 1 takes a "snapshot" of the definition of "EU treaties" for the purpose of following EU law during transition as at exit day, this list therefore could, theoretically at least, go out of date and incorporate treaty obligations by which the UK is no longer bound.

To ensure the UK is only implementing EU law during transition to the extent required by the WA, Ministers will have the power to modify the definition of EU treaties to reflect such changes.

The Government's Delegated Powers Memorandum maintains that this provision is not a Henry VIII power. However, the definition of EU treaties is, at first instance, set out in primary legislation, and this represents a power to modify the effect of that statutory provision.

Section 1 – preserving the effects of an existing delegated power

The broader effect of section 1 of the WAA (which inserts section 1A into EUWA) is to retain the effect of (most of) the ECA despite its repeal. This is done so the UK honours its obligations during the transition period in the same way it did as a Member State.

The retention of the effect of the ECA means section 2(2) ECA (the power to make regulations to implement EU obligations) is (in a modified form) preserved. Under EUWA *as enacted* that power would simply have expired on exit day. Section 1 WAA therefore effectively resurrects a delegated power to implement obligations in the WA for the purposes of transition. The power is for practical purposes as broadly drawn as that contained in the ECA. It is therefore a Henry VIII power, since it can modify any enactment. However, unlike the power in the original section 2(2) ECA, its effect is inherently limited, as the relevant saving provisions are themselves repealed on IP completion day.

Sections 2- 4

Under section 1B of EUWA (inserted by section 2 of WAA), EU-derived domestic legislation is saved from repeal or revocation during the transition period. The section also provides a framework of rules for interpreting that legislation ("glosses") so that domestic law reflects the fact that the UK is following EU law because of the WA, rather than as a Member State.

That framework of rules is imperfect, and there will be some instances where applying those rules would lead to unclear or unintended results. Without some flexibility in the legislation, this may have caused the UK to breach its obligations under the WA.

It is because of this that section 8A of EUWA (inserted by section 3 of WAA) confers a regulation-making power on Ministers. They will be able to provide additional or replacement "glosses" to support the interpretation of EU-derived domestic legislation on a case-by-case basis. This might be understood as being similar to the "correcting power" in section 8 of EUWA. The main difference is that this "glossing" power supports the implementation of treaty obligations, rather than deals with the consequences of their absence.

Section 8A(1)(e) of EUWA also provides Ministers with a broad power to make "appropriate" provision in connection with Part 4 of the WA (i.e. in connection with the transition period). This power is a Henry VIII power because it can be used to modify an enactment. However, it cannot amend primary legislation passed after IP completion day and cannot be used at all more than two years after IP completion day.

Section 4 of WAA inserts provisions into Schedule 2 of EUWA conferring analogous powers on devolved authorities where and to the extent that giving effect to the transition period falls within devolved competence.

Protocol on Ireland/Northern Ireland

Sections 21 and 22

The Protocol on Ireland/Northern Ireland is a set of unique arrangements in the WA designed to avoid a "hard border" on the island of Ireland. Sections 21 and 22 of WAA confer powers on UK Ministers and devolved authorities (respectively) to make domestic provision implementing that part of the WA. They insert section 8C and Part 1C of Schedule 2 (respectively) into EUWA.

Ministers may by regulations make "appropriate" provisions to implement the Protocol. Section 8C includes a Henry VIII power because it can be used to do anything an Act of Parliament could do, including modifying EUWA itself. The power also has no sunset clause.

This Henry VIII power is, in some respects, less restricted than others in EUWA. Unlike section 8 (the correcting power) and section 8B (the separation issues power) nothing in section 8C stops regulations from:

- imposing or increasing taxation;
- making retrospective provision;
- creating relevant criminal offences;
- establishing public bodies;
- amending, repealing or revoking the *Human Rights Act* or subordinate legislation made under it; or
- amending or repealing (parts of) the devolution statutes.

Of this, the House of Lords Constitution Committee said in its report:

> 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.[49]

The Delegated Powers and Regulatory Reform Committee similarly said:

> The fact that these important limitations are missing from section 8C may suggest that the Government propose to use the powers under clause 21 to do one or more of the things on the above list. The Government have not justified the difference in approach as between sections 8 and 8B of the 2018 Act (on the one hand) and section 8C (on the other). The House may wish therefore to seek a justification from the Minister for this difference in approach.[50]

An earlier Library Briefing Paper, Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland, 08720, 23 October 2019, discusses these provisions in detail.

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49 Ibid. para 90

50 House of Lords Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal Agreement) Bill, HL Paper 3, 9 January 2020, para 23

7.4 Direct implementation in WAA

The general approach of the Government has been to provide for detailed implementation of the Withdrawal Agreement through secondary legislation. A common criticism of resorting to secondary legislation is that key provisions in a policy area should be apparent on the face of an Act of Parliament. This normally means that those arrangements are better protected against further modification by Ministers and receive more Parliamentary scrutiny before being made.

Section 10 – Retention of existing grounds for deportation

One instance where implementation was done by directly amending primary legislation is section 10 of WAA. It amends the *Immigration Act 1971* and *UK Borders Act 2007* to ensure domestic law is compatible with the separation agreement's restrictions on deportation.

UK law on deportation generally allows individuals to be removed where it would be conducive to the public good. However Article 20 of the WA imposes more stringent conditions on deportation decisions, where they relate to an individual's conduct prior to the end of the transition period. Section 10 of WAA clarifies that section 3 of the *Immigration Act 1971* cannot be used in a way that would be incompatible with the separation agreements, and disapplies certain automatic deportation provisions in the *UK Borders Act 2007* where they would be incompatible with the WA.

Section 15 and Schedule 2 – Independent Monitoring Authority

Another notable exception, where primary legislation rather than secondary legislation is used to implement the separation agreements, concerns the Independent Monitoring Authority (IMA). The main arrangements for that new body are in Schedule 2 of WAA. The Schedule sets out in considerable detail the structure and membership of the IMA, how it is to be staffed, its constitutional status as an independent body, how it must be funded, and its core functions.

However, even within this arrangement, the Secretary of State can still take decisions by way of delegated powers.

Paragraph 39 Schedule 2 – Transferring functions of the IMA

The Secretary of State may, by regulations transfer the Independent Monitoring Authority's functions to another public body. This power was not included in the October 2019 version of the Bill.

Before the power can be used, certain bodies must be consulted (including the devolved authorities and, where relevant, the Government of Gibraltar). The power is a Henry VIII power as it can be used to modify any enactment. It has no sunset clause.

The House of Lords Constitution Committee criticised this delegation of power:

> [It] 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 o 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.[51]

Paragraph 40 Schedule 2 – Abolition of (the functions of) the IMA

The Secretary of State may by regulations abolish any function of the IMA or abolish the IMA itself where it "appears" that the WA no longer requires the relevant functions, or the IMA itself, to continue to exist. Unlike paragraph 39, this provision did appear in the original October 2019 version of the Bill.

The Government's justification for this power is that the IMA only exists where and to the extent that the WA requires it. Article 159 WA allows the Joint Committee to authorise the abolition of the IMA 8 years after the end of the transition period. Domestic law therefore provides a specific mechanism for winding-up the IMA.

The power is a Henry VIII power as it can be used to modify any enactment. It has no sunset clause.

[51] House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 62

8. Retained EU law after transition

Summary

The original *EU (Withdrawal) Act 2018* prepared the UK statute book for leaving the EU on "exit day" (originally 29 March 2019, later 12 April 2019, 31 October 2019 and 31 January 2020). This needed most, but not all, EU law to be converted and preserved as a UK domestic-only equivalent, ensuring legal continuity (to as great an extent as possible) when the EU Treaties ceased to apply to the UK.

Since the Withdrawal Agreement includes a transition period, and this is given effect to by preserving the effect of the ECA despite its repeal, these arrangements now must be postponed. The way the *EU (Withdrawal Agreement) Act 2020* does this means developments in EU law that become operative during the transition period will be retained in UK law at the end of transition.

One of the additional consequences of the WAA is that the sunset clauses on delegated powers originally conferred in the EUWA have been extended. Where powers would have expired two, five or ten years after exit day, they will now expire two, five, or ten years after IP completion day. Their existence has therefore been extended by at least 11 months.

Another change that has been made by the WAA is completely unrelated to the existence or otherwise of the transition period. The changes had not been proposed in the original October 2019 version of the Bill but were added to the December 2019 version introduced after the General Election.

Section 26(1) of the WAA amends section 6 of the EUWA. Section 6 sets out the rules for how UK courts should interpret retained EU law, and how they should treat CJEU caselaw in that endeavour. Whereas the original Act had only allowed the UK Supreme Court (and the High Court of Justiciary in Scottish criminal proceedings) to depart from CJEU caselaw in this context, other courts may now depart where Ministers have made regulations to that effect. This change has attracted criticism because of its implications for the hierarchy of the UK courts system and the possibility that legal uncertainty would result from inconsistent or contradictory interpretation of the same body of law.

8.1 Original rules in EUWA

The *EU (Withdrawal) Act 2018*, as enacted, would have repealed the ECA "on exit day". The main effect of repeal of that Act is to end the domestic recognition of the supremacy and direct applicability and effect of relevant EU law under the EU Treaties. While the UK was a Member State, this recognition happened under section 2(1) of that Act.

Consequences of not retaining EU law

In the absence of saving provision, repeal of the ECA on exit day would have had several important additional consequences.

Firstly, repeal of the ECA would have revoked any secondary legislation made under it, as the basis in primary legislation for making those instruments would have been removed. The ECA contained a broad power in section 2(2) under which Ministers and devolved authorities could change domestic law. The purpose for this power was to implement, or to support the implementation of, EU law in the UK.

Secondly, EU legislation, such as regulations, decisions, tertiary legislation, and directives, would not apply to the UK or form part of UK law. Without section 2(1) of the ECA and an active treaty-based

relationship with the EU, they are not given effect to in and do not themselves form part of UK law. In some cases other UK legislation would have replicated those EU laws, or otherwise supported their implementation, but this would be situation specific and not automatic.

Thirdly, the EU Treaties themselves confer in Member States certain other directly applicable rights, powers, liabilities, obligations, restrictions, remedies and procedures in domestic law, and give direct effect to certain provisions of directives whose implementation date has passed. These are given effect by virtue of section 2(1) of the ECA and do so independently of whether the EU has made additional legislative acts in the area concerned. These rights would no longer be enforceable in UK courts unless they were "saved" despite the repeal of the ECA.

How EUWA retains EU law

To ensure that most of the substance of this law would continue to operate after the UK left the EU, EUWA proposed to take a snapshot of EU law as it was immediately before exit day, and to save it in domestic law. The law saved by sections 2-4 of EUWA is called "retained EU law". A brief overview of these arrangements is set out in Box 2.

Making changes to retained EU law

EUWA did not just provide the arrangements to establish the body of retained EU law. It also included delegated powers to correct "deficiencies" resulting from that process.

For example, if a retained EU regulation referred to an EU-wide enforcement agency, which would no longer have powers in respect of the UK, it would need to be updated so that those functions were (if relevant) exercised by a domestic enforcement agency.[52]

The "correcting" power in section 8 of EUWA was (when first enacted) a time limited one: it would expire two years after exit day.

For a more comprehensive explanation of how the original EUWA arrangement was designed to work see Commons Library Briefing Paper, The status of "retained EU law" 08375, 30 July 2019.

[52] A non-exhaustive list of what constitutes a "deficiency" is set-out in section 8(2) of EUWA.

Box 2: Retained EU law – an overview

As enacted, the *EU (Withdrawal) Act 2018* identifies different sources of EU law and takes a "snapshot" of them "on exit day". These sources of law are then preserved as or, where relevant, converted, into a domestic form of law. The law that is preserved or converted by sections 2-4 of EUWA is collectively known as "retained EU law".

The *EU (Withdrawal Agreement) Act 2020* delays the point at which the "snapshot" of EU law is taken. Instead of the preserving and converting of different sources happening "on exit day" it will instead happen "on IP completion day" (i.e. at the end of the transition period rather than when the UK formally leaves the EU).

Section 2 – EU-derived domestic legislation

Section 2 of EUWA saves EU-derived domestic legislation from repeal. This includes law passed in the UK to implement, or support the implementation of, the UK's obligations under EU law. It includes certain UK Acts of Parliament, Acts of the devolved legislatures, and statutory instruments. Most notably, it includes statutory instruments made under section 2(2) of the ECA.

Section 3 – direct EU legislation

Section 3 of EUWA converts (with certain exceptions) direct EU legislation into a domestic equivalent called "retained direct EU legislation". It consists of EU regulations, EU decisions and EU tertiary legislation, as well as certain parts of the EEA agreement. It does not include EU directives, which will have already been implemented into UK domestic legislation.

Retained direct EU legislation is subdivided into "principal" and "minor" legislation. This distinction is analogous (but not identical) to the distinction between primary and secondary legislation that already exists in UK law, and affects whether secondary legislation can subsequently modify or repeal it.

Section 4 – residually retained EU law

Section 4 of EUWA converts (with certain exceptions) any remaining rights, powers, liabilities, obligations, restrictions, remedies and procedures, that previously would have been given effect in domestic law under section 2(1) of the ECA into a domestic equivalent.

This retains directly applicable treaty rights and preserves the more limited direct effect of directives whose implementation date has passed but which have not yet been implemented in domestic law. It also preserves, with certain exceptions, the principles of EU law as previously recognised and enforced.

Section 5 and Schedule 1 – exceptions to retention

Section 5 and Schedule 1 carve out specific exceptions to the retention of EU law. Notable exceptions to the retention of EU law include the Charter on Fundamental Rights, the exclusion of the principle of supremacy of EU law for post-exit (now post-transition) enactments, and the exclusion of *Francovich* damages under the principle of state liability.

Section 6 – interpretation of retained EU law

Section 6 sets out the rules for interpreting retained EU law, and the default rule that courts are not bound by the post-exit (now post-transition) rulings of the Court of Justice of the European Union (CJEU) and cannot from exit day (now post-transition) refer matters to it.

UK courts can continue to have regard to future CJEU rulings, however (i.e. they are persuasive authority) and are expected to interpret retained EU law (so far as unmodified) in accordance with the retained caselaw and general principles of EU law.

The Supreme Court (and in Scotland, the High Court of Justiciary in criminal matters) additionally can depart from CJEU precedent in the same way as they would depart from their own precedent from time to time.

Section 26 of the *EU (Withdrawal Agreement) Act 2020* also inserted subsection 6(5A), which (until IP completion day) enables Ministers (by regulations) to specify if and how courts can depart from CJEU caselaw, and what test or tests a court must use in deciding whether to do so.

Section 7 and Schedule 8 – status of retained EU law

Section 7 explicitly sets out when primary legislation must be used to modify, repeal or revoke retained EU law, and when secondary legislation is instead sufficient. Schedule 8 provides that retained direct principal EU legislation is to be treated as though it were primary legislation for the purposes of the *Human Rights Act 1998*.

8.2 Impact of WAA

The *EU (Withdrawal Agreement) Act 2020* changes the approach adopted in EUWA in a number of important respects.

Delaying the creation of retained EU law

First and foremost, section 25 of WAA delays the conversion process and the coming into force of retained EU law. It does this because the UK will continue to follow EU law on a dynamic basis as though most of the ECA had not been repealed until the end of the transition period. Allowing "retained EU law" to come into force prematurely could have created legal uncertainty given it does not track EU law dynamically.

The delay to the provisions was achieved (in essence) by replacing the phrase "exit day" with the phrase "IP completion day" wherever it appeared in sections 2 to 7 of EUWA.

This approach has an important side-effect as to what is included in "retained EU law". Developments in EU law that become "operative" during transition will not just be followed until at least the end of 2020 but will also form part of retained EU law thereafter. This would include:

- any new primary legislation passed by the UK Parliament or a devolved legislature, which implements or supports the implementation of, any international obligation the UK has by virtue of the transition period;
- any new secondary legislation made by the UK Government or the devolved authorities, which implements or supports the implementation of, any international obligation the UK has by virtue of the transition period;[53]
- any EU regulation, decision or tertiary legislation, becoming operative after exit day but before IP completion day;
- any EU directive which is capable of having direct effect, passed before (or after) exit day, for which the implementation date falls between exit day and IP completion day; and
- any new caselaw of the Court of Justice of the European Union (CJEU) where a ruling has been handed down after exit day but before IP completion day.

Extending and expanding the power to make corrections

The WAA widens the range of "deficiencies" for which section 8 regulations can be made. Section 8 regulations can now be made for purposes connected with the expiry of the transition period, or in light of the WA more widely.

[53] Section 1A of EUWA preserves section 2(2) of the ECA in a modified form until the end of the transition period. The UK Government and devolved authorities therefore will have a general power to make regulations to meet the UK's obligations under the Withdrawal Agreement until the end of transition. Any such regulations will then form part of retained EU law on IP completion day.

The House of Lords Constitution Committee described the provisions expanding the scope of section 8 regulations in this way as creating "vague and potentially important new categories of deficiencies":

> Neither the Explanatory notes nor the Delegated Powers Memorandum make clear why such provisions are required… 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.[54]

The power to make regulations under section 8 is still time limited following the passage of the WAA, but now expires two years after IP completion day, rather than two years after exit day.

Changes to the treatment of retained CJEU caselaw

The original *EU (Withdrawal Agreement) Bill*, introduced in October 2019, did not propose significantly to alter the way that retained EU law would be interpreted by the UK courts. Arrangements had already been put in place in section 6 of EUWA.

The original rules in EUWA

Those arrangements required domestic courts generally to follow retained EU caselaw, so far as retained EU law had not been modified, and only allowed the UK Supreme Court (or the High Court of Justiciary in Scottish criminal proceedings) exceptionally to depart from it. Lower courts, including the English Court of Appeal and the Inner House of the Court of Session in Scotland, would have had to follow retained CJEU caselaw except where the Supreme Court had already departed from it, or where the substance of the retained law had since significantly changed through legislation.

The justification for this approach had been that, while not binding the domestic courts absolutely to the past rulings of the CJEU, there still needed to be an internal consistency of interpretation of retained EU law by UK courts. When dealing with other matters of domestic law, lower courts, as a matter of course, are bound by those above them.

The changes brought about by the December Bill

The December 2019 version of the *EU (Withdrawal Agreement) Bill*, however, included provisions which would change this arrangement, and those new proposals form part of the *EU (Withdrawal Agreement) Act 2020*.

Section 26(1) of the WAA allows a Minister to specify, in regulations, the circumstances in which **any** court or tribunal (not just one of the two domestic courts of last resort) is not to be bound by retained EU caselaw. It then allows that Minister to specify both the extent to which the court is not bound by that caselaw, and what test should be adopted by the courts when deciding whether to depart from the relevant retained EU caselaw.

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54 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 110

Regulations of this kind are subject to the affirmative procedure (i.e. they must be approved by both the House of Commons and the House of Lords). The Minister must also consult several senior members of the judiciary before making regulations but does not need their agreement.

The power to make regulations is time limited: it can only be exercised before IP completion day. However any regulations made will only be relevant to how courts and tribunals interpret retained EU law (i.e. law that only comes properly into existence after IP completion day).

House of Lords reaction to the (then proposed) changes

Members of the House of Lords were very critical of this provision when it considered the *EU (Withdrawal Agreement) Bill* in January 2020. The Constitution Committee said of it in its report:

> If the meaning of UK law, as retained EU law will become after [IP completion] day, is to be altered, it should be for Parliament to change, not for ministerial guidelines to reinterpret.
>
> We do not believe it is appropriate for courts other than the Supreme Court and the Scottish High Court of Justiciary to have power to depart form 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.
>
> We do not believe the proposed consultation with senior members of the judiciary on the applicable tests for departures is an adequate substitute for determination of such issues in adversarial proceedings in open court, open to interventions and with the assistance of counsel.
>
> 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.[55]

The Lords amended the Bill at Report Stage so as (at least in part) to reverse this new proposal. Lord Beith's amendment effectively removed the power to make regulations enabling or causing courts to diverge. Lord Mackay's amendment proposed that instead of the Government's approach, a lower court should be required to refer a case to the UK Supreme Court (or the High Court of Justiciary where relevant) before any decision was taken to depart from retained CJEU caselaw.

The Government rejected this alternative and persuaded the House of Commons to overturn both amendments during "ping pong". The Government had earlier appeared to be willing to table a compromise amendment, along similar lines to Lord Mackay's proposal, and a draft Government amendment was circulated to several members of the House of Lords. However, no compromise amendment materialised.[56]

It remains to be seen whether, how, and how extensively this new Ministerial power will be used.

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55 Ibid. paras 105-108

56 HL Deb 20 January 2020 Vol 801 c982

9. Scrutiny and accountability

Summary

A core constitutional function of Parliament, beyond passing legislation, is to scrutinise the policy and administration of the Government of the day. Both Houses of Parliament have established scrutiny functions, whereby they can ask questions of Ministers, facilitate debates on matters of interest, force Ministerial statements and pass resolutions calling on the Government to pursue certain courses of action. Parliamentary committees also take evidence and report on Government activity and matters of public concern, to hold the Government to account and to influence its future actions.

Beyond this, however, Parliaments is often given statutory functions that aid its role in scrutinising and influencing the Government. Scrutiny and approval powers over secondary legislation made by Government Ministers is a prominent example of this.

In the Brexit context, it has often been argued by MPs (and Peers) that Parliament should have a more robust role in scrutinising and influencing the Government, and that sometimes this should be underpinned by statutory powers and responsibilities. These different forms of scrutiny apply to a wide range of challenges. They include scrutiny of:

- the transition period and legal developments during it;
- bilateral decisions of the Joint Committee (under the Withdrawal Agreement); and
- changes to retained EU law, especially where legal rights or standards might be regressed from.

Given that Brexit Acts often delegate broad powers to Ministers, attention and debate has focused on how best to protect Parliament's legal and practical ability to scrutinise secondary legislation.

9.1 Different types of government activity

The role of Parliamentary scrutiny in relation to Brexit has come up in several different but overlapping contexts:

- scrutiny of international negotiations with the EU and other international actors (e.g. on the future UK-EU relationship);
- scrutiny of decisions taken in connection with the Withdrawal Agreement treaty (e.g. those of the Joint Committee including over extension of the transition period);
- scrutiny of developments in EU law, which the UK must follow, during the transition period;
- scrutiny of developments in retained EU law after the transition period, especially in areas where there is the possibility of UK "regression" on EU standards (e.g. re workers' rights and environmental protection)
- technical and policy scrutiny of statutory instruments made in connection with withdrawal (mostly but not exclusively those made under Acts directly concerned with Brexit); and
- scrutiny of departmental activity (especially with regard to preparedness for the end of the transition period).

In some of these cases, Parliamentarians have argued for statutory provisions to reinforce or supplement core mechanisms to scrutinise and influence Government decision making.

9.2 Scrutinising and influencing international negotiations

We addressed in Section 5 of this paper the arrangements put in place regarding negotiations on the UK-EU future relationship, and Parliament's relatively limited role in that endeavour.

However, the same questions of scrutiny and influence have arisen in the context of similar treaty negotiations with international actors other than the EU. Neither EUWA nor WAA gave Parliament an enhanced statutory role for those kinds of treaty negotiations.

The default position is that the UK Government is responsible for UK policy in those negotiations, and Parliament's role is limited to accepting or rejecting any resulting treaty under the Constitutional Reform and Governance Act (CRAG) after any treaty text has been finalised.

While a Member State, there was a relatively limited role for Parliament in relation to treaties concluded by the European Union with third countries. However, this was not as limited as the role conferred by CRAG. This is because, for certain types of agreement, the UK would need to make a statutory instrument amending the domestic definition of "EU treaties" so that domestic law could give effect to it. Since such an Order must be made under the affirmative procedure, there would have to be a debate and vote in the Commons, which CRAG does not require (as a matter of law).

For example, it was not enough in practice for the UK Government simply to comply with CRAG in order to give effect to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The UK Government also had to pass *The European Union (Definition of Treaties) (Canada Trade Agreement) Order 2018*, which needed to be approved by both the House of Commons and the House of Lords. The UK Government did not ratify that EU-negotiated trade agreement until after that Order had been made.[57]

9.3 Scrutinising and influencing Joint Committee decisions

The Joint Committee (JC) is a body set up by Article 164 WA. It takes major legally binding decisions about and under the WA and its implementation. Prior to the passage of the WAA, therefore, there were no arrangements in UK law giving the UK Parliament a role in relation to decisions to be taken by it. Unless and to the extent that the Withdrawal Agreement itself or the WAA provided it, Parliament would have no special role in scrutinising the decisions of the Joint Committee.

The UK Government represents the UK on the Joint Committee. Section 15B of EUWA also specifies that the UK's co-chair of the Joint Committee must be a Minister of the Crown. Otherwise, Parliament is not represented on the Joint Committee. This means that if MPs wished

[57] See also Commons Library Briefing Paper, CETA: the EU-Canada free trade agreement, 07492, 20 May 2019

to compel the UK Government to take certain decisions or only to agree to decisions in a certain way, primary legislation would be needed.

In the absence of primary legislation, Parliament's only means of influence are of a general and indirect character, as with any other matter where its Members would seek to change the policy of the Government of the day. Each House could adopt resolutions, and Committees could make recommendations about what the Government should do, but they cannot, legally, compel a course of action that way.

Extension of the transition period

One of the more controversial powers of the Joint Committee is the power to extend the transition period. Although Article 126 of the WA provides that this expires at the end of 31 December 2020 Central European Time, Article 132 of the WA allows the period to be extended, once, for up to a further two years if both the UK and EU agree in the Joint Committee. The WA requires a decision to be taken no later than 30 June 2020.

The October 2019 version of the *EU (Withdrawal Agreement) Bill* would have given the House of Commons a veto over any proposal to extend the transition period. Its clause 30 would have made it unlawful for a Minister to agree to an extension in the Joint Committee without MPs' consent.[58] Since the Bill fell on dissolution, that provision fell with it.

The December 2019 version of the Bill proposed instead explicitly to prohibit any Minister from agreeing to an extension, regardless of any debates in or resolutions of the House of Commons. Section 33 of the final WAA inserts section 15A into EUWA to that effect.

If Parliament (or the Government) subsequently wishes for there to be an extension, it would therefore have to pass an Act overriding section 15A, allowing or compelling the Ministers to seek and agree to an extension. Such an extension would additionally have to be agreed to by the EU's representatives on the Joint Committee.

The 2017-19 Parliament successfully legislated on two occasions to require an extension of the (slightly different) Article 50 TEU process to be sought and agreed to by the Government of the day. It first passed the *EU (Withdrawal) Act 2019*, which led to the second extension of Article 50 until 31 October 2019. It then passed the *EU (Withdrawal) (No. 2) Act 2019*, which led to the third extension of Article 50 to 31 January 2020.

However, on both occasions the passage of primary legislation required unusual procedural mechanisms, and a degree of cross-party support, to guarantee time for debate on a private member's Bill. Given that the current Government has a clear working majority, and that a clear majority of MPs voted to "prohibit" extension, legislation of that kind in the current Parliament seems less likely regarding the transition period.

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[58] Commons Library Insight, Withdrawal Agreement Bill: Implementing the transition period, 22 October 2019

Use of Withdrawal Agreement written procedure

Section 35 of the WAA inserts section 15C into EUWA. It prohibits the UK's co-chair of the JC from agreeing to the use of "written procedure" when adopting decisions or recommendations under the WA. Written procedures allow decisions to be taken without a physical meeting taking place. Forms of written procedure are often used by the institutions of the EU, including the Council of Ministers and the European Council, where it would be thought inconvenient, impractical or unnecessary to convene a physical meeting.[59]

The Government's explanation for section 35 is that

> This ensures that decisions made by the Joint Committee are made by a Minister in person. The purpose of this provision is to ensure there is full ministerial accountability, including to Parliament, for all decisions made in the Joint Committee.

Monitoring dispute resolution under the Withdrawal Agreement

Under the Withdrawal Agreement, there is a dispute resolution mechanism available for when the parties in the Joint Committee are unable to agree about the treaty's interpretation and application. The WA itself is silent as to what role, if any, Parliament should have in overseeing developments of that kind.

Section 30 of the WAA inserts section 13B into EUWA. It requires the UK Government to keep Parliament updated when certain parts of the dispute resolution mechanism have been invoked. It requires notification and explanation to be given whenever:

- either party has requested that a dispute should go to an arbitration panel (under Article 170 of the WA); or
- the CJEU has ruled on a matter referred to it by an arbitration panel (under Article 174 of the WA).

In both situations, the Government has 14 sitting days within which to comply with this obligation for each House of Parliament.

There is also an annual reporting requirement (after the transition period) in relation to Article 169 of the WA. This concerns the prior consultation phase of dispute resolution that takes place before any arbitration panel is set up, if at all. The Government must, under section 13B(5) of EUWA, publish a report "setting out the number of times" this phase of dispute resolution has been invoked in the preceding year.

As the House of Lords Constitution Committee noted, "th[is] scheme gives no role to each House other than to be notified".[60]

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[59] For example, the third extension of Article 50 was agreed to by written procedure, since no planned or extraordinary summit of the European Council was scheduled and the other 27 EU Member States were minded unanimously to agree to the UK's request for an extension.

[60] House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 114

9.4 Scrutinising transition and developments in EU law

Arrangements while a Member State

National Parliaments have a specific role under the EU Treaties in relation to the scrutiny of proposed legislation. For example, under the subsidiarity control mechanism, those legislatures can raise concerns where they believe a Commission proposal in an area of shared competence does not respect the subsidiarity principle. If enough legislatures raise objections, the Commission must decide whether to persist with, adapt or withdraw their proposal and to explain why. This the "yellow card" procedure. In practice, the Commission often explains why it is proceeding anyway even if the objections threshold is not met.

In 2018, for example, both the European Scrutiny Select Committee of the House of Commons and the European Union Committee of the House of Lords reported on a proposed Directive concerned with Daylight Savings Time arrangements.[61]

Both Committees published reports questioning the evidence base for the proposal and argued that it did not adequately respect the principle of subsidiarity.[62] The House of Commons adopted a resolution agreeing with the conclusions of the European Scrutiny Select Committee, after a debate on the floor of the House, and both Houses received written responses from the Commission.

The purpose of those arrangements at EU level was to provide an "early warning system" as to potentially problematic legislation. However it did not, as such, allow national Parliaments to block new legislative proposals. The key decision-making bodies as to whether a proposal should be adopted would still be the Council of the EU (consisting of representatives of national governments) and the European Parliament (consisting of directly elected MEPs).

Developments during transition affecting the UK

Now that the UK has left the EU, the UK Parliament no longer has a formal role under the EU Treaties (unlike e.g. the German Bundestag).

However, during the transition period, there will be developments in the EU law that the UK must follow (as required by Part 4 of the WA). For example, new EU regulations (whether passed before the UK left the EU or during transition) may come into force in the course of 2020. Some, though not necessarily all, of those developments will then become part of retained EU law under the arrangements provided for under EUWA.

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61 The Commission proposed that Member States should abolish seasonal changes of time in national law (e.g. the UK would no longer have switched bi-annually between GMT and BST). It argued this would support the internal market.

62 House of Commons European Scrutiny Committee, Ending Seasonal Changes of Time Directive, HC 301-xli, 2 November 2018; House of Lords EU Committee, Subsidiarity Assessment: discontinuing seasonal changes of time, HL Paper 200, 22 October 2018

New statutory scrutiny during transition

In the absence of a treaty-based role for the UK Parliament, section 29 of WAA inserts section s13A into EUWA. This provision gives a new role to the European Scrutiny Select Committee in the House of Commons and the European Union Committee in the House of Lords.

Under these arrangements, the Government would have to make time for a debate in the Commons (or Lords) if the relevant Committee reports on certain EU legislation (which may be made during transition) and believes the legislation raises a matter of "vital national interest".

The relevant Committee would be expected to have considered gathering such evidence it considers "appropriate" before reporting and, in the case of the European Scrutiny Select Committee, to have considered consulting any relevant Commons Departmental Select Committees before publishing its report. It would also set out the motion to be debated in the relevant House.

The resulting debates, and any resolutions adopted, would have no legal effects in and of themselves. In particular they would not affect:

- the validity of any EU instrument coming into force and having effect in UK law during the transition period; or
- whether the relevant EU legislation forms part of retained EU law on IP completion day.

It is possible, however, that this "report and debate" mechanism might be used by the Government as one way to identify areas of retained EU law it wishes in future to modify, repeal or revoke.

9.5 Scrutiny of "non-regression" after transition

One of the main differences between "EU law" and "retained EU law" is that the UK Parliament can amend, without limitation, the latter. This is because it is a wholly domestic form of law and is not preserved because of international obligations under a treaty.

In several policy areas, EU law provided minimum standards below which no Member State's national law could fall. Notable areas where this was the case included workers' rights, equality law more broadly, and environmental matters.

After the transition period, and unless and to the extent the Withdrawal Agreement or future relationship treaties provide otherwise, these minimum standards will no longer be enforced in the UK by supranational institutions. If new Acts of Parliament, or Government regulations, modify retained EU law, they could dilute, or even remove entirely, legal standards that were previously protected by EU law.

In the last Parliament, several MPs sought reassurances from the Government that standards would not be "regressed" from in key areas after transition. The October 2019 version of the *EU (Withdrawal Agreement) Bill* included a range of "non-regression" provisions for

workers' rights. These would have required the Government to make a non-regression statement on Workers' Rights for relevant Bills coming before Parliament, similar to statements made for human rights compatibility under the *Human Rights Act 1998*. The Government would also have to explain, if they had decided not to keep pace with developments in the EU law of workers rights, why they had so decided.

The majority Government elected in December 2019 omitted the "non-regression" provisions from the newly introduced *EU (Withdrawal Agreement) Bill*. They therefore do not form part of the final Act. However, the Government has indicated that the broader issue will be revisited in an *Employment Bill* in the coming Parliamentary session.

For further detail on the scrutiny of workers' rights in this context, see Commons Library Insights:

- Withdrawal Agreement Bill: Protection for workers' rights, 22 October 2019; and
- Removal of workers' rights in the new EU (Withdrawal Agreement) Bill, 20 December 2019

9.6 Scrutinising the use of delegated powers

One challenge of legislating for Brexit has been striking the appropriate balance between primary and secondary legislation. This balance is important as it affects how Parliament holds the Government to account for the detail of its policy and how it implements it. The Brexit legislation is notable for the extent to which it relies upon delegated law-making powers, rather than detailed primary legislation, for giving effect to major parts of the Government's programme.

Key questions that have arisen in this context include;

- what (types of) laws can be changed by delegated legislation;
- whether delegated powers are perpetual or time limited;
- what (types of) changes can be made by delegated legislation;
- what form of Parliamentary approval is needed for certain statutory instruments; and
- whether Parliament should be able to insist, on a case-by-case basis, for greater scrutiny of individual statutory instruments.

The approach taken by Parliament to these issues has not been entirely consistent across EUWA and WAA. What follows is an overview of the key differences of approach between the two (otherwise closely connected) statutes. However these issues continue to be relevant to other Brexit legislation and the delegated powers conferred by them. The *Taxation (Cross-border Trade) Act 2018* already confers significant delegated powers in the context of customs arrangements, for example.

Henry VIII powers

Both EUWA and WAA have conferred on Ministers delegated powers that are capable of modifying primary legislation. The House of Lords Constitution Committee explained in its report on the *Legislative and*

Regulatory Reform Bill 2005-06 that, while these types of power are "a well-established feature of the law-making process in this country" they are nonetheless "a constitutional oddity".[63] The Committee identified three core reasons against the widespread proliferation of Henry VIII powers, namely that:

- they undermine Parliamentary sovereignty, as Ministers can override, and sometimes even set aside, Acts of Parliament;
- Parliamentary scrutiny of secondary legislation is less rigorous than of primary legislation; and
- they leave aspects of the statute book more uncertain, as the validity of secondary legislation made using Henry VIII powers can be challenged in the courts whereas Acts of Parliament cannot.[64]

It argued, in that context, that:

- the powers should have clear limits;
- the powers' purposes should be (so far as possible) narrowly prescribed;
- Parliament should be able to scrutinise those instruments to the maximum extent practical; and
- Parliament should have a veto over the use of Henry VIII powers.

It is against that framework that the delegated powers in EUWA and WAA, especially the former statute, attracted considerable attention.

Types of Acts that can be modified

One way that Henry VIII powers can be curtailed is to restrict the types of Act of Parliament they can modify or repeal. For example, section 8 of WAA (a power to make provision in relation to frontier workers' rights under the WA) can only modify the *Immigration Acts* but not other Acts. This more restrictive approach may be adopted where the Government has a clear and comprehensive sense of which Acts are likely to be affected by proposed regulations.

Alternatively, specific Acts may be excluded from a Henry VIII power, perhaps because of their constitutional significance. Some, but not all, of the powers in EUWA and WAA cannot be used to modify the devolution statutes (i.e. the *Scotland Act 1998*, *Government of Wales Act 2006*, and *Northern Ireland Act 1998*) save in limited circumstances. Some also cannot be used to modify the *Human Rights Act 1998* or instruments made under it.

These kinds of restriction are more prevalent in EUWA as enacted than they are in the WAA. They tend (though not always) to be absent wherever a Henry VIII power is directly concerned with implementing non-transition provisions of the WA. They are more common where provisions are concerned with adapting retained EU law for purely domestic purposes.

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63 House of Lords Constitution Committee, Legislative and Regulatory Reform Bill, HL Paper 194, 8 June 2006, para 34

64 Ibid. paras 32-34

Another type of restriction prevents a Henry VIII power from modifying Acts passed from a certain point in the future onwards. For example, the power in section 8A of EUWA (to provide "glosses" on the interpretation of saved EU law during the transition) cannot modify Acts of Parliament passed after IP completion day. Any such Acts seem likely to make retrospective provision, and so would be expected to attract a heightened level of scrutiny in the Public Bills process. Allowing prior delegated powers subsequently to modify them therefore could undermine that scrutiny.

Scoping delegated powers

One of the safeguards against the constitutional risks of Henry VIII powers lies in the definition and scope of the relevant powers. This has prompted Parliamentary debate in at least two contexts in relation to EUWA and the WAA.

Appropriateness v Necessity

A common feature of the delegated powers in the two statutes is that they (mostly) allow Ministers to make provision that they consider "appropriate" for a particular purpose. This means Ministers have broad discretion as to what should be done given an objective. This is also similar to section 2(2) of the ECA, which allowed Ministers to make "appropriate" provision in connection with implementing the UK's obligations as a Member State, and which now allows similar provision to be made for following EU law during transition.

The House of Lords Constitution Committee repeatedly questioned the appropriateness of the "appropriateness" test in relation to the power to "correct deficiencies" in retained EU law. In its January 2018 report into the *EU (Withdrawal) Bill*, it said:

> We are concerned that applying a subjective test of "appropriateness" to a broad term like "deficiency" makes the regulation-making power in clause 7(1) potentially open-ended.[65]

This view was shared by the House of Lords Delegated Powers and Regulatory Reform Committee, which said in its February 2018 report:

> Clause 7, in allowing Ministers to make regulations where they consider it appropriate, allows for substantial policy changes that ought to be made only in primary legislation. **The subjective "appropriateness" test in clause 7 should be circumscribed in favour of a test based on objective necessity**.[66]

Attempts were made in the House of Lords to replace the "appropriateness" test with a "necessity" test, to prevent "policy changes" being made under the guise of technical adaptations. These amendments were overturned when the Bill returned to the House of Commons, however, and did not form part of the EUWA.

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65 House of Lords Constitution Committee, European Union (Withdrawal) Bill, HL Paper 69, 29 January 2018, para 176

66 House of Lords Delegated Powers and Regulatory Reform Committee, European Union (Withdrawal) Bill, HL Paper 73, 1 February 2018, para 12

By contrast, both Committees readily accepted that delegated powers in the *EU (Withdrawal Agreement) Bill* should adopt an "appropriateness" test. The Constitution Committee said:

> 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 in important ways.[67]

The Delegated Powers and Regulatory Reform Committee agreed, giving (broadly) four reasons:

- the context was different from the EUWA because a Minister's subjective view as to what was appropriate is, for most of the WAA's powers, constrained and informed by what the WA requires the UK to do;
- a "necessity" test could be unduly restrictive where there are multiple different ways to implement and support an obligation under the WA. The powers therefore require the exercise of policy, not just technical, judgment;
- an "appropriateness" test will in this case still be construed with reference to context and legislative intent (especially the need to be used compatibly with the separation agreements); and
- given that hundreds of statutory instruments have already been made under the EUWA – and relying on an "appropriateness" test – restricting the WAA's powers to "necessity" could create legal uncertainty, since those regulation-making powers will often be used in connection with each other.[68]

Reserving certain types of decision for primary legislation

Another feature of EUWA and WAA is the prohibition on Henry VIII powers from doing certain things, even where regulations can modify or repeal primary legislation. Section 8's correcting power cannot be used:

- to impose or increase taxation or fees;
- to make retrospective provision;
- to create a relevant criminal offence; or
- to establish a public authority.

Normally these courses of action would be undertaken via specific primary legislation. For the first three restrictions, this is because they interfere with the rights and liberties of individuals and/or have significant rule of law implications. As for the fourth, the creation of public bodies has significant implications for resourcing and accountability of Government activity.[69]

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67 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 49

68 House of Lords DPRRC, European Union (Withdrawal Agreement) Bill, HL Paper 3, 9 January 2020, para 6

69 Note, however, that section 8 regulations can transfer or modify functions of existing public bodies. See also Commons Library Briefing Paper, Public Bodies, 08376, 8 August 2018, pp. 12-13

Section 21 of WAA (inserting section 8C of EUWA) attracted attention from both the House of Lords Constitution and DPRR Committees. They noted, and sought an explanation for why, the above constraints were absent from the general power to implement the Protocol on Ireland/Northern Ireland. Both Committees pointed out that the *EU (Withdrawal Agreement) Bill* had included those restrictions for another general implementing power (section 8B) concerned with implementing the separation issues part of the Withdrawal Agreement.[70]

Sunset provisions

One of the ways Parliament restricted Henry VIII powers (and indeed delegated powers more generally) in EUWA as enacted was to include sunset provisions. These impose time limits on the use of delegated powers, though sometimes in different ways.

A sunset provision might stipulate that a power can no longer be used after a certain point in time, meaning that future changes of that kind would have to be made via a further Act of Parliament. Alternatively, or even additionally, a statute might specify that the regulations made under a delegated power can only have temporary effects.

The appropriateness of a sunset provision will depend to a significant extent on what a delegated power is intended to achieve. For example, most of the Henry VIII powers in WAA are not time limited, because they enable Ministers to implement international obligations that are long-term or perpetual in character.

By contrast, the power in section 8 of EUWA for Ministers to make "corrections" to retained EU law expires two years after the end of transition. This is because – by that point – the Government can reasonably be expected to have identified most, if not all, of the areas in which genuine problems that have arisen from converting EU law into a domestic-only equivalent. The reason for continuing to confer a potentially broad power is thus less readily apparent.

Although the powers in EUWA (as enacted) are more likely to have sunset provisions than those in or added by WAA, there are exceptions to this rule of thumb. The power to make regulations concerning when courts are bound by retained CJEU caselaw (in section 26(1) of WAA) cannot be used after IP completion day, even though courts will, in practice, only be confronted with cases turning on retained EU caselaw after IP completion day. This is an example of a sunset provision being used (in part) to limit the risk of retrospective decision-making.

One notable feature of the WAA was the extent to which it replaced "exit day" with "IP completion day" in many provisions of EUWA (to delay certain changes in light of transition). This substitution also affected several sunset provisions, which would have otherwise extinguished certain delegated powers 2, 5 or 10 years "after exit day". Those powers have been extended for (at least) a further 11 months.

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70 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 90; House of Lords DPRRC, European Union (Withdrawal Agreement) Bill, HL Paper 3, 9 January 2020, para 21

Forms of procedure used for statutory instruments

Generally though not always, the level of scrutiny given to secondary legislation by Parliament is less than for primary legislation. Public Bill procedure has several stages (in both Houses) to allow distinct debate on both the principles and the detail of proposals. It also provides the opportunity for amendment and reconsideration.

Secondary legislation, by contrast, involves at most a binary choice for Parliament: whether to approve or to reject the making of an instrument (under the draft affirmative procedure). Sometimes Parliament can only annul instruments already made if Parliamentary time allows (under the negative resolution procedure).

In both cases Parliamentary committees can take evidence and report on the contents of legislation, but in the case of secondary legislation typically less time is available to do so. This is part of the reason why resorting extensively to delegated powers (and especially to Henry VIII powers) can be considered constitutionally and practically contentious.

The form of procedure to be used for each instrument to be made under EUWA is set out in Schedule 7. The "default position" in relation to its broader delegated powers, is that the Government has a choice of whether statutory instruments should be subject to the affirmative procedure or the less onerous negative procedure. This is the general position, for example, in relation to section 8 (the correcting power) and section 23(1) (the power to make consequential provision). However, where section 8 powers would be used:

- to transfer to a UK public authority the analogous function of an EU entity or public authority;
- in connection with a fee in respect of a function exercisable by a UK public authority;
- to create or widen the scope of a criminal offence;
- to create or amend a power to legislate;
- in connection with a class of deficiency defined by a Minister in regulations (rather than one set-out in statute itself);

the affirmative procedure must be used.

In certain "urgent cases" regulations can be made under (among others) section 8 without prior Parliamentary approval. A Minister must make a declaration as to the urgency of the matter at hand and lay the regulations before Parliament. If, after 28 days (excluding any prorogation, dissolution or an adjournment of more than 4 days) both Houses of Parliament have not approved the instrument in question, it lapses. This is known as the "made affirmative" procedure.[71]

[71] For example, the Secretary of State for the Environment, Food and Rural Affairs *made* *The Agricultural Products, Food and Drink (Amendment) (EU Exit) Regulations 2019* on 21 October 2019. They were described as urgent because of the need for them to be in place by the (then) EU exit day of 31 October 2019. Because of dissolution and the Christmas adjournment, the regulations remained in force until 14 January 2020, but then lapsed in the absence of Parliamentary approval.

By contrast, the approach adopted for delegated powers in the WAA is different. For a range of powers concerned with citizens' rights, the first sets of regulations are to be subject to the affirmative procedure. For the first set of regulations concerned with immigration appeals under section 11, the regulations are to be "made affirmative" and lapse 40 days after they are made in the absence of Parliamentary approval.

Thereafter, the WAA's litmus test for whether the affirmative procedure is needed is whether a regulation would amend, repeal or revoke either primary legislation or retained direct principal EU legislation (e.g. retained EU regulations). If not, SIs are made subject to annulment (i.e. the negative procedure). This applies to the range of delegated powers connected with citizens' rights and Part 3 of the WA (separation issues).

Additionally, the affirmative procedure must be used more often in connection with new section 8C of EUWA (re implementing the Protocol on Ireland/Northern Ireland). If regulations would:

- establish a public authority;
- relate to a fee in respect of a function exercisable by a public authority in the United Kingdom;
- create, or widens the scope of, a criminal offence;
- create or amends a power to legislate;
- facilitate the access to the market within Great Britain of qualifying Northern Ireland goods; or
- define "qualifying Northern Ireland Goods".

The powers in Schedule 2 WAA allowing the Independent Monitoring Authority and its functions to be reallocated, modified or abolished also require the affirmative procedure to be used.

Sifting arrangements for proposed negative statutory instruments

Arrangements made under the EUWA

One of the major procedural concessions made by the Government during the passage of EUWA, given the expected high volume of negative statutory instruments, was to create a "sifting procedure" in Parliament as an additional layer of scrutiny.

The powers under sections 8 and 23(1) of EUWA would not (normally) allow Government Ministers to make an instrument immediately under the negative procedure. Instead, they would have to "propose" that it should be made as a negative instrument. It would then have to allow a Committee of each House up to ten sitting days to consider the instrument and to recommend whether it should instead be "upgraded" to a draft affirmative instrument.

A new (temporary) Standing Order (approved 16 July 2018) created the European Statutory Instruments Committee in the Commons to discharge this new function. Its remit was renewed in the 2019 Parliament on 3 February 2020. The equivalent role in the Lords was to be discharged by the existing Secondary Legislation Scrutiny Committee.

The conclusions of the Committees would not be binding but if the Minister disagreed with the conclusion of either Committee, he or she must explain why in writing before making the instrument.

Absence of sifting in the WAA

Both the DPRR and Constitution Committees of the House of Lords criticised the absence of a sifting mechanism for the new powers in the *EU (Withdrawal Agreement) Bill*. The DPRRC noted:

> A striking feature of the Brexit statutory instruments made under the 2018 Act is the high proportion of affirmative instruments that have been laid. Out of more than 500 instruments laid since 2018, more than 50% have been subject to the affirmative procedure.[72]

It saw the approach taken by the Government to WAA as a step back in terms of accountability, as it relied too heavily on the form of regulations, rather than their substantive impact:

> Regulations that are otherwise of minor importance but amend one provision of primary legislation will trigger the affirmative procedure. By contrast, significant regulations that do not happen to amend either primary legislation or retained direct principal EU legislation merely trigger the negative procedure.[73]

It recommended that:

> A sifting mechanism along the lines of the one in Schedule 7 to the 2018 Act should apply to instruments laid under this Bill that do not otherwise qualify for the affirmative procedure. This would allow a sifting committee to recommend an upgrade to the affirmative procedure where regulations are significant but do not happen to modify primary legislation or retained direct principal EU legislation.[74]

The House of Lords Constitution Committee agreed.[75]

Amendments debated in the House of Lords could have extended Schedule 7's sifting arrangements to statutory instruments made under the WAA's powers. However, the Government resisted them for several reasons, outlined by Lord Callanan during the Lords Committee Stage. His three arguments against a sifting mechanism were that:

- far fewer instruments would be made under WAA powers;
- the powers themselves would be narrower and more specific than those in the EUWA; and
- the WAA does not grant Ministers discretion as to which procedure to use when making regulations, unlike the EUWA.[76]

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72 House of Lords DPRRC, European Union (Withdrawal Agreement) Bill, HL Paper 3, 9 January 2020, para 12
73 Ibid. para 13
74 Ibid. para 16
75 House of Lords Constitution Committee, European Union (Withdrawal Agreement) Bill, HL Paper 5, 14 January 2020, para 69
76 HL Deb 16 January 2020 Vol 801 cc905-907

10. Impact on devolution

Summary

Brexit legislation has had a major impact on the devolution settlements of Scotland, Wales and Northern Ireland. The *EU (Withdrawal) Act 2018* and *EU (Withdrawal Agreement) Act 2020* affect the parameters of devolved competence both during the transition period and beyond it. They also confer significant delegated powers on devolved authorities: Scottish Ministers, Welsh Ministers, the First and deputy First Ministers of Northern Ireland and Northern Ireland Departments, and on UK Government Ministers in devolved areas.

These changes have been controversial, as has their wider political context. The EUWA was passed explicitly contrary to the wishes of the Scottish Parliament, and the WAA was passed despite opposition from all three devolved legislatures. This has prompted wider questions about the continuing status and effect of the legislative consent convention, and how it might apply to other Bills: whether or not concerned with Brexit and its aftermath.

An unresolved area remains the question of UK "common frameworks". This term is used to describe legislative and non-legislative arrangements that co-ordinate or harmonise activity between the UK and devolved governments in areas previously influenced by EU law and policymaking. This affects areas including agriculture, fisheries, trade and the environment, in respect of which the UK Government seeks to pass primary legislation in 2020. Whether common frameworks are to be agreed or imposed, and what kind of scrutiny they will attract at the UK and devolved level, remain to be seen. This feeds into a wider debate about the adequacy of intergovernmental and interparliamentary arrangements in the United Kingdom.

Northern Ireland is affected in unique ways by the terms of the UK's withdrawal from the EU because of its geography, political history, and the peace process under the Good Friday Agreement. However, its role in the Brexit process has also been influenced by the absence of power-sharing at Stormont between March 2017 and January 2020. The Protocol on Ireland/Northern Ireland requires, among other things, that a consent mechanism is established to ensure the continued democratic support for it of Northern Ireland. The UK Government has committed to legislate for this mechanism before October 2024, when it is first likely to be exercised.

10.1 Overview

The current devolution settlements in Scotland, Wales and Northern Ireland came into existence during, and in the context of, the UK's membership of the EU. The structure and limits of the powers of devolved institutions were therefore shaped by that context. This is true both in terms of which policy areas were devolved to Holyrood, Cardiff Bay and Stormont, and how they could then be exercised.

The devolution statutes inevitably had to be adjusted considering the UK's withdrawal from the European Union, to reflect the fact that the UK would no longer be bound by EU law. However the areas of policy previously governed by EU law and common arrangements would then need to be replaced by domestic arrangements. In some of those areas, there would be a clear interest in continued cooperation, alignment and possibly even the sharing of agencies and enforcement bodies.

There have been varying levels and different types of disagreement between the UK Government and the devolved institutions as to whether and on what terms the UK is to leave the European Union. However, there have also been disagreements about how and to what

extent the devolution settlements should be recalibrated in light of EU exit. What follows is an overview of the second of these two issues.

Brexit has also prompted questions about the constitutional future of Scotland's and Northern Ireland's places in the UK, given the majority support for EU membership demonstrated in the 2016 referendum in both of those parts of the UK. Those issues are not addressed in this paper, but see also the Commons Library Briefing Papers:

- "The settled will"? Devolution in Scotland, 1998-2018, 08441, 16 November 2018
- Scottish Devolution: Section 30 Orders, 08738, 16 December 2019
- Devolution in Northern Ireland, 1998-2020, 08439, 3 February 2020

10.2 Alterations to devolved competence

Unlike the UK Parliament, the competencies of the Scottish Parliament, National Assembly for Wales and the Northern Ireland Assembly were limited in several ways from the point of their creation. This included:

- restrictions on devolved competence based on subject matter;
- protections against modification of certain statutes by devolved legislation; and
- a requirement to legislate compatibly with the European Convention's human rights and EU law.

The rationale for requiring compatibility of devolved legislation and acts with EU law is that neither the legislatures nor the executives at the sub-state level should cause the UK to breach its international obligations, whether deliberately or otherwise.

How would the EUWA have changed devolved competence?

The EUWA would have removed "on exit day" the EU law compatibility restriction on devolved competence. The rationale for this was that, unless and to the extent provided by subsequent treaties, the UK would no longer have obligations in EU law in respect of which devolved institutions reasonably could be expected to be bound.

However the EUWA proposed, from "exit day" to replace this restriction with one of a new kind. It inserted into each of the devolution statutes a power for UK Ministers temporarily to restrict devolved competence, by secondary legislation.

If regulations were made by a UK Minister, it would be beyond the devolved institutions' competence to do anything that would "modify" retained EU law to the extent provided for by those regulations. However the regulations could not be used to prevent a devolved institution from doing something that it could already do immediately before "exit day" (i.e. something that would have been compatible with EU law when the UK was required to follow it).

For example, this meant that a UK Minister could forbid the Scottish Parliament and Government from modifying a retained EU law regulation which affected fisheries or agricultural matters. However, these "section 12 regulations" would not extend to prohibiting the modification of a statutory instrument – made by the Scottish Ministers – that supported the implementation of an EU obligation, provided that the changes to be made would have been compatible with EU law immediately before exit day.

These powers would have been able to be exercised for up to two years after exit day, and any regulations, once made, would only have effect for a maximum of five years. The original expectation was that, by 2026, the Governments would have identified, agreed between them, and legislated for more permanent arrangements to replace any temporary restrictions on devolved power.

To date, no section 12 regulations have been made.

How did the WAA change devolved competence?

The WAA made several important changes to the "pending" EUWA arrangements. Firstly, it effectively delayed the coming into force of the new arrangements from "exit day" to "IP completion day". Although the devolution statutes still say that laws and acts are outwith competence if they are "incompatible with EU law", this now takes into account the fact that the UK continues to follow EU law by virtue of the WA's transition period.[77]

Additionally, the delegated power in section 12, which was subject to a sunset clause of two years after exit day, has effectively been extended by 11 months, because "exit day" has been replaced with "IP completion day". Devolved institutions will now also be judged by whether they could have legislated for or done something immediately before IP completion day, rather than exit day.

10.3 Powers of devolved authorities

One of the other major impacts of the EUWA and WAA is that they delegate certain powers to devolved authorities:

- Scottish Ministers;
- Welsh Ministers;
- First Minister and deputy First Minister of Northern Ireland or a Northern Ireland Minister; and
- Northern Ireland Departments.

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[77] "EU law" is defined in each devolution statute by reference to the "EU Treaties". That phrase is then defined (via Schedule 1 of the *Interpretation Act 1978*) as meaning whatever it means in the *European Communities Act 1972*. Although the ECA has been repealed (by section 1 of the *EU (Withdrawal) Act 2018*), its effect is saved for transition and it is to be read "as though" Part 4 of the Withdrawal Agreement were on its list of treaties (under section 1 of the *EU (Withdrawal Agreement) Act 2020*). The saving and modification of the definition of "EU Treaties" will be repealed on IP completion day, at which point the restriction on devolved competence in the devolution statutes would become spent.

What power is it?	Relevant provisions for UK Ministers	Relevant provisions for devolved authorities
Correcting deficiencies in retained EU law	Section 8 of EUWA	Part 1 Schedule 1 of EUWA
"Glossing" power for transition	Section 3 of WAA, inserting section 8A into EUWA	Section 4 of WAA inserting Part 1A Schedule 2 into EUWA
Implementing Separation Provisions	Section 18 WAA inserting section 8B into EUWA	Section 19 WAA inserting Part 1B Schedule 2 into EUWA
Implementing the Protocol on I/NI	Section 21 WAA inserting section 8C into EUWA	Section 22 WAA inserting Part 1C Schedule 2 into EUWA
Implementing mutual recognition of professional qualifications	Section 12 WAA	Section 12 and Schedule 1 WAA
Implementing social security coordination	Section 13 WAA	Section 13 and Schedule 1 WAA
Implementing non-discrimination, equal treatment and workers' rights	Section 14 WAA	Section 14 and Schedule 1 WAA

These arrangements allow devolved authorities to exercise these powers only insofar as the matter would fall within devolved competence (i.e. so far as the devolved legislature could have conferred those powers on those authorities instead). There are also certain circumstances where these devolved powers would have to be exercised in consultation with, with the consent of, or jointly with the relevant UK Ministers.

Despite these devolved powers having been conferred, UK Ministers still have the power to make regulations in areas of devolved competence without a legal requirement either to consult or to secure the agreement of, the relevant devolved authority. This was one area in respect of which the Scottish Government maintained opposition throughout the passage of the *EU (Withdrawal) Bill*, and about which the Welsh Government initially expressed criticism.

Through the *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* (the Scottish Continuity Bill) the Scottish

Parliament sought to restrict the powers conferred on UK Government Ministers, so far as they related to devolved matters. Specifically, clause 17 of that Bill would have given the Scottish Ministers a veto over regulations to be made by UK Ministers. The UK Supreme Court ruled, however, that this would amount to an unlawful modification of section 28(7) of the *Scotland Act 1998*.[78] That provision therefore could not become law, and the Bill ultimately did not reach the statute book.

10.4 Legislative consent

As a matter of constitutional convention, the UK Parliament will not normally legislate about devolved matters without the consent of the relevant devolved legislatures. This is known as the legislative consent or Sewel convention. The *Scotland Act* and *Government of Wales Act* (as amended in 2016 and 2017) explicitly "recognise" the convention.

Both the *EU (Withdrawal) Act 2018* and *EU (Withdrawal Agreement) Act 2020* are notable for how they were passed explicitly against the wishes of at least one devolved legislature. In the former case, only the Scottish Parliament withheld consent, but in the latter instance (and for the first time since the creation of the three devolution settlements) all three devolved legislatures adopted resolutions opposing the passage of the Bill so far as it regarded devolved matters.

The two Bills are the only examples of the UK Government explicitly recognising that a Bill engages the convention, but then proceeding to legislate explicitly contrary to a resolution of a devolved legislature.

EU (Withdrawal) Bill

Both the Scottish and Welsh Governments published memorandums arguing that legislative consent should be withheld from the *EU (Withdrawal) Bill*. Both devolved legislatures even took steps to legislate, in the expectation that objected-to provisions would be removed from the Bill and would require devolved equivalents. These two Bills became known as the Scottish and Welsh "Continuity Bills".[79]

The UK Government referred those Bills to the UK Supreme Court, arguing that they were beyond the competence of the devolved legislatures for a variety of reasons.[80] However the reference for the

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78 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill – Reference by the Attorney General and Advocate General for Scotland* [2018] UKSC 64, paras 43-54; Schedule 4 of the *Scotland Act* prohibits the Scottish Parliament from modifying the *Scotland Act 1998*, save for modifying a list of excepted provisions. Section 28(7) (not excepted) provides that the power of the Scottish Parliament to make laws "does not affect the power of the UK Parliament to make laws for Scotland." The Supreme Court concluded that creating an executive veto over law-making powers conferred by the UK Parliament would amount to "affecting" the power of the UK Parliament to make laws for Scotland.

79 *UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill* and *Law Derived from the European Union (Wales) Bill*

80 Most of these reasons were rejected (for the one that was upheld, see footnote 74 above) by the Supreme Court. However key parts of the *Scottish Continuity Bill* were found to be beyond devolved competence because the *EU (Withdrawal) Act 2018* had subsequently passed and had protected itself against modification by Acts of

Welsh Continuity Bill was subsequently withdrawn. An Intergovernmental Agreement was reached between the UK and Welsh Governments.[81] As part of that Agreement, the Welsh Government committed to the expeditious repeal of the *Welsh Continuity Act*, and updated its recommendation to the National Assembly (arguing that consent should now be given). No such intergovernmental accord was reached with the Scottish Government. The Scottish Parliament withheld consent but the National Assembly for Wales granted it.

The Northern Ireland Assembly was not able to give or withhold legislative consent because of the collapse in power sharing in 2017. There was no Executive to produce a memorandum and no fully functioning Assembly to vote on whether consent should be given.

EU (Withdrawal Agreement) Bill

The Scottish and Welsh Governments published legislative consent memorandums for both the October and December 2019 versions of the *EU (Withdrawal Agreement) Bill*. Both Governments recommended against consent being given for the Bill.[82] Both the Scottish Parliament and the National Assembly for Wales voted to withhold legislative consent, on 8 January 2020 and on 21 January 2020 respectively.

Although a restored Northern Ireland Executive had been established in January 2020, this happened after the completion of the Commons stages on the Bill. There was, in practice, very little (if any) opportunity for the Executive to draft a legislative consent memorandum, or for a committee of the Assembly to scrutinise it. However, the Assembly's parties were unanimously of the view that the Bill should not pass and wished to put that position on record. An Executive motion to that effect was moved and adopted on 20 January 2020.

Other Brexit Bills

Other Bills connected with the Brexit process have had legislative consent memorandums produced by both the Scottish and Welsh Governments. These include:

- *Trade Bill 2017-19*
- *Agriculture Bill 2017-19*
- *Fisheries Bill 2017-19*
- *Healthcare (International Arrangements) Bill 2017-19*
- *Direct Payments to Farmers (Legislative Continuity) Bill 2019-21*

Of these, only the *Healthcare (European Economic Area and Switzerland Arrangements) Act 2019* and the *Direct Payments to Farmers (Legislative*

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the Scottish Parliament. Had the Continuity Bill become an Act first, its provisions would instead have been impliedly repealed to the extent they were inconsistent.

81 Intergovernmental Agreement on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks, 24 April 2018

82 Scottish Government memorandums of 22 October 2019 and 20 December 2019; Welsh Government memorandums of 23 October 2019 and 6 January 2020

Continuity) Act 2020 actually passed, and on both occasions both legislatures formally granted consent.

Additionally, the Scottish Government produced a legislative consent memorandum for the *Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19*. This is because the competencies of the Scottish Parliament in the area of social security differ from Wales, and therefore would have been impacted by the Bill. That Bill, as with the *Trade*, *Agriculture* and *Fisheries Bills*, fell on prorogation.

Box 3: Normal process for legislative consent memorandums and motions

When the UK Government introduces a Bill in Parliament, the accompanying Explanatory Notes will typically set out the territorial extent of each provision, and (additionally to that) explain whether, in its view, legislative consent should be sought for each clause or Schedule. As a courtesy, a Minister may formally write to the devolved authorities seeking consent for the relevant provisions.

Thereafter, legislative consent is a devolved procedure. The Standing Orders of each of the three devolved legislatures require a devolved authority to make its own assessment of the relevant Bill, called a legislative consent memorandum, within a certain point of the Bill's introduction. This is separate assessment from that of the UK Government, and will set out which provisions the devolved authority thinks engage the convention. The memorandum will then state whether the devolved authority agrees it is appropriate for the UK Parliament to legislate about those matters (whether in whole or in part).

One or more of the committees of a devolved legislature will then scrutinise the memorandum and report on it, if time allows. Thereafter, either the devolved authority or any member of the devolved legislature can table a motion about legislative consent, indicating that it should be:

- given to the Bill as a whole;
- withheld from certain parts of the Bill; or
- withheld outright.

A debate is typically then held on the motion, a vote is taken (if there is not unanimous agreement) and the decision is formally communicated to the UK Government and Parliament.

If it is common ground that legislative consent is needed for a Bill's provisions, but that consent is withheld, the expectation would normally be that those provisions are either modified to take account of the concerns raised, or that they are removed from the Bill entirely. For example, when the Scottish Parliament consented only in part to the devolved provisions of the *Welfare Reform Bill* in 2011, the provisions that were objected to were omitted from the final Act. Holyrood then went on to pass the *Welfare Reform (Further Provision) (Scotland) Act 2012*, making alternative provision for Scotland.

Except for the two Brexit Bills, the UK Government has only ever legislated explicitly contrary to legislative consent votes by the National Assembly for Wales. In all four cases, the UK Government argued the convention was not engaged by the relevant Bill, and on two occasions the National Assembly successfully legislated partly to reverse the changes made so far as they applied to Wales.

For more information on legislative consent precedents, see Commons Library Briefing Paper, Brexit: Devolution and legislative consent, 08274, 29 March 2018.

"With regard to devolved matters"

There is disagreement as to what counts as legislating "with regard to devolved matters". It is common ground that the consent convention apples to situations where the UK Parliament legislates in a way that a devolved legislature could itself have legislated.

The Devolution Guidance Notes and early practice during devolution had also suggested that the convention applies to any legislation which

would substantively alter the competencies of the devolved institutions. However some more recent comments, made in the context of Brexit legislation, suggest that the UK Government does not currently accept the wider form of the convention.

In the case of both the *EU (Withdrawal) Bill* and the *EU (Withdrawal Agreement) Bill* this explains why the Scottish and Welsh Governments took a different view from the UK Government as to which provisions required legislative consent.

"Normally" and "exceptional" cases

The UK Government has explicitly acknowledged that the UK Parliament legislated without devolved consent for the *EU (Withdrawal) Act 2018* and *EU (Withdrawal Agreement) Act 2020*. Its stated reason for pursuing this course of action is the "singular, specific and exceptional" circumstances surrounding those pieces of Brexit legislation.[83] It argues therefore that the circumstances are not "normal" and therefore that it is constitutionally proper to proceed despite disagreement. Their position is that the convention is not an absolute rule, but one which allows for extraordinary exceptions.

The UK Government also said in relation to the December 2019 Bill:

> These letters [to the relevant Scottish and Welsh Ministers] set out the UK Government's view that the devolution settlements did not intend for the Devolved Administrations to be able to frustrate the UK Government's exercise of reserved powers. The UK Government had hoped that the Scottish and Welsh Governments would consider the Bill on the basis on the provisions for which we sought consent, including the important powers granted to them to protect citizens' rights.

The Scottish Government objected to the justification of "exceptional circumstances" in this context. Mike Russell (Scottish Cabinet Secretary for Government Business and Constitutional Relations) said the following in a letter to Michael Gove (Chancellor of the Duchy of Lancaster) on 24 January 2020:

> I believe it has long been clear there was no consent decision that could have been taken by the Scottish Parliament, on any matter in the Bill, at any point in the Bill's Parliamentary stages, that would have affected in the slightest the terms of the legislation the UK Government was determined to pass. I am supported in this view by the UK Government's rejection of the modest and sensible amendments made to the Bill by the House of Lords…
>
> … For the first time all three devolved legislatures have refused consent for a piece of UK legislation, consent that the UK Government sought under the rules of our constitution. In any effective system of government, this unprecedented stance by democratically accountable legislatures would have some impact, or at least cause the UK Government to reflect. In our system, however, neither is true and nothing is done.

[83] Letters from Steve Barclay, Secretary of State for Exiting the European Union, to Mike Russell MSP and Jeremy Miles AM, 20 January 2020

> You describe these circumstances as unique but I see no steps being taken by you or your colleagues to find ways to ensure that is the case and that they cannot recur.
>
> At the very least you should be demonstrating a much greater commitment by the UK Government to effective and binding reform of Sewel Convention from this moment on. An unequivocal determination established in statute, to ensure it is respected and the views of the devolved administrations acted on and not ignored, is the least you and your colleagues should be offering.

In a parallel letter to Steve Barclay (then Secretary of State for Exiting the EU) Mike Russell also rejected the suggestion that the Scottish Government and Parliament had opposed the Bill on exclusively reserved grounds, and questioned the adequacy of efforts to inform and consult the devolved administrations:

> The UK Government was even unwilling to make simple changes to the Bill to that would have demonstrated, at least, some respect for the devolution settlement: for example, requiring actual consent to appointments to the IMA; excluding modifications to the Scotland Act from the scope of powers in the Bill; and excluding provisions from protected enactment status, which directly affects the competence of the Scottish Parliament. These examples also refute the claim that the Scottish Parliament refused consent solely on reserved grounds.
>
> An indication of good faith and respect for devolution is early sharing of the Bill before introduction. I remind you that we only saw the Bill in its final form after it had been sent to Westminster to begin its parliamentary process. There were important changes to the Bill from its previous version, including provisions that required, in our view, legislative consent (notably clause 26).

10.5 Impact of Brexit on the Sewel Convention

The Brexit process has reanimated core questions about legislative consent. It has, at a minimum, exposed the extent to which its enforcement relies on a shared conception of what the convention demands. That appears, to some extent, now to be absent.

The Scottish Government had appeared to adopt a policy of not bringing forward any legislative consent motions of its own in relation to Brexit legislation, as a direct response to the passage of the *EU (Withdrawal) Act 2018* (despite objection). The legislative consent memorandum for the *Immigration and Social Security Co-ordination (EU Exit) Bill* suggested that the refusal to bring forward legislative consent motions was because of concerns about the status of the convention itself, more than the substance of what that particular Bill was attempting to achieve. However it should be noted that, since then, the Scottish Government has brought forward legislative consent motions for other Brexit legislation, and in two cases has recommended that consent should be granted.

External commentary has at times discussed the legislative consent convention in more forceful terms. In a recent comment piece, Jess Sargeant of the Institute for Government said [emphasis added]:

> The Sewel Convention has been a fundamental underpinning of the relationship between the four legislatures of the UK since 1999, **but it has been broken by Brexit**. As well as managing the immediate political backlash that will follow the passing of the WAB, the UK government must now seriously engage with the case for reforming the convention if it wants to ensure the sustainability of the union in the long term.[84]

Legislative consent is likely to be an important feature of interparliamentary activity throughout 2020. This is because of the range of Parliamentary Bills that are expected to be passed before the end of the transition period, which substantively affect devolved areas.

10.6 Common Frameworks

The *EU (Withdrawal) Act 2018* and *EU (Withdrawal Agreement) Act 2020* have knock-on effects in the short term for devolved competence and the powers of devolved authorities in relation to EU-exit matters. However they do not resolve what should happen in a range of policy areas where EU law has previously harmonised and co-ordinated matters of shared or common interest.

EU frameworks affecting devolved areas

While a Member State of the EU, the UK participated in a range of what could be called EU-wide "common frameworks". These shared arrangements would limit what domestic governments could do in certain policy areas across the whole of the EU. Such arrangements would vary in scope and extent, depending on the EU competencies and laws involved.

In some areas there would be a comprehensive framework governing a policy area, with substantial shared budgetary and regulatory implications. Examples of this include the Common Agricultural and Fisheries Policies. In other areas EU agencies and institutions would oversee regulatory standards alongside domestic equivalents, whether at the UK or devolved levels.

This would often mean, in devolved areas, that competencies were in practice significantly constrained by shared standards and approaches, especially in relation to agriculture and fisheries, environmental standards, public procurement and aspects of justice, transport and energy policy. Since those shared standards and approaches applied EU-wide they also, by necessary implication, applied UK-wide.

This did not prevent policy divergence outright but could often restrict it. A notable example of policy divergence has been in the implementation of EU Directive 2015/412 (on growing genetically modified crops). The Scottish and Welsh Governments have exercised the discretion inherent in this EU law to ban the growing of (otherwise

[84] Institute for Government, The Sewel Convention has been broken by Brexit – reform is now urgent, 21 January 2020

permitted) GM crops, whereas the UK Government has not banned those crops in the English agriculture sector.

Replacement UK frameworks

Unless and to the extent that EU common frameworks were replaced with UK equivalents, policy divergence within the UK would become possible in new areas and for the first time since the modern devolution settlements were established.

The Common Framework Principles, agreed between the UK, Scottish and Welsh Governments in October 2017, maintain that UK-wide frameworks are desirable for (principally) six purposes, namely to:

- enable the functioning of the UK internal market
- ensure compliance with international obligations
- ensure the UK can negotiate, enter into and implement new trade agreements and international treaties
- enable the management of common resources
- administer and provide access to justice in cases with a cross-border element; and
- safeguard the security of the UK.

The UK Government has also conducted a common frameworks analysis (last updated in April 2019), identifying areas where it believes shared arrangements are necessary. These divide into "legislative" and "non-legislative" frameworks. As the Institute for Government observed, the vast majority, but not all, of these issues fall within the policy areas of the Department for the Environment, Food and Rural Affairs (DEFRA).[85]

Legislative common frameworks can take different forms. For example, the Brexit Bills on agriculture, fisheries, trade and environmental standards can all be regarded as "legislative common frameworks" in their respective policy areas to the extent that they affect Scotland, Wales and Northern Ireland.

The External Affairs and Additional Legislation Committee (EAALC) of the National Assembly for Wales identified the legislative consent convention as a particularly important safeguard in the context of frameworks brought about by primary legislation.[86] However, not all legislative common frameworks would be brought about by primary legislation. They may depend, to a significant extent, on secondary legislation, especially but not exclusively made under Brexit-specific legislation.

For "non-legislative" frameworks, the expectation is that concordats or memorandums of understanding will make arrangements, as is the case for several other areas of joint working and co-ordination between the devolved governments and UK Government departments.

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85 Institute for Government, Devolution, common frameworks and Brexit, 17 July 2019
86 External Affairs and Additional Legislation Committee, UK-wide common policy frameworks: discussion paper, August 2019, para 19

Decision-making, oversight and accountability

Some uncertainty regarding common frameworks is political. For example, it is not known whether legislative consent will be given to the framework elements of the *Agriculture*, *Fisheries*, *Trade* and *Environment Bills* forming part of the UK Government's legislative programme. Given recent disagreements over legislative consent in relation to other Brexit legislation, it is not known how disputes over these Bills would then be resolved if consent was withheld.

There is a broader unresolved question about dispute resolution itself. The Joint Ministerial Committee structure allows devolved authorities to raise concerns and to engage in bilateral or multi-lateral dialogue, but they are not bodies with legally binding decision-making powers.

Whether and to what extent devolved authorities will be decision-makers, as opposed to consultees, will depend on what UK Government proposals for legislative common frameworks say. Where (and to the extent) frameworks are given effect to under secondary, rather than primary, legislation the Sewel Convention also will not apply.

Other uncertainties relate to the scrutiny and oversight of common arrangements. These matters arise irrespective of whether frameworks are agreed to at intergovernmental level or imposed by UK legislation. One of the main criticisms made by the National Assembly's EAALC is that it is difficult for devolved legislatures to identify and monitor developments in relation to common frameworks, and even to tell whether a particular set of arrangements form part of one:

> Policy developments, legislation (primary and secondary) and intergovernmental commitments that are made may in fact form part of a Framework without this being explicitly acknowledged.
>
> Means of ensuring that the Welsh Government clearly communicates this when such developments occur (or have occurred) will significantly aid transparency of this process. For example, requiring explanatory material to indicate when legislation interacts with (or is made under) a Framework.[87]

The EAALC also suggested that the legislatures would need to review approaches to interparliamentary working, so as better to coordinate the scrutiny of decisions being taken. Decisions might, but will not always, be taken through the (non-statutory) Joint Ministerial Committee structure and are therefore intergovernmental (and so do not directly involve the legislatures).

10.7 Northern Ireland

Brexit has presented specific challenges in relation to Northern Ireland. Most notably, the terms on which the UK has withdrawn from the EU make special arrangements for Northern Ireland, considering its land border with Ireland and the unique circumstances surrounding its peace process under the Good Friday Agreement. The Protocol on Ireland/Northern Ireland requires that Northern Ireland is treated differently from the rest of the United Kingdom after the transition

[87] Ibid. paras 60-61

period has ended on a range of matters, including customs and state aid.

This had to be reflected in the *EU (Withdrawal Agreement) Bill* itself, in terms of giving effect to key provisions of the protocol and empowering both UK Ministers and all three devolved administrations to take measures to give effect to it. The details of that continuing relationship are explored more fully in two other Commons Library Briefing Papers:

- Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland, 08270, 23 October 2019; and
- The October 2019 EU UK Withdrawal Agreement, 08713, 18 October 2019

Collapse and restoration of power-sharing

Following the March 2017 Northern Ireland Assembly elections, the elected members of the Assembly were initially unable to form an Executive. This had important knock-on effects for its representation and influence in key Brexit decision making.

In addition to being unable to scrutinise the *EU (Withdrawal) Bill* (or, in practice, the *EU (Withdrawal Agreement) Bill*) the Assembly was unable to scrutinise Brexit-related secondary legislation made by the UK Government. Although a senior representative of the Northern Ireland Civil Service has, on occasion, attended Joint Ministerial Committee meetings, Northern Ireland also did not have Ministerial presence in the same way as Scotland or Wales, for almost three years.

Common Frameworks

Northern Ireland's devolved institutions therefore had no formal role in agreeing the common framework principles or shaping the terms of the discussions about legislative and non-legislative common frameworks between March 2017 and January 2020. However, the Protocol in the Withdrawal Agreement will have significant implications for common frameworks. It may mean that some arrangements can only be Great Britain-wide (rather than UK-wide) for example.

Consent and the Protocol

The Protocol on Ireland/Northern Ireland is subject to a consent process. Article 18 of the Protocol provides that "an opportunity for democratic consent" shall be given to Northern Ireland no later than 3 years and 10 months after the transition period has ended. This process is then to be repeated at 4 or 8-yearly intervals, depending on whether democratic consent has been given on a cross-community basis. If consent is withheld, the Protocol shall cease to have effect two years later.

The WAA does not include a legislative proposal for implementing this commitment. However, the unilateral declaration made by the UK on 17 October 2019 (to which the Article 18 of the Protocol directly refers) does undertake that legislation will be passed to implement a consent mechanism. An Act of Parliament is therefore likely to be passed dealing with this matter some time before October 2024.

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