LEGISLATIVE CONSENT MEMORANDUM

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL

Introduction

1. The European Union (Withdrawal Agreement) Bill ("the Bill") was introduced into the House of Commons on 19 December 2019. It is intended to implement the terms of the agreement on the UK's withdrawal from the EU concluded by the UK and the EU on 17 October 2019\(^1\) ("the Withdrawal Agreement").

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

3. This memorandum relates to the Bill as introduced.

4. The Scottish Government believes that the best option for the UK as a whole, and for Scotland, is to remain in the EU, as voted for by the people of Scotland\(^2\). This position has been reinforced by the result of the recent UK General Election where 88% of seats\(^3\) in Scotland were won by candidates who endorsed remaining in the EU.

5. There is no democratic mandate for withdrawal from the EU in Scotland and therefore the Scottish Government cannot support a Bill that implements the exit of Scotland, as part of the UK, from the EU. It cannot recommend that the Scottish Parliament consent to a Bill to give effect to an agreement which it considers will do significant damage to Scotland. In addition, the Scottish Government cannot recommend consent to a Bill which markedly increases the risk of a withdrawal without a longer term deal at the end of 2020\(^4\). The Scottish Government deeply regrets that the timetable for a Bill implementing such a significant change to the UK and Scotland does not provide the opportunity for proper parliamentary scrutiny in either the UK or Scottish parliaments.

6. Given the consequences of the agreement which this Bill will implement, which were not endorsed by the people in Scotland, the Scottish Government recommends that the Scottish Parliament should not consent to the Bill, and should indicate its

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\(^1\) https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration
\(^2\) On 23 June 2016 62% of voters in Scotland supported remaining in the EU, with a majority for remain in every Scottish council area.
\(^3\) 52 of 59 Scottish seats (47 SNP; 4 Liberal Democrats; 1 Independent)
\(^4\) See paragraphs 38-40
opposition to Scotland’s withdrawal, as part of the UK, from the EU and to the Withdrawal Agreement. The Scottish Government does not therefore intend to lodge a legislative consent motion in relation to the Bill. In line with Rule 9B.3.3(d) of the Standing Orders, the Scottish Government’s reasons for not including a draft motion are set out in paragraphs 34 - 41 below.

Background

Withdrawal from the European Union

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

8. The European Union (Withdrawal) Act 2018 (“EUWA”), passed in June 2018, provides in domestic law for the consequences of the UK leaving the EU. It ensures that current EU law (as it stands on exit day) continues to have domestic effect following exit day, and provides Ministers with powers to ensure this retained EU law works effectively. Powers under EUWA have also been used to ensure that the exit day in domestic law is consistent with the current exit day under Article 50. EUWA required the legislative consent of the Scottish Parliament under the Sewel Convention. This was refused by the Parliament on 15 May 2018. However, the UK Government proceeded with, and the UK Parliament passed, the Bill without amendments to reflect the views of the Scottish Parliament, in breach of the Sewel Convention.

The Withdrawal Agreement and Political Declaration

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

6 See https://www.parliament.scot/parliamentarybusiness/Bills/105997.aspx
10. The Withdrawal Agreement covers matters such as citizens’ rights, outstanding financial obligations, and makes arrangements for Northern Ireland alone to continue to benefit from access to the EU’s market based on regulatory alignment for goods and application of EU customs rules to relevant trade. It also establishes an implementation period during which EU Treaties will largely apply to the UK as if it were still a member state. While the Withdrawal Agreement provides for the ability to extend this implementation period, by mutual consent, for up to two years, this Bill specifically rules out that option.

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

12. The Scottish Government considers that the Withdrawal Agreement has the effect that, alone of the UK nations, the views of the people of Scotland on withdrawal from the EU are being ignored. England and Wales voted to leave. Northern Ireland will have its own arrangements for closer alignment, and the right to decide their own future. Scotland voted Remain but is being forced to leave with no special arrangements or say over its future relationship with the European Union.

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

14. The Withdrawal Agreement does not end the possibility of no-deal. Even if the UK withdraws on 31 January 2020 under its terms, if no future relationship is agreed, the possibility of a no-deal exit at the end of the implementation period remains. Indeed, the UK Government now proposes that this Bill prohibits UK Ministers from

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7 Article 132 of the Withdrawal Agreement
8 Clause 33
agreeing to any extension to the implementation period, even if reaching agreement by the end of 2020 is in doubt. This is in stark opposition to the views of the Scottish Parliament and National Assembly for Wales.\footnote{See paragraph 19 below}

15. The devolved administrations were given no opportunity by the UK Government to consider or contribute to either the Withdrawal Agreement or Political Declaration before they were agreed.

*Scrutiny of the Withdrawal Agreement and the Bill*

16. Section 13 of EUWA\footnote{s.13(1) of the European Union (Withdrawal) Act 2018} set out steps that must be taken before the United Kingdom may ratify any withdrawal agreement, including approval by the House of Commons (the “meaningful vote”) and passage of a Bill implementing the agreement in domestic law. It stated that the UK could not, therefore, leave the EU under the terms of the Withdrawal Agreement without this Bill being passed by the UK Parliament.

17. The previously concluded Withdrawal Agreement and Political Declaration twice failed\footnote{On 15 January and 12 March 2019, the UK Government’s motions seeking approval of the Withdrawal Agreement and Political Declaration in meaningful votes were defeated by 432 votes to 202 and 391 votes to 242, respectively.} to be approved by the House of Commons in a meaningful vote and the UK Government was also unsuccessful\footnote{On 29 March 2019 the UK Government held a vote on the Withdrawal Agreement only, which did not constitute a meaningful vote under section 13(1) of EUWA, but was defeated again by 344 votes to 286.} in obtaining the approval of the Commons on a vote on the Withdrawal Agreement alone.

18. On 5 December 2018, the Scottish Parliament resolved that both a no-deal exit from the EU and the Withdrawal Agreement and Political Declaration, as then presented to the House of Commons by the Prime Minister, would damage Scotland and the nations and regions of the UK as a whole, and therefore recommended that they be rejected and that a better alternative be taken forward.\footnote{http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11826&mode=pdf}

19. On 5 March 2019, both the Scottish Parliament and the National Assembly for Wales passed motions rejecting the previously concluded Withdrawal Agreement and the possibility of leaving without a deal, at any point.\footnote{http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11976&mode=pdf}

20. On 19 October 2019 the UK Government then failed to obtain a positive meaningful vote on its renegotiated Withdrawal Agreement. Instead, the House of Commons voted to amend the Government’s motion to withhold consent until the

11 See paragraph 19 below
12 s.13(1) of the European Union (Withdrawal) Act 2018
13 On 15 January and 12 March 2019, the UK Government’s motions seeking approval of the Withdrawal Agreement and Political Declaration in meaningful votes were defeated by 432 votes to 202 and 391 votes to 242, respectively.
14 On 29 March 2019 the UK Government held a vote on the Withdrawal Agreement only, which did not constitute a meaningful vote under section 13(1) of EUWA, but was defeated again by 344 votes to 286.
implementing legislation had been passed. That implementing legislation, the European Union (Withdrawal Agreement) Bill, was introduced to the Commons on 21 October 2019. Although it passed Second Reading\(^\text{17}\), the Programme Motion was not agreed\(^\text{18}\) and the UK Government chose not to submit a further programme motion. The Bill fell on dissolution of the UK Parliament on 6 November 2019.

21. The Bill would remove the requirement for a meaningful vote, and disapply the requirements of the Constitutional Reform and Governance Act 2010 (“CRAGA”) to the Withdrawal Agreement, which would remove the need for a further statutory process in both Houses of Parliament before ratification could proceed.

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

23. In its ruling on *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent), and Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland\(^\text{19}\))* concerning the purported prorogation of the UK Parliament, the Supreme Court made clear the importance of parliamentary scrutiny and the accountability of the executive to the legislature during the process of EU exit. Scrutiny by the devolved legislatures of the Bill is also a legislative act, since it invites their consent to changes to their competence and to changes to the law that would be within their competence. The time available in advance of exit allows for barely any scrutiny of one of the most important pieces of legislation ever considered by the UK Parliament, the Scottish Parliament and National Assembly for Wales with far-reaching implications for the whole of the United Kingdom.

24. The Bill, as introduced, also removes provisions relating to parliamentary scrutiny which were included in the Bill intended to implement the Withdrawal Agreement in October (see paragraphs 49-50).

**Content of the Bill**

25. The Explanatory Notes\(^\text{20}\) accompanying the Bill set out the UK Government’s view of its purpose and main functions. The UK Government describes the principal purpose of the Bill as to implement the Withdrawal Agreement, the EEA EFTA...
Separation Agreement between the UK and Norway, Iceland and Liechtenstein, and the Swiss Citizens’ Rights Agreements between the UK and Switzerland.

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

**Part 1 – Implementation Period**
This Part maintains the effect of the European Communities Act 1972 (ECA) for the agreed implementation period, while modifying the ECA to reflect that the UK will no longer be a Member State. It will ensure that EU-derived domestic UK legislation continues to operate effectively where references in that legislation are dependent on EU membership.

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

**Part 3 and Schedules 1 and 2 – Citizens’ Rights**
This Part provides for the rights of EU (and EEA EFTA and Swiss) citizens in the UK as set out in the Withdrawal Agreement (and corresponding EEA EFTA and Swiss agreements). This Part and Schedule 2 establish an Independent Monitoring Authority (“IMA”) to monitor the implementation and application of these citizens’ rights agreements in the UK and set out its constitution and functions, including a requirement, so far as possible, for one of the non-executive members of the IMA to know about conditions in Scotland relating to relevant matters. This Part also provides powers for regulations to be made in connection with:

- The transfer of the functions of the IMA to another public authority;
- Rights related to residence: application deadline and temporary protection;
- EU, EEA EFTA and Swiss frontier workers who are economically active in, but not resident in, the UK at the end of the implementation period;
- Rights in relation to entry and residence;
- Retention of existing grounds for deportation;
- Appeals etc. against citizens’ rights immigration decisions;
- Recognition of professional qualifications;
- Coordination of social security systems;
- Non-discrimination, equal treatment and rights of workers.
Schedule 1 sets out the powers of devolved authorities in relation to recognition of professional qualifications, coordination of social security systems and equal treatment.

**Part 4 and Schedule 3 – Separation issues**
This Part amends EUWA to provide for Ministerial powers to implement Part 3 of the Withdrawal Agreement and the EEA EFTA Separation Agreement. Corresponding powers are conferred on devolved authorities, with a definition of devolved competence in relation to these powers. It also amends EUWA so the creation of retained EU law takes place at the end of the implementation period; and broadens section 8 of the EUWA so that new Statutory Instruments (SIs) can also be laid at the end of the implementation period. This Part provides financial provision which will enable the UK to make payments to the EU for the purposes of complying with the Withdrawal Agreement.

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

This Part also provides for a parliamentary role for the review of any new EU legislation during the implementation period along with other provisions, such as a prohibition against UK Ministers agreeing to an extension of the implementation period, a requirement for a UK Minister to personally exercise the role of co-chair of the Joint Committee.21

**Part 5 and Schedules 4 and 5 – General provision**
This Part makes general provision, including sections on Interpretation and consequential and transitional provision. Schedule 4 sets out more detail on regulations to be made under the Bill, including procedures relating to those. Schedule 5 includes provision to defer SIs made under section 8 of the EUWA (and other EU Exit SIs and Scottish SIs) so they take effect at the end of the implementation period. This Part also makes provision on the sovereignty of the UK Parliament.

**Requirement for legislative consent**

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

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21 The Joint Committee is the formal means of engagement between the UK and the EU post-exit.
28. The Explanatory Notes to the Bill set out the UK Government’s view that the legislative consent of the Scottish Parliament is required for the Bill and specify the particular provisions which require consent. The Scottish Government agrees consent is required for these provisions and considers that further clauses also require the Scottish Parliament’s consent, specifically clauses 25, 26 and 36.

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

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

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

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

32. Similarly, clause 36 repeals Part 2 of Schedule 2 of EUWA which enables devolved authorities to make regulations for the purposes of implementing the Withdrawal Agreement if the authority considers it appropriate for such regulations to be in force on or before exit day. Clause 36 is due to be commenced as soon as the Bill is passed (clause 42(6)(c)), which is expected to be before exit day and therefore this clause alters the executive competence of Scottish Ministers.

22 See annex A at page 115
https://services.parliament.uk/Bills/2019-20/europeanunionwithdrawalagreement/documents.html
23 s.29(2)(d) of the Scotland Act 1998
Purposes within the legislative competence of the Parliament

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

Scottish Government view

Withdrawal from the EU and the Withdrawal Agreement

34. In the referendum of 2016 Scotland voted, overwhelmingly, to remain in the European Union. The majority of both the Scottish Parliament and Scotland’s members of the House of Commons favour remaining in the EU. The Scottish Government is firmly of the view that remaining in the EU would be best for Scotland and the UK as a whole. The Scottish Government also believes that it has a democratic duty to take all the steps it can to secure that outcome and cannot support a Bill which would do otherwise.

35. Nevertheless, the Scottish Government recognises that, as a responsible government, it should prepare for withdrawal from the EU, including any necessary legislative steps. The Scottish Government has therefore worked with the UK Government on withdrawal legislation, primary and secondary, in the attempt to ensure that it was legally effective and reflected, as far as possible, Scottish interests and concerns. Similarly the Scottish Government engaged with the UK Government during the development of the Bill in anticipation of its planned introduction to implement the previously concluded Withdrawal Agreement.

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

24 Paragraph 7 of Schedule 5 of the Scotland Act 1998
37. The new arrangements were concluded on 17 October 2019 yet there have been no impact assessments or guidance produced to ensure the ramifications of this deal can be fully scrutinised and understood in their entirety. There remains a significant degree of uncertainty and conflicting messages from the UK Government as to what much of the Withdrawal Agreement might mean in practical terms and the lack of updated analysis on the terms and implications of the agreement by UK Government means no clarity has been provided.

38. The change to the Bill since October to provide that a UK Minister is prohibited from agreeing in the Joint Committee to an extension to the implementation period increases the risk of the implementation period ending without agreement on a future partnership, and therefore effectively exit without a deal at the end of 2020. Negotiating a Free Trade Agreement (FTA) is extremely complex and doing so in under a year is widely believed to be unrealistic, especially if the UK Government attempts simultaneously to negotiate FTAs with the US and other non-EU countries.

39. There is widespread concern that only the narrowest and most superficial FTA could be agreed by the end of 2020, with some believing\(^{26}\) that the only other relationship that could be negotiated without an extension is an “off-the-shelf” relationship such as the EEA, which is unlikely to be acceptable to the UK Government. A close, made-to-measure relationship – the most plausible outcome to minimise the damage of Brexit – would need an extension of the implementation period\(^{27}\), and it therefore makes no sense for the UK Government to legislate to prevent the UK taking advantage of the flexibility it has itself negotiated with the EU in the Withdrawal Agreement.

40. The harm Brexit will impose on the people and economy of Scotland must be minimised as far as possible. The optimum way to achieve this objective would be to remain in the EU, as no future partnership agreement can be as beneficial as the current arrangements. Failing that, the UK as a whole, or at least Scotland, should remain closely aligned to the EU, a member of the Single Market and Customs Union, and aligned as close as possible in other fields, notably security. There must be a proper and meaningful role for the Scottish Government in the decisions that impact Scotland in the next phase of EU-UK negotiations.

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

\(^{26}\) https://www.politico.eu/article/berlin-eu-uk-trade-deal-2020/

\(^{27}\) Which would need to be agreed by 1 July 2020
The Sewel Convention

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

The devolution settlement

43. Up until May 2019 the UK Government engaged with the devolved administrations over the preparation of the Bill intended to implement the previously-concluded Withdrawal Agreement. That engagement allowed the Scottish Government to make representations to the UK Government over how best to reflect the devolution settlement in the Bill’s provisions. However, the speed of introduction of the European Union (Withdrawal Agreement) Bill in October following the newly concluded Withdrawal Agreement meant that engagement on the terms of that version of the Bill was limited to sight of the Bill in its final form the day before introduction, with no scope to make formal representations to the UK Government. The pace of introduction of the Bill following the General Election has similarly afforded no scope for formal representations to the UK Government on this version of the Bill.

44. The Scottish Government considers that much of the Bill is a domestic legal expression of the terms of the Withdrawal Agreement, and in particular the legal changes required to give effect to the implementation period. However, the Bill nevertheless does not fully respect the devolution settlement. In particular, the Scottish Government considers that changes to the design of the Independent Monitoring Authority would ensure that it has authority, accountability and legitimacy when operating in devolved areas. The Scottish Government is also concerned at the prospect of provisions being given protected enactment status, constraining further the Parliament’s competence without its consent, and any lack of commitment by the UK Government to seek the consent of the Scottish Ministers before making secondary legislating in devolved areas. Details of the Scottish Government’s view of the Bill’s provisions and their compatibility with the devolution settlement is set out in Annex C.

45. While the Scottish Government does not recommend that the Parliament consents to the Bill, it does recognise where previous requests have been accommodated and will continue to seek changes to the Bill to ensure that, if passed, these concerns are addressed.
Sovereignty of the UK Parliament

46. Clause 38 of the Bill purports to recognise that the Parliament of the United Kingdom is sovereign. Sovereignty in the UK is traditionally said to lie with the Crown in Parliament, a claim that has never fully been accepted in Scotland. The Scottish Government respects the Scottish constitutional tradition that sovereignty properly lies with the people. Moreover the meaning and modern relevance of the “Crown in Parliament” is contested, as recent debates on the conventions surrounding Royal Assent and respective roles of the Commons and the UK Government have demonstrated. There have also been debates about the effects of EU membership, human rights and devolution on the practical meaning of parliamentary sovereignty, a debate perhaps illustrated by the terms of this provision and similar sections in the devolution settlements.

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

48. The Scottish Government considers that clause 38 does not, as it purports to do, recognise a widely-accepted principle. Instead, it represents a contested conception of the constitution, and fails to respect the different constitutional traditions that apply in and between the nations of the United Kingdom.

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28 See, for example, the scepticism expressed by Lord President Cooper in MacCormick v Lord Advocate, 1953 SC 396 at 411, the Claim of Right 1989 which “acknowledge[s] the sovereign right of the Scottish people to determine the form of Government best suited to their needs”, and the recent report of the Smith Commission, paragraph 20: “Reflecting the sovereign right of the people of Scotland to determine the form of government best suited to their needs, as expressed in the referendum on 18 September 2014, and in the context of Scotland remaining within the UK, an enhanced devolution settlement for Scotland will be durable, responsive and democratic.”

29 Examples of the extensive commentary on these matters include:
- https://ukconstitutionallaw.org/?s=Royal+Assent

30 See, for example:

31 Welsh Government, Reforming our Union: Shared Governance in the UK, 10 October 2019
Parliamentary oversight

49. In its October Bill, the UK Government included provision to prohibit a Minister of the Crown agreeing any extension to the implementation period at the Joint Committee unless that extension had been approved by the UK Parliament. Not only does this Bill remove that requirement, it now prohibits a Minister of the Crown from agreeing any extension to the implementation period at the Joint Committee. This is a proposal which markedly increases the risk of withdrawing from the EU at the end of 2020 with no satisfactory agreement in place for the future partnership. The Scottish Government urges the UK Government to amend this Bill to ensure more flexibility, in line with the provisions of the Withdrawal Agreement which the UK Government has itself negotiated and agreed with the EU. The UK Government should prioritise the quality and depth of an agreement on the future relationship over meeting a self-imposed and arbitrary deadline at the end of 2020. The Scottish Government therefore calls on the UK Government to remove now the possibility of withdrawal without agreement on the future partnership.

50. The Bill also removes provision to provide the UK Parliament with oversight of negotiations for that future relationship. The Scottish Government believes that there is a clear need for the UK Government to be transparent with the UK Parliament, and to ensure a proper and meaningful role for devolved administrations in negotiations given the profound impact any FTA will have on devolved responsibilities. The need for openness and transparency in developing these future arrangements is essential.

Citizens’ Rights

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

Workers’ Rights

52. The removal of provisions safeguarding workers’ rights from the Withdrawal Agreement Bill, replaced instead by a potential new separate Bill, leaves the Scottish Government with no confidence that the UK Government will maintain existing protections let alone strengthen them. The previous inclusion of a commitment to maintain standards at the point of exit and to ensure transparency over any future changes or divergence from EU law provided some limited comfort, but even that has now been removed. This leaves workers highly vulnerable to a deterioration in
their conditions; could result in further erosion of the role of unions; will likely result in higher degrees of uncertainty and mistrust between employers and employees; and will threaten to undermine the Scottish Government’s Fair Work agenda.

53. This concern is compounded by the provision in Clause 26 which brings forward new amendments to section 6 of EUWA\(^ {32}\) to enable UK Ministers to make regulations to provide that lower courts or tribunals (to be specified) are not to be bound by retained EU case law in certain circumstances. The Scottish Government is opposed to any proposals which could facilitate lowering standards and rights for our workers and environmental protections, and the UK Government should make clear how it intends to use these powers.

Unaccompanied children seeking asylum

54. The Scottish Government’s position is that the Ministerial statement required in the circumstances outlined by the amendment regarding unaccompanied asylum seeking children should reiterate that unaccompanied children seeking asylum in Scotland are welcomed and should be afforded support and protection. The statement would provide an opportunity for the UK Government to recognise that these children are amongst the most vulnerable in the world and have faced high levels of adversity, and that this adversity does not stop on arrival in the UK. It is the job of the Government to support and safeguard them to ensure they get the right help, at the right time to overcome their fears of being sent back, the stresses of poverty, culture shock, obstacles to integration, racism, and unemployment.

55. The Scottish Government would also expect any Ministerial statement to ensure that the rights enshrined in law under the Dublin III Regulation\(^ {33}\) will be maintained and that unaccompanied asylum seeking children will not suffer any disadvantage as a consequence of the UK’s withdrawal from the EU.

56. The Scottish Government expects that any UK Ministerial statement would reiterate the commitment made by the UK Government to rehome 480 unaccompanied children from migrant camps in Europe under section 67 of the Immigration Act 2016\(^ {34}\), and outline plans for how this commitment will be honoured.

Draft Legislative Consent Motion

57. Under Rule 9B.3.3(d) of the Parliament’s Standing Orders, if a member of the Scottish Government does not propose to include a draft motion in the Memorandum,\(^ {32}\) Section 6 of EUWA makes provision about how EU law is to be read and interpreted on and after exit day
\(^ {33}\) The EU legislation that establishes the criteria and mechanisms for determining which Member State is responsible for examining an asylum claim made in the EU
\(^ {34}\) Known as the “Dubs amendment”
the Memorandum must explain why not. Paragraphs 34 - 41 above set out the Scottish Government's reasons for not including a draft motion in this memorandum for the purposes of that rule.

Conclusion

58. The Scottish Government believes that withdrawal from the EU will have widespread detrimental effects on Scotland and the rest of the UK. The evidence for this has increased since 2016. There is also evidence that withdrawal on the terms of the UK Government's Withdrawal Agreement will be damaging to Scotland's interests, especially with Scotland being put at a competitive disadvantage to Northern Ireland. While the Scottish Government deeply regrets the decision of the UK Government to withdraw the UK from the EU under these terms and in this manner, it recognises that the UK Government is determined that, alone amongst the nations of the UK, Scotland will be taken out of the EU, as part of the UK, despite the people of Scotland's clear and repeated opposition to that course of action.

59. The Scottish Government regrets that the views of the Scottish Parliament, and the views of the majority of Members of the UK Parliament who have been elected to represent Scottish constituencies, have been consistently ignored by the UK Government in connection with the UK’s withdrawal from the EU. Given the breach of the Sewel convention on EUWA, the Scottish Government does not expect the views of the Parliament to be respected on this occasion either, demonstrating once again the democratic deficit which exists in Scotland. Nonetheless, it is important that the Scottish Government continues to represent the people of Scotland and honours their desire to remain as part of the EU.

60. That withdrawal will be forced on Scotland, with the increased threat of no-deal remaining at the end of 2020, means that the Scottish Government cannot support this deeply damaging course of action, and therefore recommends that the Scottish Parliament does not give legislative consent to the European Union (Withdrawal Agreement) Bill.

Scottish Government
December 2019
ANNEX A

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL – STRUCTURE AND PROVISIONS

PART 1

*Implementation Period*

*Saved law for implementation period*

Clause 1  Saving of ECA for implementation period

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

Clause 2  Additional saving for implementation period

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

*Supplementary powers*

Clause 3  Supplementary power in connection with implementation period
Clause 4  Powers corresponding to section 3 involving devolved authorities

These clauses would amend EUWA by inserting provision to provide supplementary powers for UK Ministers and devolved authorities in connection with the implementation period to ensure saved EU-derived domestic legislation operates effectively.
PART 2

Remaining implementation of withdrawal agreement etc.: General

Withdrawal agreement

Clause 5 General implementation of remainder of withdrawal agreement

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

Related EEA EFTA and Swiss agreements

Clause 6 General implementation of EEA EFTA and Swiss separation agreements

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

PART 3

Citizens’ rights

Rights in relation to entry and residence

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

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

Clause 12  Recognition of professional qualifications

Co-ordination of social security systems

Clause 13  Co-ordination of social security systems

Equal treatment etc.

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

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

Independent Monitoring Authority

Clause 15  Independent Monitoring Authority for the Citizens’ Rights Agreements

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

General

Clause 16  Regulations: supplementary
Clause 17  Interpretation: Part 3

PART 4

Other subject areas

Other separation issues

Clause 18  Main power in connection with other separation issues
Clause 19  Powers corresponding to section 18 involving devolved authorities
These clauses would amend EUWA by inserting provision to confer powers on UK Ministers (with corresponding powers for the devolved authorities) to implement the other separation issues in Part 3 of the Withdrawal Agreement. Those issues include matters such as the continued circulation of goods placed on the market before the end of the implementation period, ongoing VAT and excise duty matters; ongoing protection of intellectual property rights; ongoing police and judicial cooperation in criminal matters; ongoing judicial cooperation in civil and commercial matters; ongoing protection of personal data; and ongoing cases before the Court of Justice of the EU, as well as ongoing administrative procedures.

**Main financial provision**

Clause 20  Financial provision

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

**Ireland/Northern Ireland Protocol**

Clause 21  Main power in connection with Ireland/Northern Ireland Protocol
Clause 22  Powers corresponding to section 21 involving devolved authorities

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

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

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

Clause 24  No alteration of North-South co-operation

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

Relationship to EUWA 2018

Clause 25  Retention of saved EU law at end of implementation period
Clause 26  Interpretation of retained EU law and relevant separation agreement law
Clause 27  Dealing with deficiencies in retained EU law

EUWA converts EU law to domestic law on exit day (currently 31 October 2019), and most secondary legislation made under it also takes effect on that day. These clauses, clause 39 and schedule 5 would amend the EUWA so that the conversion of EU law into domestic law would take place at the end of the implementation period. Amendments are also made to the deficiencies power at section 8 of the EUWA so that it can operate on deficiencies which result at the end of the implementation period or as a result of Part 4 of the Withdrawal Agreement. Furthermore, provisions in schedule 5 will adjust the coming into force date of EU Exit SIs and SSIs so that such secondary legislation is brought into effect at the end of the implementation period in December 2020, instead of on exit day.

Clause 26 specifically amends provision in section 6 EUWA, which makes provision about how retained EU law is to be read and interpreted on and after exit day and provides, that, for the purposes of interpreting (unmodified) retained EU law, courts in the UK are to be bound by retained case law. Only (i) the UK Supreme Court or (ii) the High Court of Justiciary (HCJ) in certain circumstances could choose to depart from such retained case law.

Clause 26 makes amendments to section 6 to enable UK Ministers to make regulations to provide that other courts or tribunals (to be specified) are also not to be bound by such retained case law in certain circumstances. Specified senior members of the judiciary are to be consulted before such regulations are made.

Clause 28  Ancillary fee-charging powers

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

Parliamentary oversight

Clause 29  Review of EU legislation during implementation period

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

Clause 30  Certain dispute procedures under withdrawal agreement

This clause introduces a new section 13B into EUWA which places a requirement on UK Ministers to make a statement in writing to the House of Commons and the House of Lords in the event that either of the following occurs: (i) there has been a request to establish an arbitration panel as part of the dispute resolution process under the Withdrawal Agreement and (ii) the European Court has given a ruling following a request to do so by the arbitration panel. In addition UK Ministers are placed under an obligation to report to both House of Parliament on an annual basis setting out the number of times that the UK has been given notice about the commencement of consultations in the Joint Committee to resolve a dispute between the EU and the UK under the Withdrawal Agreement.

Clause 31  Repeal of section 13 of EUWA 2018

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

Clause 32  Requirements in Part 2 of CRAGA

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

Other matters

Clause 33  Prohibition on extending implementation period

Clause 33 introduces new section 15A into EUWA to prohibit a UK Minister from agreeing in the Joint Committee to an extension of the implementation period.
Clause 34 Ministerial co-chair of the Joint Committee

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

Clause 35 No use of written procedure in the Joint Committee

This clause introduces new section 15C into EUWA which prohibits the UK’s co-chair of the Joint Committee from consenting to the Committee using the written procedure which is provided for under the Withdrawal Agreement.

Clause 36 Repeal of unnecessary or spent enactments

This clause repeals unnecessary and spent enactment in relation to the UK’s withdrawal from the EU. In particular, certain powers in EUWA regarding the implementation of the Withdrawal Agreement are repealed, along with certain duties in relation to environmental principles etc. and a customs arrangements (the timescales for which have already passed). Two Acts of Parliament which made provision in connection with an extension under Article 50(3) are also repealed.

Clause 37 Arrangements with EU about unaccompanied children seeking asylum

Section 17 of EUWA currently places an obligation on UK Ministers to seek to negotiate an agreement with the EU to make provision for arrangements between the UK and the EU for unaccompanied children seeking asylum. The agreement to be negotiated is that (i) in circumstances where such a child makes an application to a member State and it is in the child’s best interests, the child may come to the UK to join a relative who is either lawfully resident in the UK or whose asylum request has not yet been decided, and (ii) in circumstances where such a child is in the UK and makes an application to go to a member State, that child may go to a member State in equivalent circumstances.

Clause 37 amends section 17 of EUWA to remove the obligation to seek to negotiate such an agreement. Instead, UK Ministers will be under an obligation to make a statement of policy before Parliament about any future arrangements between the UK and the EU about unaccompanied children seeking asylum in the circumstances outlined above.
PART 5

**General and final provision**

*Parliamentary sovereignty*

Clause 38  Parliamentary sovereignty

This clause recognises the common law principle of parliamentary sovereignty, setting out that parliamentary sovereignty subsists despite the continuing direct application and effect of EU law as a consequence of implementing the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.

**Interpretation**

Clause 39  Interpretation

**Supplementary and final**

Clause 40  Regulations
Clause 41  Consequential and transitional provision etc.
Clause 42  Extent, commencement and short title

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

**Schedule 2 – Independent Monitoring Authority for the Citizens’ Rights Agreements**

Part 1 – Constitution, proceedings etc.
Part 2 – Functions of the IMA etc.
Part 3 – Further provisions

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

**Schedule 4 – Regulations under this Act**

Part 1 – Procedure
Part 2 – General provision about powers under Act

**Schedule 5 – Consequential and transitional provision etc.**

Part 1 – General consequential provision
Part 2 – Specific consequential provision etc.
Part 3 – Transitional, transitory and saving provision
<table>
<thead>
<tr>
<th>Clause/Schedule</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Saves the effect of the ECA in domestic law on or after exit day for the implementation period. Modifies the definition of “the Treaties” and “the EU Treaties” and section 2(2) of the ECA to reflect Part 4 of the Withdrawal Agreement dealing with the implementation period.</td>
</tr>
<tr>
<td>2</td>
<td>Saves EU-derived domestic legislation in domestic law on and after exit day for the implementation period.</td>
</tr>
<tr>
<td>3</td>
<td>EUWA is amended to provide UK Ministers supplementary powers to address deficiencies in domestic law as a result of withdrawal.</td>
</tr>
<tr>
<td>4</td>
<td>EUWA is amended to confer supplementary powers corresponding to clause 3 on Scottish Ministers and other devolved administrations.</td>
</tr>
<tr>
<td>5</td>
<td>Provides for the general implementation of the Withdrawal Agreement into domestic law. Provides for all rights, powers, liabilities, obligations, restrictions, remedies and procedures created or provided for by the Withdrawal Agreement (other than Part 4) to be directly recognised and enforced in domestic law.</td>
</tr>
<tr>
<td>6</td>
<td>Replicates the approach in clause 5 to the EEA EFTA Separation Agreement.</td>
</tr>
<tr>
<td>12</td>
<td>Recognition of professional qualifications powers conferred on Scottish Ministers.</td>
</tr>
<tr>
<td>13</td>
<td>Coordination of social security systems powers conferred on Scottish Ministers.</td>
</tr>
<tr>
<td>14</td>
<td>Prohibition of discrimination and equal treatment powers conferred on Scottish Ministers.</td>
</tr>
<tr>
<td>15</td>
<td>Establishes a body corporate called the Independent Monitoring Authority for the Citizens’ Rights Agreement. The IMA will monitor implementation of Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA separation agreement.</td>
</tr>
<tr>
<td>16</td>
<td>Makes supplementary provision in relation to the powers in clauses 7, 8, 9 and 14 to implement provisions of the Withdrawal Agreement and provides that those powers include power to supplement the effect of section 7A EUWA (inserted by clause 5) in relation to the relevant provisions of the Withdrawal Agreement.</td>
</tr>
<tr>
<td>18</td>
<td>Inserts new powers into EUWA for UK Ministers to make provision to implement Part 3 of the Withdrawal Agreement (separation issues) and equivalent provisions of EEA EFTA separation agreement. Part 3 issues include devolved matters.</td>
</tr>
<tr>
<td>19</td>
<td>Confers powers on Scottish Ministers, and on UK Ministers acting jointly with Scottish Ministers to make provision to implement Part Three of the Withdrawal Agreement (separation issues) and equivalent provisions of EEA EFTA separation agreement.</td>
</tr>
<tr>
<td>20</td>
<td>Provides powers in connection with fees and charges, and provides that devolved authorities may incur expenditure in preparation for the making of statutory instruments under the Bill.</td>
</tr>
<tr>
<td>21</td>
<td>Provides powers to UK Ministers to implement the protocol on Ireland / Northern Ireland in the Withdrawal Agreement.</td>
</tr>
<tr>
<td>22</td>
<td>Powers in connection with Ireland/Northern Ireland conferred on Scottish Ministers and on UK Ministers acting jointly with Scottish Ministers.</td>
</tr>
<tr>
<td>25</td>
<td>Makes amendments to specified provisions of EUWA, for example, by substituting various references to “exit day” so that they are references to “IP completion day”. This is to ensure that the conversion of EU law into “retained EU law” will now take place at the end of the implementation period.</td>
</tr>
<tr>
<td>26</td>
<td>Amongst other things, his clause defines the term ‘relevant separation agreement law’ and sets out rules of interpretation so that, so far as applicable, that body of law is interpreted in accordance with the Withdrawal Agreement, the EEA EFTA separation agreement and the Swiss citizens’ rights agreement.</td>
</tr>
<tr>
<td>27</td>
<td>Amends the deficiency power in section 8 and schedule 2 of EUWA to enable these provisions to work in light of the implementation period.</td>
</tr>
<tr>
<td>28</td>
<td>Ancillary fee charging power amends scope of fee charging powers in Schedule 4 to EUWA, which are conferred on the DAs as “appropriate authorities”.</td>
</tr>
<tr>
<td>36</td>
<td>Repeals unnecessary and spent enactments. Specifically, clause 36 repeals Part 2 of Schedule 2 of EUWA which enables devolved authorities to make regulations for the purposes of implementing the Withdrawal Agreement if the authority considers it appropriate for such regulations to be in force on or before exit day.</td>
</tr>
<tr>
<td>39</td>
<td>Interpretation</td>
</tr>
<tr>
<td>40</td>
<td>With regard to regulations made under the Bill, provision is made in relation to exercise of executive function by Scottish Ministers.</td>
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<tr>
<td>41</td>
<td>With regard to consequential and transitional provision, the powers provided are capable of being exercised within devolved competence.</td>
</tr>
<tr>
<td>42</td>
<td>Clause 42 includes provision extending the territorial effect of modifications in paragraphs 1 and 2 of schedule 5, which affects subordinate legislation within devolved competence.</td>
</tr>
<tr>
<td>Sch 1</td>
<td>Provisions in relation to exercise by Scottish Ministers of their powers relating to MRPQ, coordination of social security and equal treatment and non-discrimination.</td>
</tr>
<tr>
<td>Sch 2</td>
<td>The IMA will monitor implementation for Part 2 of the Withdrawal Agreement and Part 2 of the EEA EFTA separation agreement - some of that implementation will take place within devolved competence and by means of regulations by Scottish Ministers.</td>
</tr>
<tr>
<td>Sch 4</td>
<td>With regard to Regulations made under the Bill, the Schedule provides for Scottish Ministers to exercise various powers.</td>
</tr>
<tr>
<td>Sch 5</td>
<td>Consequential, transitional, transitory and saving provision. Schedule requires consent to the extent that it includes provisions in relation to exercise by DAs of various powers, makes amendments to legislation within devolved competence (e.g. ILRA 2010) and amends the devolution statutes in ways that modify legislative and executive competence.</td>
</tr>
</tbody>
</table>
ANNEX C

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

The Independent Monitoring Authority

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

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

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

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

5. The most significant change to the IMA provision contained in the Bill is the change which allows UK Ministers to transfer the functions of the IMA to another public authority. The Scottish Government is of the view that there is a risk these new powers
could be exercised to bypass the provision in paragraphs 4 and 5 of Schedule 2 which ensure there is a member of the IMA who knows about conditions in Scotland, and which provide for a role for the Scottish Ministers in the appointment of that member. There are powers for UK Ministers to recreate that procedure for the transferee, but are not subject to any obligation to do so.

6. There is a requirement (paragraph 39(6)) to consult the Scottish Ministers and other devolved administrations before transferring the IMAs functions, but no requirement for consent to be obtained. There is also a restriction on the power (paragraph 39(2)) that the IMA's functions may only be transferred where to do so would serve the purpose of improving efficiency, effectiveness and economy, but that determination would be made solely by a UK Minister, with no role for the Scottish Ministers.

7. It is the UK Government’s intention that the power can be used to ensure that the transferee’s institutional design can be made to mirror that of the IMA, and so that the IMA’s processes and procedures (such as those around the role of DA ministers in board appointments) can be replicated for the transferee if necessary. However the Scottish Government’s view is that there would be no obligation on the UK Government to actually do so. Therefore, the transferee might not include (or be required to include) any member who knows about conditions in Scotland relating to the relevant matters. Equally, there might be no role for the Scottish Ministers in the procedure for appointing such a member to the transferee public authority.

**Protected enactment status**

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

9. The amendments to EUWA which will be introduced by the Bill and will continue to be afforded protected enactment status are as follows:
amendments introduced by clause 1 (new section 1A of EUWA) and clause 2 (new section 1B of EUWA with the exception of new section 1B(3) and (4) which will be carved out from the protection) which will maintain the effect of the ECA for the implementation period;

amendments introduced by clause 5 (new section 7A into EUWA) which will provide for the general implementation of the Withdrawal Agreement into domestic law;

amendments introduced by clause 6 (new section 7B into EUWA) which will replicate the approach in clause 5 in relation to the UK-EEA EFTA Separation Agreement and the UK-Swiss Citizens’ Rights Agreement;

amendments introduced by clause 25 (amendments to sections 2, 3, 4 and 5 and schedule 1 of EUWA, inserts new section 5A) which will retain saved EU law at the end of the implementation period;

amendments introduced by clause 26 (amends section 6 EUWA and inserts new section 7C) which will provide an interpretation of retained EU law and relevant separation agreement law;

amendments introduced by clause 27 (amends section 8 and schedule 2 of EUWA) which will provide for amendments to the deficiencies power at section 8 of EUWA so that it can operate on deficiencies which result at the end of the implementation period or as a result of Part 4 of the Withdrawal Agreement;

amendments introduced by clause 28 (amends the scope of the fee charging powers in Schedule 4 of EUWA) which will amend the scope of these powers which are conferred on devolved authorities as “appropriate authorities”;

amendments introduced by clause 37 which amends section 17 EUWA in relation to arrangements between the UK and the EU regarding unaccompanied children seeking asylum;

amendments introduced by Schedule 5 will continue to be protected to the extent that they make amendments to EUWA and other enactments already protected (with the exception of amendments inserting paragraphs 8A to 8H into Schedule 7 of EUWA).

Powers to amend the Scotland Act 1998

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

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

**Review of EU legislation during implementation period**

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

13. It is not the intention of the Scottish Government to seek any formal role for the Scottish Parliament in this process as the Scottish Government expects the Scottish Parliament to have the primary role in scrutinising the implementation of EU law in devolved areas of Scotland during the implementation period, and for such arrangements to be agreed between the Scottish Government and Parliament.
This Legislative Consent Memorandum relates to the European Union (Withdrawal Agreement) Bill (UK legislation) and was lodged with the Scottish Parliament on 20 December 2019

EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL – LEGISLATIVE CONSENT MEMORANDUM

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