

## **EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL**

### **Memorandum concerning the Delegated Powers in the EU (Withdrawal Agreement) Bill for the Delegated Powers and Regulatory Reform Committee**

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## DELEGATED POWERS MEMORANDUM

### A. Introduction

1. This memorandum has been prepared by the Department for Exiting the European Union for the Delegated Powers and Regulatory Reform Committee ('DPRRC') to assist with its scrutiny of the European Union (Withdrawal Agreement) Bill (the 'Bill').
2. This memorandum identifies the provisions of the Bill that confer powers or modify existing powers to make delegated legislation. It explains in each case why the power has been taken or modified and explains the nature of, and the reason for, the procedure selected. This memorandum reflects the Bill as introduced in the House of Commons on 21 October 2019.

### B. Purpose and Effect of the Bill

#### *Background*

3. On 23 June 2016, a referendum was held in the UK and Gibraltar on whether the UK should remain a member of the EU. More than 33.5m people, some 72 per cent of registered voters, voted in the referendum and 52 per cent of those who voted, voted to leave the EU.
4. The European Union (Notification of Withdrawal) Act 2017 was passed into law on 16 March 2017. This gave the Prime Minister the power to notify the European Council of the UK's intention to withdraw from the EU under Article 50(2) of the Treaty on the European Union. This notification was then given on 29 March 2017.
5. On 26 June 2018, the EU (Withdrawal) Act 2018 passed into law. Its purpose is to provide a functioning statute book when the UK leaves the EU.
6. On 13 November 2017, the previous Government announced its intention to bring forward a new Bill to implement the Withdrawal Agreement in domestic law. This confirmed that the major policies set out in the Withdrawal Agreement would be given effect in domestic law through new primary legislation, rather than by secondary legislation under the then EU (Withdrawal) Bill.
7. On 14 November 2018, the previous Government published a draft of the Withdrawal Agreement (agreed at negotiator level). This Agreement was agreed by European

leaders on 25 November 2018 and laid before Parliament on 26 November 2018. The Agreement was subject to votes in the House of Commons as prescribed under s.13 of the EU (Withdrawal) Act 2018 (EUWA) on 15 January 2019 and 12 March 2019, whilst the Withdrawal Agreement alone, without the Political Declaration, was voted on by the House of Commons on 29 March 2019. The Agreement was rejected in all these votes. The Agreement was also subject to a take note motions in the House of Lords.

8. On 6 March 2019, the previous Government announced that it would be bringing forward legislation designed to protect and enhance workers' rights after the UK's withdrawal from the EU.
9. On 22 March 2019 the European Council and the United Kingdom agreed to an extension to the Article 50 period until 22 May 2019, provided the Withdrawal Agreement was approved by the House of Commons before the 29 March 2019, or otherwise until 12 April 2019 (European Council Decision (EU) 2019/476, O.J. No. L 80 I, p.1).. The definition of 'exit day' in the EU (Withdrawal) Act 2018 was amended by statutory instrument *The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) Regulations 2019 (S.I. 2019/718)* to reflect this having been approved by the House of Commons and the House of Lords on 27 March 2019.
10. On 5 April 2019 the then Prime Minister wrote to the President of the European Council seeking a second extension of the Article 50 deadline. On 11 April 2019, the European Council and the UK agreed an extension to the Article 50 period until 31 October 2019 (European Council Decision (EU) 2019/584, O.J. No. L 101, p.1). This extension could be terminated early if the Withdrawal Agreement was ratified and came into force before this date. Following the conclusion of the European Council, a statutory instrument *The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 2) Regulations 2019 (S.I. 2019/859)*, was made under the negative procedure on 11 April amending the definition of 'exit day'<sup>1</sup> in the EU (Withdrawal) Act 2018 to 31 October 2019 at 11pm.<sup>2</sup>
11. On 23 May 2019, Prime Minister Theresa May resigned. Following a change in Government, Prime Minister Boris Johnson committed to negotiating a new Withdrawal Agreement. This Withdrawal Agreement was agreed by European leaders at the European Council on 17 October 2019. In addition, the Government made a

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<sup>1</sup> 'Exit day' is defined by the EU (Withdrawal) Act 2018. The date of the UK's departure from the EU is referred to as 'exit day' throughout this document.

<sup>2</sup> Between the first and second extensions of the Article 50 period the procedure (found at paragraph 14 of Schedule 7 of the EU (Withdrawal) Act 2018) for exercising the power in s.20(4) of the EU (Withdrawal) Act 2018 to change the definition of 'exit day' in that Act was changed from the affirmative to the negative procedure. This was done by s.2 of the EU (Withdrawal) Act 2019, which received Royal Assent on 8 April 2019.

unilateral declaration concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland.

12. On 19 October 2019, the Government laid before Parliament the new Withdrawal Agreement and new framework for the future relationship between the UK and the EU.
13. On 21 October 2019 the European Union (Withdrawal Agreement) Bill was introduced to Parliament.

#### *The implementation period*

14. The Withdrawal Agreement provides that the UK's exit from the EU will be followed by a time-limited implementation period, which will last until 'IP completion day'<sup>3</sup> on 31 December 2020 (Part 4 of the Withdrawal Agreement, Article 126). The Withdrawal Agreement also includes provision for a single extension to the duration of the implementation period of up to two years with any decision to extend to be made by the Joint Committee before 1 July 2020.
15. On 'exit day', the EU (Withdrawal) Act 2018 will repeal the European Communities Act 1972 (the 'ECA'). Under the terms of Part 4 of the Withdrawal Agreement, it will be necessary to ensure that EU law continues to apply in the UK during the implementation period even though the UK will no longer be a Member State. This will be achieved by way of transitional provision - the Bill will amend the EU (Withdrawal) Act 2018 so that most of the effects of the ECA are saved for the time-limited implementation period (see clause 1).
16. The Bill will also need to modify the saved ECA provisions to reflect the fact that the UK has left the EU, and that the UK's relationship with EU law during this period is determined by the UK's obligations under the Agreements, rather than as a Member State.
17. As EU rules and regulations will continue to apply in the UK during the implementation period, the Bill will need to make technical changes to the EU (Withdrawal) Act 2018 so that the conversion of EU law into 'retained EU law' and the domestication of case law of the Court of Justice of the European Union ('CJEU') can take place at the end of the implementation period rather than on exit day. These amendments to the EU (Withdrawal) Act 2018 are necessary in order to ensure that the

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<sup>3</sup> As defined at clause 37(1) of the Bill

statute book works during the implementation period despite the fact that the UK will no longer be a Member State.

18. The Bill will also provide for the way in which provisions of the Agreements, once they are given effect in domestic law, will need to be interpreted and applied and how this body of law will interact with retained EU law (as established by the EU (Withdrawal) Act 2018).
19. As the UK and EU have agreed that the existing EU mechanisms for supervision and enforcement will continue to apply in the UK during the implementation period, amendments will also be made to the EU (Withdrawal) Act 2018 to ensure that this can happen. This will ensure that EU rules are interpreted and applied consistently in both the UK and the EU for the duration of the implementation period.

#### *Beyond the implementation period*

20. The majority of the provisions of the Agreements will apply directly in domestic law from the end of the implementation period. Article 4 of the Withdrawal Agreement requires that agreement to be given the same effect as that which it has in EU Member States. The Bill will effectively replicate the same legal effects as those being given to the Withdrawal Agreement for the EEA EFTA Separation or Swiss Citizens' Rights Agreements for reasons of consistency, simplicity and to provide certainty to citizens and businesses.
21. As was noted in *Miller*<sup>4</sup>, the ECA - and particularly section 2 - authorises a process by which, without any further primary legislation, EU law becomes a direct source of domestic law. In its judgment, the Supreme Court in *Miller* referred to the ECA as the 'conduit pipe' by which EU law is introduced into domestic law.
22. The approach in the Bill to give effect to Article 4 is to replicate the 'conduit pipe' approach so that the provisions of the Withdrawal Agreement will flow directly into domestic law through this provision of the Bill - see clause 5 ('General implementation of remainder of withdrawal agreement'). The EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement will be given effect via their own 'conduit pipe'

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<sup>4</sup> See: [R. \(on the application of Miller\) v Secretary of State for Exiting the European Union \[2017\] UKSC 5](#).

at clause 6 ('General implementation of related EEA EFTA and Swiss separation agreements'). The Agreements will therefore also become direct sources of law<sup>5</sup>.

23. The Agreements provide for a limited category of dynamic provisions which will flow through these 'conduit pipes' into domestic law as they update in Union law post-exit. These include social security coordination (Article 36 of the Withdrawal Agreement), limited parts of Part 5 of the Withdrawal Agreement relating to the winding down of EU budgetary rules (Articles 136 and 138) and certain aspects of the Protocol on Ireland/Northern Ireland (Article 13(3) of the Protocol). The drafting of clause 5(1) and (2) and the equivalents in clause 6 ensure that any such updates will be able to take effect without the need for further domestic legislation by providing that rights, powers, obligations, remedies etc from time to time created or arising under the Agreements will flow through the conduit pipes of clauses 5 and 6. These clauses therefore account for the UK's varying obligations under the Agreements.
24. The effect of clause 5(3) of the Withdrawal Agreement and the equivalent 6(3) for the EEA EFTA Separation Agreement and Swiss Citizens' Rights Agreement, is that inconsistent or incompatible domestic law must 'give way' in favour of that provided for in the Agreements where there is a clash. The UK takes its international legal obligations seriously, and, although Parliament is sovereign, it is not anticipated that it would seek to repeal or amend the legislation giving effect to the Agreements while they are in force.
25. Despite the 'conduit pipe' approach taken by the Bill, some rights and obligations contained in the Agreements require further elaboration before they can work properly in domestic law. Therefore, in addition to the 'conduit pipe' approach taken at clauses 5 and 6, the Bill takes powers to ensure, for example, that the citizens' rights packages are implemented fully and to make further provision in respect of Other Separation Issues ('OSIs') and the Protocol on Ireland/Northern Ireland.
26. Although it is not relevant to the issues raised in this memorandum, it is worth noting that the EU Settlement Scheme has already been established under the Immigration Rules, which are a form of secondary legislation made under the Immigration Act 1971. The Immigration Rules are being used for this task as they are already the mechanism for granting leave to enter or remain in the UK under the Immigration Act 1971 for those who require it.

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<sup>5</sup> Clauses 5 and 6 do not apply in relation to the domestic implementation of Part 4 of the Withdrawal Agreement on the implementation period.

### **C. General commentary on the delegated powers in the Bill**

27. The Bill takes a number of delegated powers to allow ministers to implement relevant parts of the Agreements in connection with the implementation period, citizens' rights, OSIs, and the Protocol on Ireland/Northern Ireland.
28. In addition, the Bill amends four of the delegated powers contained in the EU (Withdrawal) Act 2018. These amendments are also covered in this memorandum.
29. All the delegated powers, excluding those taken for the purpose of giving effect to the citizens' rights part of the Agreements, will be inserted into the EU (Withdrawal) Act 2018 to reflect the way in which domestic law will need to be given effect in the context of the Agreements providing for the UK's withdrawal from the EU.
30. Where the Bill inserts powers into the EU (Withdrawal) Act 2018, the approach to drawing them is consistent with the powers already provided for in that Act. For example, by providing for restrictions on their exercise (see, for example, the power in respect of OSIs which expressly provides what regulations made under the power may not do). Further, the general provision about powers contained in Part 3 of Schedule 7 of that Act is extended so as to also apply to the powers to be inserted by this Bill. The Bill also adopts a broadly consistent approach to corresponding powers involving the devolved authorities to those powers already taken by the EU (Withdrawal) Act 2018.
31. While it is recognised that some of the delegated powers provided for in this Bill are necessarily broadly drawn, the concerns raised by Parliament during the passage of the EU (Withdrawal) Act 2018 regarding the appropriate degree of scrutiny on the exercise of delegated powers under that Act, particularly where they may modify primary legislation, have been carefully considered and have informed the approach taken to the delegated powers in this Bill. Following engagement with the Scottish and Welsh Governments, we have restricted the power in respect of OSIs so that it cannot amend the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998.
32. The general position, therefore, is that where the core powers in the Bill may be exercised so as to modify primary or retained direct principal EU legislation (as defined by s.7(6) of the EU (Withdrawal) Act 2018), regulations may not be made unless they are first approved by each House of Parliament or the relevant devolved legislature. While not all of these modifications to primary legislation will always substantively affect primary or retained direct principal EU legislation, this approach has been adopted given the exceptional context and unique nature of the matters being



provided for in the Bill and the recognition that Parliament will want a greater role in scrutinising amendments to all such legislation in order to give effect to the Agreements. The one exception to this general rule relates to the exercise of the power to make provision by regulations for appeals against citizens' rights immigration decisions. This is to ensure that such provision can be made in time for when the Agreements enter into force. The 'made affirmative' procedure is therefore adopted in the Bill for this purpose (see below at clause 11).

33. The Government recognises that the Bill provides for a number of delegated powers, many of which may amend primary or retained direct principal EU legislation. It has not, however, taken the decision to seek powers lightly nor in disregard of concerns raised about their use as an alternative to primary legislation - the context and purpose of the Bill is a relevant consideration when considering the approach adopted.
34. The Committee will note that the drafting approach taken to many of the powers in the Bill is by reference to a subjective test of appropriateness. The Government acknowledges previous concerns and recommendations of the Committee, particularly in the case of the then European Union (Withdrawal) Bill, that powers should be restricted by an objective test of necessity.
35. As the Government noted in its response of 11 April 2018<sup>6</sup> to the Committee's 12th Report of 1 February 2018 on the European Union (Withdrawal) Bill<sup>7</sup> - it is accepted that 'appropriate' is a broader term than 'necessary'. However, as the Government also noted (citing *Craies*), the more apparently wide a power is, the more the courts will feel obliged to impose some kind of limitation based on the context and probable legislative intent.
36. It is nevertheless the case that the majority of powers taken by the Bill are deliberately drafted by reference to express provisions of the Agreements. The scope of each power is thus naturally constrained by the scope of the particular matter contained in the Agreements that it is intended to address.
37. For these reasons, the Government considers that the powers taken by this Bill are suitably constrained while ensuring the Government is able to fulfil its international obligations under the Agreements.

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<sup>6</sup> Letter from Lord Callanan, Minister of State for Exiting the European Union at the Department for Exiting the European Union, to the Rt Hon. Lord Blencathra, Chairman of the Delegated Powers and Regulatory Reform Committee; <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/119/11905.htm>

<sup>7</sup> Delegated Powers and Regulatory Reform Committee, HL Paper 73, 12th Report of Session 2017-19, European Union (Withdrawal) Bill; <https://publications.parliament.uk/pa/ld201719/ldselect/lddelreg/73/73.pdf>

38. Despite the exceptional context in which this Bill is introduced to Parliament, the Government welcomes the views of the Committee and will consider its recommendations carefully to ensure that the delegated powers taken by this Bill are no more than is appropriate for the purpose for which they are sought.

*Further detail about the powers provided for in the Bill*

39. Part 1 of Schedule 5 provides for the parliamentary procedure applicable to specific powers in the Bill and Part 2 makes further general provision in relation to regulations contained in the Bill.
40. Part 2 of Schedule 5 makes general provision in respect of powers in the Bill. This provides for:
- a. the manner in which powers in the Bill are exercisable (paragraph 12 of Part 2, Schedule 5);
  - b. the scope of the powers (paragraph 13 of Part 2, Schedule 5) and their relationship to other powers in the Bill (paragraph 14 of Part 2, Schedule 5);
  - c. the anticipatory exercise of powers in relation to the Withdrawal Agreement (paragraph 15 of Part 2, Schedule 5);
  - d. the scope of the appointed day power (paragraph 16 of Part 2, Schedule 5)
  - e. the treatment of hybrid instruments made under powers in the Bill (paragraph 17 of Part 2, Schedule 5); and,
  - f. the applicable parliamentary procedure where powers are exercised in combination (paragraph 18 of Part 2, Schedule 5).

## D. Summary of delegated powers in the Bill

	Clause	Power conferred	Purpose	Parliamentary procedure
Powers relating to provisions in the Withdrawal Agreements on citizens' rights				
1	Clause 7(1)(a) to (g)	Power conferred on a Minister of the Crown to make regulations providing for the deadline for applications and temporary protections in respect of the settled status for EU citizens, EEA EFTA nationals, Swiss nationals and their family members in the UK.	To make regulations implementing the provisions in the Agreements which includes providing for the deadline for the submission of applications for new residence status and providing for temporary protections pending decisions on such applications.	Draft affirmative procedure for first set of regulations provided for at 7(1)(b) to (g) or where regulations amend repeal or revoke primary legislation, or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.
2	Clause 8(1) and (2)	Powers conferred on a Minister of the Crown to make provision in regulations in respect of EU, EEA EFTA and Swiss frontier workers.	To ensure that frontier workers benefit from the continued exemption from immigration control, the right of entry, and the procedures relating to the application process for issuing documents certifying frontier worker status and the issuance and renewal of such documents. Irish citizen frontier workers protected by the Agreements will not need to apply to the frontier worker registration scheme.	Draft affirmative procedure for first set of regulations under clause 8(1) and if exercise of either power involves making regulations which amend, repeal or revoke any primary legislation or retained direct principal EU legislation; otherwise it is subject to the negative resolution procedure.
3	Clause 9(1)	Power conferred on a Minister of the Crown to make regulations relating to restrictions on the rights of entry and residence in respect	To ensure that restrictions on entry or residence rights based on conduct before the end of the implementation period can be made on public policy, public security	Draft affirmative procedure for first set of regulations, and for subsequent regulations where amending, repealing or revoking

		of EU citizens, EEA EFTA nationals and Swiss nationals.	or public health grounds.	primary legislation or retained direct principal EU legislation; otherwise it is subject to the negative procedure.
4	Clause 11	Power conferred on a Minister of the Crown to make provision for, or in connection with, appeals against citizens' rights immigration decisions made in connection with the Agreements.	To make provision to give applicants protected by the citizens' rights parts of the Agreements the right to access judicial redress procedures that allow them to challenge any decision refusing to grant residence status under the residence scheme, any decision to restrict residence rights, and restrictions on the rights of entry to the UK for frontier workers and those continuing a planned course of healthcare treatment.	Made affirmative procedure for the first set of regulations to ensure the availability of an appeals mechanism from exit day. Draft affirmative for subsequent regulations where amending, repealing, or revoking primary legislation or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.
5	Clause 12(1)-(3)	Power conferred on a Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority, to make provision by regulations for the purpose of implementing provisions of the Agreements relating to professional qualifications.	To make regulations to ensure that professional qualifications held by EU citizens, EEA EFTA citizens, Swiss nationals and their family members which are recognised, or are in the process of being recognised, by a UK professional regulator before the end of the implementation period will continue to be recognised in the UK after that time.	Draft affirmative where amending, repealing or revoking primary legislation or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.
6	Clause 13(1)-(3)	Power conferred on a Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with a	To enable the government to meet the UK's obligations under the Agreements and remedy any inconsistencies in domestic legislation	Draft affirmative procedure where amending, repealing or revoking primary legislation, or retained

		devolved authority, to supplement the effect of the direct application of EU Regulations 883/2004 and 987/2009.	arising as a consequence of the Agreements that could give rise to unfair treatment or unforeseen outcomes in the area of social security coordination.	direct principal EU legislation; otherwise subject to the negative procedure.
7	Clause 14(1)-(3)	Power conferred on a Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority in respect of provisions relating to non-discrimination, equal treatment and rights of workers.	To make provision to ensure that domestic legislation is compatible with the broad equal treatment and non-discrimination provisions in the Agreements and to ensure that EU citizens, EEA EFTA nationals and Swiss nationals currently resident in the UK maintain existing entitlements to publicly funded benefits and services following the end of the implementation period and are subject to the same rules.	Draft affirmative where amending, repealing or revoking primary legislation or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.
8	Paragraph 38 of Part 3, Schedule 2	Power conferred on a Minister (either the Secretary of State or the Minister for the Cabinet Office) to remove functions of, or abolish the Independent Monitoring Authority for the Citizens' Rights Agreements (IMA).	To make provision for a process of an orderly winding down of, or limitation of the functions of, the IMA (provided for under the Withdrawal Agreement and EEA EFTA Separation Agreement only).	Subject to the draft affirmative procedure.
Other Separation Issues				
9	Clause 18 (inserts section 8B into the EU (Withdrawal) Act 2018)	Power conferred on a Minister of the Crown in connection with Other Separation Issues ('OSIs').	A power for the purpose of making domestic provision to implement the OSIs .	Draft affirmative procedure where a statutory instrument amends, revokes or repeals primary legislation or retained direct principal EU legislation, otherwise it is

				subject to the negative procedure.
10	Clause 19 (inserts new Part 1B of Schedule 2 of the EU (Withdrawal) Act 2018)	Power conferred on a devolved authority or a Minister of the Crown acting jointly with a devolved authority to make provision in connection with OSIs.	A corresponding power to that at clause 18 to enable devolved authorities to implement the OSIs in areas of devolved competence.	Draft affirmative procedure where a statutory instrument amends, repeals or revokes primary legislation or retained direct principal EU legislation, otherwise it is subject to the negative procedure.
Power in connection with finance authority				
11	Clause 20	Power conferred on a Minister of the Crown in connection with the finance authority	To make regulations to amend the date upon which the standing service provision will cease to apply	Subject to the draft affirmative procedure in the House of Commons.
Provisions relating to Ireland/Northern Ireland				
12	Clause 21 (inserts new section 8C into the EU (Withdrawal) Act 2018)	New section 8C(1) confers a power on a Minister of the Crown in connection with the Ireland/Northern Ireland Protocol in the Withdrawal Agreement New section 8C(6) places a duty on a Minister of the Crown to define the term 'qualifying Northern Ireland goods'	A power to implement the Protocol on Ireland/Northern Ireland. A duty to define the term 'qualifying Northern Ireland goods'	Draft affirmative procedure where a statutory instrument under new section 8C(1) amends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; creates or amends a power to legislate; or facilitates the access to the market within Great Britain of qualifying Northern

				Ireland goods. Otherwise it is subject to the negative procedure. Where a statutory instrument under new section 8C(6) defines the term 'qualifying Northern Ireland goods' the draft affirmative procedure will apply.
13	Clause 22 (inserts new Part 1C of Schedule 2 of the EU (Withdrawal) Act 2018)	Power conferred on a devolved authority or a Minister of the Crown acting jointly with a devolved authority in connection with the Protocol on Ireland/Northern Ireland.	A power to implement the Protocol on Ireland/Northern Ireland	Draft affirmative procedure where a statutory instrument amends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; or creates or amends a power to legislate; or facilitates the access to the market within Great Britain of qualifying Northern Ireland goods. Otherwise it is subject to the negative procedure.
Powers to give effect to the implementation period				
14	Clause 1 (inserts new section 1A into the EU (Withdrawal) Act 2018)	Power conferred on a Minister of the Crown to exclude international agreements from the definitions of 'the Treaties' and 'EU Treaties'.	To ensure that existing international agreements can be removed from the definitions of 'the Treaties' and 'EU Treaties'. This might be needed where the EU has authorised the coming into	Subject to the draft affirmative procedure.

			force of new international treaties agreed between the UK and third countries before the end of the implementation period and there is a conflict with existing international obligations that flow through the saved ECA. The UK may then need to remove the existing EU-third country international agreement from the definition.	
15	Clause 3 (inserts new section 8A into the EU (Withdrawal) Act 2018)	Power conferred on a Minister of the Crown to make supplementary provision in connection with the implementation period.	To ensure that the domestic statute book fully reflects the UK's obligations under Part 4 of the Withdrawal Agreement and operates properly in that light. It enables Ministers to create additional glosses for EU-related references during the implementation period, to make exceptions to the glosses, to make different provision to the glosses, to amend provisions of EU (Withdrawal) Act 2018 in consequence of the repeal of the implementation period provisions and; to fix other inoperabilities in connection with the implementation period.	Draft affirmative procedure for amendments to primary legislation and retained direct principal EU legislation; negative procedure for amendments to secondary legislation.
16	Clause 4 (inserts new section 11A into new Part 1A of Schedule 2 of the EU (Withdrawal)	Powers corresponding to clause 3 involving devolved authorities.	A corresponding power to that at clause 3 to enable devolved authorities, and a Minister of the Crown acting jointly with a devolved authority, to make provisions.	Draft affirmative procedure for amendments to primary legislation and retained direct principal EU legislation; negative procedure for amendments to



	Act 2018)			secondary legislation.
17	Clause 27	<b>AMENDS</b> a power conferred on a Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with one or more devolved authorities to deal with deficiencies in retained EU law.	Amends the existing correcting power in section 8(1) of the European Union (Withdrawal) Act 2018 so that the power can be used to amend deficiencies arising in retained EU law as they are at the end of the implementation period.	The procedure for the power is already provided for in the European Union (Withdrawal) Act 2018: affirmative procedure if an instrument does one or more of the things provided for in Schedule 7 Part 1, paragraph 1(2), to that Act; otherwise, the negative procedure but subject to sifting procedure provided for at Schedule 7 Part 1 paragraph 3, to that Act. Provision is also made for urgent procedures.
18	Para 1(3) and (5) of Part 1, Schedule 6	Powers conferred on a Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority to make exceptions from and add powers to the general rule delaying exit day provisions in EU exit SIs.	Powers to make exceptions from and add powers to the general rule delaying 'exit day' provisions in EU exit SIs to 'IP completion day'.	No procedure before 'exit day' (to ensure there is a functioning statute book on exit day) and negative procedure after exit day.
Other powers/amendments to existing powers in the Bill				
19	Clause 34/Part 3, Schedule 4, paragraph 4(2)	Power conferred on a Minister of the Crown to, by regulations in connection with amendments to the list of EU directives relating to workers' rights.	This power enables the Secretary of State to make amendments to the list of EU directives set out at Paragraph 4(1) in consequence of changes before IP completion day in EU directives relating to workers' rights.	Draft affirmative resolution procedure. Despite the very limited circumstances in which it may be used, and the fact the power is time limited (it sunsets 12 months after the end of the implementation period) the Government is of the

				view that the affirmative procedure is appropriate given the general approach taken to the scrutiny of powers which can amend the Act in which they are found.
20	Clause 37(4)	Power conferred on a Minister of the Crown to amend 'IP completion day'.	Power to make regulations to amend the definition of 'IP completion day' to allow for an extension to the implementation period and to make regulations to amend the definition of 'IP completion day' in the Bill as a result of an extension of the IP or a change to EU summer-time arrangements.	Subject to the negative procedure.
21	Clause 39(1) and (5)	Powers conferred on a Minister of the Crown to make general consequential provision and transitional, transitory and savings provision.	Powers to make amendments cosequential on the contents of the Bill itself and to make transitional, transitory and savings provision.	Subject to the negative procedure for the consequential power; no procedure in the case of the transitional etc power.
20	Paragraphs 5 and 69 of Schedule 6	<b>AMENDS</b> the power conferred on a Minister of the Crown to make consequential provision and transitional, transitory and savings provision in the EU (Withdrawal) Act 2018.	Power to clarify that the consequential power in the EU (Withdrawal) Act 2018 is capable of making regulations in consequence of the Act as amended by or under the Bill. This power will amend the Act so that the consequential power can amend primary legislation until the end of the implementation period.	Existing procedures which apply to section 23(1) and (6) of the EU (Withdrawal) Act 2018.
21	Clause 40	Power conferred on a Minister of the Crown to make commencement	A power to enable a Minister of the Crown to make regulations to commence	No procedure

		provisions.	particular provisions for when they are needed.	
22	Clause 28	<b>AMENDS</b> the power conferred on ‘an appropriate authority’ (as defined in paragraph 2 of Schedule 4 of the EU (Withdrawal) Act 2018) in connection with fees and charges.	To enable UK ministers and devolved authorities to create fees and charges in connection with functions that public bodies in the UK take on in connection with EU Exit. Clause 28 extends this fee charging power, so it can also be used in connection with functions given to public authorities by new sections 8B and 8C (and the corresponding powers for devolved authorities in new Parts 1B and Parts 1C of Schedule 2).	Subject to the negative procedure where the altering of a fee or charge is to reflect changes in the value of money, otherwise draft affirmative procedure applies.
23	Paragraph 50, Part 2 of Schedule 6	<b>AMENDS</b> the existing power at Schedule 5, Part 2, Paragraph 4 in EU (Withdrawal) Act 2018 to make provision about judicial notice and admissibility.	Broadens the definition of ‘relevant matter’ to include ‘the EEA EFTA separation agreement’, ‘the Swiss Citizens’ Rights Agreement’ and ‘the Withdrawal Agreement’ for the purpose of providing for the admissibility in legal proceedings of specified evidence to include and provides that regulations amending primary legislation under Paragraph 4 cannot be made after IP completion day.	The existing procedure continues to apply to the power, namely the draft affirmative procedure.

## E. Clause by clause analysis of delegated powers in the Bill

### 1. Powers relating to citizens' rights

#### **Clause 7(1)(a) to (g): powers to make regulations providing for the deadline for applications and temporary protections in respect of the EU Settlement Scheme**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: (1) Negative resolution procedure for deadline power at 7(1)(a), unless amending, repealing or revoking any primary legislation or retained direct principal EU legislation, for which draft affirmative procedure applies; (2) draft affirmative procedure for first set of regulations provided for at 7(1)(b) to (g) and draft affirmative for subsequent regulations that amend, repeal, or revoke primary legislation, or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.*

#### **Context and purpose**

41. Article 18 of the Withdrawal Agreement provides that a host state may require those residing in its territory and within the scope of that Article to apply for new residence status ('pre-settled status' or 'settled status') which confers the rights under Title II of the Withdrawal Agreement (that is, rights related to residence) and a document evidencing such status. Article 19 provides for the issuance of residence documents during the implementation period and that host states may allow for applications for residence status or a residence document to be made voluntarily from the date of the coming into force of the Withdrawal Agreement. Articles 17 and 18 of the EEA EFTA Separation Agreement contain corresponding provisions. Article 16 of the Swiss Citizens' Rights Agreement also contains a corresponding provision.
42. Under the Agreements, EU citizens, EEA EFTA nationals, and Swiss nationals and their family members who have been lawfully and continuously resident in the UK for five years will be eligible for settled status, which is also referred to as 'indefinite leave to remain' in current UK immigration law. EU citizens and their family members who have been lawfully and continuously resident in the UK for less than five years will be eligible for 'pre-settled status', also referred to in UK immigration law as 'limited leave to remain'. This means that the individual will be granted five years limited leave to remain, and will be eligible to apply for settled status as soon as they have completed

five years continuous residence in the UK.

43. The EU Settlement Scheme is being provided for under existing UK immigration law (in particular, rules made under section 3 of the Immigration Act 1971).
44. Subsection (1)(a) enables a Minister of the Crown to specify the deadline by which the protected cohort, that is, all persons who may be granted a status under the EU Settlement Scheme, must apply for immigration status under the EU Settlement Scheme, as set out in Article 18(1)(b) of the Withdrawal Agreement, Article 17(1)(b) of the EEA EFTA Separation Agreement, and Article 16(1)(b) of the Swiss Citizens' Rights Agreement. This deadline must not be less than six months from the end of the implementation period. This gives rise to a 'grace period', after the end of the implementation period, in which EU law will no longer apply but the rights and protections flowing from the Agreements must be available in legal and practical terms to members of the protected cohort who have not yet applied for immigration status under the EU Settlement Scheme.
45. Subsections (1)(b), (c) and (d) enable a Minister of the Crown, by regulations, to implement Article 18(2) of the Withdrawal Agreement, Article 17(2) of the EEA EFTA Separation Agreement, and Article 16(2) of the Swiss Citizens' Rights Agreement. Those articles provide for all the rights provided for in the citizens' rights part of the Agreements to apply to members of the protected cohort who have not yet applied for immigration status under the EU Settlement Scheme during the grace period.
46. Subsections (1)(e), (f) and (g) enable a Minister of the Crown to make regulations to implement Article 18(3) of the Withdrawal Agreement, Article 17(3) of the EEA EFTA Separation Agreement, and Article 16(3) of the Swiss Citizens' Rights Agreement. Those articles require that, where a person has made an application for immigration status under the EU Settlement Scheme, all the rights provided for in the citizens' rights parts of the Agreements shall apply to that person until the application is finally determined, including procedures for judicial redress where applicable.
47. The Government intends that regulations under subsection (1)(b) to (g) will give effect to the relevant provisions in the Agreements by saving the necessary components of the existing regime in the Immigration (European Economic Area) Regulations 2016 that protect the rights of EU citizens, EEA nationals, Swiss nationals, and their family members during the grace period and pending resolution of individual applications for status under the EU Settlement Scheme.
48. Subsections (2) and (3) enable regulations under subsection (1) to apply both to the persons whom the provision in question applies and to all those who are eligible for

leave under the EU Settlement Scheme. This will enable provision to be made, for example, to protect the position of certain groups who currently derive their residence rights from EU law, and are granted leave to enter or remain in the UK by virtue of the residence scheme immigration rules (as defined in clause 17 of the Bill) but who are not covered by the Agreements, such as family members of UK nationals who benefit from the *Surinder Singh* principle<sup>8</sup>.

49. Subsection (4) provides that the power to make regulations under this section may be exercised to modify any provision made by or under an enactment (this is therefore a so called 'Henry VIII' power).
50. This power may also be used to give effect to Joint Committee decisions amending certain parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement within the scope of the particular matters that this power is intended to address<sup>9</sup>.
51. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority).

### **Justification for the power**

52. Implementation of Article 18 of the Withdrawal Agreement, Article 17 of the EEA EFTA Separation Agreement, and Article 16 of the Swiss Citizens' Rights Agreement will involve significant technical detail. In particular, preserving the rights of those who have not yet made an application for immigration status during the grace period, and those whose application has not yet been determined, will involve detailed legislative provision. Such provision is currently set out in secondary legislation (the EEA Regulations 2016).
53. Article 18(1)(b) of the Withdrawal Agreement, and the corresponding provisions in the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement, specify that the deadline for submitting applications shall not be less than six months from the

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<sup>8</sup> *Surinder Singh* (C-370/90 *Surinder Singh*) established the principle that nationals of Member States should not be deterred from leaving their country of origin to pursue an economic activity in another Member State. They would be so deterred if on returning to the Member State of which they are a national they did not enjoy conditions at least equivalent to those they would enjoy under community law in the territory of another Member State. In this case in respect of family reunification rights.

<sup>9</sup> The Joint Committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.

end of the implementation period (the 'grace period'). However, there is a specific option in Article 18(1)(c) of the Withdrawal Agreement, and corresponding provisions in the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement, to extend the grace period, in addition to the general ability in Article 38 to make more favourable provisions. So, while we expect the grace period to expire six months from the end of the implementation period, it is prudent to provide the flexibility for an alternative date to be set, in line with the flexibility provided for in the Agreements.

54. The power at 7(1)(b) to (g) will be used to preserve the rights of those who have not made an application for immigration status during the grace period, and for those whose application has not yet been determined. Experience indicates that it may be necessary to modify the savings provision on a relatively frequent basis. For example, the EEA Regulations 2016 have been amended three times since they were made to respond to domestic legislative changes and developments in CJEU case law. Taking a power provides the scope to make appropriate savings, to make technical amendments as and when required and to respond to domestic and CJEU judgments on the interpretation of the citizens' rights provisions of the Agreements, including the EU Settlement Scheme.
55. The clause is limited to making such provision as appropriate for implementing Articles 18 and 19 of the Withdrawal Agreement and equivalent provisions in the EEA EFTA Separation Agreement and the Swiss Citizens' Rights Agreement, that is, ensuring that certain substantive procedural powers and protections under Directive 2004/38/EC (and equivalent provision in respect of Switzerland) continue to apply. Directive 2004/38/EC has already been transposed in the UK via the EEA Regulations 2016.
56. Furthermore, any provisions made under the power in connection with restrictions on citizens' rights will have to comply with the Articles 20 and 21 of the Withdrawal Agreement and the corresponding provisions in the EEA EFTA Separation Agreement (Articles 19 and 20), and the Swiss Citizens' Rights Agreement (Article 17).
57. While the main detail of the immigration rights of EEA and Swiss nationals is currently set out in secondary legislation (the EEA Regulations 2016), it is supported by a large volume of primary legislation. It will be necessary to modify this primary legislation to make effective provision for the protected cohort during the grace period pending the resolution of their applications under the EU Settlement Scheme.
58. For example, section 7 of the Immigration Act 1988 provides that those with a right under EU law or under regulations made under section 2(2) of the European Communities Act 1972 (for example the EEA Regulations 2016) to enter or reside in the

UK do not need leave to enter or reside. This is a key provision that ensures that those with rights under the EEA Regulations 2016 do not also require leave to enter or remain in the UK. It will be necessary to modify this provision to implement Article 18(2) and (3) of the Withdrawal Agreement, Article 17(2) and (3) of the EEA EFTA Separation Agreement, and Article 16(2) and (3) of the Swiss Citizens' Rights Agreement.

59. Although the aforementioned powers are capable of amending primary legislation (in particular, the Immigration Act 1971, and the Nationality, Immigration, and Asylum Act 2002), the scope of the amendments that may be made are naturally constrained by the narrow scope of what may be done under the power.

### **Justification for the procedure**

60. Paragraph 1 of Part 1, Schedule 5 provides for the parliamentary procedure applicable in respect of the exercise of these powers.
61. The power at 7(1)(a) to set a deadline for the submission of applications will be subject to the negative resolution procedure (unless it is used to amend, repeal, or revoke primary legislation or retained direct principal EU legislation).
62. The powers in clause 7(1)(b) to (g) will be used to preserve the rights of the protected cohort during the grace period. The first set of regulations to be made under the powers in clause 7(1)(b) to (g) are likely to be substantial and detailed. The first use of these powers is therefore subject to the draft affirmative procedure. The first set of regulations will, for example, provide that provisions in the EEA Regulations 2016 in relation to residence rights, powers in relation to refusal of admission and removal, procedures in relation to appeals and documentation continue to apply to the protected cohort during the grace period and pending the determination of any application to the EU Settlement Scheme. The main detail of the residence rights of EU citizens and EEA EFTA and Swiss nationals is currently contained in secondary legislation (the EEA Regulations 2016). However, this is underpinned by primary legislation, in particular the Immigration Acts.<sup>10</sup>
63. Thereafter, any changes are likely to be technical and minor. For example, consequential changes may be needed to reflect changes to domestic legislation as a consequence of developments in CJEU case law which is relevant to this area. The Government notes that at present the rights of EU citizens and EEA EFTA and Swiss nationals and their family members are provided for by regulations made under the

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<sup>10</sup> 'The Immigration Acts' is the defined term for a body of immigration legislation, as defined in Schedule 1 to the Interpretation Act 1978.



negative procedure (the EEA Regulations 2016). However, if this power is ever exercised for the purpose of amending or repealing primary legislation or retained direct principal EU legislation, the draft affirmative procedure shall apply, to provide for appropriate scrutiny for these types of amendments.

## **Clause 8(1) and (2): powers to make provision in regulations in respect of frontier workers**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative procedure for first set of regulations or if exercise of either power involves making regulations which are intended to amend, repeal or revoke any primary legislation or retained direct principal EU legislation; otherwise negative resolution procedure.*

### **Context and purpose**

64. Frontier workers are EU citizens, EEA EFTA nationals or Swiss nationals who are economically active, but not resident, in the UK. This clause provides for the protections of their rights where they are working in the UK at the end of the implementation period, in line with the Agreements. Under the Common Travel Area, UK and Irish citizens will have the right to move freely and work across the Irish border, and so will not need to rely on these frontier worker rights to work in and enter the UK<sup>11</sup>.
65. Articles 24(3) and 25(3) of the Withdrawal Agreement, Articles 23(3) and 24(3) of the EEA EFTA Separation Agreement, and Article 20(2) of the Swiss Citizens' Rights Agreement provide for the rights of employed and self-employed frontier workers to enter and exit the state of work and to retain their status in certain circumstances to recover from an illness or accident or to allow them to find new employment in the state of work. These rights are currently underpinned by section 7 of the Immigration Act 1988 ('the 1988 Act') which exempts EU citizens, EEA EFTA nationals and Swiss nationals from UK immigration control, and in the EEA Regulations 2016 which transpose EU law relating to the free movement of persons. The planned Immigration and Social Security Co-ordination (EU Withdrawal) Bill will disapply section 7 of the 1988 Act and the EEA Regulations 2016, so these rights will need to be set out afresh in domestic legislation.

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<sup>11</sup> A Memorandum of Understanding between the UK and Ireland on the Common Travel Area was signed between the UK Government and the Irish Government on 8 May 2019.

66. Article 26 of the Withdrawal Agreement, Article 25 of the EEA EFTA Separation Agreement and Articles 21(1)(a) and (2) of the Swiss Citizens' Rights Agreement permit the state of work to require EU citizens, EEA EFTA nationals and Swiss nationals who have rights as frontier workers under the Agreements to apply for a document certifying their rights.
67. Subsection (1) provides Ministers of the Crown with a power to make secondary legislation for the purpose of implementing Articles 24(3) and 25(3) of the Withdrawal Agreement and equivalent provisions in the EEA EFTA Separation Agreement (Article 23(3) and 24(3)) and the Swiss Citizens' Rights Agreement (Article 20(2)) concerning the rights of employed and self-employed frontier workers to enter their state of work, and retention of the rights that they enjoyed as workers there before the end of the implementation period.
68. Subsection (2) provides for a power to make secondary legislation for the purpose of implementing Article 26 of the Withdrawal Agreement, Article 25 of the EEA EFTA Separation Agreement and Articles 21(1)(a) and 21(2) of the Swiss Citizens' Rights Separation Agreement. These provisions allow for a permit system that can be used to certify EU citizens, EEA EFTA nationals and Swiss nationals as frontier workers in the UK after the end of the implementation period.
69. Subsection (3) provides that the power to make regulations under subsection (1) or (2) may be exercised by modifying any provision made by or under the Immigration Acts, as defined in Schedule 1 of the Interpretation Act 1978 (this is therefore a so called 'Henry VIII' power).
70. This power may also be used to give effect to Joint Committee decisions amending certain parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement, within the scope of the particular matters that this power is intended to address<sup>12</sup>.
71. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority).

## **Justification for powers**

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<sup>12</sup>The Joint Committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.

72. It is proposed that the frontier worker provisions in Articles 24(3), 25(3) and 26 of the Withdrawal Agreement and relevant equivalent provisions in the EEA EFTA Separation Agreement (Articles 23(3), 24(3) and 25) and the Swiss Citizens' Rights Agreement (Articles 20(2) and 21(1)(a) and (2)) should be implemented in secondary legislation because the detail will be highly technical. An example of this technical detail is the definition of when a person retains the status of a worker, such as the result of illness or an accident. This can be seen in the EEA Regulations 2016 which currently implement most of these rights as they exist now. Further, implementing in secondary legislation means necessary amendments can be made more quickly, ensuring the UK's compliance with its international obligations as early as possible. With regard to amending primary legislation, the Government considers that the use of delegated powers is justified in the context of the limited scope of what the powers can do, that is, to implement Articles 24(3), 25(3) and 26 of the Withdrawal Agreement, Articles 23(3), 24(3) and 25 of the EEA EFTA Separation Agreement, and Articles 20(2) and 21(1)(a) and (2) of the Swiss Citizens' Rights Agreement. This power is limited in that it may only be used to amend provisions made by or under the Immigration Acts.
73. The frontier worker provisions need to include the continued exemption from immigration control, the right of entry, and the procedures relating to the application process for documents certifying frontier worker status and the issuance and renewal of such documents. The latter will be a detailed technical regime.
74. Further, any of these provisions may require amendment in the future in light of jurisprudence from the CJEU, either by the end of the implementation period (for matters relating to frontier workers under EU law) or by 31 December 2028 (for matters relating to frontier workers in the Withdrawal Agreement).
75. Some restrictions on the rights of frontier workers as permitted by the Agreements will be set out in the same secondary legislation, but using the power in clause 9 (for example, the restriction on the right of entry). Other restrictions will be set out in existing instruments, either in the 2016 Regulations by virtue of savings provisions or in primary legislation (for example, the Immigration Act 1971 and the UK Borders Act 2007 which set out the framework for deportation).

### **Justification for procedure**

76. Paragraph 1 of Part 1 of Schedule 5 provides for the parliamentary procedure applicable in respect of the exercise of these powers.
77. The first set of regulations made under the power at clause 8(1) are likely to be substantive and detailed, setting out the rights of employed and self-employed frontier

workers. The first set of regulations made under this power will therefore be subject to the draft affirmative procedure. Any subsequent regulations made under this power will be for the purpose of making minor technical amendments or corrections to the first set of regulations. For this reason, subsequent regulations will be subject to the negative resolution procedure, unless those regulations amend, repeal or revoke primary legislation or retained direct principal EU legislation, in which case the draft affirmative procedure will apply to provide appropriate scrutiny of the proposed legislation.

78. Exercise of the power at clause 8(2) will be subject to the negative procedure, unless the power is exercised to amend, repeal or revoke primary legislation or retained direct principal EU legislation, in which case the draft affirmative procedure will apply. There is precedent for the proposed approach: current registration schemes under EEA Regulations 2016 are made under the negative procedure. Subsequent regulations will only need to deal with technical matters such as those necessary to give effect domestically to decisions of the CJEU for the time-limited period that the CJEU has jurisdiction in respect of the citizens' rights parts of the Withdrawal Agreement.

## **Clause 9(1): power to provide for restrictions of rights of entry and residence**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative procedure for first set of regulations, and for subsequent regulations which amend, repeal or revoke primary legislation or retained direct principal EU legislation; otherwise negative resolution procedure.*

### **Context and purpose**

79. Article 20 of the Withdrawal Agreement and relevant equivalent provisions at Article 19 of the EEA EFTA Separation Agreement, and Articles 17 and 20(3) of the Swiss Citizens' Rights Agreement establish the legal basis on which a person's entry and residence rights under the Agreements can be restricted.
  
80. Article 20(1) of the Withdrawal Agreement and its equivalent provisions at Article 19(1) of the EEA EFTA Separation Agreement provide that conduct before the end of the implementation period of persons in scope must be considered in accordance with Chapter VI of Directive 2004/38/EC. Article 17(1) of the Swiss Citizens' Rights Agreement requires that conduct before the end of the implementation period of persons in scope shall be considered in accordance with Article 5 of Annex 1 to the EU-Swiss Free Movement of Persons Agreement ('FMOPA'). This means that the relevant public policy, public security or public health test under the Directive and FMOPA (i.e. the existing EU law test for restrictions of entry and residence) is to be applied to conduct by EU citizens, EEA EFTA nationals, and Swiss nationals and their family members committed before the end of the implementation period. Article 20(2) of the Withdrawal Agreement provides that conduct after the end of the implementation period is to be considered in accordance with national law. Article 20(3) provides that the UK may refuse, terminate or withdraw entry and residence rights in the case of abuse of those rights or fraud as set out at Article 35 of Directive 2004/38/EC. Article 20(4) provides for the removal of applicants who submit fraudulent or abusive applications under the conditions set out in Directive 2004/38/EC and even before final judgment where judicial redress is sought. Similar provisions are included in the EEA EFTA Separation Agreement (Article 19) and the Swiss Citizens' Rights Agreement (Articles 17 and 20(3)).

81. This clause gives Ministers of the Crown the power to make regulations for the purpose of implementing the relevant provisions in the Agreements in connection with restrictions on entry and residence rights based on conduct committed before the end of the implementation period or on the grounds of fraud or abuse of rights. In particular it enables Ministers to ensure that decisions to restrict entry or residence rights based on conduct before the end of the implementation period can be made by applying the relevant public policy, public security or public health test. The power can be exercised, among other things, by saving the current provisions for removal and exclusion of EU citizens, EEA EFTA and Swiss nationals within EEA Regulations 2016 to the extent necessary to ensure those provisions continue to apply in relation to conduct before the end of the implementation period.
82. Subsection (1) provides the power to make regulations to implement Articles 20(1), (3), and (4) of the Withdrawal Agreement, Articles 19(1), (3), and (4) of the EEA EFTA Separation Agreement, and Articles 17(1), 17(3) and 20(3) of the Swiss Citizens' Rights Agreement.
83. Subsection (2) provides that regulations under subsection (1) can be applied to:
  - a. persons to whom a provision identified in subsection (1) applies; and
  - b. persons to whom those provisions do not apply, but who are otherwise protected by the UK's domestic implementation of the Agreements i.e. they have been granted leave to enter or remain under the EU Settlement Scheme, as well as those who have entry clearance granted by virtue of relevant entry clearance immigration rules, and those who otherwise have leave to enter granted after arriving with entry clearance by virtue of relevant entry clearance immigration rules.
84. Subsection (3) provides that references to a person who has entry clearance or leave to enter or remain in sub-section 2(b) include persons who would have had entry clearance or leave to enter or remain but for the making of a deportation order under section 5(1) of the Immigration Act 1971 or any other decision made in connection with restricting a right to enter the UK.
85. Subsection (4) provides that the power to make regulations under this clause may be exercised by modifying any provision made by or under the Immigration Acts (see the definition in s.61 of the UK Borders Act 2007) or any subordinate legislation made under any other primary legislation. This is therefore a so called 'Henry VIII' power but limited only to the modification of the Immigration Acts, not wider primary legislation.

86. This power may also be used to give effect to Joint Committee decisions amending Parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement, within the scope of the particular matters that this power is intended to address<sup>13</sup>.
87. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority).

### **Justification for taking the power**

88. Implementing Article 20 of the Withdrawal Agreement, Article 19 of the EEA EFTA Separation Agreement, and Articles 17 and 20(3) of the Swiss Citizens' Rights Agreement will involve significant technical detail. The volume and nature of the amendments required make them well suited to secondary legislation. Taking a power allows the Government to make appropriate savings, to make technical amendments as and when required and to quickly respond to domestic and CJEU judgments in coming years on the interpretation of the citizens' rights provisions of the Withdrawal Agreements. Without a power, the Government would not be able to respond quickly to ensure correct implementation of its international obligations under the Agreements.
89. The clause is limited to the provisions of the Agreements on restrictions on rights of entry and residence, that is, ensuring that certain substantive and procedural protections under Directive 2004/38/EC (and equivalent provision in respect of Switzerland) continue to apply. Directive 2004/38/EC has already been transposed in the UK via the EEA Regulations 2016. The ability to modify primary legislation is further constrained to modification of the Immigration Acts only.
90. Any provisions made under the power in connection with restrictions on citizens' rights will have to comply with the terms of the Agreements. The Independent Monitoring Authority ('IMA') will oversee the UK's implementation of the citizens' rights provisions in the Withdrawal Agreement and the EEA EFTA Separation Agreement. The power can be used to make technical amendments in response to IMA reports.

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<sup>13</sup>The Joint Committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.



91. This power can only be used in a way that provides protection in respect of the restriction of entry and residence rights for people in scope; it cannot be used in wider ways which act to their detriment.

### **Justification for procedure**

92. Paragraph 1 of Part 1, Schedule 5 provides for the parliamentary procedure applicable to the exercise of this power.
93. The first set of regulations made under the power is subject to the draft affirmative procedure because the first set of regulations will be substantive and detailed, setting out how and when a person's admission and residence rights can be restricted. Any subsequent regulations will be used to make technical amendments and corrections, and therefore the negative resolution procedure will apply for subsequent regulations, unless those regulations amend, repeal or revoke primary legislation or retained direct principal EU legislation, in which case the draft affirmative procedure will apply, to provide appropriate scrutiny of the proposed legislation.
94. The procedure provided for by this clause is based on the procedure under which the current restrictions provisions deriving from EU law were made. There is precedent for use of the negative procedure for subsequent regulations of this nature. The current provisions governing when and how a person's EEA admission and residence rights can be restricted were made within the EEA Regulations 2016, by negative statutory instrument under section 2(2) of the ECA. They transpose powers and obligations within Directive 2004/38/EC.
95. The exercise of the power may include modifying any provision made by or under the Immigration Acts, as defined in Schedule 1 of the Interpretation Act 1978, or any provision made under other primary legislation. Where subsequent regulations are made for the purpose of amending or repealing a provision of the Immigration Acts, the draft affirmative procedure will be adopted.

## **Clause 11(1): power to make provision for appeals against citizens' rights immigration decisions**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Made affirmative procedure for the first regulations. Draft affirmative for subsequent regulations which amend, repeal or revoke primary legislation, or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.*

### **Context and purpose**

96. Articles 18 and 21 of the Withdrawal Agreement provide the right to judicial redress in respect of decisions refusing to grant residence status under the EU Settlement Scheme or to restrict residence rights of persons protected by the Withdrawal Agreement. Corresponding obligations exist under the EEA EFTA Separation Agreement at Articles 17 and 20.
97. Further, the effect of Article 20 of the Withdrawal Agreement (and the corresponding provision at Article 19 in the EEA EFTA Separation Agreement) is to provide for a right of judicial redress against restrictions on rights of entry to the UK for frontier workers and those continuing a planned course of healthcare treatment under Article 32 of the Withdrawal Agreement (and the corresponding provision at Article 31 of the EEA EFTA Separation Agreement).
98. Article 8 of the Swiss Citizens' Rights Agreement provides for similar rights of judicial redress.
99. This clause provides a Minister of the Crown with a power to make regulations to make provision for, or in connection with, appeals against citizens' rights immigration decisions, defined in subsection (2) of the clause as:
  - a. a decision made in connection with entry clearance by virtue of relevant entry clearance immigration rules;
  - b. a decision made in connection with leave to enter or remain by virtue of residence scheme immigration rules;

- c. a decision made in connection with entry clearance for the purposes of acquiring leave to enter or remain in relation to a healthcare right of entry (as defined in subsection (5));
- d. a decision made in connection with or leave to enter or remain in relation to a healthcare right of entry (as defined in subsection (5));
- e. a decision made in connection with a right to enter or remain by virtue of regulations for frontier workers;
- f. a decision to make, or a refusal to revoke, a deportation order under section 5(1) of the Immigration Act 1971 in relation to a relevant person; and
- g. any other decision made in connection with restricting the right of a relevant person to enter the United Kingdom.

100. This power may also be used to make provision for, or in connection with, reviews (including judicial reviews) of decisions within (2)(g).

101. This power may also be used to give effect to Joint Committee decisions amending parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement, within the scope of the particular matters that this power is intended to address<sup>14</sup>.

102. Subsection (1) provides that a Minister of the Crown may by regulations make provision for, or in connection with, appeals against citizens' rights immigration decisions.

103. The Government intends that regulations under this power will make provision for appeals to be made to the First-tier Tribunal (Immigration and Asylum Chamber) with an onward right of appeal with permission to the Upper Tribunal on a point of law.

104. Subsection (2) defines the 'citizens' rights immigration decisions' in connection with which a Minister of the Crown may make appeals regulations under this clause.

105. Subsection (3) states that a Minister of the Crown may make regulations to make provision for, or in connection with, reviews (including judicial reviews) of decisions within (2)(g).

106. Subsection (4) states that the power to make regulations under this subsection (1) or (3) may, among other things, be exercised by modifying any provision made by or under an enactment.

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<sup>14</sup>The joint committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.

107. Subsection (5) defines a ‘healthcare right of entry’ for the purposes of subsection (2) as a right to enter the UK that a person has by virtue of Article 32(1)(b) of the Withdrawal Agreement, Article 31(1)(b) of the EEA EFTA Separation Agreement, or Article 26a(1)(b) of the Swiss Citizens’ Rights Agreement.
108. Subsection (6) defines a ‘relevant person’ for the purposes of subsections (2)(f) and (g) as a person to whom Article 20 of the Withdrawal Agreement, Article 19 of the EEA EFTA Separation Agreement, or Articles 17 or 20(3) of the Swiss Citizens’ Rights Agreement applies, or if the person does not fall within these Articles, a person who has entry clearance granted by virtue of relevant entry clearance immigration rules, has leave to enter or remain granted by virtue of residence scheme immigration rules or otherwise has leave to enter granted after arriving with entry clearance granted by virtue of relevant entry clearance immigration rules.
109. Subsection (7) provides that references in subsection (6)(b) to a person who has entry clearance or leave to enter or remain include references to a person who would have had entry clearance or leave to enter or remain but for the making of a deportation order under section 5(1) of the Immigration Act 1971 or any other decision made in connection with restricting the right of the person to enter the UK.
110. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to a person who is not a public authority (but may so provide if the person is a public authority).

### **Justification for taking the power**

111. There is a high level of technical detail involved in drafting appeal rights which will need to cover a wide range of different cohorts and a variety of decisions. Taking a power provides scope and flexibility to make technical amendments, better suited to being made by secondary legislation rather than requiring primary legislation, and to respond to domestic and CJEU judgments on the interpretation of the citizens’ rights provisions of the Withdrawal Agreement. Future uses of this power may arise in light of evolving interpretation of the Agreements, such as following investigation by the IMA. This power will ensure that the Government can respond by providing for any amendments required to ensure the UK’s ongoing compliance with its international obligations.
112. Taking a power is also consistent with the approach taken at section 109 of the Nationality, Immigration and Asylum Act 2002, under which the appeals provisions

are made in respect of a person who has or claims to have a right under any of the EU Treaties. This is the power that was used to create the appeal rights within the EEA Regulations 2016. The scope of the proposed power is wider than that included in section 109 of the Nationality, Immigration and Asylum Act 2002. This allows, for example, provision to be made in connection with section 3C of the Immigration Act 1971 to ensure leave can be extended while an appeal under the regulations is pending.

113. Subsection (4) provides that regulations under this section may modify any provision made by or under an enactment, including primary legislation. Where, for example, the regulations provide under subsection (1) for a power to certify a decision to deport, subsection (4) will allow any necessary amendment to be made to the Nationality, Immigration and Asylum Act 2002 regarding the effect of certification.

114. Regulations made under this power will have to comply with the protections built into the terms of the Agreements. Further, the IMA will oversee the UK's implementation of the Withdrawal Agreement and the EEA EFTA Separation Agreement on citizens' rights, including whether the right of appeal is properly legislated for.

#### **Justification for procedure**

115. Paragraph 2 of Part 1, Schedule 5 provides for the parliamentary procedure in respect of these powers.

116. The first regulations made under this power are subject to the made affirmative procedure, which will allow the power to be exercised so that regulations made under it are effective immediately. This approach is being taken to ensure that the UK is able to fully comply with its obligations when the Agreements come into force by providing for the availability of judicial redress relating to those citizens' rights immigration decisions which need to be in place from that date. Under the made affirmative procedure the regulations will cease to have effect unless an affirmative resolution is received within the 40 day period of having been laid, thus ensuring Parliament must debate and approve the SI to allow it to remain in force, while allowing for operational functionality at the earliest opportunity.

117. Any subsequent regulations will be used to make technical amendments and corrections, or where appeal rights need to be added to be in place at the end of the implementation period, and therefore the negative resolution procedure will apply for subsequent regulations, unless those regulations amend, repeal or revoke primary legislation or retained direct principal EU legislation, in which case the draft

affirmative procedure will apply, to provide appropriate scrutiny of the proposed legislation.

118. There is precedent for the approach of providing regulation-making powers under the negative procedure for appeals provisions, as regulations concerning current EEA appeals made under section 109 of the Nationality, Immigration and Asylum Act 2002 are made using the negative procedure.

119. The power does not provide the Government with the ability to change existing appeals legislation except in so far as provision is made for, or in connection with, appeals against citizens' rights immigration decisions, and the review of decisions to restrict the entry rights to the UK of relevant persons, as provided for in the Bill. In the event that the power is used to amend, repeal or revoke primary legislation or retained direct principal EU legislation in subsequent regulations, the draft affirmative procedure will be used.

## **Clause 12(1): recognition of professional qualifications**

*Power conferred on: A Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative where amending, repealing or revoking primary legislation or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.*

### **Context and purpose**

120. This clause gives Ministers of the Crown and devolved authorities the power to make regulations to implement Chapter 3 of Title II of Part 2 of the Withdrawal Agreement (Professional Qualifications) and the relevant provisions of the EEA EFTA Separation Agreement (Article 26, 27 and 28) and the Swiss Citizens' Rights Agreement (Article 23(4) so far as relates to recognition of professional qualifications and all Articles under Part 4).
121. This will ensure that EU citizens and EEA EFTA nationals who are resident or frontier working in the UK, who hold professional qualifications which have been recognised, or are in the process of being recognised, by a UK professional regulator before the end of the implementation period, will continue to have their qualifications recognised in the UK. The clause allows these provisions to be extended to those in scope of the EU Settlement Scheme.
122. Under the Swiss Citizens' Rights Agreement, Swiss nationals who hold professional qualifications which have been recognised, or are in the process of being recognised, by a UK professional regulator before the end of the four year period following the end of the implementation period will continue to have their qualifications recognised, so long as the individual had obtained, or was in the process of obtaining, a qualification before the end of the implementation period. Article 23 of the Swiss Citizens' Rights Agreement provides that those providing services on a temporary basis from Switzerland to the UK or from the UK to Switzerland shall have the right to continue to do so after the end of the implementation period, provided certain conditions are met.

123. The effects of these recognition decisions will remain the same as when the UK was a Member State – for example, entitling the holder of the recognition decision to practise the profession under the same conditions as UK nationals and allowing those who have been granted ‘partial access’ to a profession to retain this status. Article 39 of the Withdrawal Agreement provides that this recognition will be for the lifetime of the professional. The equivalent provision is found at Article 37 of the EEA EFTA Separation Agreement, and Article 4 of the Swiss Citizens’ Rights Agreement.
124. For the purpose of this clause, the devolved authorities are the Scottish Ministers, the Welsh Ministers and Northern Ireland departments.
125. For EU citizens and EEA EFTA nationals this clause applies to decisions made under UK legislation that implements the following provisions of EU law:
- a. Title III of Directive 2005/36/EC;
  - b. Articles 10(1) and (3) of Directive 98/5/EC;
  - c. Article 14 of Directive 2006/43/EC; and
  - d. Council Directive 74/556/EEC.
126. For Swiss nationals, this clause applies to decisions made under UK legislation that implements the following provisions of EU law:
- a. Title III of Directive 2005/36/EC;
  - b. Directive 98/5/EC;
  - c. Council Directive 77/249/EEC;
  - d. Council Directive 74/556/EEC; and
  - e. Council Directive 86/653/EEC.
127. The Withdrawal Agreement and EEA EFTA Separation Agreement only make provision for the purposes of establishment, and not where recognition was made for the temporary and occasional provision of services. The Swiss Citizens’ Rights Agreement also makes provision for the purposes of establishment. In addition Article 23 of the Swiss Citizens’ Rights Agreement provides that those providing services on a temporary basis from Switzerland to the UK or from the UK to Switzerland shall have the right to continue to do so after the end of the implementation period, provided certain conditions are met. Those in the scope of Article 23 may continue to rely upon the Council Directive 77/249/EEC (which facilitates the exercise by lawyers of freedom to provide services) and the provisions of Title II of Directive 2005/36/EC (which concerns the freedom to provide services for other regulated professions).
128. Subsection (1) provides that the power may be used to make regulations to implement Chapter 3 of Title II of Part 2 of the Withdrawal Agreement, as well as to supplement the effect of section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the



Bill) in relation to that Chapter, and to deal with matters arising out of, or related to that Chapter.

129. Subsection (2) provides that the power may be used to make regulations to implement Chapter 3 of Title II of Part 2 of the EEA EFTA Separation Agreement, as well as to supplement the effect of section 7B of the EU (Withdrawal) Act 2018 in relation to that Chapter, and to deal with matters arising out of, or related to that Chapter.
130. Subsection (3) provides that the power may be used to make regulations to implement Article 23(4) (so far as relates to recognition of professional qualifications) and Part 4 of the Swiss Citizens' Rights agreement, as well as to supplement the effect of section 7B of the EU (Withdrawal) Act 2018 in relation to those provisions, and to deal with matters arising out of, or related to those provisions. Article 23(4) sets out that Swiss service providers, providing temporary and occasional services in regulated professions in accordance with Article 23(1) can continue to do so.
131. Subsection (4) outlines that for the purposes of subsection (3) the professional qualification provisions of the Swiss Citizens' Rights Agreement are Part 4 and Article 23(4) (so far as it relates to the recognition of professional qualifications).
132. Subsection (5) provides that an appropriate authority may make the regulations that apply not only to persons within the scope of the relevant provisions of the Withdrawal Agreement and EEA EFTA Separation Agreement but also to persons outside the scope of those agreements who have been granted leave to enter or remain in the UK under the residence scheme immigration rules (see clause 17).
133. Subsection (6) provides that the powers in subsections (1), (2) and (3) may be used to modify any provision made by or under an enactment (as defined at clause 7(1)) but subsection (7) provides that primary legislation passed or made after IP completion day is not caught by subsection (6).
134. Subsection (8) defines an 'appropriate authority' for the purpose of this clause as meaning, a Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority.
135. Subsection (9) references Schedule 1 which makes further provision about the powers of the devolved authorities to make regulations under this clause.
136. This power may also be used to give effect to amendments to the Withdrawal Agreement, and the EEA EFTA Separation Agreement adopted by the Joint Committee falling within the scope of the particular matters that this power is intended to address.

137. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority).

### **Justification for taking the power**

138. The power to make regulations may be exercised to amend primary and secondary legislation. However, the power is limited in that it can only amend primary legislation that relates to the implementation of the directives referred to in the Agreements (see above) and only in relation to persons in the scope of the Agreements or those granted leave to enter or remain under residence scheme immigration rules. Under the Swiss Citizens' Rights Agreement recognition of qualifications held by Swiss nationals is not dependent on individuals being resident or frontier workers in the UK.

139. Amendments will mainly be technical in nature to give effect to the provisions in the Agreement. The purpose of any amendments will be primarily to facilitate the conclusion and winding up of the current system for recognition of professional qualifications. The power cannot be exercised to modify primary legislation passed after the end of the implementation period.

140. There is precedent in that parts of the Professional Qualifications Directive (2005/36/EC, as amended by 2013/55/EU) are implemented by amendments to primary legislation made by regulations under section 2(2) of the ECA (see, for example, European Qualifications (Health and Social Care Professions) Regulations 2016, which amends the Medical Act 1983 and the Dentists Act 1984).

141. The legislation that needs to be amended will include devolved secondary legislation and so a concurrent power has been conferred on the devolved authorities, to make regulations when it is within their competence to do so. The UK Government will not normally use the power in areas of devolved competence without the agreement of the relevant devolved authority.

### **Justification for procedure**

142. Where the power to make regulations is used to modify primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply, otherwise the negative resolution procedure will apply. The purpose of regulations made under the negative procedure will be to give effect to the provisions in the Agreements. The

scope of these provisions is constrained by the Agreements themselves and by the scope of the power itself. Where amendments are required to primary legislation or retained direct principal EU legislation, the draft affirmative procedure is adopted to provide for appropriate scrutiny of the proposed legislation. The devolved authorities have been consulted on the equivalent scrutiny procedures which apply in respect of their exercise of the power.

## Clause 13(1): coordination of social security systems

*Power conferred on: A Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative where amending, repealing or revoking primary legislation, or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.*

### Context and purpose

143. Clauses 5 and 6 will ensure that EU Regulations 883/2004 and 987/2009<sup>15</sup> which govern social security coordination will continue to apply in domestic law as provided for by the Agreements. This includes future updates to these Regulations, which will be added to the relevant Annexes of the Agreements by the Joint Committees.<sup>16</sup> This power is required to supplement the effect of those updates flowing through clauses 5 and 6 for those individuals within scope of Title III of Part 2 of the Withdrawal Agreement, Title III of Part 2 of the EEA EFTA Separation Agreement, and Part Three and Article 23(4) of the Swiss Citizens' Rights Agreement.

144. The EU social security coordination regulations, as an overarching aim, protect the social security position of persons who have exercised their free movement rights within the EU. They do this in a number of ways, ensuring the equal treatment of UK nationals and EU citizens, and coordinating the application of different Member States' social security systems to avoid conflict or duplication. They also provide for the aggregation of periods of work, insurance (National Insurance Contributions (NICs) in the UK) or residence to help meet benefit entitlement conditions and for the payment of certain benefits to or in respect of a person living in another Member State ('export of benefits').

145. For instance, the EU regulations ensure that a worker (and their employer) or a self-employed worker are only required to pay contributions into one Member State's

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<sup>15</sup> EU Regulations 1408/71 and 574/72 will apply to nationals of third countries in situations covered by Title III.

<sup>16</sup> Joint Committees established by Article 164 of the Withdrawal Agreement, Article 65 of the EEA EFTA Separation Agreement, Article 6 of the Swiss Citizens' Rights Agreement.

social security scheme at a time and determines which Member State is responsible for the payment of benefits and the cost of healthcare. They set out certain rights to healthcare cover in the UK, reimbursed by the Member State responsible for healthcare, and equivalent rights for healthcare cover in Member States, reimbursed by the UK.

146. These rules also apply to the EEA States via the EEA Agreement, and Switzerland via the Free Movement of Persons Agreement (FMOPA).
147. Clause 13 provides Ministers of the Crown and devolved authorities (separately or jointly) with a power to modify domestic legislation to implement Title III of Part 2 of the Withdrawal Agreement, Title III of Part 2 of the EEA EFTA Separation Agreement, and Part 3 and Article 23(4) of the Swiss Citizens' Rights Agreement. It will enable Ministers of the Crown and devolved authorities to supplement the effect of the direct application of these EU Regulations into domestic law, for example through remedying any unforeseen inconsistencies with domestic legislation which may occur and give rise to unfair treatment. It also allows Ministers of the Crown and devolved authorities to make provision otherwise for the purposes of dealing with matters arising out of, or related to, that Title. The UK Government will not normally use the power in areas of devolved competence without the consent of the relevant devolved administration. For the purpose of this clause, the devolved authorities are the Scottish Ministers and Northern Ireland departments. Social security in Wales is a reserved matter.
148. This power will also be available to update domestic legislation to reflect future changes to the EU Regulations that take effect in domestic law under the Withdrawal Agreement. This will ensure that the UK can react to future changes and continue to meet its obligations under the Withdrawal Agreement. This will also allow the UK to implement, where required, interpretations of Union law by the CJEU and allow the UK to reflect decisions of the Administrative Commission<sup>17</sup> that the UK wishes to accept as an accurate interpretation of matters under the coordination regulations.
149. Subsection (1) enables an 'appropriate authority' to make regulations to implement Title III of Part 2 of the Withdrawal Agreement, to supplement the effect of section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill), or to deal with matters arising out of or related to Title III of Part 2 of the Withdrawal Agreement. Subsections (2) and (3) contain equivalent provisions to be made in respect of Article

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<sup>17</sup> The Administrative Commission is responsible for dealing with administrative matters and questions of interpretation arising from the provisions of regulations on social security coordination. Decisions of the Commission are not legally binding.

7B of the EU (Withdrawal) Act 2018 for the EEA EFTA Separation Agreement and Swiss Citizens' Rights Agreement respectively.

150. Subsection (4) defines which provisions in the Swiss Citizens' Rights Agreement are 'social security co-ordination provisions'.
151. Subsection (5) states that the power to make regulations under this section may, among other things, be exercised by modifying any provision made by or under an enactment (this is therefore a so called 'Henry VIII' power).
152. Subsection (6) defines an 'appropriate authority' as a Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with a devolved authority.
153. Subsection (7) sets out that Schedule 1 contains further provision on the use of these powers by the devolved authorities.
154. This power may also be used to give effect to amendments to the Withdrawal Agreement, and the EEA EFTA Separation Agreement adopted by the Joint Committees falling within the scope of the particular matters that this power is intended to address.
155. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority). Regulations that confer or delegate functions on a public authority may require amendments to existing legislation which refers to that public authority. For example, where ensuring that NHS bodies may continue to process reciprocal healthcare entitlements on a UK-wide basis.

### **Justification for taking the power**

156. The interaction of the Agreements with existing and future domestic legislation has the potential to undermine the legal certainty of individuals rights to entitlements under the Agreements, or give rise to unexpected consequences for individuals or groups. There may be interactions between the Agreements and bilateral social security agreements that the UK may wish to enter into in the future, in relation to which domestic legislative provision needs to be made. The use of delegated legislation to rectify any unintended effects, or any inconsistencies in the domestic statute book, that could give rise to unfair treatment will ensure that the Government can respond as appropriate. This will ensure that the terms of the Agreements are fully implemented

in domestic law at both the end of the implementation period and in the future. The power is constrained in that it may only be used in relation to implementation of Title III of Part 2 of the Withdrawal Agreement, Title III of Part 2 of the EEA EFTA Separation Agreement and Part 3 of the Swiss Citizens' Rights Agreement or to supplement the effect of 7A or 7B of the EU (Withdrawal) Act 2018 (inserted by clauses 5 and 6 of the Bill) or deal with matters arising out of those provisions in the Agreements.

157. There will also need to be consequential amendments to the statute book. The purpose of this is to enable departments to administer obligations under the EU Regulations via other bodies, such as arms-length bodies. There are also references in primary legislation to the EU Regulations, which may have to be amended to refer to section 7A of the EU (Withdrawal) Act 2018, or to Title III of Part 2 of the Withdrawal Agreement and EEA EFTA Separation Agreement, or Part 3 of the Swiss Citizens' Rights Agreement.

### **Justification for procedure**

158. Where the power at clause 13(1) (and its equivalents at subsections (2) and (3)) is used to modify primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply. Otherwise, where the power at clause 13(1) is used to modify secondary legislation, the negative resolution procedure will apply. This is because the anticipated modifications will largely consist of technical amendments to secondary legislation required to implement and ensure compliance with the social security coordination obligations at Title III of Part 2 of the Withdrawal Agreement, Title III of the EEA EFTA Separation Agreement, and Part 3 of the Swiss Citizens' Rights Agreement. Given the fully coordinated nature of social security coordination and that the power is tied to implementing the agreements, there is very little scope to make substantial provision using this power. However, where technical amendments are required for primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply to provide for appropriate scrutiny of the proposed legislation. The devolved authorities have been consulted and are content that equivalent scrutiny procedures should apply in respect of their exercise of the power.

## **Clause 14: non-discrimination, equal treatment and rights of workers**

*Power conferred on: A Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative where amending, repealing or revoking primary legislation, or retained direct principal EU legislation; otherwise subject to the negative resolution procedure.*

### **Context and purpose**

159. This clause makes provision to ensure that domestic legislation is compatible with the broad equal treatment and non-discrimination provisions in the Agreements. This includes the ability to make provision to ensure that EU citizens, EEA EFTA nationals and Swiss nationals (and their family members) currently resident in the UK maintain existing entitlements to publicly funded benefits and services following the end of the implementation period. EU citizens, EEA EFTA nationals and Swiss nationals and their family members could otherwise find themselves excluded from certain benefits and services after the implementation period when various provisions of free movement of persons are amended or repealed. Under current rules, access to certain publicly funded benefits and services for EU citizens, EEA EFTA nationals, Swiss nationals and their family members is, broadly speaking, linked to a status under the EEA Regulations 2016, or whether claimants have a right to reside under EU law. For example, Regulation 2 of the State Pension Credit Regulations 2002 makes reference to status under the EEA Regulations 2016, and amendments will be required to ensure that those covered by the Agreements are still eligible for this benefit when the EEA Regulations 2016 are repealed.

160. Under the current rules, those with permanent residence under the EEA Regulations 2016 are entitled to certain benefits and services on the same terms as UK nationals, subject to meeting relevant eligibility criteria.

161. Where an individual does not have permanent residence, entitlement to these benefits and services is subject to eligibility tests. Eligibility is linked to holding another status under the EEA Regulations 2016, such as being a 'qualifying person' (for example, a worker in genuine and effective employment), or having a right to reside by virtue of a



directly effective treaty right. This power will be used to save the operation of the EEA Regulations 2016 (which will be repealed at the end of the implementation period as part of the wider repeal of legislative provisions implementing the free movement of persons) and related domestic law for the purpose of preserving access to benefits and services based on the same conditions as now.

162. Subsection (1) confers a power on an appropriate authority so as to enable it to make necessary regulations to implement Articles 12, 23, 24(1), 25(1), 24(3) and 25(3) of the Withdrawal Agreement. Subsection (2) provides that the power may be used to implement Articles 11, 22, 23(1), 24(1), 23(3) and 24(3) in the EEA EFTA Separation Agreement. Subsection (3) provides that the power may be used to implement Articles 7, 18, 19, 20(1) and 23(1) in the Swiss Citizens' Rights Agreement.
163. Subsection (4) provides that regulations made under subsections (1), (2) and (3) may be made so as to apply both to persons who are persons covered by the relevant provisions of the relevant agreement, as well as persons to whom the provision in question does not apply but who may be granted leave to enter or remain under the residence scheme immigration rules whether or not they have been granted such leave.
164. Subsection (5) states that the power to make regulations may be used to modify any provision made under an enactment (as defined at 40(1)) (this is therefore a so called 'Henry VIII' power).
165. Subsection (6) defines appropriate authority for the purposes of this clause. Subsection (7) references Schedule 1 which makes further provision about the powers of the devolved authorities in respect of citizens' rights provisions.
166. The UK Government will not normally use this power in areas of devolved competence without the agreement of the relevant devolved administration.
167. This power may also be used to give effect to amendments to the Withdrawal Agreement, and the EEA EFTA Separation Agreement adopted by the Joint Committees falling within the scope of the particular matters that this power is intended to address.
168. Subsection (3) of clause 16 provides that regulations made under this power may not provide for the conferral of functions (including the conferral of a discretion) on, or the delegation of functions to, a person who is not a public authority (but may so provide if the person is a public authority).

## **Justification for taking the power**

169. It is intended that provisions of domestic law that implement free movement of persons will be amended or repealed at the end of the implementation period by the planned Immigration and Social Security Co-ordination (EU Withdrawal) Bill. Provision therefore needs to be made under this Bill to amend, save (and if necessary modify) such legislation to ensure that it continues to comply with the UK's obligations to afford equal treatment to people residing on the basis of the Agreements.
170. This power will be used to ensure continuity of eligibility for benefits and services. Eligibility for benefits and services is set out across a large set of cross-cutting legislation, including immigration legislation. The amendments required to implement equal treatment, non-discrimination and rights of workers provisions across this legislation will be of a complicated nature. The changes required, including regulations to define qualifying persons, are well suited to secondary legislation.
171. A power is required because of the volume of cross-cutting legislation which links eligibility to benefits and services with a person's nationality, their status under the EEA Regulations 2016, or their exercise of EU law rights. The purpose of the power is to maintain the status quo with regards to eligibility, rather than to create new or remove existing entitlements. Maintaining this status quo will require a combination of complicated technical changes which will be subject to individual departments eligibility criteria.
172. There is also a requirement for this power to operate on future legislation in order to give effect to changes as domestic interpretation evolves, for example in response to reports by the IMA or litigation. The citizens' rights cohort extends to future children (and dependent grandchildren) of those protected by the Agreements, and so the requirement for equal treatment stretches far into the future. These powers will ensure that we continue to be able to comply with our obligations.
173. Despite the fact that the power can be exercised to amend primary legislation, any such amendments can only amend UK legislation to the extent it is appropriate for the purposes of implementing specific provisions in the Agreements as well as for other relevant persons as defined in the clause.

## **Justification for procedure**

174. Where the powers to make regulations in clause 14 are exercised to modify primary legislation or retained direct principal EU legislation, the Bill provides that the draft

affirmative procedure will apply, otherwise they will be subject to the negative resolution procedure. The anticipated amendments will largely consist of minor and mechanistic amendments to secondary legislation required to implement and ensure compliance with the equal treatment and non-discrimination obligations under the Agreements for example amending references to EU instruments. Such amendments will be subject to the negative resolution procedure. However, where amendments are required to primary legislation or retained direct principal EU legislation, the draft affirmative procedure is applied, to provide for appropriate scrutiny of the proposed legislation. The devolved authorities have been consulted and are content that equivalent scrutiny procedures should apply in respect of their exercise of the power.

## **Paragraph 38(1) of Part 3, Schedule 2 : power to limit the functions of, or abolish, the Independent Monitoring Authority for the Citizens' Rights Agreements (IMA)**

*Power conferred on: Secretary of State*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative*

### **Context and purpose**

175. The UK has agreed as part of the Withdrawal Agreement under Article 159 for an IMA in the UK to monitor the implementation and application of the citizens' rights part of the Withdrawal Agreement. It will be able to receive complaints from EU citizens and their family members and conduct inquiries concerning alleged breaches of citizens' rights contained in Part 2.

176. A parallel obligation has been agreed under Article 64 of the EEA EFTA Separation Agreement.

177. As provided in the Withdrawal Agreement, there is the possibility for the UK and the EU to decide - through the Joint Committee established by the Withdrawal Agreement - that the IMA's monitoring role is no longer required after a minimum period of 8 years has passed following the end of the implementation period. There is a parallel provision in the EEA EFTA Separation Agreement. Therefore, this power makes provision for the amendment of the IMA's functions (where only one Joint Committee has decided that the IMA is no longer needed), or to end its operation (in the case where both Joint Committees have taken this decision).

### **Justification for power**

178. The establishment of the IMA is a requirement of the Withdrawal Agreement and the EEA EFTA Separation Agreement and, accordingly, the body is being established solely for the purposes of complying with those agreements. In the circumstances where one or other of the relevant Joint Committees (which operate consensually as between the UK and the EU or EEA EFTA states) under the Agreements determines

that the IMA is no longer necessary, and thus that an obligation in an international agreement no longer binds the UK, the functions of the IMA can be modified or extinguished. Reflecting this in domestic legislation would become a process of an orderly winding down of the IMA (or limitation of its functions), entailing no significant new policy decisions, but involving a great deal of technical provision such as that regarding the treatment of legacy assets and employees of the IMA. A power is therefore taken for this purpose.

### **Justification for procedure**

179. As the power may be used to substantively amend primary legislation (including this Act itself as it is this Act which establishes the IMA and sets out its functions) the draft affirmative procedure will apply to this power, to provide for appropriate scrutiny of the proposed legislation.

## *2. Powers relating to the Other Separation Issues (OSIs)*

### **Clause 18: main power in connection with OSIs**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative procedure where a statutory instrument amends, revokes or repeals primary legislation or retained direct principal EU legislation, otherwise the negative procedure applies*

#### **Context and Purpose**

180. At the end of the implementation period, it will be important that the application of the EU legal order in the UK is brought to an orderly conclusion. The provisions on the Other Separation Issues (OSIs) in the Withdrawal Agreement are about providing legal certainty for individuals and businesses as the UK winds down out of the current legal order. The nature of the UK's future relationship with the EU will ultimately determine how we can best transition from these separation provisions to future arrangements.

181. The OSIs all relate to areas currently governed by EU law. They cover:

- a. goods placed on the market;
- b. ongoing customs procedures;
- c. ongoing VAT and Excise Duty matters;
- d. Intellectual Property;
- e. ongoing police and judicial cooperation in criminal matters;
- f. ongoing judicial cooperation in civil and commercial matters;
- g. data and information processed or obtained before the end of the implementation period or on the basis of the Withdrawal Agreement;
- h. ongoing public procurement and similar procedures;
- i. Euratom related issues;
- j. Union judicial and administrative procedures;
- k. administrative cooperation procedures;
- l. privileges and immunities; and
- m. other issues relating to the functioning of the institutions, bodies, offices and agencies of the EU.

182. Where relevant, similar provisions have been agreed with the EEA EFTA states as part of the EEA EFTA Separation Agreement. These cover:
- a. goods placed on the market;
  - b. ongoing customs procedures;
  - c. Intellectual Property;
  - d. data and information processed or obtained before the end of the implementation period or on the basis of the separation agreement;
  - e. ongoing public procurement and similar procedures;
  - f. ongoing police and judicial cooperation in criminal matters, and
  - g. judicial procedures.
183. As set out above, the rights and obligations arising under the Withdrawal Agreement and EEA EFTA Separation Agreement will be available in domestic law by virtue of new sections 7A and 7B of the EU (Withdrawal) Act 2018 (inserted by clauses 5 and 6 of the Bill). This includes those rights and obligations contained within the OSIs. This means that many provisions in the OSIs will not require any further domestic legislation. However, in some instances, further details will need to be set out in domestic legislation to ensure that the OSIs are given full effect in the UK legal system.
184. This clause (which inserts section 8B into the EU (Withdrawal) Act 2018) therefore provides Ministers of the Crown with a power to implement the OSIs, which form Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement. Ministers can only use this power in connection with those Parts. It is designed to enable implementation of the OSIs in domestic law and to supplement the effect of new sections 7A and 7B of the EU (Withdrawal) Act 2018.
185. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.
186. Subsection (1) provides Ministers with the power to make legislative changes which they consider appropriate for the purposes of implementing Part 3 of the Withdrawal Agreement. This includes supplementing the effect of the new section 7A of the EU (Withdrawal) Act 2018 in relation to Part 3, or dealing with matters arising out of, or related to, Part 3. This includes giving effect to amendments to the Withdrawal Agreement adopted by the Joint Committee in relation to Part 3.
187. Subsection (2) provides Ministers with the same power to make legislative changes which they consider appropriate for the purposes of implementing Part 3 of the EEA EFTA Separation Agreement.

188. Subsection (3) provides that secondary legislation made under this power is capable of doing anything an Act of Parliament can do, subject to the restrictions specified in subsection (5).
189. Subsection (4) clarifies that the power can be used to restate elements of Part 3 that automatically become domestic law via the new sections 7A and 7B of the EU (Withdrawal) Act 2018. This type of restatement can occur where it would be helpful to provide clarity or to make the law more accessible.
190. Subsection (5) places a series of restrictions on the power, stating what it cannot do. The power cannot be used to:
- a. impose or increase taxation or fees;
  - b. make retrospective provision;
  - c. create a relevant criminal offence;
  - d. establish a public authority;
  - e. amend, repeal or revoke the Human Rights Act 1998 (nor legislation made under it); or
  - f. amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to the EU (Withdrawal Act) 2018 or are amending or repealing any provision of those Acts which modifies another enactment).
191. Subsection (6) defines references to Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement as including references to any provisions of EU law applied by or referred to in Part 3.
192. The restriction applied to the power regarding the devolved settlements has been applied following engagement with the Scottish and Welsh Governments.

### **Justification for power**

193. Many aspects of the OSIs in Part 3 of the Withdrawal Agreement and of the EEA EFTA Separation Agreement will not require further implementing measures, given that they will flow into domestic law and have direct effect by virtue of new sections 7A and 7B of the EU (Withdrawal) Act 2018. This is the case for much of Title I, goods on the market, for example. Where OSI provisions make applicable EU regulations, those EU regulations will be directly applicable in domestic law by virtue of new sections 7A and 7B.



194. The legislative changes that will be necessary are relatively limited and are technical in nature. They also do not need to come into effect until the end of the implementation period and many provisions could be superseded by our future economic and security relationship with the EU, which would require new arrangements to be agreed and put in place. A power is therefore taken for this purpose to enable these changes to be made in secondary legislation.
195. Where further implementing measures are required, because some OSI provisions and provisions of EU law made applicable by or referred to in an OSI provision are not directly effective or directly applicable, new section 8B of the EU (Withdrawal) Act 2018 provides Ministers with a power to make such provision. In practice, those regulations will most likely amend domestic legislation which presently implements EU law obligations made applicable by OSI provisions. A significant measure of that is primary legislation. For example, Ministers will likely need to amend provision in the Competition Act 1998 and Enterprise Act 2002 to implement the agreement on administrative procedures.
196. The power is nevertheless naturally constrained to the extent that a Minister of the Crown may only use it to make regulations in connection with Part 3 of the Agreements. The power is further constrained by the list of restrictions at subsection (5) which sets out the things that the power may not do.
197. This power may also be used to give effect to Joint Committee decisions amending parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement, within the scope of the particular matters that this power is intended to address<sup>18</sup>.

### **Justification for procedure**

198. Where the power at new section 8B is used to modify primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply. Otherwise, where the power at new section 8B is used, the negative resolution procedure will apply. This is because the modifications that are anticipated will largely consist of technical amendments to secondary legislation required to allow processes to be concluded under the current arrangements, as set out in Part 3 of the Withdrawal Agreement and of the EEA EFTA Separation Agreement. The negative resolution procedure applies to technical modifications to secondary legislation for this narrow purpose. However, where technical modifications are required for primary legislation

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<sup>18</sup>The Joint Committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.

or retained direct principal EU legislation, the draft affirmative procedure applies, to provide for appropriate scrutiny of the proposed legislation.

## **Clause 19: corresponding power for devolved authorities in connection with OSIs**

*Power conferred on: A devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative procedure where a statutory instrument amends repeals or revokes primary legislation or retained direct principal EU legislation, otherwise the negative procedure applies.*

### **Context and purpose**

199. This clause, which inserts Part 1B of Schedule 2 of the EU (Withdrawal) Act 2018, provides a corresponding power to that at new section 8B of the EU (Withdrawal) Act 2018 (inserted by clause 18 of the Bill) for the devolved authorities (as defined at section 20(1) of the EU (Withdrawal) Act 2018) to make regulations to implement Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement to ensure that EU law can be wound-down in areas of devolved competence.

200. Paragraph 11G(1) provides a devolved authority acting alone with the power to make legislative changes which they consider appropriate for the purposes of implementing Part 3 of the Withdrawal Agreement. This includes supplementing the effect of new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill) in relation to Part 3, or dealing with matters arising out of, or related to, Part 3. This power may also be used to give effect to Joint Committee decisions amending parts of the Withdrawal Agreement, and the EEA EFTA Separation Agreement, within the scope of the particular matters that this power is intended to address<sup>19</sup>.

201. Paragraph 11G(2) makes provision for a Minister of the Crown acting jointly with a devolved authority to make the same provision as provided for at sub-paragraph (1) which concerns a devolved authority acting alone.

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<sup>19</sup>The Joint Committees may only adopt amendments to parts of the Agreements other than Parts One, Four and Six where such amendments are necessary to correct errors, address omissions or other deficiencies, or to address situations unforeseen when the Agreements were signed. Any such amendments may not amend the essential elements of the Agreements.

202. Paragraph 11G(3) provides a devolved authority acting alone with the power to make legislative changes which they consider appropriate for the purposes of implementing Part 3 of the EEA EFTA Separation Agreement. This includes supplementing the effect of new section 7B of the EU (Withdrawal) Act 2018 in relation to Part 3, or dealing with matters arising out of, or related to, Part 3.
203. Paragraph 11G(4) makes provision for a Minister of the Crown acting jointly with a devolved authority to make the same provision as provided for at sub-paragraph (3) which concerns a devolved authority acting alone.
204. Paragraph 11G(5) provides that regulations made under this power are capable of doing anything an Act of Parliament can do, subject to the restrictions specified in subsection (7).
205. Paragraph 11G(6) clarifies that the power can be used to restate elements of Part 3 that automatically become domestic law via the new sections 7A or 7B (inserted by clauses 5 and 6 of the Bill). This type of restatement can occur where it would be helpful to provide clarity or to make the law more accessible.
206. Paragraph 11G(7) places a series of restrictions on the power, stating what it cannot do. The power cannot be used to:
- a. impose or increase taxation or fees;
  - b. make retrospective provision;
  - c. create a relevant criminal offence;
  - d. establish a public authority;
  - e. amend, repeal or revoke the Human Rights Act 1998 (nor legislation made under it); or
  - f. amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to the EU (Withdrawal) Act 2018 or are amending or repealing any provision of those Acts which modifies another enactment).
207. These restrictions are identical to those provided for at subsection 5 of new section 8B of the EU (Withdrawal) Act 2018 (inserted by clause 18 of the Bill). The restriction applied to the power regarding the devolved settlements has been applied following engagement with the Scottish and Welsh Governments.
208. Paragraphs 11G(8), 11H, and 11J to L restrict the breadth of the devolved authorities' OSI implementation powers to their devolved competence.

209. Paragraph 11G(9) defines references to Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement as including references to any provisions of EU law applied by or referred to in Part 3.

210. Paragraph 11I subjects devolved authorities to requirements for consent, joint exercise or consultation, in relation to areas where those requirements would be in place under other powers.

### **Justification for power**

211. The power is required to enable devolved authorities to make regulations implementing Part 3 of the Withdrawal Agreement and Part 3 of the EEA EFTA Separation Agreement, and supplementing the effect of new sections 7A and 7B of the EU (Withdrawal) Act 2018 in areas of devolved competence. To do otherwise would prevent the devolved authorities from being able to make the required amendments to legislation falling within their areas of competence.

### **Justification for procedure**

212. Where the power is used to modify primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply. Otherwise, it will be subject to the negative resolution procedure. This is because the modifications that are anticipated will largely consist of technical amendments to secondary legislation required to allow processes to be concluded under the current arrangements, as set out in Part 3 of the Withdrawal Agreement and EEA EFTA Separation Agreement.

213. The negative resolution procedure will apply to technical modifications to secondary legislation for this narrow purpose. However, where technical modifications are required for primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply, to provide for appropriate scrutiny of the proposed legislation

### *3. Powers relating to financial authority*

## **Clause 20(7): Power in connection with financial provision**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: Draft affirmative procedure before the House of Commons alone*

### **Context and Purpose**

214. Part 5 of the Withdrawal Agreement sets out the UK's financial obligations to the EU as well as the EU's financial obligations to the UK. Clause 20 of the Bill provides the legislative mechanism to provide authority to the Government to meet the UK's obligations under the Withdrawal Agreement. During the period from exit day until 31 March 2021 these obligations will be met through a standing service provision authorising payments from the UK's Consolidated Fund, or, if the Treasury so decides, from the National Loans Fund.

215. The standing service provision will cease to apply after 31 March 2021, after which time all obligations payable under the Withdrawal Agreement (other than those relating to customs duties) will be met through supply.

216. Subsection (7) provides a Minister of the Crown with the power to amend the date upon which the standing service provision will cease to apply, allowing the obligations to continue to be met through the standing service provision.

### **Justification for the power**

217. Subsection (1) provides parliamentary approval to meet the Withdrawal Agreement obligations during the period from exit day until 31 March 2021. The power is required to enable a Minister of the Crown to make regulations amending the date upon which the standing service provision will cease to apply. This will allow the government to seek House of Commons agreement to the extension of the standing service provision. The financial settlement will constitute a binding obligation on the UK in international law regardless of the procedures by which that is given effect to in domestic law. The power allows the Government to put before the House of Commons the opportunity

to maintain, as it has during the period of the UK's membership of the EU, a provision granting the Government authority to pay the sums required by law. The Government believes the House of Commons should have the option to choose this, rather than rely on an annual process involving multiple votes, which cannot extinguish or effect the international legal obligations on the UK.

### **Justification for the procedure**

218. The power may be used to give Parliament a role in determining how the UK meets its obligations under the Withdrawal Agreement. In line with the rules requiring Parliamentary consideration of expenditure to make it proper, the Parliamentary scrutiny afforded by the draft affirmative procedure is appropriate.

#### *4. Powers relating to Northern Ireland*

### **Clause 21: main power in connection with Ireland/Northern Ireland Protocol**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes (main power); No (definitional power)*

*Parliamentary Procedure: Draft affirmative procedure where a statutory instrument under new section 8C(1) of the EU (Withdrawal) Act 2018 amends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; creates or amends a power to legislate; or facilitates the access to the market within Great Britain of qualifying Northern Ireland goods. Otherwise the negative procedure applies. Draft affirmative procedure for power to define 'qualifying Northern Ireland goods' under new section 8C(6).*

#### **Context and purpose**

219. The Protocol on Ireland/Northern Ireland (the 'Protocol') provides arrangements that seek to ensure that the UK (including Northern Ireland) does not remain in a customs union with the European Union. The Protocol also makes arrangements to ensure that there are no checks and controls conducted at or near the border between Northern Ireland and Ireland, as well as providing that the arrangements contained in the Protocol are to be subject to democratic consent in Northern Ireland.

220. As set out above, the rights and obligations arising under the Withdrawal Agreement will be available in domestic law by virtue of new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill). This includes those rights and obligations contained within the Protocol and its Annexes, meaning that some provisions in the Protocol will not require any further domestic legislation. However, there will be a need to set out some further details in domestic legislation to ensure that the Protocol is given full effect in the UK legal system.

221. For example, the obligation on the UK, under Article 2(1) of the Protocol, to ensure that no diminution of the rights, safeguards and equality of opportunity, as set out in the relevant Chapter of the Belfast (Good Friday) Agreement 1998, results from the



UK's withdrawal from the EU, will be given effect in domestic law through new section 7A of the EU (Withdrawal) Act 2018. However, the obligation to ensure that there is no diminution of rights etc. includes the area of protection against discrimination as enshrined in the EU directives listed in Annex 1 of the Protocol and, by virtue of Article 13(3) of the Protocol, the reference to these directives shall be read as referring to them as amended or replaced. The effect of this is that domestic legislation may need to be amended as the directives listed in Annex 1 develop.

222. Furthermore, the UK will be required to set up the framework necessary to give effect to the obligations contained in the Protocol. This will require amendments to domestic legislation and retained direct principal EU legislation in the areas covered by the Protocol.
223. As mentioned above, pursuant to Article 13(3) of the Protocol, the implementation of the Protocol necessitates more than just preserving the status quo. Further action will be required domestically to take account of the developments in relevant areas of EU law listed in the Protocol Annexes.
224. Clause 21 (which inserts a new section 8C into the EU (Withdrawal) Act 2018) provides Ministers of the Crown with the power to make provision for the purposes of implementing the Protocol.
225. Subsection (1) of new section 8C provides Ministers with the power to make provision which they consider is appropriate for the purposes of implementing the Protocol. This includes supplementing the effect of new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill) in relation to the Protocol, or dealing with matters arising out of, or related to, the Protocol. This will be used where further provision is required to give effect to the Protocol, including where amendments to domestic legislation are required as a result of developments in the EU law which is listed in the Annexes to the Protocol. This includes giving effect to amendments to the Withdrawal Agreement adopted by the Joint Committee falling within the scope of the particular matters that this power is intended to address.
226. Subsection (2) provides that regulations made under this power are capable of doing anything an Act of Parliament can do (including modifying the EU (Withdrawal) Act 2018).
227. Subsection (3) clarifies that the power may be used to make provision facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

228. Subsection (4) clarifies that regulations made in connection with subsection (3) may, among other things, provide for the recognition within Great Britain of technical regulations, assessments, registrations, certificates, approvals and authorisations issued by the authorities of a Member State or bodies established in a Member State in respect of qualifying Northern Ireland goods.
229. Subsection (5) clarifies that the power can be used to restate elements of the Protocol that automatically become domestic law via new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill). This type of restatement can occur where it would be helpful to provide clarity or to make the law more accessible.
230. Subsection (6) places a duty on a Minister of the Crown to exercise the power to define, in regulations, the term 'qualifying Northern Ireland goods' for the purposes of the EU (Withdrawal) Act 2018.
231. Subsection (7) defines the Protocol for the purposes of new section 8C of the EU (Withdrawal) Act 2018 as including any other provision of the Withdrawal Agreement that relates to the Protocol, and any provisions of EU law applied by, or referred to in, the Protocol, but not the second sentence of Article 11(1) of the Protocol (which provides that the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the Belfast (Good Friday) Agreement 1998 in other areas of North-South cooperation on the island of Ireland).
232. This power may also be used to give effect to amendments to the Withdrawal Agreement, and the EEA EFTA Separation Agreement adopted by the Joint Committees falling within the scope of the particular matters that this power is intended to address.
233. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.

### **Justification for taking the power**

234. As set out above, some parts of the Protocol will flow into domestic law and have direct effect by virtue of new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill), without the need for further implementation. The power in new section 8C(1) is required to give effect to parts of the Protocol which require further implementation.

235. The power in new section 8C(1) is a so called 'Henry VIII' power because it will need to amend primary legislation, as well as provide for the practical operation of the framework required to give effect to the Protocol.
236. Furthermore, that power will be required to implement any additions or amendments to the Protocol and its Annexes ensuring continued alignment with relevant EU law where necessary. Amendments to domestic legislation may be required, as the Annexes are updated, or the EU law listed within it is amended.
237. The power in 8C(1) is also capable of amending the EU (Withdrawal) Act 2018. This is required in order to ensure that the power can be used to explain the relationship between the snapshot of EU law which is domesticated at the end of the Implementation Period and the EU law that applies in Northern Ireland as a result of the provisions of the Protocol coming into effect (where Northern Ireland will be required to align with EU law in certain areas). For example, it may be necessary to carve out exceptions to the snapshot at the end of the Implementation Period in order to ensure that the Protocol and the domestic statute book operate effectively.
238. The power in new section 8C(1) is nevertheless naturally constrained to the extent that a Minister of the Crown may only use it to make regulations in connection with the Protocol.
239. The power in new section 8C(6) is a limited power which can only be used by a Minister of the Crown to make regulations to define 'qualifying Northern Ireland goods' for the purposes of the EU (Withdrawal) Act 2018. It is required to define that expression for the purposes of the EU (Withdrawal) Act 2018 (into which this section will be inserted) as this expression does not currently have a statutory definition.

### **Justification for procedure**

240. Where the power in new section 8C(1) is used to amend, repeal or revoke primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply so that Parliament will be required to actively approve any changes. The draft affirmative procedure will also apply where the power is used to establish a public authority; to create, or widen the scope of, a criminal offence; create or amend a power to legislate; in relation to a fee in respect of a function exercisable by a public authority in the UK; or to facilitate access to the market within Great Britain of qualifying Northern Ireland goods.
241. Otherwise, where the power in new section 8C(1) is used, the negative resolution procedure will apply. This is because many of the anticipated modifications will

largely consist of amendments to secondary legislation which are required as a result of developments in the EU law that is referenced in the Protocol.

242. The power to define 'qualifying Northern Ireland goods' at new section 8C(6) is subject to the affirmative procedure to provide appropriate scrutiny of the proposed legislation.

## **Clause 22: powers corresponding to section 21 involving devolved authorities**

*Power conferred on: A devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Draft affirmative procedure where a statutory instrument amends, repeals or revokes primary legislation or retained direct principal EU legislation; establishes a public authority; relates to a fee in respect of a function exercisable by a public authority in the UK; creates, or widens the scope of, a criminal offence; creates or amends a power to legislate or to facilitate access to the market within Great Britain of qualifying Northern Ireland goods. Otherwise the negative procedure applies.*

### **Context and purpose**

243. This clause, which inserts a new part into Schedule 2 of the EU (Withdrawal) Act 2018, provides a corresponding power to that at clause 21 for devolved authorities to make regulations to implement the Protocol in areas of devolved competence. This power will be inserted into the EU (Withdrawal) Act 2018 after Part 1B of Schedule 2 as Part 1C, paragraph 11M.

244. Sub-paragraph (1) provides devolved authorities with the power to make provision which they consider is appropriate for the purposes of implementing the Protocol. This includes supplementing the effect of new section 7A of the EU (Withdrawal) Act 2018 in relation to the Protocol, or dealing with matters arising out of, or related to, the Protocol. This includes giving effect to amendments to the Withdrawal Agreement adopted by the Joint Committee falling within the scope of the particular matters that this power is intended to address.

245. Sub-paragraph (2) makes provision for a Minister of the Crown acting jointly with a devolved authority to make the same provision as provided for at sub-paragraph (1).

246. Sub-paragraph (3) provides that regulations made under this power are capable of doing anything an Act of Parliament can do.

247. Sub-paragraph (4) clarifies that the power may be used to make provision facilitating the access to the market within Great Britain of qualifying Northern Ireland goods.

248. Sub-paragraph (5) clarifies that regulations made in connection with subparagraph (4) may, among other things, provide for the recognition within Great Britain of technical regulations, assessments, registrations, certificates, approvals and authorisations issued by the authorities of a Member State or bodies established in a Member State in respect of qualifying Northern Ireland goods.
249. Sub-paragraph (6) clarifies that the power can be used to restate elements of the Protocol that automatically become domestic law via new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill). This type of restatement can occur where it would be helpful to provide clarity or to make the law more accessible.
250. Sub-paragraph (7) makes the use of this power subject to the provisions of paragraph 11N (restricting the power to being exercisable only in areas of devolved competence) and paragraph 11O (applying paragraphs 5 to 7 of the Schedule, concerning certain requirements for consent, joint exercise or consultation, to this power).
251. Sub-paragraph (8) defines the Protocol as including any other provision of the Withdrawal Agreement that relates to the Protocol, and any provisions of EU law applied by or referred to in the Protocol, but not the second sentence of Article 11(1) of the Protocol (which provides that the United Kingdom and Ireland may continue to make new arrangements that build on the provisions of the Belfast (Good Friday) Agreement 1998 in other areas of North-South cooperation on the island of Ireland).
252. This power may also be used to give effect to amendments to the Withdrawal Agreement, and the EEA EFTA Separation Agreement adopted by the Joint Committees falling within the scope of the particular matters that this power is intended to address.
253. Paragraph 11N confirms that a devolved authority acting alone can only make provision under this power if the provision is within its devolved competence, as defined in paragraphs 11P to 11R.
254. The restriction applied to the power regarding the devolved settlements has been applied following engagement with the Scottish and Welsh Governments.

### **Justification for taking the power**

255. The power is required to enable devolved authorities to make regulations for the purpose of implementing the Protocol and supplementing the effect of new section 7A of the EU (Withdrawal) Act 2018 (inserted by clause 5 of the Bill) in areas of devolved competence. To do otherwise would prevent the devolved authorities from being able

to make the required provision falling within their areas of competence to implement the Protocol.

### **Justification for procedure**

256. Where the power at new paragraph 11M is used to modify primary legislation or retained direct principal EU legislation, the draft affirmative procedure will apply to provide appropriate scrutiny of the proposed legislation. For the same reason, the draft affirmative procedure will also apply where the power is used to establish a public authority; to create, or widen the scope of, a criminal offence; create or amend a power to legislate; in relation to a fee in respect of a function exercisable by a public authority in the UK; or to facilitate access to the market within Great Britain of qualifying Northern Ireland goods. The approach to the procedure attached to powers contained in the Bill which are conferred on the devolved authorities has been discussed in the wider context of the Bill with the devolved administrations.

257. Otherwise, where the power at new paragraph 11M is used, the negative resolution procedure will apply. This is because many of the anticipated modifications will largely consist of amendments to secondary legislation which are required as a result of developments in the EU law that is referenced in the Protocol.

## *5. Powers relating to the implementation period*

### **Clause 1: saving for the implementation period: the power to exclude international agreements from the definition of EU treaties**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: Draft affirmative procedure for the power to exclude international agreements from the definition of EU treaties*

#### **Context and purpose**

258. On exit day (as defined by section 21(1) of the EU (Withdrawal) Act 2018), the UK will leave the EU, and the EU (Withdrawal) Act 2018 will repeal the ECA. We will need to ensure that the UK can continue to apply EU law during the implementation period. This will ensure that businesses and citizens only need to prepare for one change as we bridge to the future relationship. Part 4 of the Withdrawal Agreement provides for the implementation period. To achieve this, clause 1 inserts a new section 1A in to the EU (Withdrawal) Act 2018. Section 1A saves and amends the ECA for the duration of the implementation period, reflecting that the UK is no longer a Member State. Whilst up until exit day the ECA's purpose is to implement EU law as obligated by the UK's membership of the EU, during the implementation period, the saved and repurposed ECA will implement EU law as set out in the Withdrawal Agreement.

259. As well as saving the ECA, section 1A will take a snapshot of what is an 'EU Treaty' on exit day. This will provide certainty as to what falls within the definition of 'the Treaties' or 'EU Treaties' at exit day and the Treaties will continue to have effect during the implementation period through the saved ECA.

260. Article 129(4) of the Withdrawal Agreement states that the UK Government may negotiate, sign and ratify international agreements entered into in its own capacity covering areas that are within the 'exclusive competence' of the EU, as long as they do not enter into force until after the implementation period, unless authorised by the EU.

261. This clause provides a power to Ministers to exclude an international agreement from the definition of Treaties/EU Treaties, where appropriate. Section 1A(3)(a)(ii) of the Bill



is designed to allow for the eventuality where the UK negotiates, signs and ratifies an international agreement during the implementation period in areas of EU exclusive competence, the EU authorises the UK to bring it into force during the implementation period, and, in order to ensure there is no conflict with existing international obligations that flow through the ECA, the UK needs to remove an existing EU-third country international agreement from the definition of Treaties/EU Treaties.

### **Justification for power**

262. During the implementation period there needs to be certainty as to what falls within the definition of 'Treaty' or 'EU Treaty' so that any rights that have been given effect to under those 'Treaties' or 'EU Treaties' will be saved, including any rights given effect to under s.2(1) and regulations made under s.2(2) ECA. 'Fixing' the list by virtue of 1A(3)(a)(ii) provides certainty as to what falls within that definition at exit day. This also reflects the fact that from exit day, the UK's obligations will derive from the Withdrawal Agreement under international law, rather than from its position as a Member State.

263. In areas of exclusive competence of the EU, the EU may authorise the coming into force of new international treaties agreed between the UK and third countries before the end of the implementation period. This may require the removal of an existing international agreement from the definition of 'the Treaties' at s.1(2) ECA if this conflicts with our obligations under the new agreement.

### **Justification for procedure**

264. The power to exclude treaties gives the potential for significant policy change, and as a result secondary legislation under this power is subject to the draft affirmative procedure to provide appropriate scrutiny of the proposed legislation.

## **Clause 3: supplementary power in connection with the Withdrawal Agreement**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Negative procedure for amendments to secondary legislation; draft affirmative procedure for amendments to primary legislation or retained direct principal EU legislation.*

### **Context and purpose**

265. Clause 2 modifies EU-derived domestic legislation so that it continues to function during the implementation period. This will be achieved by applying ‘glosses’ to EU-related terminology in this legislation so that it continues to operate in light of the implementation period. For example, these ‘glosses’ clarify how references to EU law, an EU Treaty (such as the Treaty on the Functioning of the European Union or the Treaty on European Union), to an area of the EU or a citizen of the EU should be read during the implementation period. Further, clause 2 provides that even where EU-derived legislation is not the subject of a specific gloss, it should be interpreted so far as is possible and necessary in line with Part 4 of the Withdrawal Agreement. The provisions in clause 2 which save EU-derived domestic legislation on exit day, and the glosses applying to such legislation during the implementation period, will automatically be repealed at the end of the implementation period when they are no longer needed.

266. Clause 3 provides Ministers of the Crown with a supplementary power in connection with the implementation period. This clause will insert a new section 8A after section 8 in the EU (Withdrawal) Act 2018. This power is designed to ensure that the domestic statute book fully reflects the UK’s obligations under Part 4 of the Withdrawal Agreement and operates properly in that light. It also enables Ministers to amend provisions of the EU (Withdrawal) Act 2018 in consequence of the repeal of the ECA saving on IP completion day. New section 8A(1) sets out what regulations made under the power can do.

267. Subsection (1)(a) gives Ministers the power to make other modifications for the purposes of section 1B(3)(f)(i). This provides a power for the Minister of the Crown to

specify additional glosses to EU-related terms in EU-derived domestic legislation where it is appropriate to do so. This is a limited power to modify legislation for the purposes of ensuring that legislation continues to work for the time-limited implementation period.

268. Subsection (b) provides for Ministers to disapply the glossing approach for EU-related references set out in new section 1B(3) and (4). This power can affect a particular piece of legislation or specific term in a piece of legislation, to ensure that it reads as it would have been without the gloss. This is intended to make legislation operable that is caught by the general glosses either inadvertently, or in cases where we would want to make specific exceptions.
269. Subsection (c) gives Ministers the power by regulations to change a specific gloss for particular EU-related terms to read differently so as to enable the piece of legislation to work as necessary during the implementation period. This might enable an EU related reference to be glossed in a different way. This means a different approach to the general gloss can be taken in order to suit specific circumstances. The purpose of this application is to fix any errors caused by the glosses, where their application has not had the desired effect, but the legislation still requires to be read differently for the purposes of Part 4 of the Withdrawal Agreement. This could be to add in some clarifying wording, or to take a different approach to the general gloss if needed.
270. Subsection (d) provides that Ministers may repeal provisions of the EU (Withdrawal) Act 2018 that need to be repealed or amended in consequence of the repeals of the new provisions which establish the implementation period at new section 1A(5) or 1B(6). This may be necessary in the interests of certainty and clarity, as the Act will have been substantially amended to provide for the implementation period. At the end of that period, some of these modifications will no longer be applicable and therefore should be removed in order for the law to function clearly.
271. Subsection (e) provides that Ministers may make provision, not covered by paragraphs (a) to (d) above, but which is appropriate for the purposes of, or otherwise in connection with, Part 4 of the Withdrawal Agreement. This power is available to Ministers to ensure that domestic legislation fully reflects Part 4 of the Withdrawal Agreement and otherwise operates properly. For example, this power would be available to remove EU-related references in domestic legislation that were redundant or produced the wrong result in light of the effect of Part 4 of the Withdrawal Agreement and the UK having left the EU.
272. The power in new section 8A may be used to modify any provision made by or under an enactment as defined in section 20(1) of the EU (Withdrawal) Act 2018. This is

therefore a so called 'Henry VIII' power. Subsection (3) provides that 'enactment' in this case does not include primary legislation passed or made after IP completion day.

273. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.

274. The power is sunsetted in subsection (4) so that no regulations may be made under this section after the end of a period of two years starting from IP completion day.

### **Justification for power**

275. The various applications of this power in new section 8A from subsections (1)(a) to (c) to provide for additional glosses, to disapply specific glosses and to make different provision for glosses to EU-related terms in EU-derived domestic legislation, as well as the residual power in subsection (e), are necessary to ensure certainty in the application and meaning of the law during the implementation period. The powers in (1)(a) to (c) will be used to ensure that the statute book is able to function properly during the implementation period in accordance with our obligations under the Withdrawal Agreement. The sweeper in paragraph (e) comes after the list of those specific powers and the Government regards use of the sweeper being limited to the sorts of technical corrections intended by those paragraphs above.

276. Government departments and the devolved administrations have tested the glosses in the Bill against their legislation but given the wide-ranging application of the glosses across the statute book, it is possible that there may be cases where the glosses produce the wrong result or further glosses or other modifications are needed. It is critical that legislation continues to function properly during the implementation period, in order to provide continuity and certainty to business and individuals. In the event that an EU-related term which has not been glossed is found on the statute book during the implementation period, it will be critical for legal certainty for a Minister of the Crown, or the devolved authorities in respect of legislation within devolved competence, or a Minister of the Crown and a devolved authority acting jointly, to be able to act swiftly to make the appropriate amendments so that it is clear how the legislation should be interpreted.

277. This power is restricted at subsection (3) to ensure it cannot be used to modify primary legislation enacted after the end of the implementation period. The power is further restricted at subsection (4) by a sunset which provides that no regulations can be made under this power two years after the end of the implementation period.

## **Justification for procedure**

278. Any need for the glossing of terms not already identified and provided for expressly in the Bill (or other corrections made under the new section 8A power) will need to be made swiftly in order to ensure legal certainty. The power can be used to modify primary legislation, including to amend or repeal enactments, but it is technical in nature, limited to correcting the the UK statute book to reflect the UK's obligations under Part 4 of the Withdrawal Agreement, where the meaning of the provision is unclear or simply produces the wrong result. However, in order to fulfil this goal, the power must be capable of modifying both primary and secondary legislation, until the end of the implementation period. For this reason, statutory instruments laid under this power modifying secondary legislation will be subject to the negative procedure, whilst statutory instruments amending primary legislation and retained direct principal EU legislation, will be subject to the draft affirmative procedure to provide appropriate scrutiny of the proposed legislation.

## **Clause 4: powers corresponding to clause 3 involving devolved authorities**

*Power conferred on: A devolved authority, or a Minister of the Crown acting jointly with one or more devolved authorities*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Negative procedure for amendments to secondary legislation; draft affirmative procedure for amendments to primary legislation and retained direct principal EU legislation.*

### **Context and purpose**

*NB. The context for this power is the same as that for clause 3 above.*

279. Clause 4 provides devolved authorities acting alone, and for a Minister of the Crown acting jointly with a devolved authority, a supplementary power in connection with the implementation period. After Part 1 of Schedule 2 to the EU (Withdrawal) Act 2018, this clause will insert a new Part 1A. These powers are designed to ensure that the domestic statute book fully reflects the UK's obligations under Part 4 of the Withdrawal Agreement and operates properly in that light.

280. Paragraph 11A(1)(a) to (d) gives devolved authorities the power to:

- a. make other modifications for the purposes of section 1B(3)(f)(i). This provides a power for a devolved authority to specify additional glosses for EU-related terms in EU-derived domestic legislation where it is appropriate to do so. This is a limited power to non-textually amend legislation for the purposes of ensuring that legislation continues to work for the time-limited implementation period;
- b. disapply the glossing approach for EU-related references set out in new section 1B(3) or (4). This power can affect a particular piece of legislation or specific term in a piece of legislation, to ensure that it reads as it would have been without the gloss. This is intended to make operable legislation that is caught by the general glosses either inadvertently, or in cases they would want to make specific exceptions to;
- c. change a specific gloss for particular EU-related terms to read differently so as to enable the piece of legislation to work as necessary during the

implementation period. This might enable an EU related reference to be glossed in a different way. This means a different approach to the general gloss can be taken in order to suit specific circumstances. The purpose of this application is to fix any errors caused by the glosses, where their application has not had the desired effect, but the legislation still requires to be read differently for the purposes of Part 4 of the Withdrawal Agreement. This could be to add in some clarifying wording, or to take a different approach to the general gloss if needed; and

- d. make provision, not covered by paragraphs (a) to (c) above, but which is appropriate for the purposes of, or otherwise in connection with, Part 4 of the Withdrawal Agreement. This power is available to the devolved authorities to ensure that domestic legislation fully reflects Part 4 of the Withdrawal Agreement and otherwise operates properly. For example, this power would be available to remove EU-related references in domestic legislation that were redundant or produced the wrong result in light of the effect of Part 4 of the Withdrawal Agreement and the UK having left the EU.

281. Paragraph 11A(2) confers the same power as at 11A(1) on a Minister of the Crown acting jointly with a devolved authority.

282. When acting alone under paragraph 11A(1) the devolved authorities can only make provision which is within the devolved competence, as defined in paragraphs 11D to 11F. In addition, by virtue of the application of paragraphs 5 to 7 of Schedule 2 to the EU (Withdrawal) Act 2018, paragraph 11C provides that any consent, consultation or joint exercise requirements which would otherwise be required in respect of the provision being made will be required when a devolved authority exercises the powers in paragraph 11A to make that provision.

283. The power is sunsetted in paragraph 11A(5) so that no regulations may be made under this section after the end of a period of two years starting from IP completion day.

### **Justification for power**

284. The various applications of these powers in new Part 1A of Schedule 2 to provide for additional glosses, to disapply specific glosses and to make different provision for glosses to EU-related terms in EU-derived domestic legislation, as well as the residual power in paragraphs 11A(1)(d) and 11A(2)(d), are necessary to ensure certainty in the application and meaning of the law during the implementation period. The powers in 11A(1)(a) to (c) and 11A(2)(a) to (c) will be used to ensure that the statute book is able to function properly during the implementation period in accordance with our obligations under Part 4 of the Withdrawal Agreement. Government departments and

the devolved administrations have tested the glosses in the Bill against their legislation but given the wide-ranging application of the glosses across the statute book, it is possible that there may be cases where the glosses produce the wrong result or further glosses or other modifications are needed. It is critical that legislation continues to function properly during the implementation period, in order to provide continuity and certainty to business and individuals. In the event that an EU-related term which has not been glossed is found on the statute book during the implementation period, it will be critical for legal certainty for the devolved authorities or a Minister of the Crown and a devolved authority acting jointly, to be able to act swiftly to make the appropriate amendments so that it is clear how the legislation should be interpreted.

285. This power is restricted at paragraph 11A(4) to ensure it cannot apply to primary legislation enacted after the completion of the implementation period. The power is further restricted at paragraph 11A(5) by a sunset which provides that no regulations can be made under this power two years after the end of the implementation period.

#### **Justification for procedure**

286. Any need for glossing of terms not already identified and provided for expressly in the Bill (or other corrections made under the new Part 1A powers) will need to be made swiftly in order to ensure certainty. The powers can be used to modify primary legislation but is technical in nature, limited to correcting the interpretation of the statute book to reflect Part 4 of the Withdrawal Agreement, where the meaning is unclear or simply produces the wrong result. However, in order to fulfil this goal, the power must be capable of modifying both primary and secondary legislation, until the end of the implementation period. For this reason, regulations laid by a Minister of the Crown modifying secondary legislation will be subject to the negative procedure, whilst regulations amending primary legislation and retained direct principal EU legislation, will be subject to the draft affirmative procedure to provide appropriate scrutiny of the proposed legislation, and equivalent scrutiny procedures will apply in the devolved legislatures for regulations laid by a devolved authority.



## **Clause 27: deficiencies in retained EU law: amendments to the existing correcting powers in the EU (Withdrawal) Act 2018**

*Power conferred on: A Minister of the Crown, a devolved authority, or a Minister of the Crown acting jointly with one or more devolved authorities*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Existing procedure which applies to section 8(1) of, or Part 1 of Schedule 2 to, the EU (Withdrawal) Act 2018 - draft affirmative or negative (with the 'sifting' procedure applying to certain negative instruments), subject to urgent procedures*

### **Context and purpose**

287. The EU (Withdrawal) Act 2018 contains a power at section 8(1) to correct deficiencies in retained EU law to ensure that the UK statute book functions on exit day when the UK ceases to be a Member State. That Act was passed without prejudice to the negotiations and the final content of the Withdrawal Agreement with the EU. Statutory instruments, including those made under section 8, are therefore being laid to prepare the statute book for the UK's withdrawal from the EU. To date, the government has laid over 600 statutory instruments and all the statutory instruments laid or made to date can be found on [legislation.gov.uk](http://legislation.gov.uk). The devolved authorities also have a corresponding power in Part 1 of Schedule 2 to the EU (Withdrawal) Act 2018 to make corrections in time for exit day to ensure a functioning statute book where these fall within areas of devolved competence. The UK Government will not normally use the power to amend domestic legislation in areas of devolved competence without the agreement of the relevant devolved administration.

288. As a result of the implementation period, the Bill will amend the EU (Withdrawal) Act 2018 so that EU law will not be retained and domesticated on the UK statute book until the end of the implementation period. For this reason, the Bill needs to also amend section 8 of the EU (Withdrawal) Act 2018 so that the power can be used to amend deficiencies arising in retained EU law as at the end of the implementation period.

289. In addition, so that the section 8 power can correct all deficiencies arising from the end of the implementation period, the Bill inserts an additional deficiency into the list of deficiencies in section 8(2). The reason for this is that the snapshot at the end of the implementation period which will form the basis for retained EU law will operate on

the UK statute book as it stands at that time, complete with the effect of sections 2 to 6 or Schedule 1 of the amended EU (Withdrawal) Act 2018, including the glosses which apply to EU-derived domestic legislation during the implementation period due to clause 2. The section 8 power will therefore need to be capable of correcting deficiencies arising from the saving of EU law, including the application of the glosses at the end of the implementation period. For example, this power may be needed where an existing deficiencies regulation already corrects deficiencies in a piece of EU-derived domestic legislation and the Bill defers this statutory instrument from coming into force until the end of the implementation period. It may then be necessary to amend the statutory instrument further, to correct deficiencies in that EU-derived domestic legislation arising from the saving of EU law and application of the glosses, rather than just the deficiencies arising from the end of EU law applying in the UK.

290. This clause also makes a number of technical changes to the section 8 power to allow it to work on deficiencies arising at the end of the implementation period. For example, it amends references to 'exit day' so that they refer to 'IP completion day' (as defined at clause 37(1)) instead or amends existing deficiencies in section 8(2) so that they catch deficiencies arising from Part 4 of the Withdrawal Agreement. Further, the restriction in section 8(7)(e) on the power being used to implement the Withdrawal Agreement is removed so that deficiencies regulations can take account of the Withdrawal Agreement.

291. Part 1 of Schedule 2 to the EU (Withdrawal) Act 2018 confers a corresponding power to the section 8(1) power on the devolved authorities, and on a Minister of the Crown acting jointly with a devolved authority. Paragraph 1(3) of Schedule 2 provides that section 8(2) to (9) apply for the purposes of the powers conferred by Part 1 of Schedule 2, as they apply for the purposes of section 8(1). As a result, section 8(2) to (9) as amended by this clause will apply for the purposes of Part 1 of Schedule 2.

292. In addition, as a result of the powers being available during the implementation period a number of technical amendments are made by clause 27(7) to references in Part 1 of Schedule 2 to the EU (Withdrawal) Act 2018. These amendments update references to exit day to IP completion day.

### **Justification for power**

293. The amendments to the deficiencies power are required so that it can be used to correct deficiencies in retained EU law resulting from the implementation period that may render the law inoperable.

294. These amendments are necessary to allow the power to function in the revised context of the implementation period. It was not possible to draft the power in this manner when the EU (Withdrawal) Act 2018 was passed, because that Act was drafted without prejudice to the outcome of the negotiations, and so could not take into account the prospect of an implementation period.

### **Justification for procedure**

295. This clause is not a new power as it amends the power in section 8(1) of the EU (Withdrawal) Act 2018 to include deficiencies arising as a result of the implementation period. Regulations made under it will continue to be subject to the procedure which Parliament provided for in passing the EU (Withdrawal) Act 2018, detailed below.

296. Schedule 7, Part 1, paragraph 1 of that Act provides that the draft affirmative procedure must be used if an instrument made under section 8(1) does one or more of the things listed in sub-paragraph (2):

- a. transfers an EU legislative function (i.e. a power to make delegated or implementing acts) to a UK body;
- b. relates to fees of a public authority;
- c. creates or widens the scope of a criminal offence (although the power cannot be used to create certain criminal offences); or
- d. creates or amends a power to legislate.

297. Schedule 7, Part 1, paragraph 1 also provides that the equivalent procedure to the draft affirmative procedure in the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly, must be used in respect of an instrument made under Part 1 of Schedule 2 which does one or more of the things listed in sub-paragraph (2). In addition, paragraph 2 of Schedule 7 to that Act establishes the applicable procedures in respect of regulations made under Part 1 of Schedule 2 of a Minister of the Crown acting jointly with a devolved authority.

298. Schedule 7, Part 1, paragraph 3 of that Act also requires, before instruments under section 8(1) being proposed for the negative procedure may be made, that the Minister lays a draft of the instrument before both Houses of Parliament, along with a memorandum explaining the choice of procedure. This committee has 10 sitting days (beginning on the first day both Houses are sitting, and ending on, where Commons sitting days are different to Lords sitting days, whichever period ends later) to make a recommendation as to the appropriate procedure for the instrument. After receiving the recommendation, or after 10 sitting days without a recommendation, a Minister may either proceed with making a negative instrument, or proceed with an affirmative instrument instead. In either circumstance, the Minister need not proceed immediately, but may proceed with the instrument at a later date. If the Minister

disagrees with a recommendation of a committee for the affirmative procedure, they will be required to make a statement in writing explaining why they disagree before they can proceed with the negative procedure. Schedule 7, Part 1, paragraph 4 requires a similar process in the National Assembly for Wales in respect of regulations of Welsh Ministers.

299. Schedule 7, Part 1, paragraph 5 allows for the made affirmative procedure to be used instead of the draft affirmative, for regulations under section 8 made by a minister of the crown in urgent cases. Sub-paragraph (8) enables Ministers to make negative regulations without going through the procedure at paragraph 3 in urgent cases (in cases which do not trigger the affirmative procedure). Schedule 7 Part 1 paragraph 6 makes equivalent provision for regulations made by the devolved authorities under Part 1 of Schedule 2 in urgent cases.

## **Paragraph 1(3) and (5) of Part 1, Schedule 6: powers to make exceptions from and add powers to the general rule delaying exit day provisions in EU Exit SIs**

*Power conferred on: A Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: No Procedure before exit day and negative procedure after exit day*

### **Context and purpose**

300. The EU (Withdrawal) Act 2018 contains powers which aim to prepare the UK statute book for withdrawal from the EU. For example, under section 8(1) of that Act a Minister of the Crown can make regulations to correct deficiencies in retained EU law. Part 1 of Schedule 2 to that Act also makes provision for the devolved authorities acting alone and the devolved authorities acting jointly with a Minister of the Crown to make regulations to correct deficiencies in retained EU law.

301. Since the passage of this Act, the UK Government has been making regulations to ensure a functioning statute book on exit day, without prejudice to the outcome of negotiations. Many of these regulations would therefore be unnecessary and unworkable if they came into force during the implementation period. For example, deficiencies regulations might transfer functions from an EU to a UK authority or remove redundant provisions, such as requirements on the UK to make reports to the European Commission, to reflect that the UK no longer has ongoing arrangements with the EU and may therefore put the UK in breach of its obligations under Part 4 of the Withdrawal Agreement which continue those arrangements.

302. As the Bill ensures that EU law will continue to apply in the UK for the duration of the implementation period, regulations made under powers in the EU (Withdrawal) Act 2018 will mostly not be required for this period. The Bill will therefore generally defer these regulations from coming into force on exit day to coming into force on IP completion day.

303. The Bill accomplishes this by directing, in Paragraph 1(1) of Schedule 6, that where regulations, or any part of them, are made under specified powers and are to come into force immediately before exit day, on exit day or after exit day and by reference to exit day (such as 'three months after exit day'), this is to be read instead as providing for those regulations to come into force immediately before IP completion day, on IP completion day or after IP completion day and by reference to IP completion day (such as 'three months after IP completion day') (the 'mass deferral').
304. The key powers in the EU (Withdrawal) Act 2018 under which these regulations will be made have been specified in paragraph 1(1)(a) of Schedule 6. However, in some cases, Ministers or a devolved authority will make EU Exit statutory instruments under powers in other Acts (or possibly under other powers in the EU (Withdrawal) Act 2018) which aim to prepare the statute book for exit day. As with the deficiencies regulations made under section 8(1) of the EU (Withdrawal) Act 2018, and deficiencies regulations made under Part 1 of Schedule 2 to that Act, their coming into force during the implementation period would likely render the law confusing or potentially breach our international obligations under the Withdrawal Agreement.
305. The Bill will therefore provide a power for the appropriate authority to specify, by regulations, other powers under which statutory instruments will be made to come into force immediately before, on or after exit day, which should be deferred to come into force instead immediately before, on or after IP completion day. Appropriate authority is defined by paragraph 1(8) of Schedule 6 as a Minister of the Crown, a devolved authority or a Minister of the Crown acting jointly with a devolved authority.
306. Paragraph 2 provides for the exercise of this power by the devolved authorities acting alone. The devolved authorities will be able to specify additional powers under which statutory instruments will be made to come into force immediately before, on or after exit day, which should be deferred to come into force instead immediately before, on or after IP completion day. They will be able to do so where those powers permit the devolved authority acting alone to make subordinate legislation, or permit another person to make the subordinate legislation where the power would also have permitted the devolved authority, acting alone, to have made that subordinate legislation. So far as applicable to the making of subordinate legislation under the powers to be specified, in order to produce the same result as produced by specifying the power, any requirement to consult the UK Government applicable under the powers to be specified will also apply for the purposes of the devolved authority acting alone specifying the power.

307. In a small number of cases, provisions in EU exit statutory instruments may be required to be in force for the implementation period. Further, as EU exit statutory instruments will continue to be made during the passage of the Bill in order to prepare the statute book for exit day, it may not be possible to finalise any exceptions needed for exit day until close to exit day. Other exceptions may come to light during the implementation period. For example, it may be appropriate to bring a provision into force before IP completion day to allow for preparatory steps to be taken in advance. The appropriate authority will, therefore, have a power to make exceptions to the mass deferral. This is done in paragraph 1(5) of Schedule 6 which enables regulations to be made that make different provision for particular cases from the mass deferral or provide for the mass deferral to not apply.

308. Paragraph 3 provides for the exercise of this power by a devolved authority acting alone. As a result, a devolved authority can, acting alone, only provide for a provision in subordinate legislation to be excepted from the mass deferral, so far as the result of that exception is a result which they could have produced acting alone under the power which the subordinate legislation in question was made by. Paragraph 3 also provides that in certain cases the consent of a Minister of the Crown is required where a devolved authority is acting alone, or that joint procedure is required. In all other cases, consultation with a Minister of the Crown is required for a devolved authority acting alone to make an exception to the mass deferral, and therefore, bring into force provisions prior to IP completion day.

### **Justification for powers**

309. Government Departments and the devolved administrations have reviewed statutory instruments made with a coming into force date of exit day to assess whether they will be required during the implementation period.

310. A number of powers have been identified under which EU exit statutory instruments are being made before exit day and should be deferred until the end of the implementation period. However, as these instruments may still be being made up until exit day, the full list of powers cannot be completely confirmed until close to exit day. As such, the Bill takes a power for the appropriate authority to specify additional powers once the full list of powers can be confirmed.

311. The Bill will also need to confer a power on the appropriate authority to make exceptions to the mass deferral. This is necessary to allow time for the UK Government and the devolved administrations to finalise any exceptions which might be needed for exit day. Further, in the event that departments and the devolved administrations continue to make secondary legislation for exit day, it is possible that a need for

provisions to be exempted will only be identified close to exit day. Were this to occur, it would be necessary to exempt such secondary legislation from the deferral, and a power to do so is therefore necessary. It may also become apparent during the implementation period that a different coming into force date is needed. It is also possible to expressly disapply the mass deferral in the subordinate legislation itself, under paragraph 1(2) of Schedule . However, this will only be possible when the need for the exception is known at the time of making the instrument.

### **Justification for procedure**

312. For the reasons given above, the appropriate authority may need to exercise both powers very close to and for exit day.
313. As such, there is no procedure in the UK Parliament or the devolved legislatures for the exercise of these powers to make the technical provision needed in time for exit day, so that we can ensure a clear and functioning statute book on exit day.
314. After exit day, any changes will still be technical and minor, but there will be more time, as the urgency of exempting or preventing statutory instruments from coming into force on exit day will have passed. Any subsequent uses of the powers after exit day will therefore be subject to the negative procedure.



## *6. Other powers in the Bill/amendments to powers in the European Union (Withdrawal) Act*

### **Paragraph 4(2) of Schedule 4: power to amend table referred to in the definition of ‘workers’ retained EU rights’**

*Power conferred on: Minister of the Crown*

*Power exercisable by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary procedure: Draft affirmative*

#### **Context and purpose**

315. Clause 34 (Protection for workers’ rights) makes provision for a new Schedule 5A to be inserted into the EU (Withdrawal) Act 2018. Schedule 4 of the Bill contains the provision to be inserted. One of the matters provided for in this new schedule requires a Minister in charge of a Bill to make a statement of non-regression, which requires an assessment as to whether or not the Bill results in a failure to confer a ‘worker’s retained EU right’. The definition of ‘workers’ retained EU rights’ is provided for at paragraph 3(1) of Part 3 of new Schedule 5A (Interpretation) and includes reference to obligations that the UK was obliged to confer by virtue of certain EU directives at the end of the implementation period. That list of directives is set out in a table at paragraph 4(1), Part 3 of new Schedule 5A. The power at paragraph 4(2) of the new Schedule enables the Secretary of State, by regulations, to add to/amend that list in consequence of changes to EU legislation before the end of the implementation period.

#### **Justification for power**

316. The Government appreciates that this is a so called ‘Henry VIII’ power; but believes that it is important to ensure that, if there is new EU legislation that has a transposition deadline within the implementation period, this can be added to the relevant list of EU legislation – so that it is included in the non-regression assessment. The power can only be used to amend this list, to add new pieces of EU legislation which are made before the end of the IP, or remove those which are repealed or superseded and cannot be used to amend other primary legislation. The power is time-limited and sunsets 12 months after the end of the implementation period. Paragraph 58(6) of Schedule 6 amends paragraph 40 of Schedule 8 of the EU (Withdrawal) Act 2018 to ensure that the existing provision there (which confirms that the prohibition on making regulations

after the sunset does not affect the continuation in force of regulations made prior to the sunset) applies to paragraph 4(2) of new Schedule 5A.

### **Justification for procedure**

317. Regulations made under this section are subject to the affirmative resolution procedure. Despite the very limited circumstances in which it may be used, and the fact that the power is time-limited (it sunsets 12 months after the end of the implementation period), the Government is of the view that the affirmative procedure is appropriate given the general approach taken to the scrutiny of so called 'Henry VIII' powers in the Bill.

## **Clause 37(4): power to amend ‘IP completion day’**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: negative procedure*

### **Context and purpose**

318. IP completion day is defined as 11.00 p.m. on 31 December 2020. The end of the implementation period is linked to the end of the current EU multiannual financial framework with 11.00 p.m. on 31 December 2020 UK time corresponding to midnight on 31 December 2020 Brussels time.

319. Article 132 of the Withdrawal Agreement provides for a single extension by a period of up to two years to the duration of the implementation period up to 31 December 2022, with any decision to extend the implementation period to be made by the Joint Committee before 1 July 2020.

320. The EU is also currently consulting on the functioning of EU summer-time arrangements as provided for by Directive 2000/84/EC which currently requires that the clocks of EU Member States are changed twice per year but with a proposal to either keep current summer-time arrangements or discontinue the current bi-annual time changes for all Member States and prohibit periodic switches. This would not affect the choice of time zone, and it would ultimately remain each Member State's decision whether to go for permanent summer or wintertime (or a different time).

### **Justification for power**

321. This is a limited (albeit significant) power which allows a Minister of the Crown to make regulations to amend the definition of IP completion day in this Bill to allow for an extension to the implementation period as a result of a decision of the Joint Committee to provide for a single extension of the implementation period.

322. The power also allows a Minister of the Crown to make regulations to amend the definition of ‘IP completion day’ and the references to ‘IP completion day’ in the Act as a result of a change to EU summer-time arrangements during the implementation

period so as to ensure that the definition of IP completion day in the UK is the same as in Brussels time.

### **Justification for Procedure**

323. Any extension of the implementation period will be as a result of a decision by the Joint Committee. Any extension of the implementation period would be a sovereign decision for the UK. No extension could be agreed by the UK without the House of Commons having passed a motion to approve the proposed extension and the House of Lords having had the opportunity to debate the proposed extension as provided for by clause 30. It is therefore appropriate for regulations amending the definition of 'IP completion day' to be subject to the negative procedure as the amendment would merely reflect what had been agreed under international law and what had already been approved by the House of Commons.

324. The negative procedure would also apply to regulations made under this power to amend IP completion day and references to IP completion day as a result of technical changes to EU summer-time arrangements.

## **Clause 39(1) and (5): powers to make consequential provision and transitional, transitory and savings provision**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes*

*Parliamentary Procedure: Negative procedure for the consequential power; no procedure in the case of the transitional etc power*

325. This clause contains two powers: one to make such consequential provision and the other to make transitional, transitory or saving provision as is appropriate in connection with the coming into force of any of the provisions of the Bill.

326. Subsection (1) provides that a minister of the Crown can make regulations as she considers 'appropriate' in consequence of the Act. There are likely to be a range of different ways in which consequential issues could be addressed. Accordingly, it is for the Minister to determine what is appropriate.

327. Subsection (2) permits regulations made under subsection (1) to be exercised by, among other things, modifying any provision made by or under an enactment. 'Enactment' is defined at clause 37(1) and includes primary legislation. The power is therefore a so called 'Henry VIII' power.

328. Subsection (3) provides that enactment for the purposes of subsection (2) does not include primary legislation passed or made after the end of the parliamentary session in which this Bill becomes an Act.

329. Subsection (4) directs the reader to Parts 1 and 2 of Schedule 6 which provide for general and specific consequential provision made by the Bill.

330. Subsection (5) provides a Minister of the Crown with the power to make, by regulations, such transitional, transitory or saving provision as she considers appropriate in connection with the coming into force of any provision of the Bill. As for subsection (1), it is for the Minister to determine what is appropriate.

331. Subsection (6) directs the reader to Part 3 of Schedule 6 which contains specific transitional and savings provisions.

## Justification for powers

332. This Bill builds on changes to the legal framework of the UK that began with the EU (Withdrawal) Act 2018.
333. As a result of changes required to the statute book required to give effect to the Agreements, there will inevitably be consequential amendments required in order to ensure that the statute book is compatible with the obligations the UK has signed up to. Provision which may be made by regulations includes that which is in consequence of particular provision or a number of provisions or the Bill as a whole. Where it has been possible to identify specific consequential amendments required, these have been made by Part 2 of Schedule 6 of the Bill.
334. The consequential power is limited to making amendments consequential to the contents of the Bill itself and not for any other purpose. Although the consequential power may be exercised to amend primary legislation, the effect of subsection (3) is that it cannot be used to modify primary legislation passed or made after IP completion day. The so called 'Henry VIII' aspect of this power is therefore time-limited and any amendments to primary legislation which is consequential on the contents of the Bill cannot be made beyond the end of the implementation period. This ensures that any primary legislation currently before Parliament for example and which cannot be expected to have taken into account the consequences of this Bill when it was drafted and made, can be amended. Beyond the end of the implementation period however, primary legislation will need to take into account that matters provided for by this Bill as the consequential power will no longer be available.
335. The transitional, transitory or savings power is a standard power to make transitional, transitory or saving provision in connection with the bringing into force of provisions in the Bill. This power therefore provides for further transitional, transitory or savings provisions to be made over and above those already set out at Part 3 of Schedule 6 to the Bill. The purpose of such powers is to ensure a smooth transition between existing law and the law as it will look after the implementation period.
336. As with the power to make consequential provision, any such power will be construed strictly.
337. Clause 39 is substantively drafted in identical terms as the consequential and transitional powers passed by Parliament in the EU (Withdrawal) Act 2018.

## Justification for procedure

338. The consequential power is subject to the negative procedure. It is nevertheless considered that such an approach is justified - the consequential power, like consequential powers in other primary legislation, will be construed strictly by the courts and, in effect, to making the minimum amendments necessary to procedure, or machinery to reflect the provisions of the Act or instrument concerned. In particular there will be a presumption against substantive changes that interfere with rights or liabilities<sup>20</sup>.

339. The transitional power is subject to no procedure. There is substantial precedent for this type of power to attract no procedure, as most recently seen in the Taxation (Cross-border Trade) Act 2018.

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<sup>20</sup> *Ye Olde Cheshire Cheese Ltd v Daily Telegraph Plc* [1988] 1 W.L.R. 1173

## **Paragraphs 5 and 69 of Schedule 6: operation of the powers to make consequential provision and transitional, transitory and savings provision in the EU (Withdrawal) Act 2018**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: Yes, but only in respect of section 23(1) - the consequential power*

*Parliamentary Procedure: Existing procedures which apply to section 23(1) and (6) of the EU (Withdrawal) Act 2018*

### **Context and purpose**

340. Paragraph 5(1) of Schedule 6 clarifies that the consequential power in the EU (Withdrawal) Act 2018 is capable of making regulations in consequence of the Act as amended by or under the Bill. The Bill will also amend section 23(3) so that the consequential power can amend primary legislation until the end of the implementation period. Further, the power will be sunset ten years from IP completion day.

341. Paragraph 69(1) of Schedule 6 clarifies that the transitional, transitory and saving power in section 23(6) the EU (Withdrawal) Act 2018 is capable of making regulations in connection with the coming into force of any provision of the Act as amended by or under the Bill. The Bill will also amend section 23(6) so that the power can be used in connection with the coming into force of any provision including its operation in connection with IP completion day.

### **Justification for power**

342. The clarification in Paragraph 5(1) is required so that the consequential power in section 23(1) the EU (Withdrawal) Act 2018 can be used as intended in the event of an implementation period. This enables the power to be used to make regulations in consequence of the Act as it will stand following the passage of this Bill and the modifications this will make to it. The further amendments ensure that the power can be exercised in light of the implementation period.

343. The clarification in paragraph 69(1) is required so that the consequential power under section 23(6) of the EU (Withdrawal) Act 2018 can be used as intended in the event of



an implementation period. This enables the power to be used to make regulations in connection with the coming into force of any provision of the Act as it will stand following the passage of this Bill and the modifications this will make to it. The further amendment ensures that the power can be exercised in light of the implementation period.

### **Justification for procedure**

344. These are technical extensions of the powers to make consequential and transitional, transitory or saving provision under sections 23(1) and 23(6) of the EU (Withdrawal) Act 2018. Regulations made under these powers will continue to be laid under the procedures set out in paragraphs 15, 16 and 17 of Schedule 7 of that Act.

## **Clause 40(7): power to make commencement provisions**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: no procedure*

### **Context and purpose**

345. This clause contains a standard power for a Minister of the Crown to bring provisions of the Bill into force by commencement regulations. Clause 40(6) lists the provisions that will come into force on the day on which the Bill is passed. Not all of the provisions in the Bill will need to be in force immediately on the Bill being passed and for this reason, a power is taken to enable a Minister of the Crown to appoint, by regulations, a day (or different days) for the coming into force of the remainder of the provisions contained in the Bill.

### **Justification for power**

346. Some parts of the Bill will need to be commenced earlier than others. For that reason, where commencement is not already expressly provided for at clause 40(6), this power will enable a Minister of the Crown to make regulations to commence particular provisions for when they are needed.

### **Justification for procedure**

347. As is usual with commencement powers, regulations providing for the coming into force of the remainder of the provisions of the Bill are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

## **Clause 28: amendment to powers in connection with Fees and Charges**

*Power conferred on: An appropriate authority (as defined by Schedule 5, Part 1, paragraph 2, EU (Withdrawal) Act 2018)*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: Negative procedure where the altering of a fee or charge is to reflect changes in the value of money, otherwise draft affirmative procedure applies.*

### **Context and purpose**

348. The EU (Withdrawal) Act 2018 contains a power at Part 1 of Schedule 4 to provide for fees or charges in connection with functions given to public authorities by section 8 or section 9 of that Act. This enables UK ministers and devolved authorities to create fees and charges in connection with functions that public bodies in the UK take on in connection with EU exit. It ensures ministers have the flexibility to ensure the burden of specific industry-related costs does not fall on the general taxpayer. It should be noted that this could include the creation of tax-like charges, which go beyond recovering the direct cost of the provision of a service to a specific firm or individual, including to allow for potential cross-subsidisation or to cover the wider functions and running costs of a public body, or to lower regulatory costs for small or medium sized enterprises.

349. This clause extends this fee charging power by amending Schedule 4 of the EU (Withdrawal) Act 2018 so it can also be used in connection with functions given to public authorities by new sections 8B and 8C (and the corresponding powers for devolved authorities in new Part 1B and Part 1C of Schedule 2).

350. Extending Schedule 4 Part 1 to cover these new powers, means that they can also be used to mitigate the burden on the general taxpayer to pick up the cost of functions created to deal with the implementation of the Withdrawal Agreement and EEA EFTA Separation Agreement by new sections 8B and 8C (and their corresponding equivalents). For example, it is anticipated that this could include the cost of renewing certain intellectual property rights. While the Withdrawal Agreement and EEA EFTA Separation Agreement set out that existing rights holders will be granted equivalent UK rights at no charge, once these have expired there will be costs associated with their renewal. It may be that this power would be used in connection with those costs.

351. Subsection (c) sets out that the time limit that exists for making certain provisions under this power will not apply to its extended role. This is because the duties to implement the Withdrawal Agreement and EEA EFTA Separation Agreement on OSIs are not strictly time limited and it is therefore not possible to define the end point of the functions created in connection with those agreements.

352. The power as set out in Schedule 4 is capable of being used to confer a power on public authorities to create their own fees and charges schemes. The regulations conferring such a power on a public authority would themselves be subject to Treasury consent and the draft affirmative procedure.

353. In addition, for the UK Government, Treasury consent is required for the creation of a new fee or charge, further ensuring departments justify their case. This constraint does not apply to the devolved authorities, in accordance with standard practice around financial arrangements for devolution (although devolved authorities could of course impose their own similar constraints administratively to mirror the requirement for Treasury consent).

#### **Justification for power**

354. This power is designed to allow flexibility in how new Government functions are funded. It enables the creation and modification of fees or other charges so the costs of Government services do not have to always fall on the taxpayer.

355. The power is designed to work in conjunction with functions that may be legislated for by regulations under new sections 8B and C (and the corresponding powers for devolved authorities in new Part 1B and 1C of Schedule 1). It therefore follows that provision for creating fees and charges in this connection be made via a regulation-making power.

#### **Justification for procedure**

356. The draft affirmative procedure applies to the current exercise of the power in the UK Parliament or the devolved legislature, depending where the regulations are made, where departments provide for the charging of new fees. This procedure would be extended to the new functions of the power. The Government recognises that the decision whether or not to charge for a particular function is a policy choice with impact on industry or individuals wishes to ensure appropriate scrutiny of the proposed legislation for this exercise of the power (unless the power is being exercised only to reflect changes in the value of money in which case, the negative procedure

will apply on the basis that the power is being used only to update in line with inflation rather than to reflect any policy change).

## **Paragraph 50, Part 2 of Schedule 6: amendment to power to provide for judicial notice**

*Power conferred on: A Minister of the Crown*

*Power exercised by: Regulations made by Statutory Instrument*

*Henry VIII power: No*

*Parliamentary Procedure: Draft affirmative procedure*

### **Context and purpose**

357. The EU (Withdrawal) Act 2018 contains a power at paragraph 4, Part 2 of Schedule 5 which enables Ministers to make provision on judicial notice and evidential rules on EU law, the EEA agreement, and retained EU law. The power was taken to ensure that, despite the repeal of the ECA, provision could be made which would allow the courts to continue to take notice of aspects of EU law (such as the EU Treaties) and determine how evidence of EU instruments may be given in domestic courts. As was explained in the first Delegated Powers Memorandum<sup>21</sup> to the then EU (Withdrawal) Bill, notwithstanding the repeal of the ECA, provisions on judicial notice and admissibility would in any event need to be supplemented to take into account the final details of the change in the legal landscape following the UK's exit from the EU.

358. The Bill amends paragraph 4(5) of Part 2, Schedule 2 to broaden the meaning of 'a relevant matter' for the purposes of paragraph 4(1) so as to include 'the EEA EFTA Separation Agreement', 'the Swiss Citizens' Rights Agreement' and 'the Withdrawal Agreement' (paragraph 4(5)(ca) to (cc)) and anything which is specified in the regulations and which relates to a matter mentioned in those Agreements (paragraph 4(5)(d)).

359. The Bill also makes a consequential change at paragraph 4(4) so as to ensure that regulations made under paragraph 4 cannot modify any provision contained in primary legislation passed or made after IP completion day (rather than after the end of the parliamentary Session in which the EU (Withdrawal) Act 2018 was passed).

### **Justification for amendments to the power**

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<sup>21</sup> Dated 13 July 2017.

360. The broadening of the definition of ‘a relevant matter’ has the effect that regulations may be made by a Minister of the Crown to provide for the admissibility in legal proceedings of the EEA EFTA Separation Agreement, the Swiss Citizens’ Rights Agreement and the Withdrawal Agreement or anything which relates to it (if specified in the regulations). This is in addition to the regulations which may already be made under this power to provide for the admissibility in any legal proceedings of retained EU law, EU law and the EEA EFTA Separation Agreement (or anything which is specified in the regulations and which relates to them).
361. The consequence of not including ‘the EEA EFTA Separation Agreement’, ‘the Swiss Citizens’ Rights Agreement’ and ‘the Withdrawal Agreement’ as a ‘relevant matter’ for the purpose of the power at paragraph 4(1) is that these Agreements will need to be proved by evidence before a court of law in accordance with the general rule that all matters in issue or relevant to legal proceedings must be proved before they are admitted. This would create an unnecessary hurdle for those seeking to rely on matters contained in these agreements before a court or tribunal.
362. The amendment to paragraph 4(4) to ensure that regulations made under paragraph 4 cannot modify any provision contained in primary legislation passed or made after IP completion day (rather than after the end of the parliamentary Session in which the EU (Withdrawal) Act 2018 was passed) is adopted in the context of the transition period agreed between the UK and EU in the Withdrawal Agreement. Without this amendment, modifications to primary legislation required as a consequence of the exercise of the power at 4(1) could only be made up to the end of the parliamentary Session in which the Bill was passed (autumn of 2019) despite the fact that this has already come to pass, that the UK will continue to apply EU law for several more months whilst it is in the implementation period, and this would prevent the power being exercised for its intended purpose. As any regulations made under this power will not be required until the end of the implementation period, it is sensible to avail the relevant Government Departments of time to make regulations for this purpose so that they may be ready for the day of expiry of the implementation period.

### **Justification for the procedure**

363. The power contained in the EU (Withdrawal) Act 2018 is currently subject to the draft affirmative procedure on the basis that the content of any regulations made under it may be of particular interest to Parliament. On the basis that Parliament has already approved the procedure in connection with the exercise of this power, the Bill does not seek to amend it.

**Department for Exiting the European Union**

**21 October 2019**