



BRIEFING PAPER

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*The European Union
(Withdrawal) Bill: clauses 9,
8 and 17*

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3 Commons Library Briefing, 7 December 2017

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Summary

This briefing paper has been prepared for day 7 of the Committee Stage of the European Union (Withdrawal) Bill (EUW Bill) in the House of Commons, scheduled for Wednesday 13 December 2017.

It addresses **clauses 9, 8 and 17** of the EUW Bill, each of which contains a delegated power for ministers to make secondary legislation, for specific purposes, in order to prepare for Brexit:

- **Clause 9** provides the Government with the legislative authority to use secondary legislation to implement any withdrawal agreement agreed with the European Union under Article 50(2) Treaty on European Union (TEU);
- **Clause 8** gives Government the power, until two years after exit day, to make secondary legislation to prevent or remedy any breaches of the UK's international obligations that might arise from Brexit; and
- **Clause 17** grants powers to make consequential and transitional provisions.

A Commons Library Briefing from September 2017, [European Union \(Withdrawal\) Bill \(CBP8079\)](#), covers all of the provisions in the Bill. The parliamentary procedures for scrutinising secondary legislation made under these powers are set out in Schedule 7 of the EUW Bill and will also be debated on day 7 of the Committee Stage. Schedule 7 is discussed in Commons Briefing Paper 8172, [European Union \(Withdrawal\) Bill: scrutiny of secondary legislation \(Schedule 7\)](#), 7 December 2017.

Clause 9: implementing the withdrawal agreement

Clause 9 of the EUW Bill provides the UK Government with the ability to implement the EU withdrawal agreement in domestic law using secondary legislation.

Since the EUW Bill was introduced, the UK Government [announced](#) (on 13 November 2017) that it will bring forward primary legislation, the 'Withdrawal Agreement and Implementation Bill' (WAI Bill), to implement the withdrawal agreement and any 'implementation' (transition) period.

On 8 December 2017, [the Joint Report from the negotiators of the European Union and the United Kingdom Government](#) (the Joint Report on Phase 1) was published. The Joint Report on Phase 1 makes a number of references to the WAI Bill, including:

The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future.¹

The Government has not yet explained how the use of clause 9 will be coordinated with either the proposed Withdrawal Agreement and Implementation Bill, or with the promised

¹ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 36

vote, on a motion both Houses of Parliament, on the substance of a withdrawal agreement. It has however indicated that clause 9 could be used if the negotiations conclude late in the two-year period. This could mean that clause 9 might only be used if there was not enough parliamentary time to implement the withdrawal agreement through primary legislation. The Communication from the Commission to the European Council on the progress of the negotiations, published on the 8 December 2017, set out the following on the timings of the process:

European Negotiations should be complete by autumn 2018 to allow good time for the Withdrawal Agreement to be concluded by the Council after obtaining consent of the European Parliament, and to be approved by the United Kingdom in accordance with its own procedures before 29 March 2019.²

Clause 9 gives rise to a number of significant interlocking issues, each of which is discussed in this briefing:

- **Purpose, scope and limits of the clause 9 power.** The purpose of clause 9 is to enable UK Ministers to make regulations “for the purposes of implementing the withdrawal agreement” made under Article 50, “whether or not ratified”. The scope of clause 9 is notable as it would enable regulations to “amend the Bill itself in order to reflect the outcome of negotiations”. The Joint Report of Phase 1 indicates that elements of the EUW Bill, for example clause 6(1)(b) on references to the Court of Justice of European Union, could need to be amended to give effect to the Withdrawal Agreement.³ Clause 9 is constrained by both express and implied limitations, and also has a ‘sunset clause’ which provides that the power expires on exit day. Regulations made under clause 9 would be subject to parliamentary scrutiny as provided by **Schedule 7 part 2 paragraph 6**. (Section 2)
- **Constitutional implications of clause 9.** The *precise form* and *constitutional status* of the legislation used to implement the withdrawal agreement, and in particular to secure any rights that it contains, is a significant issue in the negotiations with the EU. (Section 2.5)
- **Parliament’s role in the withdrawal negotiations.** The Government has promised a vote in Parliament on the substance of a withdrawal agreement before it signs it, and Parliament would later have the opportunity to delay ratification under the Constitutional Reform and Governance Act 2010. But neither of these would give Parliament a formal power to amend the terms of the withdrawal agreement. Voting ‘no’ in a ‘meaningful vote’ on the withdrawal agreement could result in the UK leaving the EU without an agreement. (Section 3.2)
- **Parliament’s role in implementing the withdrawal agreement.** While the withdrawal agreement is being negotiated, Parliament is debating the powers it will have for implementing the (as yet unknown) provisions of the agreement. It is likely that Parliament would then consider legislation to implement the agreement only if the vote on the substance of the agreement is passed. It is likely that any agreement will have profound implications for the UK constitutional framework and legal system. In

² [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p15

³ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union (8 December 2017) para 38

particular, it is likely to necessitate major changes to areas of retained EU law such as citizens' rights, Irish border issues and dispute resolution. (Section 3.3)

- **Transitional arrangements.** If a transition or 'implementation' period is agreed as part of the Article 50 agreement, implementing legislation would be needed for that too. This could require changes to the provisions of the EUW Bill itself. The Government has said that the EUW Bill is not intended to provide for any transition period. (Section 3.4)
- **Relationship with the proposed 'Withdrawal Agreement and Implementation Bill'.** In November the Government [announced](#) that it would "enshrine the Withdrawal Agreement between the UK and the EU" in UK domestic law through new primary legislation: the Withdrawal Agreement and Implementation Bill, which would also deal with the complexities of legislating for an 'implementation period'. The Joint Report on Phase 1 indicates that elements of the withdrawal agreement could require changes to the EUW Bill, as it is currently drafted, for example in relation to the role of the CJEU after exit day (clause 6 of the EUW Bill).⁴ These changes could be through the WAI Bill or by using the delegated power in clause 9 of the EUW Bill. (Section 3.5)
- **Timing.** It will not be possible to publish implementing legislation under clause 9 (or the proposed new Bill) until the withdrawal agreement is finalised. But depending on the timing of the negotiations, this could leave very little time to make all the necessary implementing legislation before exit day. Clause 9 could therefore be used to effect a number of significant policy changes via secondary legislation in a short timescale. The scarcity of time is central to the Government's justification for including a power to implement the withdrawal agreement through secondary legislation. The commitment to the WAI Bill in the Joint Report on Phase 1 would require the Government to find the necessary parliamentary time to ensure that the WAI Bill was passed before exit day. It is presumed, but not legally necessary, that the vote on the substance of the withdrawal agreement in both Houses of Parliament will occur before either the implementing primary or secondary legislation. (Section 3.6)
- **Role of the devolved authorities.** The devolved authorities have parallel powers to clause 9 in Schedule 2 part 3, but with more limits than apply to UK Ministers. The devolved authorities have no formal role in scrutinising or agreeing international treaties such as the withdrawal agreement, but they discuss the negotiations in a Joint Ministerial Committee (JMC) subcommittee on EU Negotiations. There has however been criticism of how this subcommittee is used. (Section 3.7)

Clause 8: complying with international obligations

Clause 8 gives UK Government ministers the power, until two years after exit day, to make secondary legislation to prevent or remedy breaches of the UK's international obligations that might arise from Brexit.

The Government says this is needed because clause 7 may not always provide the requisite power (clause 7 only covers failure of retained EU law to operate effectively, or

⁴ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 38

deficiencies in retained EU law). But it has given only one example of where clause 8 might be used. It is not clear what other breaches of international obligations arising from leaving the EU could be prevented or remedied by UK legislation under clause 8.

Clause 8 is subject to several limitations, but unlike clauses 7 and 9, the power in clause 8 may be used to impose taxation.

Parallel powers for the devolved administrations are set out in **Schedule 2 Part 2**.

Clause 17: consequential and transitional provisions

Clause 17(1) contains a power to make such consequential provisions “as the minister considers appropriate in consequence of this Act”. The purpose of clause 17(1) is to enable the Government to make changes to primary and secondary legislation that might arise as a consequence of this Bill.

Clause 17(5) enables the Government to make regulations to provide for transitional provisions that might be needed as a result of this Bill coming into force. The Government cites two examples of how this power might be used. The first is that the power could be used to save section 2(3) of the European Communities Act 1972 in respect of liabilities incurred while the UK was a Member State. The second is that that the power could be used to make provision for court cases in the Court of Justice of the EU that are ongoing on exit day.

1. Introduction

The [European Union \(Withdrawal\) Bill 2017-19](#) (EUW Bill) was published on 13 July 2017. The Bill cuts off the source of European Union law in the UK by repealing the European Communities Act 1972 (ECA) and removing the competence of European Union institutions to legislate for the UK.

The Bill had its [second reading debate](#) in the House of Commons on 7 and 11 September 2017. The [Programme Motion](#) passed at the end of the Second Reading debate provided for eight days in Committee of the Whole House.

The Department for Exiting the European Union (DExEU) has published [Explanatory Notes](#) to the Bill, a series of [factsheets](#) on the Bill's provisions, and a [Delegated Powers Memorandum](#) (DPM) addressed to the House of Lords Delegated Powers and Regulatory Reform Committee. It has also published a [European Convention on Human Rights Memorandum](#).

Hundreds of amendments have been tabled for the Committee stage. There is an up-to-date list on Parliament's [Bill pages](#) online.

The Commons Library produced a [briefing paper](#) to inform the Second Reading debate which sets out full details of the provisions of the Bill and extensive commentary on them.

The present briefing paper has been produced for the Committee of the Whole House debate on clauses 9, 8 and 17, which is scheduled to take place on day 7 (13 December 2017).

Several parliamentary committees have published reports on the EUW Bill, including the House of Commons [Exiting the EU Committee](#), the Commons [Procedure Committee](#), the House of Lords [Constitution Committee](#) and the Lords [Delegated Powers](#) and Regulatory Reform Committee. Many other committees in Westminster and the devolved legislatures are also examining the Bill.

2. Clause 9: implementing the withdrawal agreement

2.1 Introduction: the need for speed

Clause 9 is a delegated power that enables the UK Government to make secondary legislation to implement a withdrawal agreement agreed with the European Union under Article 50(2) of the Treaty on European Union (TEU). In terms of its policy impact, clause 9 could have the most significant effect of all the provisions of the EUW Bill.

The devolved authorities are given parallel powers under **Schedule 2 Part 3**.

During the Second Reading debate in the House of Commons on 7 September 2017, David Davis, the Secretary State for Exiting the European Union, described the power in the following terms:

Under the article 50 process, we are negotiating a withdrawal agreement with the European Union. Provisions of that agreement will need to be implemented in domestic law, and some of that will need to be done before exit day. Given the timetable set by article 50, it is prudent to take this power now so that we are ready, if necessary, to move quickly to implement aspects of an agreement in domestic law. That will be particularly important if the negotiations conclude late in the two-year period.⁵

Central to the Government's case for clause 9 is that ministers must hold the legislative authority to implement the deal, even in the event that there is only a short window of time to do so before exit day:

In seeking these powers the Government wishes to provide early reassurance to our EU partners, as well as citizens and businesses across Europe, that we are ready and able to quickly implement the changes which are required.⁶

Further, the Government has argued that the EUW Bill could not provide for the implementation of the withdrawal agreement on its face "because the legislation to give statutory effect to the UK's withdrawal from the EU must proceed at the same time as the Government's negotiations with the EU".⁷

On 13 November 2017, the UK Government [announced](#) that it would bring forward primary legislation, a 'Withdrawal Agreement and Implementation Bill', in order to implement the withdrawal agreement

⁵ [HC Deb 7 September 2017 c352](#)

⁶ [Department for Exiting the European Union—Written evidence \(EUW0036\)](#), October 2017

⁷ [Department for Exiting the European Union—Written evidence \(EUW0036\)](#), October 2017

and any transitional arrangements. The Government has not yet said whether the Withdrawal Agreement and Implementation Bill would itself contain delegated powers; nor did it comment on whether the Withdrawal Agreement and Implementation Bill would need to be passed before the power in clause 9 of the EUW Bill was exercised.

The Joint Report on Phase 1 makes a number of references to the WAI Bill and indicates that the withdrawal agreement could require changes to the provisions of the EUW Bill as drafted.⁸ For example, the Joint Report on Phase 1 indicates that in relation to citizens' rights domestic courts will have to have "due regard to" CJEU judgments after exit day, and this would appear to conflict with clause 6 of the EUW Bill.⁹ The scope of clause 9, which enables secondary legislation to be used to change the provisions of the EUW Bill as enacted, means any changes arising from the withdrawal agreement could be made through secondary legislation.

2.2 Purpose of clause 9

The purpose of clause 9 is defined in **clause 9(1)** as being to enable Ministers to make regulations "for the purposes of implementing the withdrawal agreement". The agreement is defined by **clause 14** as an agreement with the European Union under Article 50(2) TEU, "whether or not ratified". This confirms that the power could be used only for any agreements made under Article 50(2) TEU, but could be used before the agreement is ratified.

Clause 9(1) does not limit the sort of legal changes that the regulations made under the power could achieve, as long as it could be shown that the Government considered them to be for the purpose of implementing the withdrawal agreement.

Potential examples include:

- giving EU citizens who are living in the UK on a specified date the legal right to continue living here;¹⁰
- setting up new regulatory bodies; and
- providing for any continuing role for the CJEU under the withdrawal agreement (see box below).

⁸ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) paras 36 and 38

⁹ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 38

¹⁰ UK Government, [Technical note: implementing the withdrawal agreement](#) (2017).

Box 1: What might the withdrawal agreement say about enforcement and dispute resolution?

Regulations under clause 9 to implement the withdrawal agreement could have **major implications for the UK's legal systems**.

Both sides in the negotiations recognise that mechanisms for enforcing the withdrawal agreement and resolving disputes arising from it will be central to the whole agreement, and to any transitional period.

The main question is **whether the CJEU will have any continuing role** in enforcing or interpreting the agreement, or having its rulings taken into account.

The Joint Report on Phase 1 states:

This Part of the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, **UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date**. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part.¹¹

The Government argues that the broad purpose of the clause 9 power is needed to be "sufficiently flexible" to cover all the legislative measures that might be required as a result of the withdrawal agreement.¹²

Clause 9(1) states that the Minister may make "such provision as the Minister *considers appropriate*" for the purpose of implementing the withdrawal agreement. This suggests that if the relevant Minister believes that the power is being used for one of the purposes as defined, then that could be sufficient. The term "appropriate" requires that the relevant decision-maker was satisfied that the relevant purpose was met.¹³

2.3 Scope of clause 9

Clause 9(2) confirms that secondary legislation made under clause 9 can be used to "achieve anything that could be done by an Act of Parliament". The European Communities Act 1972 contains a similar power in [section 3\(4\)](#), which states that the provision on delegated powers in section 2(2) includes, subject to limitations set out in Schedule 2 of the Act, "any such provision (of any such extent) as might be made by Act of Parliament".

¹¹ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 38

¹² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 62.

¹³ *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142

Even if it is not possible to predict all of the changes that will be needed, it is certain that any power to implement the withdrawal agreement would need to have a broad legal scope in order to cover the range of possible legislative measures that would be required by such a significant international treaty. The Joint Report on Phase 1 indicates that the withdrawal agreement will require Parliament to enact domestic legislation which is constitutional in character, for example, it states that the WAI Bill will “prevail over inconsistent or incompatible legislation”.¹⁴

A power to modify provisions in the EUW Bill once enacted

Clause 9(2) also states that secondary legislation made under clause 9 could also modify the provisions of the EUW Bill once enacted. The Government’s Delegated Powers Memorandum (DPM) indicates that this power to change the provisions of the Bill, as enacted, might be needed “in order to reflect the outcome of negotiations”.¹⁵

The Joint Report on Phase 1 provides one such possible example of a change that might be required to the EUW Bill. The Joint Report on Phase 1 implies that UK courts will be able to make references to the CJEU on questions on the interpretation of the citizens’ rights elements of the withdrawal agreement.¹⁶ This is time-limited to 8 years from the date that the citizens’ rights part comes into force. This could require clause 6(1)(b) of the EUW Bill, which as currently drafted states that after exit UK courts cannot make references to the CJEU, to be amended. If this provision needed to be amended after it was enacted, this could be done through clause 9, the WAI Bill or other primary legislation.

Any changes to the EUW Act itself would be subject to the affirmative procedure.¹⁷

The other powers in this Bill do not enable secondary legislation to be used in this way. *Craies on Legislation*, the legal practitioners’ text on legislation, provides some indication as to why this power may be provided for expressly:

A Henry VIII power may not be sufficient to permit amendment of the Act which confers it unless it does so expressly.¹⁸

¹⁴ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union (8 December 2017) para 36

¹⁵ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#) para 61

¹⁶ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union (8 December 2017) para 38

¹⁷ Schedule 7 Part 2 Paragraph 6(2)(g)

¹⁸ *Craies on Legislation*, 10th ed (2015), edited by Daniel Greenberg p21

An example of a similar power can be found in section 277(2) of the Enterprise Act 2002, which enables a power to modify itself through secondary legislation.

It may be that the courts would allow a power to implement a treaty to be defined broadly. For instance, in *ITV Broadcasting v TV Catchup Ltd*¹⁹ the High Court noted that section 2(2) of the ECA should not be interpreted as restrictively as other Henry VIII powers, as it is a unique power for the purpose of implementing treaty obligations.

In theory, clause 9 could be used to amend any legal limitations on the powers in the Bill. In practical terms, the principal limits on using the power in this way would be political and it is extremely unlikely that a Government would seek to circumvent the express limitations on the powers in the Bill in this way. Further, as the courts are likely to interpret general words that define the scope of Henry VIII powers narrowly, there would be some doubt that such secondary legislation would be effective.

Clause 9 or the WAI Bill?

The legislative strategy used to implement the withdrawal agreement will ultimately depend on the substance of what is agreed with the European Union. The Joint Report on Phase 1 suggests that the withdrawal agreement will require the WAI Bill to include constitutionally sensitive provisions that provide for domestic courts to disapply domestic legislation that conflicts with citizens' rights.²⁰ In any event, such provisions would be unlikely to be made through clause 9, as primary legislation would probably be needed in order to reflect and secure their constitutional status.

Should the withdrawal agreement require EU legislation made after exit day to take effect in domestic law, for example as part of any transitional arrangements, this could require new legislative powers or mechanisms – comparable to those in the European Communities Act 1972 but limited to the terms of the withdrawal agreement – to be enacted. If such provisions were required, it is likely that primary legislation would be required to secure their effectiveness.

2.4 Limits on the use of clause 9

The drafting of **clause 9** reflects the need for the Government to have significant discretion to make changes to the UK's legal system in order to implement any future withdrawal agreement. For this power to be effective the legal limitations must reflect the potential constitutional implications of the contents of the withdrawal agreement.

¹⁹ [2001] EWHC 28 (Admin)

²⁰ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 36

Express limitations

Clause 9(3) sets out the restrictions that apply to the power. Regulations made under it cannot:

- a. Impose or create taxation,
- b. Make retrospective provision,
- c. Create a relevant criminal offence, or
- d. Amend, repeal or revoke the *Human Rights Act 1998* or any subordinate legislation made under it.

Clause 9(3)(d) raises the question, as **Clause 7(6)(f)** does in relation to **clause 7**,²¹ of why the *Human Rights Act 1998* is singled out. The logic of such an express reference is that all other constitutional legislation could be modified by the power. This would include the legislation which underpins the devolution settlements in Scotland, Wales and Northern Ireland. Unlike clause 7, there is no express protection for the Northern Ireland Act 1998. The Government's explanation for the clause 7 restriction is:

because that Act is the main statutory manifestation of the Belfast Agreement and it would not, therefore, generally be appropriate for a power with this breadth of scope to be capable of amending that Act.²²

Clause 9 has been criticised on the basis that it enables UK ministers to make changes to the legislation that underpins the devolution settlements, as well as to laws within devolved competence. The [Welsh Government's Legislative Consent Memorandum](#) set out their concerns with the powers in the EUW Bill:

These powers would allow a Minister of the Crown to unilaterally amend legislation that is within the legislative competence of the Assembly, to include legislation where the Welsh Ministers exercise functions. The scrutiny obligation would then be discharged by Parliament rather than the Assembly. Those powers could also be used to amend the Government of Wales Act 2006, without any requirement for the Assembly's approval.²³

The [Scottish Government's Legislative Consent Memorandum](#) also criticised the approach of clause 9:

Exercise of Ministerial powers under the Bill will require policy choices to be made on how retained EU law is to be corrected, or the withdrawal agreement is to be implemented. In devolved areas those choices are a matter for Scottish Ministers, with accountability to the Scottish Parliament. Under the Bill, UK Ministers would have the power to make changes to law in

²¹ See [Commons Briefing Paper 8171](#)

²² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 40

²³ Welsh Government, [Legislative Consent Memorandum: European Union \(Withdrawal\) Bill](#) Para 26

devolved areas without any formal mechanism for accountability to the Scottish Parliament or consent from the Scottish Ministers. In relation to directly effective EU legislation, as set out above, UK Ministers would have the sole power to make necessary corrections to law in devolved areas. The Scottish Government does not believe that is an acceptable proposal. Scottish Ministers should have the power to make corrections in all areas of devolved law, whatever the original nature of the relevant retained EU law.²⁴

The UK Government may not intend the power to make such changes. However, the House of Lords Constitution Committee has argued that ministerial assurances as to the purpose of a power are not a substitute for legal safeguards.²⁵

Previous examples of delegated powers have been limited by more extensive restrictions, such as section 3 of the *Legislative and Regulatory Reform Act 2006*. However, such comparisons are difficult in view of the unique circumstances of the withdrawal agreement. The Government is explicit in recognising that this power may be used to make changes that otherwise would be made by primary legislation, and is not limited to “technical” changes, as **clause 7** is.

It is worth noting that **clause 7** is subject to the limit that it cannot be used to implement the withdrawal agreement. This is to ensure that only **clause 9** (which has a shorter lifespan) will be used for this purpose.²⁶

Amendments to the EUW Bill

Several tabled amendments seek to preserve other rights and equalities provisions from being changed or removed by regulations under clause 9.²⁷

Others would require strategies to be published for seeking to maintain participation in various bodies or programmes such as Euratom, the European Medicines Agency, ERASMUS or the European Arrest Warrant before making regulations under clause 9,²⁸ or for various impact assessments to be published first.²⁹

Several amendments to clause 9 have been tabled relating to the devolution statutes and the Belfast Agreement.³⁰

²⁴ Scottish Government, [Scottish Government's Legislative Consent Memorandum](#) Para 28.

²⁵ House of Lords Select Committee on the Constitution, *Growth and Infrastructure Bill* (2012-2013 HL 104) para 10.

²⁶ Clause 7 will continue to exist for two years after exit day, whereas clause 9 expires on exit day – see below

²⁷ See for example amendments 369, 13, 27, 115, 142, 150, 268, 271

²⁸ Amendments 196, 224-225, 231-232, 238, 241-263, 275-276, 351

²⁹ Amendments 227-230

³⁰ See for example new clauses 38 and 39 and amendments 147, 156 and 157

Sunset clause

Clause 9 is limited by a sunset clause in **9(4)** which provides that the power expires on exit day.

Under the Bill as drafted, the Government will prescribe when exit day will be, under **clause 14(1)**, and also can set different exit days for different provisions (Schedule 7, para 13). Such changes are not subject to parliamentary oversight, so the life of the power could be extended by this ability to alter the exit day or set multiple exit days. However, the Government has tabled amendments to the Bill to set exit day as 29 March 2019 for all purposes of the Bill.

Clause 9(2) could theoretically enable the Government to change the terms of the sunset clause, for example should the withdrawal agreement require it. But Parliament would have to approve such a measure under the affirmative resolution procedure (**Schedule 7 part 2 paragraph 6**).³¹

Implied limitations

Although **clause 9** is a broad power, it will be subject to implied limitations of the common law, for example through the principle of legality.³² It is legally possible for constitutional changes or changes to constitutional rights to be made through secondary legislation. However, the possibility of implied restrictions could be said to incentivise express articulation of the power's scope to amend constitutional laws and rights.³³

In the Supreme Court's judgment in the *Public Law Project*, a 2016 case, Lord Neuberger endorsed the following analysis by Daniel Greenberg:

As with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.³⁴

2.5 Constitutional implications of clause 9

The House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) has argued that clause 9 could enable significant

³¹ See Commons Library Briefing Paper 8172, [The European Union \(Withdrawal\) Bill: scrutiny of secondary legislation \(Schedule 7\)](#), 7 December 2017

³² *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131

³³ T. Khaitan, 'A Constitution Protection Clause for the Great Repeal Bill?', U.K. Const. L. Blog (19th Jul 2017) (available at: <https://ukconstitutionallaw.org/>).

³⁴ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39 para 26; *Craies on Legislation*, 10th ed (2015), edited by Daniel Greenberg, para 1.3.11.

constitutional rights, for example the rights of EU citizens resident in the UK, to be implemented in domestic law by negative procedure regulations, even if this requires amendments to primary legislation.³⁵ The DPRRC also criticised clause 9's ability to amend provisions of the EUW Bill through secondary legislation as "wholly unacceptable". The DPRRC Report argues that clause 9 is "the widest Henry VIII power" in the EUW Bill.³⁶

In contrast with clause 7, the Government has not justified clause 9 on the basis that it will be used to implement "technical" changes to retained EU law. The Government justification for the lack of limits on this power, and its ability to make substantive policy changes, may rest on the fact that the power will presumably only be used if the withdrawal agreement is approved by both Houses of Parliament through the vote on a motion on the final agreement before it is concluded.³⁷ However, nothing in the Bill imposes such a restriction. Nevertheless, as the Government argues, only changes that give effect to the content of the withdrawal agreement can be made, and in that sense the content of the agreement is the principal legal limit on how it can be used.³⁸

As currently drafted **clause 9** could, theoretically, be used to amend the principal provisions in the EUW Bill, for example to change the role of the Court of Justice of the EU (CJEU) after exit day or to remove the legal limits on the powers in the Bill. That a power *can* be used in such a way does not mean that the Government *will* use the power in such a way. All regulations made under clause 9 are subject to parliamentary scrutiny under the terms of **Schedule 7 part 2 paragraph 6**.³⁹ The principal practical limits on the use of the power in clause 9 are therefore political in nature, in that changes to the EUW Bill itself would be subject to the affirmative procedure.

Further, there is some doubt as to whether the removal of express limitations on powers, for example, would be within the legal scope, as the courts could imply that certain restrictions are not covered by general words. For example, the courts are likely to closely scrutinise any changes to individual rights through secondary legislation that are not expressly permitted by the relevant delegated power.⁴⁰

³⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, para 44

³⁶ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, para 45

³⁷ Delegated Powers Memorandum (DPM) para 64

³⁸ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 64.

³⁹ See Commons Library Briefing Paper 8172, [European Union \(Withdrawal\) Bill: scrutiny of secondary legislation \(Schedule 7\)](#), 7 December 2017

⁴⁰ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39 para 26; *Craies on Legislation* (10th ed (2015)), edited by Daniel Greenberg), para

The constitutional status of the regulations made under **clause 9** is potentially significant. Raphael Hogarth, research associate at the Institute for Government, has argued that it is “unlikely, bordering on impossible” that the courts would treat secondary legislation as having the status of a ‘constitutional statute’.⁴¹ This, combined with the courts’ ability to judicially review secondary legislation, could limit the extent to which clause 9 can be used to implement the withdrawal agreement.

However, it is worth noting that secondary legislation made under the ECA does have superior status and may be treated differently from other delegated legislation.⁴² SIs made under section 2(2) ECA are used to implement EU directives, a major source of EU law, and have a special constitutional status by which they are capable of having superior to subsequent UK legislation. It is not yet clear whether secondary legislation which gives effect to the withdrawal agreement will be capable of superior status in domestic law.

The precise form and constitutional status of the legislation used to implement the withdrawal agreement, and in particular to secure any rights that it contains, is a significant issue in the negotiations with the EU.

The European Commission has suggested that the rights in the withdrawal agreement should be “directly enforceable” in the UK’s domestic legal system (see section 3.3 below). The UK Government has argued that would be both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law. It [announced](#) on 13 November 2017 that citizens’ rights will be provided for in the Withdrawal Agreement and Implementation Bill.

The Joint Report on Phase 1 indicates that the WAI Bill will include a number of provisions of constitutional significance. The Joint Report on Phase 1 states that rights protected by the WAI Bill will “prevail over inconsistent or incompatible legislation” unless Parliament expressly legislates to the contrary. This would imply provisions similar to those in the ECA 1972 (section 2(4) and the Human Rights Act 1998 (sections 3 and 4) that enable domestic courts to scrutinise primary legislation. The equivalent power in the WAI Bill would likely empower domestic courts with new powers over legislation, and as such are likely to be closely scrutinised in Parliament.

1.3.11; *R v Secretary of State for the Home Department Ex p Simms* [2000] 2 AC 115, 131 HL

⁴¹ Raphael Hogarth, [Dispute Resolution after Brexit](#), Institute for Government, October 2017, p73

⁴² *ITV Broadcasting v TV Catchup Ltd* [2001] EWHC 28 (Admin); as the Supreme Court demonstrated in *Miller (R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5), when an Act of Parliament gives effect to rights provided for in an international treaty, as regulations made under **clause 9** could, this can have important consequences for how the relevant domestic law is interpreted.

2.6 Devolved authorities' powers

Schedule 2 part 3 sets out powers for the devolved authorities parallel to the clause 9 powers. These include the same restrictions as apply to UK Ministers, plus some additional ones. For example, the devolved authorities cannot:

- sub-delegate law-making powers;
- amend the Act itself;
- use their powers outside their areas of devolved competence as defined by the Bill in Schedule 2, paragraphs 18-20; or
- modify retained direct EU legislation.

The powers will be subject to the same two-year sunset as will apply to the powers of UK Ministers.

The exercise of the powers will be subject to the same requirements for consent, joint exercise or consultation with UK Ministers as would apply to any other legislation on those matters. So if, for instance, a Scottish Minister wanted to make a regulation to modify retained EU law in order to implement the withdrawal agreement, they would have to consult with a UK Minister if that were a requirement for legislation on the same matter that did not relate to implementing the withdrawal agreement and did not modify retained EU law.

The UK Government is not prohibited from exercising its powers under the Bill in devolved areas, and there is no specific obligation in the Bill for it to seek the consent of the devolved authorities before doing so.

There is a full discussion of the devolved aspects of the EUW Bill in another Commons Briefing Paper: [*The European Union \(Withdrawal\) Bill: Devolution*](#), CBP 8154, 24 November 2017.

Devolved Ministers will also gain powers to make regulations under other Brexit Bills such as the *Trade Bill 2017-19* (currently awaiting second reading), which are subject to similar restrictions as the powers under the EUW Bill.

3. Parliament and the Withdrawal Agreement

3.1 Introduction

Clause 9 of the EUW Bill is but one part of a wide and complex potential set of arrangements for Parliament's scrutiny, approval and implementation of the withdrawal agreement. In particular, questions of how and when clause 9 might be used have been complicated by the announcement of a proposed Withdrawal Agreement and Implementation Bill, which would put implementing measures into primary rather than secondary legislation.

The Communication from the Commission to the European Council, on the progress of the negotiations, published on the 8 December 2017, states the following on the timings of the process:

European Negotiations should be complete by autumn 2018 to allow good time for the Withdrawal Agreement to be concluded by the Council after obtaining consent of the European Parliament, and to be approved by the United Kingdom in accordance with its own procedures before 29 March 2019.⁴³

Several significant interlocking issues are discussed in this section:

- Parliament's role in negotiating the withdrawal agreement (Section 3.2);
- Parliament's role in implementing the withdrawal agreement (Section 3.3);
- transitional arrangements (Section 3.4);
- proposed Withdrawal Agreement and Implementation Bill (Section 3.5);
- timeframe (Section 3.6); and
- role of the devolved authorities (Section 3.7).

3.2 Parliament's role in the withdrawal negotiations

The UK Parliament – unlike the European Parliament – has no formal role in the negotiations on the UK's withdrawal from the EU.

The Government has promised a vote in Parliament on the substance of a withdrawal agreement before it signs, and Parliament would later have the opportunity to delay ratification. But neither of these would

⁴³ [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p15

give Parliament a formal power to amend the terms of the withdrawal agreement. Voting 'no' in a 'meaningful vote' on the withdrawal agreement could result in the UK leaving the EU without an agreement.

Debating legislation that implements an international agreement (discussed below) is not the same as debating and agreeing the agreement's content. The two are equally important, but Parliament's role is very different. So it is important to make the distinction, particularly when the negotiations on the agreement and the debates on how to implement it are happening simultaneously.

Vote on a motion

The Government has promised a parliamentary vote on the substance of the withdrawal agreement. This would be a vote on a motion in both Houses. It intends this to be held when the withdrawal agreement is finalised, but before it is concluded and signed (and before the European Parliament vote):

The Government have committed to a vote on the final deal in both Houses before it comes into force. This will cover both the withdrawal agreement and our future relationship with the European Union. I can confirm that the Government will bring forward a motion on the final agreement, to be approved by both Houses of Parliament before it is concluded. We expect and intend that that will happen before the European Parliament debates and votes on the final agreement.⁴⁴

This commitment does not appear in legislation, and the result of such a vote would also be politically rather than legally binding.

It could be Parliament's only chance to vote on the substance of the withdrawal agreement: a yes/no vote on whether to approve the whole of the unsigned withdrawal agreement. The vote would not allow Parliament to propose amendments to a withdrawal agreement.

If this vote happened well before 29 March 2019 a 'no' vote could potentially lead to further negotiations. However, the Government has stated that a 'no' vote would mean the agreement(s) would fall and the UK would leave the EU without any agreement. It does not intend to re-negotiate the agreement(s) in the event of Parliament voting no, even if there is still time within the terms of Article 50 TEU.⁴⁵

The Government has committed to the following in the Joint Report on Phase 1, in relation to the agreed position on Ireland and Northern Ireland:

The United Kingdom remains committed to protecting North-South cooperation and to its guarantee of avoiding a hard border. Any future arrangements must be compatible with these

⁴⁴ David Jones MP, Minister of State for Exiting the EU, [HC Deb 7 February 2017 c274](#). See also Department for Exiting the European Union, [Legislating for the United Kingdom's withdrawal from the European Union](#) (March 2017) Cm 9446 para 1.19

⁴⁵ David Jones MP, Minister of State for Exiting the EU, [HC Deb 7 February 2017 c273](#)

overarching requirements. The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all island economy and the protection of the 1998 Agreement.⁴⁶

Does this mean that 'no deal' now looks very different? In other words, if there is no withdrawal agreement, or if Parliament votes against the one on offer, will the UK maintain much more of its current arrangements than was hitherto thought? It is not immediately clear what "in the absence of agreed solutions" nor maintaining "full alignment" mean.

An amendment tabled to clause 9 would require the Government to seek agreement to extend the two-year Article 50 period, create a stand-still transition⁴⁷ or take other action approved by the House of Commons in the event of a 'no' vote on a deal.⁴⁸

Clause 9 does not include any requirement that Parliament approve the withdrawal agreement before the power is used. However, various amendments to this effect have attracted considerable support.⁴⁹

Objecting to ratification

The withdrawal agreement would also be subject to the treaty procedures of Part 2 of the [Constitutional Reform and Governance Act 2010](#).⁵⁰ This gives parliamentary disapproval of treaties statutory effect, and effectively gives the House of Commons a new power to block ratification. But it does not require Parliament to scrutinise, debate or vote on treaties (and it rarely does so).

The process is this:

- Once the treaty is signed, and all necessary domestic legislation put in place, the Government must **lay it before Parliament**. The Government may not ratify the treaty for the following 21 'sitting days' (ie days when both Houses were sitting).
- Parliament does not have to do anything. But if within those 21 sitting days **either House resolves that the treaty should not be ratified**, by agreeing a motion on the floor of the House, the

⁴⁶ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 49

⁴⁷ Whereby the UK would continue to operate under existing EU rules.

⁴⁸ New clause 69

⁴⁹ Amendments 7, 8 and 47.

⁵⁰ For more information on Parliament's role in ratifying treaties, see Commons Library briefing paper 5855, [Parliament's role in ratifying treaties](#), 17 February 2017.

Government must lay before Parliament a statement setting out its reasons for nevertheless wanting to ratify.

- If the **Commons** resolves against ratification – regardless of whether the Lords did or not – a further 21 sitting day period is triggered from when the Government’s statement is laid. During this period the Government cannot ratify the treaty.
- If the Commons again resolves against ratification during this period, the process is **repeated**. This can continue indefinitely, in effect giving the Commons the power to block ratification.
- If there are no outstanding resolutions, the Government can **ratify** the treaty. Ratifying is when a State confirms that it is bound by a treaty that it has already signed.
- The treaty **enters into force** for the UK according to the provisions in the treaty.

Neither House has yet resolved against ratification of a treaty under these provisions, and there are limited options for how they can do so. Moreover, Parliament can only oppose (or tacitly accept) treaties in full – it cannot amend them. And ratifying a treaty under the 2010 Act does not change UK domestic law on its own.

There have been some calls for a process that results in more debates and votes on treaties, perhaps involving parliamentary committees, but Parliament has so far been reluctant to set up new mechanisms for treaties. Many of the proposed amendments to the Bill that became the *European Union (Notification of Withdrawal) Act 2017* concerned Parliament’s role in the negotiating process or approving the final agreement, but none of them passed.⁵¹

3.3 Parliament’s role in implementing the withdrawal agreement

While the EU withdrawal agreement is being negotiated, Parliament is debating the powers it will have for implementing its as yet unknown provisions.

It is likely that Parliament would then consider legislation to implement the withdrawal agreement(s) only if the vote on a motion was passed. There would be limited room for manoeuvre on the implementing legislation given the need to meet the Government’s obligations under the agreement.

⁵¹ See House of Lords Library Note LLN-2017-0009, [European Union \(Notification of Withdrawal\) Bill: Briefing for Lords Stages](#), 20 February 2017; House of Commons Library Briefing Paper 7922, [European Union \(Notification of Withdrawal\) Bill: analysis of Lords’ amendments](#), 10 March 2017

Need for implementing legislation

Implementing legislation is needed largely because the withdrawal agreement would be an international treaty. International treaties are usually taken to bind the UK Government only under public international law, and not to automatically give rise to any rights or obligations that individuals or businesses could enforce directly in UK courts.⁵² This is often referred to as the 'dualist' (in contrast to 'monist') approach to international treaties. The Government's [Technical Note on implementing the withdrawal agreement](#) argues against making provisions in the withdrawal agreement directly enforceable under UK domestic law.

Incorporation and 'direct effect': primary or secondary legislation?

Clause 9 gives the Government a wide-ranging power to implement the withdrawal agreement through secondary legislation.

Implementing treaties through secondary legislation is not a novel concept. Double taxation treaties, for example, are implemented through secondary legislation (Orders in Council) made under the *Taxation (International and Other Provisions) Act 2010* and the *Finance Act 2006*, which are subject to the affirmative resolution procedure.

However, there has been considerable criticism of this approach, from various angles.

For example, it has been argued that primary legislation should be used to provide proper scrutiny, and that it will be needed to give legal effect to the withdrawal agreement, given the fundamental changes in the law and legal rights that would result and as a means to prevent legal challenges to the agreement.⁵³

In particular, as noted in section 2.3 above, if a transitional period required EU legislation made after exit day to take effect in domestic law, this could need new legislative powers or mechanisms comparable to those in the European Communities Act 1972. This would probably need primary legislation to be effective.

One of the EU's concerns is that rights specified in UK domestic legislation and upheld by UK domestic courts could be altered by subsequent UK domestic legislation.⁵⁴ This is part of the reason that it has [called for continued CJEU jurisdiction](#) in some areas. The [UK response](#) at first was that it will continue to be bound by the withdrawal agreement as a matter of public international law

⁵² For a contrary view, see E Borge, 'Can unincorporated treaty obligations be part of English law?' [2017] Public Law 571

⁵³ Commons Exiting the EU Committee, [European Union \(Withdrawal\) Bill](#), HC 373 of 2017-19, 17 November 2017, para 83

⁵⁴ See Commons Exiting the EU Committee, [European Union \(Withdrawal\) Bill](#), HC 373 of 2017-19, 17 November 2017, paras 86-91

In her [Florence speech](#) on 22 September 2017, the Prime Minister committed for the first time to incorporating the withdrawal agreement 'fully into UK law':

I know there are concerns that over time the rights of EU citizens in the UK and UK citizens overseas will diverge. I want to incorporate our agreement fully into UK law and make sure the UK courts can refer directly to it.

Where there is uncertainty around underlying EU law, I want the UK courts to be able to take into account the judgments of the European Court of Justice with a view to ensuring consistent interpretation. On this basis, I hope our teams can reach firm agreement quickly.

It was not clear whether she meant incorporating only the provisions on citizens' rights, or the whole withdrawal agreement. Nor was it clear at that point whether she envisaged primary legislation once the withdrawal agreement has been signed, or using the powers under clause 9.

Incorporating a treaty into UK law means that the UK courts can, as the Prime Minister says, refer directly to the text when considering individual rights. What it does not necessarily do is give that text any kind of supremacy over other UK law. The EUW Bill provides for continued supremacy of EU law only in limited circumstances (**clause 5**).

Nor does incorporation protect a text from future amendment. If future legislation were to put the UK in breach of the withdrawal agreement, it would be answerable in international law, but individuals might have no remedy in domestic law.

[David Davis](#) repeated the Prime Minister's words about "incorporating the final withdrawal agreement fully into UK law" in his press statement at the end of the September negotiations. However, he then added the phrase "Direct effect if you like".

It was not clear exactly what he meant by this. In international treaty law, direct effect means that international treaties can be relied on in domestic courts without the need for any domestic incorporation⁵⁵ – so can be seen as the opposite of incorporation.

But, as set out above, the UK has a 'dualist' system in which domestic legislation is needed to allow individuals to assert their rights under international law in domestic courts.

EU law can currently have direct effect in the UK as a result of the European Communities Act 1972 in combination with case-law of the CJEU (see below). The UK position paper on implementing the withdrawal agreement argued that the 'EU concept of direct effect' should not be continued after exit:

⁵⁵ See Professor Kenneth Armstrong, ['The "Direct Effect" of the Withdrawal Agreement: Do Davis and Barnier Agree?](#), Brexit time blog, 28 September 2017

It would be both inappropriate and unnecessary for the agreement to require the UK to bring the EU concept of direct effect into its domestic law. The same substantive result can be achieved if the Withdrawal Agreement requires the UK to give citizens specified rights, and the UK enacts domestic legislation whose effect is to bestow those rights. Not only will EU citizens be able to enforce those rights through the UK's domestic legal system, but the UK's compliance with its international obligations can also be enforced using whatever mechanisms the agreement includes for the resolution of disputes.⁵⁶

Box 2: 'Directly applicable' and 'direct effect' in EU law

'Directly applicable' means that the EU law applies in the Member States without further national implementing measures,⁵⁷ as soon as it enters into force (either on the date stipulated in the act or on the twentieth day following its publication in the Official Journal of the European Union).

Directly applicable laws usually also have 'direct effect'.⁵⁸ This means that they automatically create rights which individuals can rely on before national courts. In the [Van Gend & Loos judgment](#) on 5 February 1963, the Court of Justice of the EU (CJEU) established the principle of 'direct effect' and rights for individuals.⁵⁹ To have direct effect, an EU obligation must:

- be intended to confer rights on individuals;
- be precise, clear and unconditional; and
- not entail any additional national or EU measures.

But talking to the European Parliament on 3 October 2017, the EU's chief Brexit negotiator [Michel Barnier](#) said that direct effect in the UK was required to prevent rights being changed:

To effectively guarantee these rights, we need:

- The withdrawal agreement to have direct effect to allow British authorities and judges to rely directly on the withdrawal agreement. Without direct effect, these rights could be changed over time.
- A coherent interpretation of the agreement on both sides of the Channel, which only the European Court of Justice can assure.

The [European Parliament resolution](#) adopted that day described the Prime Minister's commitment as giving direct effect to the withdrawal agreement, and also called for withdrawal agreement rights to have primacy over UK law:

Notes that the Prime Minister of the United Kingdom's speech of 22 September 2017 gave a commitment to ensuring that the

⁵⁶ HM Government, [Technical Note: Implementing the Withdrawal Agreement, para 3](#)

⁵⁷ In practice the effects of directly applicable laws do need further domestic enactment.

⁵⁸ Although direct applicability is not a necessary pre-condition for direct effect.

⁵⁹ The judgment established that former Article 12 of the EEC Treaty (now Article 30 TFEU) was directly effective, as it was a means of ensuring uniform application in all Member States.

rights of citizens of the EU-27 residing in the United Kingdom are given direct effect by means of the incorporation of the withdrawal agreement into United Kingdom law; underlines that this should be done in a manner that prevents it from being changed unilaterally, allows EU citizens to invoke the withdrawal agreement rights directly before United Kingdom courts and public administration, and gives it primacy over United Kingdom law; underlines that in order to guarantee the coherence and integrity of the EU legal order, the CJEU must remain the sole and competent authority for interpreting and enforcing European Union law and the withdrawal agreement; awaits concrete proposals from the United Kingdom in that regard;

The Government is bringing forward a number of Brexit Bills in order to make substantive policy changes in areas of EU competence.⁶⁰ It is not certain whether these Bills will also be used to implement the withdrawal agreement, or if they will contain powers that enable changes to be made in their respective subject areas, such as immigration. If such powers are included it is not clear how the work would be divided between those powers and the clause 9 power.

As discussed below (Section 3.5), the UK Government has now committed, in the Joint Report on Phase 1 published on 8 November, to introduce a Withdrawal Agreement and Implementation Bill in order to implement the withdrawal agreement and to protect citizens' rights.⁶¹

The Joint Report on Phase 1 also says that the withdrawal agreement itself should specify a form of supremacy for the citizens' rights elements of the withdrawal agreement, and that there will be express reference to this in the WAI Bill.⁶² This could result in a double lock, comparable to that which is secured through the ECA 1972: supremacy secured by international law that is then incorporated into UK domestic law.

3.4 Transitional arrangements

If any transitional arrangements were agreed as part of the Article 50 agreement, implementing legislation would be needed for those too. This is likely to require changes to the provisions of the EUW Bill itself.

⁶⁰ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 58.

⁶¹ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 36

⁶² Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) paras 35-36

Negotiating positions

The UK Government has stated that it would like to agree transitional arrangements. The Prime Minister, on 22 September 2017, said the following on transition:

As I said in my speech at Lancaster House a period of implementation would be in our mutual interest. That is why I am proposing that there should be such a period after the UK leaves the EU.

Clearly people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU.

So during the implementation period access to one another's markets should continue on current terms and Britain also should continue to take part in existing security measures. And I know businesses, in particular, would welcome the certainty this would provide.

The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations.⁶³

[The European Council's Article 50 guidelines](#) state:

To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply.

If the EU's position were accepted, EU law might need to be supreme and CJEU judgments binding for the duration of the transition period. On 9 October 2017, the Prime Minister said in the House of Commons:

We will have to negotiate what will operate during the implementation period. Yes, that may mean that we start off with the ECJ still governing the rules we are part of for that period, but we are also clear that we can bring forward discussions and agreements on issues such as a dispute resolution mechanism. If we can bring that forward at an earlier stage, we would wish to do so.⁶⁴

The Communication from the Commission to the European Council, on the progress of the negotiations states the following on transitional arrangements:

⁶³ <https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu>

⁶⁴ HC Deb 9 October 2017 c53

Such transitional arrangements would be based on Article 50 of the Treaty on European Union and would by their very nature be for a limited period of time. During such a potential transitional period, the entire *acquis* – the full corpus of EU law – would continue to apply in the United Kingdom. Any such transitional arrangements would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply. Should the European Council (Article 50) recognise that sufficient progress has been made, the Commission stands ready to begin work immediately on such transitional arrangements, which could also provide bridges to the future relationship.⁶⁵

The Commission's Communication also argues that the citizens' rights elements of the withdrawal agreement should come into force only at the end of the transitional period.⁶⁶ If that is the case, what would be the legal basis for those continuing rights during the transition? Would it be existing EU law and Treaties, as applied by the transitional arrangements in the withdrawal agreement? Or would the Article 50 period have to be extended? The WAI Bill is expected to provide the necessary domestic legislation to underpin the transitional or implementation period.

Some of the complex legal and constitutional issues around transition have been explored in recent academic articles including:

- Piet Eeckhout and Oliver Patel, '[Brexit Transitional Arrangements: Legal and Political Considerations](#)', UCL Brexit Insights, November 2017
- Kenneth Armstrong et al, '[Implementing Transition: How Would it Work?](#)', 13 October 2017

Transition and the EUW Bill

The broad powers of clause 9 – which as explained above allow even amendments to the Act itself – could be technically capable of implementing a transition period.

But in evidence to the [Exiting the European Union Committee](#), the DExEU Minister Steve Baker said that this was not the Government's intention:

Mr Baker: This Bill is not about the transition period. This Bill is about how we leave the European Union and get our statute book ready for exit day. Its purpose is to deliver certainty and continuity as we leave. Its purpose is not to implement the

⁶⁵ [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p15

⁶⁶ [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p5

implementation period. As I have said before, if we find we need to bring forward additional legislation, we will do so. [...]

Chair: Can I just ask you, Mr Baker, whether I heard you correctly in saying to Peter Grant that, when it comes to the transitional arrangements, this Bill would not be used to implement those and you would require separate legislation? Is that what you said?

Mr Baker: That is our position, yes. This Bill is about delivering a functioning statute book on exit day.⁶⁷

This implied that if a transition period were to be agreed, further primary legislation would be needed, as the EUW Bill is not designed to legislate for such an eventuality.

The Chair of the Committee, Hilary Benn, then pointed out that this appeared to undermine the arguments against bringing in a separate Bill to implement the withdrawal agreement:

Chair: That is extremely interesting, because if that is the case, if you are going to require a separate piece of legislation to implement any transitional arrangements, does it not rather undermine the argument that you put earlier: that having a separate Bill to deal with the whole withdrawal agreement—of which the transitional arrangements would be part—would not really work in terms of time? You have just accepted that you will need separate legislation for that. Why should that not also deal, for instance, with the divorce settlement and any framework agreement on future relationship, if you are going to have the Bill anyway?

Mr Baker: You make a very interesting point, Mr Benn, which is well-made and heard, and we will consider the implications of what you have said.

Chair: Now, that sounds like a very, very interesting answer, for which I am profoundly grateful.⁶⁸

3.5 Proposed ‘Withdrawal Agreement and Implementation Bill’

Following the developments outlined above around ‘direct effect’ and implementing the transitional arrangements, the Government announced that there would be a new ‘Withdrawal Agreement and Implementation Bill’ to implement the agreement and any transitional arrangements through primary legislation. This has thrown into doubt how and when clause 9 might be used, and brought questions of scheduling and timing to the fore (see section 3.6 below).

⁶⁷ House of Commons Exiting the EU Committee, [Oral evidence: The European Union \(Withdrawal\) Bill, HC 373, Thursday 26 October 2017](#), qq184 and 187

⁶⁸ House of Commons Exiting the EU Committee, [Oral evidence: The European Union \(Withdrawal\) Bill, HC 373, Thursday 26 October 2017](#), q188

David Davis made the announcement on 13 November 2017, in his statement to the Commons following the November negotiations:

It is clear that we need to take further steps to provide clarity and certainty—both in the negotiations and at home—regarding the implementation of any agreement into UK law. I can now confirm that, once we have reached an agreement, we will bring forward a specific piece of primary legislation to implement that agreement. It will be known as the withdrawal agreement and implementation Bill. This confirms that the major policies set out in the withdrawal agreement will be directly implemented into UK law by primary legislation, and not by secondary legislation under the withdrawal Bill. It also means that Parliament will be given time to debate, scrutinise and vote on the final agreement we strike with the European Union. The agreement will hold only if Parliament approves it.

We expect the proposed Bill to cover the contents of the withdrawal agreement, which will include issues such as an agreement on citizens' rights, any financial settlement and the details of an implementation period agreed between both sides. Of course, we do not yet know the exact details of the Bill and are unlikely to do so until the negotiations are near completion.⁶⁹

David Davis added "this is as near as we can come to direct effect".⁷⁰

The DExEU [announcement](#) did not explain whether the Withdrawal Agreement and Implementation Bill would itself contain delegated powers; nor did it comment on whether the Withdrawal Agreement and Implementation Bill would need to be passed before the power in Clause 9 of the EUW Bill was exercised.

Mr Davis did however state that the new Bill would be in addition to the promised parliamentary vote on a motion on the final deal.

The Commons Exiting the EU Committee says that the Government should now "justify the purpose of clause 9" of the EUW Bill, which contains powers to implement the withdrawal agreement by secondary legislation, potentially before the new Bill is considered by Parliament.⁷¹

The Joint Report on Phase 1 makes a number of references to the WAI Bill, including:

The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will

⁶⁹ [HC Deb 13 November 2017 c37](#)

⁷⁰ [HC Deb 13 November 2017 c39](#)

⁷¹ Commons Exiting the EU Committee, *European Union (Withdrawal) Bill*, HC 373 of 2017-19, 17 November 2017, para 85

prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future.⁷²

A number of amendments to **clause 9** have been tabled to require the withdrawal agreement to be implemented through separate primary legislation.⁷³

3.6 Timeframe

It will not be possible to publish implementing legislation until the withdrawal agreement is finalised, because the content will not be known until then. But depending on the timing of the negotiations, this could leave very little time to make all the necessary implementing legislation.

It is not clear whether parliament would have to approve the withdrawal agreement before any implementing legislation was made.

Michel Barnier suggested on 6 December 2016 that the negotiations should be concluded by October 2018 to allow for the European Parliament, the EU Council and the UK to complete their respective processes on the agreement before the end of the two-year time frame under Article 50 on 29 March 2019.

The Communication from the Commission to the European Council, on the progress of the negotiations states that the negotiations should be concluded by autumn 2018 to allow “good time” for the agreement to be approved and implemented before the end of March 2019.⁷⁴

Although Article 50 does not specify that a withdrawal agreement must come into force two years after notification of withdrawal, the EU’s negotiating mandate said that it should.

Box 3: Possible timetable of negotiations and legislation⁷⁵

The interlocking timetable of negotiations and legislation could look something like this:

June 2017	Negotiations start
Summer 2017 to autumn 2018	EUW Bill and other Brexit Bills go through Parliament
Spring 2018 onwards	‘Correcting’ regulations made under clause 7 etc
Autumn 2018	Negotiations end, UK Parliament votes on withdrawal agreement, EP votes on withdrawal agreement, withdrawal agreement signed and

⁷² Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union (8 December 2017) para 36

⁷³ New clauses 3 and 75, and amendments 7, 355 and 28

⁷⁴ [Communication from the Commission to the European Council](#) (Article 50) on the state of progress of the negotiations with the United Kingdom under Article 50 of the Treaty on European Union p15

⁷⁵ See also Institute for Government, [Brexit negotiations and legislation: implied timeline](#), November 2017

	laid before Parliament under Constitutional Reform and Governance Act 2010
Winter 2018	Withdrawal agreement approved by EU27 (qualified majority)
Winter 2018 to spring 2019	UK implementing legislation
Spring 2019	Withdrawal agreement ratified by UK Government
29 March 2019	Withdrawal agreement and domestic implementing legislation come into force. EU Treaties cease to apply to the UK.

But many things could cause this timetable to slip. For instance, a European Parliament briefing of February 2016 stated that the withdrawal agreement is not primary EU law, since it is concluded between the EU and the withdrawing state rather than between the latter and the rest of the Member States.⁷⁶ This means that the agreement could be challenged by a remaining Member State by referral to the CJEU, which could lead to an even tighter timetable for implementation.

If the withdrawal agreement is concluded close to exit day, **clause 9** might be used to effect a number of significant policy changes via secondary legislation in a short timescale. The potential scarcity of time is central to the Government's justification for having the power to implement the withdrawal agreement through secondary legislation.

If the withdrawal agreement is concluded right up against exit day, there would be no time for the UK Parliament and EP to vote on the agreement, for the UK to make implementing legislation, and the EU27 and UK Government to ratify it before the EU Treaties ceased to apply. It could mean that the promised Parliamentary vote on the substance of the withdrawal would happen after March 2019.⁷⁷

However, this eventuality might lead to unanimous agreement to extend the two-year period under Article 50. An amendment tabled to clause 9 would require the Government to seek agreement with the EU to extend the two-year period, create a stand-still transition or take other action approved by the House of Commons if no deal had been concluded by 31 October 2018, or if Parliament had not approved a deal by 28 February 2019.⁷⁸

The Commons Exiting the EU Committee raised the question of timing in its December 2017 report on the negotiations:

...We recognise that the timeframe for agreeing the withdrawal agreement is not in the Government's hands. However, the timing of the vote in the House of Commons is significant. As it stands, any deal will need to be voted on by the UK Parliament and the European Parliament before 11pm on 29 March 2019 unless the

⁷⁶ EPRS, [Article 50 TEU: Withdrawal of a Member State from the EU](#), February 2016.

⁷⁷ David Davis, [oral evidence to the Commons Exiting the EU Committee, 25 October 2017](#), q120

⁷⁸ New clause 69

date of exit has been postponed by unanimous agreement of the 27 Member States under the terms of Article 50. If the European Parliament has not approved the agreement and the negotiating period has not been extended, the UK will leave the EU without a deal. Clearly a vote cannot take place until an agreement has been reached between the UK and the EU. If this happens at the very end of the Article 50 period then the Government would be unable to guarantee that either the motion or the Bill could be debated and voted on before the end of March 2019. Therefore, the Government must hold a vote as soon as possible after any deal is agreed. It would not be acceptable to present a motion to the House after the UK has left the EU.⁷⁹

The commitment to the WAI Bill in the Joint Report on Phase 1 would require the Government to find the necessary parliamentary time to ensure that the WAI Bill was passed before exit day.⁸⁰

3.7 Role of the devolved authorities

International relations, including treaty-making, is a reserved matter in the UK. The devolved governments and legislatures therefore have no formal role in negotiating or approving UK treaties (including the EU withdrawal agreement). However, the UK Government has undertaken to cooperate with them on negotiating and implementing treaties.

Under devolution arrangements, international relations including treaty-making remain the exclusive responsibility of the UK Government. But it is recognised that the devolved administrations in Northern Ireland, Scotland and Wales need to be involved where a treaty might have implications for devolved areas of responsibility.

Rules governing the cooperation between Whitehall and the devolved administrations are set out in a Concordat on International Relations, which is one of five concordats supporting a [Memorandum of Understanding](#).⁸¹ This Concordat is explicitly intended to be binding in honour only rather than in law, but promises cooperation on exchanging information, formulating UK foreign policy, negotiating treaties and implementing treaty obligations. It also provides for ministers and officials from the devolved administrations to form part of UK treaty-negotiating teams and for apportioning any quantitative treaty obligations, as well as imposing penalties should the devolved bodies default on any agreed liability. For example, the UK Government

⁷⁹ House of Commons Exiting the EU Committee, [The progress of the UK's negotiations on EU withdrawal](#), HC 372 2017-19, 1 December 2017, para 116

⁸⁰ Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union (8 December 2017) para 36

⁸¹ [Memorandum of Understanding and Supplementary Agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive Committee](#), October 2013

consulted all three devolved administrations before ratifying Protocol 15 to the European Convention on Human Rights.⁸² The [Scotland Act 1998](#) provides a role for Scottish Ministers in assisting UK Ministers in respect of international relations, including the EU. This is in Schedule 5, paragraph 7 (2)(b). This option has not been taken up so far in respect of withdrawal from the EU.

Nevertheless, as Joanna Harrington has pointed out:

It is both implicit and explicit in the nature of the devolved arrangements that Westminster retains the ability to override the actions of any devolved body and it could do so to ensure the State's compliance with its international commitments.⁸³

The Joint Ministerial Committee (JMC) is the main forum in which devolved administrations and the UK Government meet. In October 2016 the JMC established a sub-committee, known as the JMC (EN) (EN stands for EU Negotiations) specifically for discussing the Article 50 negotiations. There has been criticism of the JMC (EN), particularly the scarcity of its meetings and the fact that it has not even been notified in advance of some important decisions.⁸⁴

⁸² Ministry of Justice, *Explanatory Memorandum on Protocol No 15 Amending the Convention on the Protection of Human Rights and Fundamental Freedoms*, Cm 8951, 2014

⁸³ J Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making', 55 *International and Comparative Law Quarterly* 121 (2006), p150

⁸⁴ See Commons Library briefing paper, [The European Union \(Withdrawal\) Bill: Devolution](#), CBP 8154, 24 November 2017, pp30-32

4. Clause 8: complying with international obligations

4.1 Introduction

Clause 8 gives UK Government ministers the power, until two years after exit day, to make secondary legislation to prevent or remedy any breach of the UK's international obligations that might arise from leaving the EU.

Corresponding powers for the devolved administrations are set out in **Schedule 2 Part 2**.

The Government says this is needed because clause 7 may not always provide the requisite power (clause 7 only covers failure of retained EU law to operate effectively, or deficiencies in retained EU law). But it has given only one example of where clause 8 might be used. It is not clear what other breaches of international obligations arising from leaving the EU could be prevented or remedied by UK legislation.

Unlike clauses 7 and 9, the power in clause 8 may be used to impose taxation.

4.2 Purpose and scope of clause 8

The purpose of **clause 8** is to ensure that UK legislation can be amended where this is needed to comply with the UK's international obligations after Brexit. It is to be used only to "prevent or remedy any breach" of the UK's international obligations that arises from EU withdrawal.

Why is it needed?

The Government explains that the clause 8 power is needed because **clause 7** may not always provide the requisite power.

Clause 7 could be used when a breach of the UK's international obligations could be prevented or remedied by amending a retained EU law that was not operating effectively or was otherwise "deficient". But the **clause 8** power may have to be used when a breach of international obligations arises from withdrawing from the EU but there is no relevant deficiency in retained EU law.⁸⁵

Delegated legislation and international obligations

It is not unheard of to use delegated legislation to implement international obligations, but normally this would be done in relation to

⁸⁵ See Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 51.

known, specific treaty provisions, and might require parliamentary approval for more substantive or politically important measures. For example section 8 of the Intellectual Property Act 2014 allows the Government to make orders to give effect to a 1999 treaty on international registration of industrial designs, subject to the draft affirmative resolution procedure.

By contrast, clause 8 regulations could apply to an as yet unknown number of international obligations, whether in treaties or other international law, and would normally only need the negative resolution procedure.⁸⁶

Henry VIII power

Like clause 7,⁸⁷ clause 8 is a Henry VIII power: subsection 8(2) allows Ministers to do anything that an Act of Parliament can do, save for the express limitations set out in clause 8(3) (see below), and any implied limitations applied by the courts.

‘Appropriateness’ test

There has been some criticism of allowing the Government to make “such regulations as the Minister considers appropriate” under this power (as with clauses 7 and 9). The House of Lords Delegated Powers Committee is amongst those arguing for a test based on necessity instead of appropriateness,⁸⁸ and various amendments have been tabled to this effect. However, Sir Stephen Laws, former First Parliamentary Counsel, takes a different approach, arguing that:

- a necessity test is problematic and “makes no sense at all in the case of the powers in the Bill”
- it would “provide a fruitful source of litigation”, and
- in his view the best way to mitigate the risks of inappropriate measures going through this route would be “to ensure better Parliamentary processes for scrutinising the way the powers in the Bill are exercised”.⁸⁹

4.3 What sort of international obligations might it cover?

Clause 8 is widely framed, and does not define or give examples of the sort of breaches of international obligations it might be needed for.

⁸⁶ Schedule 7 paras 4-5: See Commons Library Briefing Paper 8172, [European Union \(Withdrawal\) Bill: scrutiny of secondary legislation \(Schedule 7\)](#), 7 December 2017

⁸⁷ See [Commons Briefing Paper 8171](#)

⁸⁸ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, para 35

⁸⁹ Sir Stephen Laws, First Parliamentary counsel and Permanent Secretary 2006-12, [written evidence to the House of Commons Exiting the EU Committee](#), 11 October 2017, paras 62-72

There are some concerns that it could be used to effect important policy measures.

However, it could not be used to change the UK's actual international obligations – just the domestic law relating to them.

What UK international obligations might be breached by Brexit?

Many of the UK's current international obligations are bound up with its EU membership. The EU has concluded hundreds of treaties with third countries on a wide range of topics, to which the UK is party as a result of its EU membership.⁹⁰ Some other treaties are implemented more indirectly through the UK's EU membership.

It is not clear whether or not leaving the EU would result in breaching any of these treaties.

Also, 'international obligations' includes general international law such as the Vienna Convention on the Law of Treaties, and customary international law. So clause 8 might for example cover obligations incurred or rights acquired under a treaty that no longer applies to the UK.

Which breaches might require the clause 8 power?

Even where potential breaches of international obligations arising from leaving the EU can be identified, only some of these would require the clause 8 power. Others could be remedied by clause 7, or by powers under other specific legislation such as the Trade Bill. Others might not need any legislation at all, or conversely might not be capable of being remedied by domestic legislation alone.

Other obligations might simply no longer apply after Brexit, or might be implemented through other legislation.

The House of Lords Delegated Powers Committee said that "the Government have not been explicit about the sorts of international obligation they have in mind under clause 8" (apart from one example set out below), and that "it would be helpful if the Government would give more examples".⁹¹ An amendment to this effect has been tabled.⁹²

Possible examples

Below are some examples of types of international obligations that are connected to Brexit, with an assessment of whether clause 8 powers might or might not be needed:

⁹⁰ See Commons Briefing Paper 7850, [Legislating for Brexit: EU external agreements](#) 5 January 2017

⁹¹ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, para 36

⁹² New clause 20

EU external treaties

Many EU treaties with third countries currently contain obligations for the UK as a result of its EU membership. Will leaving the EU result in a breach of UK international obligations under those treaties? And if so would clause 8 be needed to prevent or remedy them – or be capable of doing so?

For some EU external treaties that the UK has signed and ratified alongside the EU ('mixed agreements'), it might be possible to identify provisions that continued to apply to the UK after Brexit. If these were implemented by EU law that become part of retained EU law under clauses 2-4 of this Bill, that retained EU law could be amended by regulations under clause 7 so that the treaty provisions could still work in a UK context.

Many other treaty provisions could not apply to the UK after Brexit, for example because they refer to EU Member States rather than parties to the treaty. UK domestic legislation could not remedy this, because it cannot change the terms of the treaty. If the UK wished still to be bound by such provisions, it would have to reach agreement with the other parties to the treaty about how to do so.

Some EU external treaties might automatically stop applying to the UK after Brexit. Depending on their terms, this might result in a breach of UK obligations. UK legislation under clause 8 might be needed to remedy such a breach – perhaps for example by providing compensation – but again it could not on its own continue the international obligations.

Some EU external treaties contain their own procedures for withdrawal. Even if in practice these were considered not to apply to the UK after leaving the EU, there is an argument that the UK would breach these treaties if it didn't also follow the individual procedures for withdrawal. Does clause 8 give Ministers the power to issue any necessary notifications of withdrawal? This argument is sometimes made in relation to the EEA Agreement (see box below).

Box 4: The EEA Agreement

It is not always straightforward to establish whether the UK will be in breach of its international obligations after exit day. For example, some argue that to leave the EEA without breaching its international obligations under the [EEA Agreement](#), the UK would need to issue a separate notification to leave the EEA.

The UK is party to the EEA Agreement alongside the EU, and the Agreement has its own withdrawal provision that requires notification of withdrawal 12 months in advance.⁹³

Former Treasury legal adviser Charles Marquand was quoted as saying 'A failure by the UK to give notice of its intention to leave would, I think, be a breach of the EEA Agreement'.⁹⁴ If this is correct, the

⁹³ EEA Agreement Article 127

⁹⁴ ['Brexit: UK risks an international court case over Theresa May's plans for leaving EU single market, say experts'](#), Independent, 11 August 2017

Government could potentially use the clause 8 power to remedy the breach. However, this could be contrary to the Supreme Court's ruling in the Miller case that primary legislation is needed to remove rights.⁹⁵

On the other hand, the UK Government's view is that once the UK leaves the EU, the EEA Agreement would automatically cease to apply to the UK, because the UK is a member of the EEA only by virtue of its membership of the EU. As such, **Schedule 8** of the Bill simply removes the domestic effect EEA Agreement under the *European Economic Area Act 1993*.⁹⁶

A new clause tabled by Heidi Alexander and supported by 52 Members⁹⁷ seeks to prevent regulations under the Bill being used to notify withdrawal from the EEA Agreement.

New bilateral treaties to replace EU external treaties

In some cases the UK is seeking to conclude new bilateral treaties that are as similar as possible to the existing EU external treaties.

Where it wants to 'transition' treaties like this, the Government appears to want specific implementing powers in separate primary legislation, for example the Trade Bill 2017-19 that is currently before the House of Commons.

Clause 8 could be used to implement new treaty obligations only if any breach of those obligations was deemed to arise from leaving the EU.

Continuing international obligations

In other cases international obligations will continue to apply to the UK after Brexit but without new EU implementing legislation continuing to apply. Here again the Government appears in some cases to be seeking specific powers through separate primary legislation.

For example the [Sanctions and anti-money laundering bill 2017-19](#) is intended to ensure that the UK government has the powers necessary to continue to meet its international obligations on sanctions and money laundering after leaving the EU (see box below).

Box 5: Sanctions

The [Sanctions and anti-money laundering bill 2017-19](#) is intended to ensure that the UK government has the powers necessary to continue to meet its international obligations.

In the words of Lord Ahmad of Wimbledon, introducing the Bill in the House of Lords, the Bill:

ensures that the UK can continue to meet its international obligations and to implement UK sanctions and anti-money laundering measures after we leave the European Union.

The EUW Bill would transpose and freeze sanctions regimes and designations current when the UK leaves, as well as anti-money laundering and anti-terrorist financing regulations; both of these are at present based on the European Communities Act 1972.

The Sanctions Bill would provide ministers with powers both to amend (or repeal) existing 'frozen' sanctions regimes, by adding new designations for example, and to implement completely new regimes, either as required by UN Security Council resolutions or on the UK's own initiative.

⁹⁵ [R \(Miller\) v Secretary of State for Exiting the EU](#) [2017] UKSC 5

⁹⁶ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 269

⁹⁷ New clause 22 (as at 29 November 2017)

The Sanctions Bill would provide similar powers both to amend or repeal existing anti-money laundering regulations and to make new regulations as required to comply with international standards set by the Financial Action Task Force, of which the UK is a member.

Ministers hope to ensure with the powers in the Bill that the transition from EU-based sanctions and money-laundering regulations to regulations based on UK legislation will be seamless.

Non-EU treaties implemented through EU membership

Some non-EU treaties are implemented in the UK through its EU membership, but not simply through having EU law that would become retained EU law after exit day.

The Government's DPM gives one example:

For example, the UK is a party to the Council of Europe Convention on Transfrontier Television. However, a break clause (Article. 27) says that EU member states are to implement EU law instead - which is Directive 2010/13/EU (known as the Audiovisual Media Services Directive (AVMSD)). On this basis, the UK has never actually implemented the Convention, but implemented the AVMSD instead. Once we leave the EU, potentially even if we were to negotiate ongoing participation in the framework of AVMSD, we would regardless no longer benefit from the exemption in the Convention, as we would not be a member state. We could then be in breach of our international law obligations by not having implemented the Convention. We could use this power in clause 8 to implement it, which could involve changes other than to retained EU law.⁹⁸

4.4 Limits on the use of clause 8

Sunset clause

Clause 8 (4) provides a 'sunset clause' which states that no regulations may be made under clause 8 two years or more after exit day. This is the same as the sunset clause that applies to clause 7, and the same points raised in pp18-19 of [Commons Briefing Paper 8171](#) apply.

Some limits match clause 7

Regulations to remedy or prevent a breach of the UK's international obligations cannot, according to clause 8(3):

- (a) make retrospective provision;
- (b) create a relevant criminal offence;
- (c) be made to implement the withdrawal agreement; or
- (d) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.

⁹⁸ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 52.

All these limitations also appear in **clause 7**.⁹⁹

The reason clause 8 powers cannot be used to implement the withdrawal agreement is to ensure that only **clause 9** (which expires on exit day) is used for this purpose. But this does not prevent the content of the regulations made under clause 8 reflecting the content of the withdrawal agreement. Indeed, the Government appears to envisage that clause 8 powers might be used to prevent or remedy breaches of international obligations caused by the negotiations:

breaches here could arise in areas in which the UK is considering pursuing a negotiated outcome with the EU. It would be unwise to legislate in primary legislation to provide for the implementation of our preferred negotiated outcome and thereby 'show our hand' to those with whom we are negotiating in the EU.¹⁰⁰

The Bill contains no restrictions to prevent the regulations from amending provisions on rights or equalities (other than the Human Rights Act 1998), nor does it provide for greater parliamentary oversight of any that do so.

But a number of amendments to the Bill seek to impose further limitations on the clause 8 power, for instance to require compliance with the UN Convention on the Rights of the Child,¹⁰¹ or to prevent the regulations from removing rights or freedoms or reducing environmental or other protections.¹⁰²

Clause 8 regulations can impose taxation

Unlike clauses 7 and 9, the clause 8 regulations can be used to impose taxation¹⁰³ (but only "where that is an appropriate way of preventing or remedying a breach" of the UK's international obligations caused by leaving the EU).¹⁰⁴

The Lords Delegated Powers Committee said that the Government have not explained why regulations under clause 8 may impose or increase taxation, "thus allowing the supremacy of the House of Commons in financial matters to give way to taxation by statutory instrument". It called on the Government to "demonstrate a convincing case" for doing so.¹⁰⁵

⁹⁹ See [Commons Briefing Paper 8171](#)

¹⁰⁰ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 54

¹⁰¹ New clauses 34 and 36

¹⁰² Amendments 12, 26, 111, 367, 352 etc

¹⁰³ Clause 8(2)

¹⁰⁴ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 53.

¹⁰⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal\) Bill](#), HL 22 2017-19, 28 September 2017, paras 37 and 40

Devolution statutes

Regulations under clause 8 would be able to amend the legislation which underpins the devolution settlements in Scotland, Wales and Northern Ireland.

Unlike clause 7, there is no express protection for the Northern Ireland Act 1998. The Government's explanation for the clause 7 restriction is:

because that Act is the main statutory manifestation of the Belfast Agreement and it would not, therefore, generally be appropriate for a power with this breadth of scope to be capable of amending that Act.¹⁰⁶

The Belfast Agreement (also known as the Good Friday Agreement) includes an international treaty, the British-Irish Agreement. Regulations under clause 8 could theoretically be used to prevent or remedy breaches of that Agreement arising from EU withdrawal, including by amending the Northern Ireland Act that implements the Agreement. But both sides in the EU withdrawal negotiations have committed to upholding the Good Friday Agreement. And it is not clear what Brexit-related breaches of the British-Irish Agreement might arise that could be remedied by domestic legislation (clause 8 regulations could not amend the international obligations themselves – only the domestic legislation relating to those obligations).

A number of amendments to clause 8 have been tabled relating to the Belfast Agreement and the Northern Ireland Act 1998.¹⁰⁷

As discussed above, the Scottish and Welsh Governments' Legislative Consent Memorandums criticise the EUW Bill for giving powers to UK ministers to make changes to the legislation that underpins devolution, as well as to laws within devolved competence. The Government may not intend the power to make such changes. However, the Lords Constitution Committee has argued that ministerial assurances as to the purpose of a power are not a substitute for legal safeguards.¹⁰⁸

Devolved authorities' powers

Schedule 2 part 2 sets out powers for the devolved authorities parallel to the clause 8 powers. These include the same restrictions as apply to UK Ministers, plus some additional ones such as:

- the devolved authorities cannot sub-delegate law-making powers;
- the devolved authorities' power cannot be used outside their areas of devolved competence as defined by the Bill in Schedule 2, paragraphs 18-20;

¹⁰⁶ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 40

¹⁰⁷ See amendments 145, 146, 346 and 347

¹⁰⁸ House of Lords Select Committee on the Constitution, *Growth and Infrastructure Bill* (2012-2013 HL 104) para 10.

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- the devolved authorities cannot amend retained direct EU legislation; and
- the devolved authorities would require the consent of the UK Government before legislating before exit day, or on WTO obligations, or on quotas.

The powers will be subject to the same two year sunset as will apply to the powers of UK Ministers.

The exercise of the powers will be subject to the same requirements for consent, joint exercise or consultation with UK Ministers as would apply to any other legislation on those matters. So if, for instance, a Scottish Minister wanted to make a regulation to modify retained EU law in order to comply with an international obligation, s/he would have to consult with a UK Minister if that were a requirement for legislation on the same matter that did not arise from an international obligation and did not modify retained EU law.

The UK Government is not prohibited from exercising clause 8 powers in devolved areas, and there is no specific obligation in the Bill for it to seek the consent of the devolved authorities before doing so.

There is a full discussion of the devolved aspects of the EUW Bill in another Commons Library briefing paper: [The European Union \(Withdrawal\) Bill: Devolution](#), CBP 8154, 24 November 2017.

Devolved Ministers also gain powers to make regulations under other Brexit Bills such as the *Trade Bill 2017-19* (currently awaiting second reading), which are subject to similar restrictions as the powers under the EUW Bill.

5. Clause 17: consequential and transitional provisions

Clause 17 contains two delegated powers:

- **clause 17(1)**: power to make consequential provision;
- **clause 17(5)**: power to make transitional, transitory or saving provision;

Delegated powers are fundamental to the scheme of the EUW Bill and beyond the core powers in **clauses 7** and **9**, and the power to set the exit day in **clause 14 (1)**, there are a number of other provisions that seek to delegate legislative authority to the Government. The Delegated Powers Memorandum lists a total of 14 delegated powers.¹⁰⁹

Parliament's scrutiny of regulations made under each of these powers, as proposed by **Schedule 7**, is covered in the Commons Library Briefing, the *European Union (Withdrawal) Bill: scrutiny of secondary legislation (Schedule 7)*. Clause 17(1) regulations are subject to the negative procedure and clause 17(5) regulations are subject to either the affirmative, negative or no procedure.

The Government has argued that clause 17 contains standard powers that are routinely included in primary legislation. The DPRRC has asked the Government to justify "why it is necessary to have powers that go beyond those conferred by clauses 7 to 9".¹¹⁰

5.1 Clause 17(1)

Clause 17(1) contains a power to make consequential provisions "as the minister considers appropriate in consequence of this Act". Clause 17(1) is designed to enable ministers to make regulations in order to make changes to legislation that are direct consequences of the provisions in the EUW Bill coming into force.

Elizabeth Gardner CB, First Parliamentary Counsel, in evidence to the DPRRC on 8 March 2017, provided the following general explanation on the inclusion a power to make consequential provisions:

The inclusion in an Act of a provision that permits the Secretary of State, by order or regulations, to make provision in consequence of a provision of the Bill has been well precedented for many years. You can find many examples. It is fairly easy. There are a lot of examples in 2016, such as the Enterprise Act, and you can look back to the Financial Services Act 2010, the Education Act 2005

¹⁰⁹ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), 13 July 2017, p2-5.

¹¹⁰ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Bill\)](#), (2017-2019 Third Report HL Paper 22) para 75

and the Criminal Justice and Court Services Act 2000. For a variety of reasons, it might not be possible or appropriate for a Bill to deal, on its face, with all the changes needed across the statute book in consequence of the substantive policy changes made by the Bill. The number of consequential amendments might cause a disproportionate increase in the length of the Bill, or it might be determined that utilising drafting resources on consequential amendments is time better spent on refining and improving the substantive provisions of the Bill before they are introduced. As a matter of practicality, it may be difficult during the drafting or even during the progress of the Bill to anticipate the full extent of the consequential amendments that are needed. An intention to stagger the commencement of the provisions of the Bill, or an expectation of a significant delay in commencement, may lead the drafter to think it would be better to draft consequential amendments by reference to the legislative landscape at the time the provisions come into force.¹¹¹

Gardener adds that a power to make consequential provisions is “inherently limited” by the requirement that the relevant secondary legislation must be consequential on the provisions in the relevant Act.¹¹² As such secondary legislation made under clause 17(1) could not “alter or overturn” the core policy of the EUW Bill. However, the constitutional and legal significance of the EUW Bill means that there could be a large number of consequential changes that flow from the EUW Bill’s provisions.

The DPM describes 17(1) as a “standard power”.¹¹³ The House of Lords Constitution Committee describes clause 17 as an “extremely wide power”.¹¹⁴ The DPRRC also views clause 17(1) as “widely drawn”.¹¹⁵

The purpose of the power

¹¹¹ Delegated Powers and Regulatory Reform Committee Corrected [oral evidence: Consequential provision and the power to “otherwise modify”](#) Wednesday 8 March 2017, Elizabeth Gardiner CB, First Parliamentary Counsel and Permanent Secretary of the Government in Parliament Group, Office of the Parliamentary Counsel, Cabinet Office; and David Cook CB, Second Parliamentary Counsel, Office of the Parliamentary Counsel, Cabinet Office, p1

¹¹² Delegated Powers and Regulatory Reform Committee Corrected [oral evidence: Consequential provision and the power to “otherwise modify”](#) Wednesday 8 March 2017, Elizabeth Gardiner CB, First Parliamentary Counsel and Permanent Secretary of the Government in Parliament Group, Office of the Parliamentary Counsel, Cabinet Office; and David Cook CB, Second Parliamentary Counsel, Office of the Parliamentary Counsel, Cabinet Office, p2

¹¹³ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 79

¹¹⁴ House of Lords Select Committee on the Constitution, [European Union \(Withdrawal\) Bill: interim report](#) (2017-2019 Third Report HL Paper 19), para 43

¹¹⁵ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Bill\)](#), (2017-2019 Third Report HL Paper 22), para 71

The purpose of clause 17(1) is to enable the Government to make changes to primary and secondary legislation that might arise as a consequence of this Bill.

The Government explains in the DPM that it is “unable to identify, at this early stage, all the possible consequential provisions required”.¹¹⁶ The purpose of the power, according to the Memorandum, is to limit regulations made under it to changes that are a direct consequence of the content of the Bill, and cannot be used to make regulations arising from leaving the EU, which is served by other powers in the Bill. As the Bill covers almost every element of EU withdrawal, in terms of both the constitutional framework, and in terms of the substantive areas of law covered by EU law, it is difficult to see how this distinction will operate in practice.

The Government cites recent uses of similar “consequential” Henry VIII powers, including section 59 of the *Crime and Courts Act 2013* and section 92 of the *Immigration Act 2016*. None of the precedents cited are in Acts which are as constitutionally significant as this Bill. Furthermore, such is the uncertainty around how the powers in this Bill might be used, it is difficult to ascertain how the content of this Bill can be regarded as a limit on the scope of this power.

Clause 17(1) enables the relevant Minister to make such secondary legislation as they consider “appropriate” in consequence of the provisions in the EUW Bill.

The DPRRC’s report on the EUW Bill recommended that clause 17(1) “should be restricted by an objective test of necessity rather than being left to the subjective judgment of the Minister”.¹¹⁷

Clause 17(2) provides that secondary legislation made under the power can “modify” primary legislation. Clause 14(1) of the EUW Bill defines “modify” Bill to include amend, repeal or revoke.

Paragraph 15(2) of Schedule 7 to the EUW Bill clarifies that the power in 17(1) can be used to modify retained EU law if the modification is consequential on repeal of the ECA 1972. The DPRRC has argued that this could be used “to make substantive policy changes to retained EU law, going beyond remedying a defect”.¹¹⁸ As a consequence the DPRRC has argued that “in the absence of a convincing explanation, clause 17(1) should not be capable of being used to amend retained EU law”.¹¹⁹

Legal limits

¹¹⁶ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 76.

¹¹⁷ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Bill\)](#), (2017-2019 Third Report HL Paper 22), para 74

¹¹⁸ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Bill\)](#), (2017-2019 Third Report HL Paper 22), para 72

¹¹⁹ House of Lords Delegated Powers and Regulatory Reform Committee, [European Union \(Withdrawal Bill\)](#), (2017-2019 Third Report HL Paper 22), para 76

The principal legal limit, other than any supplied by the content of the Bill, is that under clause 17(2) the power cannot be used to modify primary legislation “passed or made” after the end of the Session in which the Bill is passed. Assuming the Bill is passed in this Session, which began in June 2017 and is expected to last until May 2019, Acts made after its end could not be amended under clause 17(1). This limitation does not apply to any secondary legislation enacted after the end of the current Session. The DPM does not explain why the end of the Session is used as a limit, rather than exit day, which is used as reference point for most of the other powers in the Bill.

There are no express legal limits on the power in clause 17(1) that match or correspond to those imposed on clauses 7, 8 and 9. There is no sunset clause or time-limit on when the power can be exercised. As noted in relation to all the powers in the Bill, the absence of express limitations does not mean that the power is unconstrained, as such general powers can be interpreted narrowly by the courts.¹²⁰

How might this power be used?

The DPM explains that the power could be used to prescribe whether retained direct EU legislation should be treated as primary or subordinate legislation for the purposes of a particular enactment.¹²¹ The Government adds that it “anticipates a large number of straightforward changes, including to primary legislation” will be needed as a consequence of the Bill.¹²² There are no express limits that restrict the substance of the changes that might be needed as a consequence of this Bill.

5.2 Clause 17(5)

Clause 17(5) enables the Government to make regulations to provide for transitional provisions that might be needed as a result of this Bill coming into force. The Government cites two examples of how this power might be used. The first is that the power could be used to save section 2(3) of the ECA in respect of liabilities incurred while the UK was a Member State. The second is that that the power could be used to make provision for CJEU court cases ongoing on exit day.

Parts 3 and 4 of Schedule 8 to the EUW provide examples of transitional provisions. These provide some indication of the sort of legislative changes that could be made through secondary legislation under clause 17(5). Schedule 8, Part 3, paragraph 25 sets out a general transitional provision “that anything done or in force before exit day (or

¹²⁰ *R (on the application of The Public Law Project) v Lord Chancellor* [2016] UKSC 39 para 26

¹²¹ Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 77

¹²² Department for Exiting the EU, [Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee](#), para 78

in in the process of being done), and which relates to any element of retained EU law is preserved".¹²³ The Explanatory Notes state that this would mean that, for example, licences lawfully issued before exit day would continue to have effect after exit day.¹²⁴

Schedule 8, Part 3, paragraph 26 states that any right within an EU directive, which is recognised by a court or tribunal in the UK in a case which began before exit day, but is decided *on or after* exit day, will not be caught by the exclusion in clause 4(2), and is therefore preserved by clause 4.

¹²³ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 276

¹²⁴ [Explanatory Notes to the European Union \(Withdrawal\) Bill](#) (Bill 5-EN) para 276

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