



## UK's Withdrawal from the European Union Debate on 19 October 2019

The House of Lords will sit on Saturday 19 October 2019. This will be the first weekend sitting since 1982. The following motions have been tabled under the name of Lord Callanan, Minister of State at the Department for Exiting the European Union:

that for the purposes of section 1(1)(b) of the European Union (Withdrawal) (No. 2) Act 2019 and section 13(1)(c) of the European Union (Withdrawal) Act 2018, this House takes note of the negotiated withdrawal agreement titled “Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community” and the framework for the future relationship titled “Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom” that the United Kingdom has concluded with the European Union under Article 50(2) of the Treaty on European Union, as well as a “Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the ‘Democratic consent in Northern Ireland’ provision of the Protocol on Ireland/Northern Ireland”, copies of which three documents were laid before the House on Saturday 19 October.

that for the purposes of section 1(2)(b) of the European Union (Withdrawal) (No. 2) Act 2019, this House takes note of the statement laid before the House on Saturday 19 October titled “Statement that the United Kingdom is to leave the European Union without an agreement having been reached under Article 50(2) of the Treaty on European Union”.

On 17 October 2019, the UK and the EU reached political agreement on a [revised withdrawal agreement](#) and [political declaration on the framework for the future relationship](#) between the UK and the EU. Alongside these two documents, the UK Government [made a unilateral declaration](#) on the functioning of a new consent mechanism found in the political declaration, relating to the application of a revised protocol to Northern Ireland. This House of Lords Library Briefing provides a summary of the revised withdrawal agreement and political declaration. To provide context for the wording of the debate motions, it also:

- sets out the procedures required to ratify the agreement, including legislative requirements under section 13(1)(c) of the European Union (Withdrawal) Act 2018; and
- outlines the provisions of the European Union (Withdrawal) (No. 2) Act 2019 (the Benn Act).

Charley Coleman and Nicola Newson | 18 October 2019

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## **I. Summary**

On 17 October 2019, UK and EU negotiators reached agreement on a revised withdrawal agreement and political declaration on the framework for the future relationship. It was subsequently endorsed by the European Council.

The revised withdrawal agreement contains changes to the protocol on Ireland/Northern Ireland. The protocol in the previous agreement (agreed under Theresa May) contained provisions to prevent a hard border on the island of Ireland through what was commonly called the backstop. The revised agreement contains new provisions concerning customs arrangements, Northern Ireland's relationship with the EU single market, VAT collection, and protections for the UK's internal market. The agreement also sets out a consent mechanism, which would engage the Northern Ireland Assembly four years after the end of the transition period.

A revised political declaration was also agreed. The principal changes to the declaration are that the future UK/EU relationship would be based on a "comprehensive and balanced" free trade agreement (FTA). This replaced references in the previous agreement to a "free trade area" and a trading relationship on goods "that is as close as possible".

It has been reported that campaigners have lodged a petition at the Court of Session in Scotland, seeking an injunction stopping the Government asking for parliamentary approval of the agreement. The petition claims the revised protocol contravenes section 55 of the Taxation (Cross-border Trade) Act 2018, which makes it unlawful for the Government "to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain".

The deal was met with opposition from parties across the House of Commons. The Labour Party, the Scottish National Party, the Liberal Democrats, and the Democratic Unionist Party all said they would not support the new agreement.

Both the UK and the EU must formally ratify a withdrawal agreement before it can enter into force. Each side has its own procedures that it must complete before it can ratify the withdrawal agreement. If either side failed to do so by 31 October 2019, the default legal position under international law remains that the UK will leave the EU on that date with no deal, unless there was an agreed extension period or the UK revoked its article 50 notification of its intent to leave.

The debate motions tabled for the parliamentary sitting on 19 October 2019 also refer to section 1 of the European Union (Withdrawal) (No. 2) Act 2019. This legislation is also known as the Benn Act. Section 1 provides that the Prime Minister must ask the European Council for an extension to article 50(3) of the Treaty on European Union unless one of two conditions is met. Therefore, were the House of Commons to agree to either the new withdrawal agreement, or to leave the EU with no deal, the letter would not be required to be sent.

## **2. Agreement Reached on New Withdrawal Agreement and Political Declaration**

On 17 October 2019, UK and EU negotiators reached political agreement on a revised withdrawal

agreement and political declaration on the framework for the future relationship.<sup>1</sup> It was subsequently endorsed by the European Council.<sup>2</sup> The agreement followed a period of intensive negotiation which the UK and the EU entered into after the Prime Minister, Boris Johnson, and the Irish Taoiseach, Leo Varadkar, met for talks in Liverpool on 10 October 2019. A joint statement was issued saying that both leaders believed that there was a “pathway to a possible deal”.<sup>3</sup>

### **Northern Ireland ‘Backstop’**

The revised withdrawal agreement contains changes to the protocol on Ireland/Northern Ireland. The protocol in the previous agreement (agreed under Theresa May) contained provisions to prevent a hard border on the island of Ireland through what was commonly called the backstop. If the framework for the future relationship had not been negotiated by the end of the transition period (including any extension) then the backstop’s provisions would have been engaged. In summary, these would have provided that Northern Ireland and the rest of the UK would have remained in a customs union with the EU on all goods (excluding fish). The EU’s rules on state aid and competition law would also have applied to the UK (so-called ‘level playing field provisions’). Northern Ireland would have had to follow certain EU regulations on VAT, agriculture, the environment and the EU’s customs code. The backstop would have continued until a future relationship that could prevent a hard border was agreed to replace it.<sup>4</sup> In this way the backstop was intended to act as an insurance policy. Boris Johnson had said that he intended any revised agreement would not include the backstop.

The revised protocol includes provisions in the following areas:

- **Customs:** The revised protocol no longer contains provisions for the whole of the UK to remain in a customs union with the EU. It does contain provisions requiring Northern Ireland to apply the EU’s Customs Code to all goods entering the country.<sup>5</sup> Under article 4, Northern Ireland would remain part of the customs territory of the UK and therefore able to benefit from future free trade agreements (FTAs) that the UK may enter into.<sup>6</sup> The European Commission has explained that the application of the Customs Code in Northern Ireland would avoid “any customs checks and controls on the island of Ireland”.<sup>7</sup> Speaking at a press conference, the EU’s chief negotiator, Michel Barnier, explained the customs provisions as follows:

Northern Ireland will remain in the UK’s customs territory. It will therefore benefit from the UK’s future trade policy. But Northern Ireland will also remain an entry point into our single market. So what have we done to square this circle?

UK authorities can apply UK tariffs on products coming from third countries, so long as those goods entering Northern Ireland are not at risk of entering our single

<sup>1</sup> Department for Exiting the European Union, ‘[New Protocol on Ireland/Northern Ireland and Political Declaration](#)’, 17 October 2019.

<sup>2</sup> European Council, [Special Meeting of the European Council \(Art. 50\) \(17 October 2019\)—Conclusions](#), 17 October 2019.

<sup>3</sup> UK Prime Minister, 10 Downing Street, ‘[Official Twitter Account](#)’, 10 October 2019.

<sup>4</sup> For a more detailed explanation of the backstop, see: House of Commons Library, [The UK’s EU Withdrawal Agreement](#), 7 December 2018; and ‘[The Backstop Explained](#)’, 12 December 2018.

<sup>5</sup> European Commission, ‘[Brexit: What Did You Agree With the UK Today?](#)’, 17 October 2019.

<sup>6</sup> *ibid.*

<sup>7</sup> *ibid.*

market. However, for goods at risk of entering the single market, UK authorities will apply the EU's tariffs.<sup>8</sup>

Before the end of the transition period, the joint committee<sup>9</sup> would establish criteria for determining whether a good was at risk of entering the single market.<sup>10</sup> The UK would be able to reimburse duties levied according to EU law in cases where UK duty was lower, “subject to appropriate safeguards on the correct application of EU state aid rules”.<sup>11</sup> Speaking on the BBC’s *Today* programme on Radio 4, the Foreign Secretary, Dominic Raab, referred to the reimbursement provisions in the protocol:

Under the new arrangements, the only tariff that could conceivably be levied in relation to goods in Northern Ireland would be in relation to those that come from GB where the idea is to circumvent the rules of the single market and the ultimate destination is mainland Europe. Even then the UK has a double safeguard of waiver or reimbursement.<sup>12</sup>

It has been reported that campaigners have lodged a petition at the Court of Session in Scotland, seeking an injunction stopping the Government asking for parliamentary approval of the agreement.<sup>13</sup> The petition claims the revised protocol contravenes section 55 of the Taxation (Cross-border Trade) Act 2018. The Act states that “It shall be unlawful for Her Majesty’s Government to enter into arrangements under which Northern Ireland forms part of a separate customs territory to Great Britain”.<sup>14</sup> The petition argues that “the legal reality under the protocol is that Northern Ireland will be part of the EU customs territory, a separate customs territory from that of the rest of the United Kingdom”.<sup>15</sup> The petitioner therefore argues that “unless and until section 55 is repealed by the UK parliament, it is simply not open, as a matter of law, for the United Kingdom to enter into such an agreement”.<sup>16</sup>

- **Single Market Provisions:** Northern Ireland would remain aligned to a subset of the EU’s single market rules to prevent the need for a hard border, including legislation on goods; sanitary and phytosanitary rules; rules on agricultural production/marketing; VAT and excise in respect of goods; and state aid rules.<sup>17</sup>
- **VAT:** Northern Ireland would continue to apply the EU’s VAT rules for goods. VAT exemptions and reduced rates that are applied in Ireland could also be applied in Northern Ireland. The European Commission has explained that this would “avoid

<sup>8</sup> European Commission, [‘Remarks by Chief Negotiator Barnier at the Press Conference on the Commission Recommendation to the European Council to Endorse the Agreement Reached on the Revised Protocol on Ireland/Northern Ireland and Revised Political Declaration’](#), 17 October 2019.

<sup>9</sup> Under article 164 of the previous withdrawal agreement, a joint committee would be established and co-chaired by the EU and the UK. It would be responsible for the implementation and application of the agreement (HM Government, [Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community](#), March 2019).

<sup>10</sup> European Commission, [‘Brexit: What Did You Agree With the UK Today?’](#), 17 October 2019.

<sup>11</sup> *ibid.*

<sup>12</sup> *Guardian*, [‘Live Feed: Raab Claims Brexit Plan is ‘Cracking Deal for Northern Ireland Businesses’](#), 18 October 2019.

<sup>13</sup> BBC News, [‘Legal Bid at Court of Session to Stop MPs Passing ‘Illegal’ Brexit Deal’](#), 17 October 2019.

<sup>14</sup> Taxation (Cross-border Trade) Act 2018, section 55.

<sup>15</sup> Jolyon Maugham, [Final Note of Argument](#), 18 October 2019.

<sup>16</sup> BBC News, [‘Legal Bid at Court of Session to Stop MPs Passing ‘Illegal’ Brexit Deal’](#), 17 October 2019.

<sup>17</sup> European Commission, [‘Brexit: What Did You Agree With the UK Today?’](#), 17 October 2019.

distorting the level playing field on the island”.<sup>18</sup> However, the Commission has stated that Northern Ireland would remain part of the UK’s VAT area “with HMRC remaining responsible for applying VAT legislation, including the collection of VAT, and the setting of VAT rates”. The UK would keep revenues accruing from this tax.<sup>19</sup> Article 8 of the revised protocol states that the UK would be responsible for the application and implementation of the provisions listed in annex 3 of the protocol, including the collection of VAT and excise duties.

- **Protecting the UK’s Internal Market:** Article 6 of the revised protocol contains provisions on the protection of the UK’s internal market. These include that nothing in the protocol could prevent the UK from ensuring unfettered access for goods moving from Northern Ireland to other parts of the UK. It also states EU law that applied to Northern Ireland under the protocol that prohibited or restricted the exportation of goods “shall only be applied to trade between Northern Ireland and other parts of the United Kingdom to the extent strictly required by any international obligations of the Union”.<sup>20</sup>
- **Consent Mechanism:** The application of the protocol would be subject to a consent mechanism provided for in article 18. This would be engaged four years after the end of the transition period (the transition period plus four years is referred to as the ‘initial period’). Two months prior to the end of the initial period the UK must seek the democratic consent of Northern Ireland for the continuation of articles 5 to 10 of the protocol. Article 18(2) of the protocol states that this must be “strictly in accordance” with the unilateral declaration made by the UK Government concerning the operation of the consent mechanism.<sup>21</sup> If consent was signified by a majority of Members of the Northern Ireland Assembly present and voting, then consent would not be required again for another period of four years. Therefore, articles 5 to 10 would continue to apply. Were consent to be given with cross-community support<sup>22</sup> then consent would not need to be granted again for a period of eight years. If consent is not given then the protocol would cease to apply two years later.<sup>23</sup> Article 18(4) states that in such a case the joint committee would make recommendations to the UK and the EU on any necessary measures, taking into account obligations under the Good Friday (Belfast) Agreement.

The revised protocol also makes provision in other areas, including for the operation of the single energy market and on state aid.

The European Commission has said the revised protocol was “no longer an insurance policy”.<sup>24</sup> It was a fully legally operative solution to the problem of the border that would continue to apply “unless it

<sup>18</sup> European Commission, [‘Brexit: What Did You Agree With the UK Today?’](#), 17 October 2019.

<sup>19</sup> *ibid.*

<sup>20</sup> Department for Exiting the European Union, [Protocol on Ireland/Northern Ireland](#), 17 October 2019, article 6(1).

<sup>21</sup> Department for Exiting the European Union, [Declaration by Her Majesty’s Government of the United Kingdom of Great Britain and Northern Ireland Concerning the Operation of the ‘Democratic Consent in Northern Ireland’ Provision of the Protocol on Ireland/Northern Ireland](#), 17 October 2019.

<sup>22</sup> Cross-community support would mean “a majority of those Members of the Legislative Assembly present and voting, including a majority of the unionist and nationalist designations present and voting” or “a weighted majority (60%) of Members of the Legislative Assembly present and voting, including at least 40% of each of the nationalist and unionist designations present and voting” (Department for Exiting the European Union, [Protocol on Ireland/Northern Ireland](#), 17 October 2019, article 18(6)).

<sup>23</sup> European Commission, [‘Brexit: What Did You Agree With the UK Today?’](#), 17 October 2019.

<sup>24</sup> *ibid.*

fails to receive the democratic support of the Northern Ireland Assembly”. It has also stated that the EU and UK’s “shared ambition to have zero customs duties and quotas between the EU and the UK”, as set out in the future relationship, would have a bearing on the application of the revised protocol. The UK Government has argued that article 18 “plainly makes the continuation of the application of articles 5 to 10 of the protocol” conditional on the consent mechanism as described in the UK’s unilateral declaration.<sup>25</sup> The Government stated therefore that:

There are no grounds for supposing that the EU would have any legal basis to assert that articles 5 to 10 of the protocol should continue to apply absent that consent or that the EU would possess a veto over the right of members of the Northern Ireland Legislative Assembly to withhold consent to the continued application of those provisions.<sup>26</sup>

### **Revised Political Declaration**

A revised political declaration was also agreed which reflected changes in the Government’s policies under Boris Johnson. The principal changes to the declaration are that the UK’s future relationship with the EU would be based on a “comprehensive and balanced” free trade agreement (FTA).<sup>27</sup> The UK and the EU envisaged an “ambitious trading relationship on goods on the basis of an FTA”.<sup>28</sup> This replaced references to a “free trade area” and a trading relationship on goods “that is as close as possible”.<sup>29</sup> The European Commission has stated that the precise nature of any commitments under an FTA would be commensurate with “the ambition of the future relationship and take into account the economic connectedness and geographic proximity of the UK”.<sup>30</sup> The political declaration also refers to safeguards and ‘level playing field’ provisions to ensure that a future relationship would be “based on open and fair competition”.<sup>31</sup> The revised political declaration also removes reference to the UK considering “aligning with [European] Union rules in relevant areas” in the context of regulatory aspects of the declaration.<sup>32</sup>

In a press conference in Brussels, Mr Johnson described the agreement as “a great deal for the UK” and a “very good deal” for the EU.<sup>33</sup> He said that it would allow the UK to leave the EU “as one United Kingdom—England, Scotland, Wales, Northern Ireland, together”. Mr Johnson said that he was confident that once MPs studied the agreement, they would want to vote for it.

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<sup>25</sup> Department for Exiting the European Union, [‘Position of the Government on the Terminability of the Protocol on Ireland/Northern Ireland to the Agreement on Withdrawal of the United Kingdom from the European Union’](#), 18 October 2019.

<sup>26</sup> *ibid.*

<sup>27</sup> HM Government, [Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom](#), October 2019, para 3.

<sup>28</sup> *ibid.*, para 19.

<sup>29</sup> HM Government, [Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom](#), March 2019, paras 17 and 20.

<sup>30</sup> European Commission, [‘Brexit: What Did You Agree With the UK Today?’](#), 17 October 2019.

<sup>31</sup> *ibid.*

<sup>32</sup> HM Government, [Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom](#), March 2019, para 25.

<sup>33</sup> Prime Minister’s Office, [‘PM Press Conference at EU Council: 17 October 2019’](#), 17 October 2019.

## 2.1 UK Opposition Party Responses

The Labour Party, Scottish National Party, Liberal Democrats, and Democratic Unionist Party all said they could not support the deal. Their reasons are explored below.

### **Labour**

The Leader of the Labour Party, Jeremy Corbyn, argued that the deal risked “triggering a race to the bottom on rights and protections”.<sup>34</sup> He stated that the deal would not “bring the country together and should be rejected”.

The Shadow Secretary of State for Exiting the European Union, Keir Starmer, said Labour’s concerns about the deal agreed by Theresa May were not principally related to the backstop, but were about the political declaration.<sup>35</sup> Mr Starmer argued that Boris Johnson’s deal was “far worse” than Theresa May’s. He asserted that it paved the way for “a decade of deregulation” and expressed concern that Mr Johnson would use it to “slash worker’s rights, environmental standards and consumer protection”. Mr Starmer said the revised political declaration represented a distant relationship between the UK and the EU and ruled out a new customs union and a close relationship with the single market.

### **Scottish National Party**

The Leader of the Scottish National Party (SNP), Nicola Sturgeon, said that the deal agreed by Boris Johnson was a “much looser relationship” with the EU for food standards, environmental protections and worker’s rights.<sup>36</sup> She also argued that it was “democratically unacceptable” that Scotland was facing an outcome it did not vote for.

The SNP argued that Boris Johnson’s deal would give Northern Ireland preferential treatment with access to the EU single market.<sup>37</sup> An SNP press release said that England and Wales would “get the Brexit they voted for” and Northern Ireland would be given a unique deal closer to the EU. The SNP has stated that whilst it supported efforts to ensure peace and stability on the island of Ireland, it was an “outrage that Northern Ireland will have its unique circumstances respected, and Scotland’s voice has been completely ignored”. It asserted that the deal could place Scotland at a competitive disadvantage.

### **Liberal Democrats**

The Leader of the Liberal Democrats, Jo Swinson, said the new deal would be bad for the UK’s economy, public services and for the environment.<sup>38</sup> She said that when the deal came before Parliament the Liberal Democrats “would use every possible opportunity to give the public a people’s vote”, which would include the option to remain in the EU.

<sup>34</sup> Labour Party, [‘Jeremy Corbyn Responds to Brexit Deal’](#), 17 October 2019.

<sup>35</sup> Keir Starmer, [‘Official Twitter Account’](#), 17 October 2019.

<sup>36</sup> Nicola Sturgeon, [‘Official Twitter Account’](#), 17 October 2019.

<sup>37</sup> Scottish National Party, [‘Boris Johnson’s Brexit Deal: What You Need to Know’](#), 17 October 2019.

<sup>38</sup> Liberal Democrat Press Office, [‘Official Twitter Account’](#), 17 October 2019.

## **Democratic Unionist Party**

The Democratic Unionist Party (DUP) said that it was unable to support the new deal.<sup>39</sup> It stated that it did not believe it would be beneficial to the economic well-being of Northern Ireland and that it would undermine the integrity of the union. The DUP said that whilst there had been progress on the issue of consent, it believed that Northern Ireland should have a say on whether it entered into the arrangements. The DUP expressed particular concern about the principles of consent in the Good Friday (Belfast) Agreement:

The Government has departed from the principle that these arrangements must be subject to the consent of both unionists and nationalists in Northern Ireland. These arrangements would be subject to a rolling review but again the principles of the Belfast Agreement on consent have been abandoned in favour of majority rule on this single issue alone.

These arrangements will become the settled position in these areas for Northern Ireland. This drives a coach and horses through the professed sanctity of the Belfast Agreement.<sup>40</sup>

On the issue of VAT, the DUP also argued that Northern Ireland would be “bound into arrangements” that the rest of the UK would not.

### **3. Ratifying a Withdrawal Agreement**

Both the UK and the EU must formally ratify a withdrawal agreement before it can enter into force. Each side has its own procedures that it must complete before it can ratify the withdrawal agreement. If either side failed to do so by 31 October 2019, the default legal position under international law remains that the UK will leave the EU on that date with no deal, unless:

- the UK and the EU-27 unanimously agree to extend the article 50 period; or
- the UK revokes its article 50 notification of its intent to leave.

#### **3.1 UK Requirements**

Under UK law, there are statutory requirements the Government must comply with before ratification can take place. These include requirements for the House of Lords, as explained below.

#### **Section 13 of the European Union (Withdrawal) Act 2018: Commons ‘Meaningful Vote’ and Lords Take-Note Debate**

Section 13(1) of the European Union (Withdrawal) Act 2018 (the EUWA 2018) sets out specific requirements for the ratification of a withdrawal agreement that has been agreed between the UK and the EU under article 50(2) of the Treaty on European Union.

This requires that before a withdrawal agreement can be ratified four conditions must be met (those

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<sup>39</sup> Democratic Unionist Party, ‘[Statement from the Democratic Unionist Party](#)’, 17 October 2019.

<sup>40</sup> *ibid.*

requirements placed upon the House of Lords are defined in section 13(1)(c):

### 13 Parliamentary approval of the outcome of negotiations with the EU

- (1) The withdrawal agreement may be ratified only if—
- (a) a Minister of the Crown has laid before each House of Parliament—
    - (i) a statement that political agreement has been reached,
    - (ii) a copy of the negotiated withdrawal agreement, and
    - (iii) a copy of the framework for the future relationship,
  - (b) the negotiated withdrawal agreement and the framework for the future relationship have been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown,
  - (c) a motion for the House of Lords to take note of the negotiated withdrawal agreement and the framework for the future relationship has been tabled in the House of Lords by a Minister of the Crown and—
    - (i) the House of Lords has debated the motion, or
    - (ii) the House of Lords has not concluded a debate on the motion before the end of the period of five Lords sitting days beginning with the first Lords sitting day after the day on which the House of Commons passes the resolution mentioned in paragraph (b), and
  - (d) an Act of Parliament has been passed which contains provision for the implementation of the withdrawal agreement.

Ratification of the withdrawal agreement can only proceed if the House of Commons approves the withdrawal agreement and the framework for the future relationship. The framework for the future relationship is often also referred to as the political declaration. The Commons decision on whether to approve these two texts is commonly known as the ‘meaningful vote’.

Approval by the House of Lords is not required under section 13(1)(c) in order for ratification of the withdrawal agreement to proceed.

### ***Section 13 of the European Union (Withdrawal) Act 2018: Legislation is Required to Implement the Withdrawal Agreement***

The UK is a dualist state. This means that international treaties do not automatically become part of domestic law. UK courts have no power to enforce treaty rights and obligations unless legislation is passed to implement the relevant treaty provisions into domestic law. In the case of a withdrawal agreement with the EU, section 13(1)(d) of the EUWA 2018 creates a statutory obligation for the Government to pass domestic implementing legislation before the UK can ratify the agreement.

In a briefing on the Queen’s Speech published on 14 October 2019, the Government signalled its intention to introduce a European Union (Withdrawal) Agreement Bill.<sup>41</sup> It said the main elements would be:

- Implementing the withdrawal agreement, Swiss Citizens’ Rights Agreement and EEA

<sup>41</sup> Cabinet Office, [Queen’s Speech 2019: Background Briefing Notes](#), 14 October 2019, p 17.

[European Economic Area] EFTA [European Free Trade Association] Separation Agreement in UK law.

- Implementing a new Protocol on Ireland/Northern Ireland, which does not include the backstop arrangements.
- Protecting the rights of EU, EEA and Swiss citizens in EU law.
- Securing a transition period to give businesses time to prepare.

The bill could also be expected to implement provisions on the financial settlement (sometimes referred to as the ‘divorce bill’). Apart from the revised protocol on Ireland/Northern Ireland, the rest of the withdrawal agreement has not changed from the one agreed between Theresa May and the EU. A House of Commons Library briefing, [The UK’s EU Withdrawal Agreement](#) (8 July 2019), contains a detailed analysis of this, covering the elements that would need to be legislated for in the bill.

The House of Lords’ usual powers with regard to passing legislation would apply to this bill. Parliament could seek to amend the bill. However, amending the bill does not amend the withdrawal agreement itself. The House of Commons Library explains this relationship between domestic and international law:

Parliament can amend any government bill relating to a treaty, and as long as it does not hinder the Government from fulfilling its obligations under the treaty this will not block ratification. For example, Parliament might insist that the Government report to Parliament on the implementation of the treaty, even if there is no such requirement in the treaty itself. This of course does not amend the treaty itself.<sup>42</sup>

The significance and likely complexity of legislation to implement a withdrawal agreement have led to questions about the time that would be available for parliamentary scrutiny. Under the terms of the Benn Act, if the Commons has approved a deal by 19 October 2019, the Prime Minister does not have to request to extend the UK’s membership of the EU beyond 31 October 2019. Mr Johnson would then have twelve calendar days, including weekends, in which to pass a bill and ratify the withdrawal agreement in order to be able to leave with a deal on 31 October 2019.

The Institute for Government (IfG) has calculated that past bills to implement major EU treaties have taken between ten and 40 days to get through Parliament.<sup>43</sup> The IfG argues that the “constrained” timetable available to pass a bill before 31 October 2019 “will hugely limit Parliament’s ability to properly scrutinise the legislation”.<sup>44</sup>

The Government previously said that if a new deal was forthcoming at the European Council meeting, it would move “at pace” to introduce the bill and secure its passage before 31 October 2019.<sup>45</sup> Mr Johnson said if there was a deal, he wanted the House of Commons to “debate, scrutinise and

<sup>42</sup> House of Commons Library, [Parliament’s Role in Ratifying Treaties](#), 17 February 2017, p 9.

<sup>43</sup> Institute for Government, [The Withdrawal Agreement Bill](#), 15 May 2019.

<sup>44</sup> Institute for Government, [Even a Commons Majority for an EU Withdrawal Agreement Doesn’t Rule Out a No-deal Brexit](#), 26 September 2019.

<sup>45</sup> Prime Minister’s Office, [Queen’s Speech: Invest in NHS, Attack Violent Crime, Cut the Cost of Living](#), 28 August 2019.

endorse it in time for our departure on 31 October”.<sup>46</sup> Ministers have argued that the Benn Act, which was passed in less than a week, shows Parliament can legislate quickly.<sup>47</sup>

### **Part 2 of the Constitutional Reform and Governance Act 2010**

The Constitutional Reform and Governance Act 2010 (CRAG) contains requirements about Parliament’s role in scrutinising treaties before they can be ratified.<sup>48</sup> Usually, the Government must lay a copy of a new treaty before Parliament and a period of 21 sitting days must elapse without either House resolving against ratifying the treaty. This can be repeated indefinitely in theory if the Commons keeps resolving against the treaty.

The Lords does not have the same power as the Commons to delay ratification. If the Lords resolves against ratification but the Commons has not done so, then a treaty may still be ratified if a Minister of the Crown has laid a statement before Parliament indicting that the treaty should nevertheless be ratified and explaining why.

There is no longer time to allow for a 21-sitting day period before 31 October 2019. Under exceptional circumstances, CRAG allows the Government to ratify a treaty without waiting for 21 sitting days, but not if either House has already resolved against ratifying the treaty. Another possible avenue would be to use a withdrawal agreement bill to modify or set aside the CRAG requirements so a withdrawal agreement could be ratified more quickly. Theresa May suggested in February 2019 that she would consider using this route.<sup>49</sup>

### **3.2 EU Requirements**

The European Council endorsed the withdrawal agreement and approved the political declaration at its summit on 17 October 2019.<sup>50</sup> The European Council has now invited the European Commission, the European Parliament and the Council of the European Union to “take the necessary steps to ensure that the agreement can enter into force on 1 November 2019”.<sup>51</sup>

The European Council explained in November 2018 that once it had endorsed a deal, the next steps would be as follows:

1. The Commission adopts proposals for:
  - Council decision on the signing of the withdrawal agreement
  - Council decision on conclusion of the withdrawal agreement
2. The Council (Article 50):
  - adopts the decision on the signing of the withdrawal agreement

<sup>46</sup> [HC Hansard, 3 September 2019, col 27.](#)

<sup>47</sup> For example: [HL Hansard, 25 September 2019, col 1432.](#)

<sup>48</sup> For a more detailed explanation of the requirements of the Constitutional Reform and Governance Act 2010, see: House of Lords Library, [Brexit: Further Recent Developments](#), 21 March 2019.

<sup>49</sup> [HC Hansard, 12 February 2019, cols 744–5.](#)

<sup>50</sup> European Council, [Special Meeting of the European Council \(Art 50\) \(17 October 2019\)—Conclusions](#), 17 October 2019. The UK does not participate in discussions or decisions when the European Council is acting in its Article 50 formation.

<sup>51</sup> *ibid.*

- approves the decision on conclusion and refers it to the European Parliament for its consent
3. The European Parliament provides its consent by simple majority of the members of the European Parliament.
  4. The Council (Article 50) adopts on behalf of the EU the decision on conclusion of the withdrawal agreement. For this adoption, the Council acts by reinforced qualified majority of the EU27 (at least 20 member states comprising at least 65% of the population of EU27 member states).<sup>52</sup>

#### 4. European Union (Withdrawal) (No. 2) Act 2019 (Benn Act)

The debate motions tabled for the parliamentary sitting on 19 October 2019 refer to section 1 of the European Union (Withdrawal) (No. 2) Act 2019. This legislation is also known as the Benn Act after Hilary Benn (Labour MP for Leeds Central) who introduced it in the Commons.

Section 1 provides that the Prime Minister must ask the European Council for an extension to article 50(3) of the Treaty on European Union unless one of two conditions is met. These conditions are that the House of Commons has approved, and the House of Lords has had the opportunity to debate, either:

1. a withdrawal agreement with the EU or
2. a statement that the UK is to leave the EU without an agreement.

If neither of these conditions is met, subsection 1(4) requires the Prime Minister to send a letter to the President of the European Council requesting an extension to article 50 until 31 January 2020. This letter must be sent no later than 19 October 2019, and the exact form of the request is set out in a schedule to the Act. Subsection 3(1) obliges the Prime Minister to accept this extension if it is offered. If the European Council offers an extension to a date other than 31 January 2020 the Prime Minister can either accept the European Council's offer or ask the House of Commons whether it accepts the offer. If the House of Commons approves the offer, the Prime Minister must accept it. If the House of Commons decides not to approve, the Prime Minister can still choose to accept the extension offered (subsection 3(4)).

If the Prime Minister requests an extension on 19 October 2019 in line with the requirements of the Benn Act, subsection 1(5) also allows the Prime Minister to withdraw or modify that request before 30 October if either of the conditions have been met.

Boris Johnson has referred to this legislation as the 'Surrender Act'.<sup>53</sup> He has said that the UK will leave the EU on 31 October 2019 "come what may".<sup>54</sup> He has also stated that even if the Commons does not approve either of the specified outcomes by the 19 October deadline, he will not seek an article 50 extension.<sup>55</sup>

<sup>52</sup> European Council, '[Special Meeting of the European Council \(Art 50\), 25/11/2018](#)', 25 November 2018.

<sup>53</sup> Boris Johnson, '[I Passionately Believe that I Can Strike an EU Deal Within Weeks](#)', *Telegraph* (£), 15 September 2019.

<sup>54</sup> Conservative Party, '[Prime Minister: Let's Get Brexit Done and Take This Country Forward](#)', 2 October 2019.

<sup>55</sup> [HC Hansard, 25 September 2019, col 821](#).

At the same time, government ministers have maintained that they will obey the law, including in papers submitted in legal proceedings in the Scottish Court of Session.<sup>56</sup> The Outer House of the Court of Session decided on 7 October 2019 that it was “neither necessary nor appropriate” to grant an order requiring the Prime Minister to comply with the Benn Act.<sup>57</sup> On the basis of the Government’s written pleadings, the court found “there can be no doubt” that the Prime Minister “now accepts that he must comply with the requirements of the 2019 Act [the Benn Act] and has affirmed that he intends to do so”.<sup>58</sup> The Inner House of the Court of Session is due to consider on 21 October 2019 a petition brought by Joanna Cherry (Scottish National Party MP for Edinburgh South West) and others. They are petitioning the court to exercise its ‘nobile officium’ jurisdiction and send the letter on Mr Johnson’s behalf if the requirements of the Benn Act are engaged and he fails to comply with them.<sup>59</sup>

The Benn Act does not oblige the EU to agree to a request from the UK for an extension. Under the terms of article 50, all 27 remaining EU member states need to agree to it unanimously. Speaking on 17 October 2019, Jean-Claude Juncker, President of the European Commission, said the new deal meant “there is no need for any kind of prolongation”.<sup>60</sup> Some press coverage interpreted this as the EU ruling out agreeing to any extension.<sup>61</sup> However, the decision on whether to agree an extension rests with the European Council, not the European Commission. Donald Tusk, President of the European Council, later said that if there was a request for an extension, he would contact the EU27 member states to see how to react.<sup>62</sup>

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<sup>56</sup> For example: [HC Hansard, 25 September 2019, col 799](#) (Boris Johnson); [HC Hansard, 3 October 2019, col 1357](#), (Geoffrey Cox, Attorney General); and [\[2019\] CSOH 77](#), para 37.

<sup>57</sup> [\[2019\] CSOH 77](#), para 42.

<sup>58</sup> *ibid.*

<sup>59</sup> [\[2019\] CSIH 51](#), para 12. The ‘nobile officium’ jurisdiction enables the Court of Session, within limits, to provide a legal remedy where none exists (Judiciary of Scotland, ‘[Glossary](#)’, accessed 17 October 2019).

<sup>60</sup> European Commission, ‘[Remarks by President Juncker at the Joint Press Conference with Boris Johnson, Prime Minister of the United Kingdom](#)’, 17 October 2019.

<sup>61</sup> For example: BBC News, ‘[Brexit: Juncker Rules Out Brexit Extension](#)’, 17 October 2019 (video hosted by YouTube).

<sup>62</sup> *Guardian*, ‘[Live Feed: Tusk Refuses to Rule Out EU Granting Further Brexit Extension, Despite Juncker Saying Earlier It Would Not Happen](#)’, 17 October 2019.