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Baroness Kennedy of The Shaws  
Chair, EU Justice Sub-Committee  
House of Lords  
London  
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Dear Baroness Kennedy,

Thank you for the European Union Justice Sub-Committee's report published on 3 May 2018 which considers dispute resolution and enforcement after the UK's exit from the EU. The Committee's analysis is a welcome contribution.

I was pleased to give evidence to the Committee on 27 March 2018 alongside The Ministry of Justice Parliamentary Under Secretary of State, Lucy Frazer. The Government's response to the Committee's recommendations is set out below. This response also addresses the broader points raised throughout the body of the report, on which I hope I can provide you with useful assurances.

**SUELLA BRAVERMAN MP**  
**PARLIAMENTARY UNDER SECRETARY OF STATE FOR**  
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## **GOVERNMENT RESPONSE TO THE EUROPEAN UNION COMMITTEE'S REPORT *DISPUTE RESOLUTION AND ENFORCEMENT AFTER BREXIT***

### **Dispute Resolution**

As set out in the Government's future partnership paper on enforcement and dispute resolution<sup>1</sup>, there are a number of different mechanisms for resolving disputes in international agreements. There are also a number of existing precedents where the EU has reached agreements with Third Countries which provide for a close cooperative relationship, without the CJEU having jurisdiction over those countries. These examples illustrate the range of ways in which the parties to international agreements, including the EU, have obtained assurances that obligations in those agreements will be enforced, that divergence can be avoided where necessary, and that disputes can be resolved.

The Government agrees with the Committee's assessment that none of these existing options provides a complete solution for dispute resolution after EU exit. These different models and approaches are not mutually exclusive, and dispute resolution mechanisms can combine a number of these together. This is why the Government has made clear on a number of occasions that we will not be pursuing an off-the-shelf arrangement. Instead, we will be seeking a bespoke arrangement that works for both the UK and the EU.

We also agree that with the report's statement that there is no "one-size-fits-all" solution to dispute resolution after EU exit. Ultimately, the dispute resolution mechanism we agree will be dependent on the final substance and context of the agreement. We know that to underpin our trading relationship, for example, we will need an arbitration mechanism that is completely independent, something which is common to Free Trade Agreements.

### **Withdrawal Agreement**

The Government agrees with the Committee's view that we must respect the legal autonomy of both the UK and the EU's legal orders. The CJEU will continue to interpret EU law and be the ultimate arbiter of EU law within the EU and its Member States. We will respect that role as we would the courts of any of our close partners, and as we would expect our partners to respect the role of the Supreme Court within the UK.

We recognise that the EU cannot be bound by an international judicial body other than the CJEU on matters of EU law. However, it does not follow that the CJEU must be given the power to enforce and interpret international agreements between the EU and third countries, even where they utilise terms or concepts found in EU law. Nor is it a required means of resolving disputes between the EU and third countries on the interpretation or implementation of an agreement. As the precedents explored in our future partnership paper demonstrate, there is no barrier to agreements which use terms or concepts in EU law being enforced or interpreted by judicial bodies which are not the CJEU, where those judicial bodies only bind non-EU parties to the agreement, and do not purport to bind the EU itself.

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/639609/Enforcement\\_and\\_dispute\\_resolution.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf)

**1. We are unconvinced by the Government's suggestion that all disputes relating to the Withdrawal Agreement can simply be settled politically by the Joint Committee. It is possible that intractable disputes may arise under the Withdrawal Agreement. These should not be left as potentially insoluble for reasons of short-term expediency: the Government and the EU will have to reach a sensible and pragmatic compromise on this question. (Paragraph 121)**

As it stands, the EU's draft legal text for the Withdrawal Agreement states that the CJEU should have jurisdiction over disputes referred to it by the Joint Committee at the request of either the UK or the EU. Such an arrangement, whereby the CJEU would act as the means of resolving disputes between the EU and a non-Member State would be wholly unprecedented. As already mentioned, the Withdrawal Agreement must respect the autonomy and integrity of both the UK and the EU.

The dispute resolution mechanism for the Withdrawal Agreement is a matter for negotiation and will depend on the document's content. We recognise that there needs to be a clear mechanism for governing and enforcing our Withdrawal Agreement with the EU – as there is in any international agreement – and we will continue to engage constructively on this in the negotiations.

**2. If the Government does wish to avail itself of the suggested option of docking with the EFTA court, simply for the purpose of settling disputes arising from the Withdrawal Agreement, it will have to commence negotiations with both the EU 27 and the EEA/EFTA states as a matter of urgency. (Paragraph 123)**

The Committee's report acknowledges that docking into the EFTA Court would be a limited solution. The report does, however, suggest that the Government could dock to the EFTA Court for the purpose of settling disputes arising from the Withdrawal Agreement. The Government has no plans to dock to the EFTA Court to settle disputes arising from the Withdrawal Agreement or from future agreements. Using the EFTA Court even for this purpose would not be a simple or straightforward solution. The EFTA Court does not currently offer a dispute resolution mechanism between EFTA States and the EU. It is a court within the internal legal order of the three EFTA States, much as the UK Supreme Court is the highest court within the UK's internal legal order. Its decisions do not legally bind the EU. So disputes between the EFTA states and the EU are not resolved by the EFTA Court. Furthermore, the EFTA Court's role and responsibilities are set out in an international agreement between Norway, Iceland and Liechtenstein. All three countries would have to agree to fundamentally change the role of the Court which only has jurisdiction to settle disputes between EFTA States regarding the interpretation or application of the EEA Agreement.

**3. It is important that this continued jurisdiction of the CJEU should only be for a reasonable, time limited, period: we urge the Government to ensure that there is a longstop for any claims that arise during the transition, so that cases relating to acts occurring during transition cannot be brought indefinitely. (Paragraph 147)**

As the Committee's report sets out, we have agreed that during the implementation period in order to provide continuity and certainty for businesses and individuals the existing

framework of rules and regulations will continue to apply. The existing EU mechanisms for supervision and enforcement will also continue to apply and we will continue to follow CJEU judgments. The Committee should be assured that this does not change the fact that in the long term, after the end of the implementation period, the UK will no longer be under the jurisdiction of the CJEU.

As part of our withdrawal, we have agreed that any pending UK cases before the CJEU at the end of the implementation period should continue through to a binding judgment. The Government agrees with the Committee's assessment that allowing the CJEU to continue to rule indefinitely over new cases based on facts arising before the end of the Implementation Period would cause uncertainty and undermine the sovereignty of our courts. We expect to reach agreement in negotiations soon on this remaining issue.

**4. The Minister seemed unconcerned at the loss of UK judges from the CJEU during the transition, and did not address the consequences that could arise as a result. (Paragraph 148)**

Judges and Advocates General appointed by Member States to the CJEU do not 'represent' their home country, nor is there any guarantee that they will sit on cases involving or referred by their home country. The UK will no longer be a Member State from March 2019 and it is right therefore that we withdraw from the institutions. Whilst we may no longer have a UK-nominated judge at the CJEU, during the implementation period we will maintain our right to intervene in cases before the Court, and our lawyers will maintain their rights of audience. This will ensure that UK interests can continue to be represented at the Court during the implementation period.

**5. We urge the Government to be much clearer, by being more detailed, about its approach to these issues. If the Prime Minister wishes to make such an offer to the EU 27 this should be done with precision and clarity, by means of a draft text that can be properly scrutinised by all sides. (Paragraph 179)**

We will engage constructively to negotiate an approach to dispute resolution which meets the key objectives of the UK and the EU, underpinning the deep and special partnership we seek. The Government's future partnership paper on this matter sets out our approach to enforcement and dispute resolution in more detail.

The paper states that, as part of the deep and special partnership we seek with the EU, it is in the interests of both the UK and the EU that: the rights and obligations agreed between us can be relied upon and enforced by individuals and businesses; and where disputes arise between the UK and the EU on the application or interpretation of these obligations, those disputes can be resolved efficiently and effectively.

The paper also sets out four principles for enforcement and dispute resolution, which are to: maximise certainty for individuals and businesses; ensure that they can effectively enforce their rights in a timely way; respect the autonomy of EU law and UK legal systems while taking control of our own laws; and continue to respect our international obligations.

As the paper also sets out, the form these mechanisms take varies considerably across the spectrum of agreements, given the different areas of international cooperation, and consequently the varied nature of potential disputes that could arise. We accept that the appropriate dispute resolution mechanism will be dependent on the substance and context of each agreement.

We have also set out our approach to the CJEU. In leaving the European Union, we will bring about an end to the jurisdiction of the CJEU in the UK. That means that UK courts will no longer be obliged to make references to the CJEU, and the UK will not be bound by the hundreds of CJEU judgments each year. However, as the Prime Minister made clear in her Mansion House Speech, EU law and the decisions of the CJEU will continue to affect us. For a start, the CJEU determines whether agreements the EU has struck are legal under the EU's own law. Or, if, as part of our future partnership, Parliament passes an identical law to an EU law, it may make sense for our courts to look at the appropriate CJEU judgments so that we both interpret those laws consistently. Or, if we agree the UK should continue to participate in an EU agency this would mean abiding by the rules of those agencies and making an appropriate contribution; as part of those rules, the UK would have to respect the remit of the CJEU in that regard. But, our Parliament would remain ultimately sovereign. It could decide not to accept these rules, but with consequences for our membership of the relevant agency and linked market access rights.

As we have previously announced, our intention is to shortly publish a White Paper setting out further detail underpinning the PM's speeches in Mansion House, Florence, and Munich.

**6. We recommend further that the enforcement and dispute resolution system established under the future relationship should be accessible to citizens and businesses, either directly or via a reference system from the domestic courts. The interests of citizens and businesses would be prejudiced if the future dispute resolution system between the UK and the EU 27 were to be entirely at-state-to-state level. (Paragraph 180)**

As previously stated, our published paper states that it is in the interests of both the UK and the EU that the rights and obligations agreed between us can be relied upon and enforced by individuals and businesses and, where disputes arise between the UK and the EU on the application or interpretation of these obligations, those disputes can be resolved efficiently and effectively.

We also set out four principles, which are to: maximise certainty for individuals and businesses; ensure that they can effectively enforce their rights in a timely way; respect the autonomy of EU law and UK legal systems while taking control of our own laws; and continue to respect our international obligations. The UK will engage constructively with the EU to negotiate an approach to dispute resolution and enforcement on this basis.

**7. We recognise the substantial positive influence that UK lawyers and judges have played in the evolution of EU law. After Brexit, the ability of the UK to affect the development of case-law in the EU is likely to be diminished significantly. Given the importance of the jurisdiction of the CJEU internationally, this may have a negative impact on the international standing of the UK's common law system. (Paragraph 188)**

The Government believes that the underlying strengths of the UK's laws and legal systems will remain after the UK leaves the EU. Specifically, the common law will remain attractive globally because it is built on precedents that make it predictable and transparent, and instil business confidence. As well as being grounded in the English language, the common law can adapt quickly, where, for example, new technology has implications for the law, and contracts are interpreted based on what they say.

The Government is also making sure that the strengths of our law and our legal services sector are promoted internationally. In October, Lord Keen launched the 'Legal Services are GREAT' campaign in Singapore. The campaign targets stronger links with emerging and established markets across the world and highlights the strengths of English law.

There are also forums outside of the formal EU structures where officials, lawyers and judiciary will be able to engage with their counterparts. For example, the UK is one of the founder members of the modern Hague Conference on Private International Law. We remain committed to the organisation and the projects it is pursuing, including one that aims to create a global instrument for the recognition and enforcement of civil judgments.

The Prime Minister has been clear that we are seeking the broadest and deepest possible partnership with the EU – covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today. We do not want to discriminate against EU service providers in the UK and we would not want the EU to discriminate against UK service providers. We want to agree an appropriate labour mobility framework that enables UK and EU businesses and professionals to travel, and provide services in person and over the phone or internet. This will support the ability of UK lawyers to practise in EU Member States after exit.

We also want UK professional qualifications, including UK legal titles, to continue to be recognised across the EU in the future, and vice versa. The March European Council agreed guidelines for negotiations on our future relationship, which reference the desire of the EU27 to include ambitious provisions on the recognition of qualifications. This is a useful starting point for the next stage of negotiations on the future economic partnership.

**8. We took evidence on the issue of mutual recognition of judgments and civil justice cooperation as part of this inquiry, since the Government's response to our report *Brexit: justice for families, individuals and businesses?* highlighted limited progress. We have grave concerns about these issues, and we will revisit them shortly. (Paragraph 190)**

The Government looks forward to the Committee's further consideration of civil judicial cooperation. We have been clear that we believe the optimum outcome for both sides will be a new agreement, negotiated between the UK and the EU as part of the future partnership, which reflects our close existing framework and builds from our shared history and partnership. The European Council guidelines in March promisingly referred to co-operation in family matters, but, in line with the Prime Minister's Mansion House speech, we believe an agreement in this area should cover other aspects of civil judicial cooperation as well.

As the Committee will know, the negotiations with the EU have focussed until now on withdrawal and separation matters. As noted in the 19 June 2018 Joint Statement on the progress of separation negotiations<sup>2</sup>, we have agreed the last outstanding area on how the UK would withdraw from the EU rules on civil judicial cooperation at the end of the Implementation Period. Now we look forward to negotiating the future UK-EU relationship with our EU partners. To that end, the Government published a set of slides that were presented to the EU earlier in June<sup>3</sup>. This presentation set out in detail the UK's proposal for civil judicial cooperation in the context of our future relationship.

The Government recently announced that it will be producing a White Paper that will set out in detail the UK's position on a future relationship, including on civil judicial cooperation. It will provide further explanation of the Prime Minister's vision by giving detailed, ambitious and precise explanations.

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<sup>2</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/717697/Joint\\_Statement\\_-\\_19\\_June\\_2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717697/Joint_Statement_-_19_June_2018.pdf)

<sup>3</sup><https://www.gov.uk/government/publications/framework-for-the-uk-eu-partnership-judicial-civil-cooperation>