



House of Commons
European Scrutiny Committee

The draft EU/UK Withdrawal Agreement: key legal and political questions

Fifty-Eighth Report of Session 2017–19

*Report, together with formal minutes
relating to the report*

*Ordered by the House of Commons
to be printed 6 March 2019*

Notes

Numbering of documents

Three separate numbering systems are used in this Report for European Union documents:

Numbers in brackets are the Committee's own reference numbers.

Numbers in the form "5467/05" are Council of Ministers reference numbers. This system is also used by UK Government Departments, by the House of Commons Vote Office and for proceedings in the House.

Numbers preceded by the letters COM or SEC or JOIN are Commission reference numbers.

Where only a Committee number is given, this usually indicates that no official text is available and the Government has submitted an "unnumbered Explanatory Memorandum" discussing what is likely to be included in the document or covering an unofficial text.

Abbreviations used in the headnotes and footnotes

AFSJ	Area of Freedom Security and Justice
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
ECA	European Court of Auditors
ECB	European Central Bank
EEAS	European External Action Service
EM	Explanatory Memorandum (submitted by the Government to the Committee)*
EP	European Parliament
EU	European Union
JHA	Justice and Home Affairs
OJ	Official Journal of the European Communities
QMV	Qualified majority voting
SEM	Supplementary Explanatory Memorandum
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

Euros

Where figures in euros have been converted to pounds sterling, this is normally at the market rate for the last working day of the previous month.

Further information

Documents recommended by the Committee for debate, together with the times of forthcoming debates (where known), are listed in the European Union Documents list, which is published in the House of Commons Vote Bundle each Monday, and is also available on the parliamentary website. Documents awaiting consideration by the Committee are listed in "Remaining Business": www.parliament.uk/escom. The website also contains the Committee's Reports.

*Explanatory Memoranda (EMs) and letters issued by the Ministers can be downloaded from the Cabinet Office website: <http://europeanmemoranda.cabinetoffice.gov.uk/>.

The European Scrutiny Committee

The European Scrutiny Committee is appointed under Standing Order No. 143 to examine European Union documents.

Current membership

[Sir William Cash MP](#) (*Conservative, Stone*) (Chair)

[Geraint Davies MP](#) (*Labour/Cooperative, Swansea West*)

[Martyn Day MP](#) (*Scottish National Party, Linlithgow and East Falkirk*)

[Steve Double MP](#) (*Conservative, St Austell and Newquay*)

[Richard Drax MP](#) (*Conservative, South Dorset*)

[Mr Marcus Fysh MP](#) (*Conservative, Yeovil*)

[Kate Green MP](#) (*Labour, Stretford and Urmston*)

[Kate Hoey MP](#) (*Labour, Vauxhall*)

[Kelvin Hopkins MP](#) (*Independent, Luton North*)

[Darren Jones MP](#) (*Labour, Bristol North West*)

[Mr David Jones MP](#) (*Conservative, Clwyd West*)

[Stephen Kinnock MP](#) (*Labour, Aberavon*)

[Andrew Lewer MP](#) (*Conservative, Northampton South*)

[Michael Tomlinson MP](#) (*Conservative, Mid Dorset and North Poole*)

[David Warburton MP](#) (*Conservative, Somerton and Frome*)

[Dr Philippa Whitford MP](#) (*Scottish National Party, Central Ayrshire*)

Powers

The Committee's powers are set out in House of Commons Standing Order No 143. The scrutiny reserve resolution, passed by the House, provides that Ministers should not give agreement to EU proposals which have not been cleared by the European Scrutiny Committee, or on which, when they have been recommended by the Committee for debate, the House has not yet agreed a resolution. The scrutiny reserve resolution is printed with the House's Standing Orders, which are available at www.parliament.uk.

Publication

Committee reports are published on the Committee's website at www.parliament.uk/escom and in print by Order of the House.

Evidence relating to this report is published on the relevant [inquiry page](#) of the Committee's website.

Committee staff

The staff of the Committee are Jessica Mulley (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Foeke Noppert, Sibel Taner and George Wilson (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Joanne Dee and Emily Unwin (Deputy Counsels for European Legislation), Jeanne Delebarre (Second Clerk), Daniel Moeller (Senior Committee Assistant), Sue Beeby, Nat Ireton and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants)

Contacts

All correspondence should be addressed to the Clerk of the European Scrutiny Committee, House of Commons, London SW1A 0AA. The telephone number for general enquiries is (020) 7219 3292/5467. The Committee's email address is escom@parliament.uk.

Contents

1	Introduction	3
	Our UK exit from the EU inquiry	4
2	The proposed Decisions to sign and conclude the Withdrawal Agreement	7
	The proposed Council Decisions on signature and conclusion	7
	Steps in the Article 50 process leading to the proposed Decisions	7
	Process and substance: the proposed Decisions themselves	8
	Implications of an Article 50 extension for the proposed Decisions	13
	The draft Withdrawal Agreement	15
	Overview of the draft Agreement	15
	Government's view of the draft Withdrawal Agreement	17
	Issues of legal significance arising from the draft Withdrawal Agreement	18
3	Conclusion	24
4	Annex	25
	Formal minutes	26
	Witnesses	27

1 Introduction

1. Following our request and that of the European Union Committee in the House of Lords,¹ the Government has deposited with Parliament the proposed Council Decisions authorising the EU to [sign](#) and [conclude](#) the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the [Withdrawal Agreement](#)²).³ In addition to providing an [Explanatory Memorandum](#) of 21 February, the Secretary of State for Exiting the EU (Rt Hon. Steven Barclay MP) has also written simply to confirm to us that this has been done.⁴

2. The proposed Decisions were first published by the Commission on 5 December 2018. On 11 January 2019 the Council voted to formally [adopt](#) the proposed Council Decision on signature⁵ and politically approve the proposed Decision on conclusion and to send it with the appended draft Withdrawal Agreement text to the European Parliament (EP) for its consent. Article 50(4) of the Treaty on the European Union (“TEU”) excludes the UK, as the withdrawing State, from participating in the Council discussions relating to or voting on these proposed Decisions. The Council will only formally adopt the proposed Decision on conclusion once the consent of the European Parliament (EP) has been obtained. Although this means that our Scrutiny Reserve Resolution⁶ does not apply to these Decisions, they still fall to be deposited for our scrutiny in accordance with the terms of our Standing Order.⁷ The draft Withdrawal Agreement has not been signed by the UK Government.

3. As part of our normal document scrutiny we address later in this Report the process for adopting the proposed Decisions, examine how they fit into the overall process prescribed by Article 50 TEU for the UK’s withdrawal from the EU and highlight questions about their substance. In doing so, we summarise any views that the Government has expressed in its Explanatory Memorandum provided in relation to the Decisions.

4. We also identify key points of legal significance relating to the text of the Withdrawal Agreement itself. The text of the draft Agreement is appended to the proposed Council Decision on signature and referred to in the proposed Council Decision on conclusion. It is important to note that the [Political Declaration](#)⁸ on the framework for a future

-
- 1 Letter of 7 February 2019 to the Secretary of State for Exiting the EU (Rt Hon. Steven Barclay MP) from Sir William Cash MP (Chairman of the European Scrutiny Committee) and Lord Boswell (Chairman of the European Union Committee)
 - 2 The draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 14 November 2018, accessible from the website of the Department for Exiting the EU
 - 3 The UK has reached a [separate agreement](#) on separation issues with Iceland, Liechtenstein and Norway (‘the EEA EFTA states’). In particular, this includes a deal on citizens’ rights that protects the rights of EEA EFTA nationals in the UK and UK nationals in the EFTA EEA countries. The [document](#) ‘Explainer for the agreement on arrangements between Iceland, the Principality of Liechtenstein and the Kingdom of Norway, and the United Kingdom of Great Britain and Northern Ireland, following the withdrawal of the United Kingdom from the European Union’ (dated 20 December 2018) contains further detail on this agreement.
 - 4 Letter from Secretary of State for Exiting the EU (Rt Hon. Steven Barclay MP) to Sir William Cash MP of 21 February 2019
 - 5 Council Decision (EU) 2019/274
 - 6 House of Commons, Public Business Standing Orders 2018, [Resolution](#) of the House of 17 November 1998, HC 1020
 - 7 House of Commons, Public Business Standing Order 2018 [143](#), [HC 1020](#)
 - 8 Political Declaration setting out the framework for the Future Relationship between the EU and the UK, 25 November 2018

relationship between the EU and the UK is not an integral part of the draft Withdrawal Agreement and is not legally-binding. However, Article 184 on “Negotiations on the future relationship” provides:

The Union and the United Kingdom shall use their best endeavours, in good faith and in full respect of their respective legal orders, to take the necessary steps to negotiate expeditiously the agreements governing their future relationship referred to in the political declaration as endorsed on 25/11/2018 and to conduct the relevant procedures for the ratification or conclusion of those agreements, with a view to ensuring that those agreements apply, to the extent possible, as from the end of the transition period.

5. This Report does not seek to provide a detailed account of the substance of the draft Withdrawal Agreement, though we do provide a short overview. This is because the text has already been the subject of a wide range of explanatory material produced by both the EU and the Government to which this Report provides links in the Annex.

Our UK exit from the EU inquiry

6. Our scrutiny of the proposed Council Decisions has taken place within the context of public discourse and parliamentary debates and votes on aspects of Brexit as well as our own scrutiny of EU documents and our own ongoing “UK exit from the EU” [inquiry](#).

7. We established this inquiry late in 2018 specifically to examine the conduct, processes and outcomes of negotiations between the UK Government and the European Union regarding the UK’s exit from the European Union. Evidence gathered so far can be viewed on the Committee’s [website](#). The inquiry also builds on our previous “EU Withdrawal” [inquiry](#) and our [inquiry](#) into “Dispute Resolution and Enforcement in the draft Withdrawal Agreement.” We are in no doubt that some of the questions we have posed to the Government on the proposed Decision documents later in this Report have been coloured by what we have heard so far in our inquiry.

8. We are aware that there are risks and downsides in seeking to draw even preliminary conclusions on the basis of as yet partial evidence gathering but such is the topicality of the subject matter and the significance of our evidence that we feel a duty to highlight some emerging themes from our work. We hope that doing so will help to inform both debate in the House and our wider audience as well as Members of Parliament who, as individuals and as a collective, have weighty and urgent decisions to make in the coming days and weeks regarding the future of our nation and its relations with the EU.

9. We have to date examined Mr Steve Baker MP and Suella Braverman MP, both former Ministers in the Department for Exiting the EU; Rt Hon. David Davis MP, Secretary of State for Exiting the EU from July 2016 to July 2018 and Rt Hon. Dominic Raab MP, Mr Davis’ successor in office until his resignation in November 2018. We are grateful to them for their frankness, insight and willingness to assist in our deliberations. We have, of course, also had access to evidence taken and the thoughts and conclusions reached by other Select Committees in preceding months on Brexit and the draft Withdrawal Agreement; and we continue to build upon our own preceding inquiries into related topics.

10. One of the most striking themes to have emerged from our evidence so far concerns the way in which the UK Government itself has handled the process of negotiation internally.

11. This seems to us to have left the Government vulnerable to internal division and therefore capable of undermining its own negotiating position with the EU and potentially compromising the British position under draft Withdrawal Agreement itself. Mr Davis described to us a position in which he, as Secretary of State for Exiting the EU, had less influence than expected in drawing up the UK negotiating position and conducting negotiations. He told us, for instance, that the Chequers Deal had been drawn up by No. 10 and that he had been given only five days to review it. As Mr Baker put it:

Within [DExEU], Ministers led by David Davis were developing one policy and the Cabinet Office Europe unit was clearly developing another... For a Secretary of State to be cut out of the development of his main policy is quite a debacle. It seems that something similar happened to Dominic Raab as his successor.⁹

12. Mr Raab, for his part, when he gave evidence to us, described his restructuring efforts to ensure that the Prime Minister had the right political and technical advice at all times and the challenges he encountered in doing so. The example he gave us, although he was cautious in ascribing direct cause and effect, was that of the robust line he took on insisting on an exit mechanism from the Northern Ireland backstop - an issue which of course has become one of the most contentious matters in the Withdrawal Agreement - which resulted in what he called 'some pushback' from No. 10.¹⁰

13. The key point we wish to emphasize in relation to the Northern Ireland Protocol and the proposed transition/implementation period, on the basis of the evidence we have heard to date is as follows. The Withdrawal Agreement as drafted means that the UK will cede to the EU the ability to make laws which will apply to the UK. And this is without the UK having means to participate in or formally influence the formulation of those laws (see paragraphs 60–61). Mr Raab put it succinctly and straightforwardly in his evidence, saying that “It is entirely indefensible, both in principle and in practice.”¹¹

14. We welcome the deposit of the proposed Council Decisions by the Secretary of State. But we are disappointed that we had to prompt him to do so in a joint letter from our Chairman and the Chairman of the European Union Committee in the Lords. Both documents fall clearly within the terms of our Standing Order.¹² Should the Article 50 process, particularly if extended, produce further EU documents falling within our Standing Order, we expect them to be deposited in accordance with usual practice. There have been other, well-publicised occasions during the Brexit process where the Government has been reluctant to provide information to Parliament. We trust that this deposit of documents represents a will to underpin rather than undermine parliamentary scrutiny of EU and Brexit-related issues.

9 Q.73

10 Q.123

11 Q.178

12 House of Commons, Public Business Standing Order 2018 [143](#), [HC 1020](#)

15. We recognise that we are reporting on these documents in a fast-moving situation and we are aware that the results of the Attorney General's current negotiations with the EU are critical given the clear obligations of the Attorney General to Parliament. We consider it therefore imperative that the results of these negotiations are made available to Parliament no less than 48 hours before the debate scheduled to take place no later than 12 March in time for it to have the opportunity to give proper consideration before the second Meaningful Vote on the draft Withdrawal Agreement promised by the Prime Minister and expected to take place on that day.

16. We urge the Government, through the Secretary of State and the Prime Minister, to authorise immediately the publication of the draft Withdrawal Agreement and Implementation Bill so that Parliament can assess how the draft Withdrawal Agreement is intended to be enacted, including its effect on the express repeal of the European Communities Act 1972, under section 1 of the European Union (Withdrawal) Act 2018.

17. At the time of writing there remains uncertainty about when, if at all, the process for adopting and implementing both proposed Decisions will be completed.¹³ We therefore retain the documents under scrutiny whilst seeking further information from the Secretary of State on the specific conclusions and questions set out in the body of this Report. Given the urgency of the current situation, we request an urgent response to this Report before the next European Council to be held on 21–22 March.

18. In the meantime, we draw this Report and these documents to the attention of the House, in advance of the second "Meaningful Vote" expected to take place on 12 March. In particular, we draw them to the attention of the Committee on Exiting the EU, the International Trade Committee and the Home Affairs Committee for the reasons given in our conclusions on the scrutiny of the proposed Decisions.

¹³ As we have noted, the proposed Decision on signature has already been adopted.

2 The proposed Decisions to sign and conclude the Withdrawal Agreement

Committee's assessment	Legally and politically important
Committee's decision	Not cleared from scrutiny; further information requested; drawn to the attention of the Committee on Exiting the EU, the International Trade Committee and the Home Affairs Committee
Document details	Proposed Council Decisions on (a) the signing, on behalf of the European Union and of the European Atomic Energy Community, of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Withdrawal Agreement); (b) the conclusion on behalf the EU of the Withdrawal Agreement
Legal base	Article 50(2) TEU and Article 106a of the Euratom Treaty; enhanced qualified majority of the continuing EU27 Member States pursuant to Article 238(3)(b) TFEU; for (b) only, EP consent
Department	Exiting the European Union
Document Numbers	(a) (40401),—, COM(18) 833; (b) (40402),—, COM(18) 834

The proposed Council Decisions on signature and conclusion

Steps in the Article 50 process leading to the proposed Decisions

19. On 29 March 2017 the UK notified the European Council pursuant to Article 50 TEU of its intention to withdraw from the EU and Euratom. Article 50 TEU states that based on the guidelines provided by the European Council, the EU shall negotiate and conclude an agreement with the withdrawing State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the EU. The Withdrawal Agreement is to be concluded on behalf of the EU by the Council, acting by an enhanced qualified majority¹⁴ and after obtaining the consent of the EP by simple majority. In default of the Withdrawal Agreement being ratified the EU Treaties will cease to apply to the UK on 29 March 2019 and the UK will leave the EU with no deal in place.

20. The European Council adopted its own guidelines on [29 April 2017](#) and on [22 May 2017](#) which authorised the Commission to open negotiations for a Withdrawal Agreement. Subsequent guidelines were similarly agreed by the European Council on [15 December 2017](#) addressing conditions for transitional arrangements, with the Council adopting supplementary negotiating directives on [29 January 2018](#). The EP also issued resolutions on [5 April 2017](#), [3 October 2017](#), [13 December 2017](#) and [14 March 2018](#).

¹⁴ This is a super qualified majority as defined in Article 238(3)(b) of the TFEU i.e. at least 72% of the Member States (20 Member States) in the Council representing at least 65% of the population of those States.

21. The negotiations were completed and initialled at the level of Chief Negotiators on 14 November 2018. It is this text, following legal review or “scrubbing”, which is proposed for signature and conclusion. On 25 November 2018, the leaders of the EU27 met for a [special meeting](#) of the European Council and endorsed the text of the Withdrawal Agreement. They also approved the Political Declaration on future EU-UK relations, which accompanies and is referred to in the Withdrawal Agreement. The Withdrawal Agreement text was officially [published](#) in the Official Journal of the EU on 19 February 2019, together with the [Political Declaration](#). The proposed Council Decision on signature suggests that legal review or “scrubbing” had taken place before that publication.¹⁵

Process and substance: the proposed Decisions themselves

Process

22. On 5 December 2018 the Commission proposed Decisions for the EU to sign and conclude the draft Withdrawal Agreement. Article 50 TEU itself does not include a requirement for the Withdrawal Agreement to be signed, but now the Council has authorised the EU to sign we would expect it to be signed by both parties. We understand however that there has been no formal signature of the text of the draft Withdrawal Agreement by either party. From the UK perspective the Prime Minister [wrote](#) on 11 January 2019 to our Chairman as requested to confirm that:

The Withdrawal Agreement and the Political Declaration were agreed between the Government and the Commission and endorsed by leaders of the 27 Member States at the special European Council in November [2018]. Until ratification by both parties the Withdrawal Agreement has the status of a political commitment rather than a legal agreement. Neither document was physically signed or initialled by leaders.¹⁶

23. From an EU perspective, the Explanatory Memorandum on the proposed Council Decision on signature states that “the negotiations were completed and initialled at the level of Chief Negotiators on 14 November 2018”. The European Council Conclusions of [25 November](#) and [13 December 2018](#) state that EU27 Leaders “endorsed” the draft Withdrawal Agreement text. But there has been no suggestion that the text has been signed yet even by the EU.¹⁷ This remains the case even though on 11 January 2019, the Council voted to [adopt](#) the proposed Council Decision enabling the EU to sign the draft Withdrawal Agreement¹⁸ (document (a)), to approve the proposed Decision on conclusion and to send it with the appended Withdrawal Agreement text to the EP for its consent.

24. Once the EP has given its consent by a simple majority of MEPs voting¹⁹ the Council will be able to formally adopt the proposed Decision on conclusion (document (b)). If the current draft of the Withdrawal Agreement has been concluded by the EU on the basis of these Decisions and signed and ratified by the UK it will have the status of a treaty that will be binding on the EU and the UK under international law.

15 See footnote 1, page 1 of document (a)

16 Letter from Rt Hon. Theresa May MP, Prime Minister, to Sir William Cash MP, 11 January 2019, [UKX0003](#)

17 See paragraph 22 of this Report.

18 Council Decision (EU) 2019/274

19 As opposed to a majority of component Members. This includes UK MEPs.

25. As Article 50 TEU makes clear, the draft Withdrawal Agreement is subject to formal conclusion (ratification) by the EU. Additionally, the withdrawing Member State is to act “in accordance with its own constitutional requirements”. For the UK this entails compliance with the various requirements of Section 13 of the European Union (Withdrawal) Act 2018 and the Constitutional Reform and Governance Act 2010 before the draft Withdrawal Agreement can be ratified. Where a signature of an agreement is subject to ratification as here,²⁰ signature would not in international law indicate consent of the Parties to be bound or an obligation to ratify.²¹ Even if the parties had signed the text of the draft Withdrawal Agreement in this situation, it would only create an interim obligation of good faith to refrain from acting to frustrate the purpose of the treaty. However, all the indications are that at the very most, UK and EU negotiators/leaders have simply authenticated the text.²² We ask the Government to confirm whether it agrees with our understanding and, if not, to explain why.

26. The Minister states in his Explanatory Memorandum that the proposed Council Decisions will be adopted after the UK Parliament has signalled it is content with the draft Withdrawal Agreement as required by Section 13 of the Withdrawal Act. We ask the Government to explain how this statement fits with the EU’s own announcement that the Council Decision on signature has already been adopted by the EU. When does he expect the UK to sign the draft Withdrawal Agreement?

Substance of the proposed Decision on signature

27. The provisions of the proposed Council Decision on signature (document (a)) are short (disregarding the appended text of the Withdrawal Agreement). The Commission’s explanatory memorandum accompanying the proposal mainly consists of an overview of the various Parts and Protocols of the draft Withdrawal Agreement. Articles 1 and 2 of the proposed Decision authorise the Presidents of the Commission and European Council to sign the appended text of the draft Withdrawal Agreement, subject to its conclusion. Article 3 requires that immediately after signing, the Commission should notify third country contracting parties to EU international agreements that they should treat the UK as a Member State during the post-exit transition/implementation period. Article 4 sets a deadline of 15 February 2019 (now past) for continuing Member States to notify the Commission of their intention to not surrender their nationals to the UK under the European Arrest Warrant Framework during the transition/implementation period (second paragraph of Article 185 of the Withdrawal Agreement). Finally, Article 5 provides that the Decision shall enter into force on its adoption.

20 As also indicated by Articles 1 and 2 of the proposed Decision on signature. See also [Article 14 of the 1969 Vienna Convention of the Law of the Treaties](#). The Vienna Convention, even though between States, is indicative of customary international law. The 1984 Vienna Convention between States and International Organisations is not yet in force.

21 As in [Article 12 of the 1969 Vienna Convention of the Law of the Treaties](#)

22 See [Article 10 of the 1969 Vienna Convention of the Law of the Treaties](#). The term “authentication” refers to the procedure whereby the text of a treaty is established as authentic and definitive. Once a treaty has been authenticated, states cannot unilaterally change its provisions. If states which negotiated a given treaty do not agree on specific procedures for authentication, a treaty will usually be authenticated by signature, signature ad referendum or the initialling by the representatives of those states.

Substance of the proposed Decision on conclusion

28. The provisions of the proposed Council Decision on conclusion are more substantial so we only summarise the more important aspects. In the case of this Decision, the clarifications in the Recitals are also noteworthy.

29. Article 1 approves the draft Withdrawal Agreement on behalf of the EU, but the preamble makes clear that this is subject to the consent of the European Parliament. Article 2 establishes that for the purposes of Article 164²³ of the Agreement, the Commission will represent the EU in the Joint Committee and Specialised Committees (Article 165).²⁴ But it also provides for the Commission to be accompanied by representatives of Ireland, Cyprus and Spain respectively for meetings of the Specialised Committees relating to the Ireland/Northern Ireland Protocol, the Cyprus Sovereign Base Area Protocol and the Gibraltar Protocol. The Commission is to keep the Council informed of meeting schedules for these Committees well in advance to enable Council prior engagement and to report on meeting outcomes. In any event, Recital (5) indicates that where the Joint Committee is to adopt acts having legal effects, the EU will establish positions to be taken in that Committee on the EU's behalf in the Council pursuant to Article 218(9) TFEU. Furthermore, Recital (6) indicates that where such a Union position is to be taken on the extension of the transition period or review of the Northern Ireland Protocol, the Council must act in accordance with European Council Guidelines. The Commission is also to report annually both to the European Parliament and the Council on the implementation and application of the Agreement, for the first five years after its entry into force.

30. Article 129(4) of the draft Withdrawal Agreement allows the UK to negotiate, sign and ratify international agreements in areas of EU exclusive competence during the transition/implementation period but not to bring them into force, unless authorised to do so by the EU. Article 3 of the proposed Decision on conclusion specifies conditions for the Council to authorise the UK to do so, following notification by the UK. Authorisation decisions will be by Council implementing act.²⁵ In short, the conditions are:

- Demonstration by the UK of a “specific interest” that the particular agreement should apply or enter into force;
- Compatibility of the agreement with EU law applicable to the UK during the transition/implementation period; and
- Entry into force or application of the agreement during transition would not prejudice or undermine the EU's own external action objectives and interests.

31. Article 4 sets out the conditions for authorisations for Ireland, Cyprus and Spain respectively to enter into bilateral agreements with the UK in areas of EU exclusive competence. Similar conditions as to compatibility with EU law and non-prejudicial impact on EU external action apply. The bilateral agreement must be “necessary for the proper functioning” of the respective Protocols. Similar procedures apply for the authorisation Decisions to be made by Council implementing acts.

23 Article 164 also provides for UK representation in the Joint Committee and for it to be co-chaired by the EU and UK.

24 Article 165 also provides for UK representation in these Specialised Committees.

25 In duly justified specific cases Article 291 TFEU permits the Council, rather than the Commission to adopt implementing acts.

32. Articles 5 and 6 respectively provide for the Commission to specify by implementing acts:²⁶

- the period of validity and format of residence and frontier worker documents to be issued by the continuing Member States for UK citizens; and
- specimens relating to Movement Certificates²⁷ and postal consignment labels in the context of the Northern Ireland Protocol.

33. Additionally, Recital (8) recalls that the Commission, after consulting the Council, intends to issue a guidance document on the consistent application of Article 128(5) of the draft Withdrawal Agreement: this allows exceptional attendance by the UK at comitology committees and other expert bodies during the transition/implementation period subject to certain conditions.

34. **We understand that changes were made to the proposed Council Decision on conclusion (document (b)) in the period between its publication on 5 December and approval by the Council on 9 January. These appear simply to reflect the Treaty prerogatives of the European Parliament in relation to the process of the UK's withdrawal from the EU, both generally and to reflect the requirement in Article 218(10) TFEU to keep the European Parliament fully informed throughout the process. We ask the Government to:**

- a) **provide details of the role envisaged for the European Parliament;**
- b) **set out any other significant changes to the proposed Council Decisions during their negotiation; and**
- c) **indicate whether it is aware of any document or discussions outlining the respective roles of the Commission and the Council in the operation of the Joint Committee and whether a role is envisaged for the European Parliament. We intend to reflect further on the role the UK Parliament should play in relation to decisions made by the Joint Committee, particularly in the light of the role of the European Parliament.**

35. **Even allowing for exclusion of the UK from the negotiation and adoption of the proposed Decisions pursuant to Article 50(4) TEU, we are profoundly disturbed that the Government does not comment on the actual provisions of the proposed Council Decisions themselves. The Government's Explanatory Memorandum is limited to rehearsing by now familiar material on the draft Withdrawal Agreement. We ask the Government to confirm that this does not presage an indifferent approach to vital future scrutiny of EU legislation agreed during any post-exit transition/implementation period where the UK will be similarly absent from the Council. We would be deeply concerned by such an approach.**

36. **In default of the Government so doing, we have already identified above some provisions of interest in the Decisions and now set out some questions for the Minister as follows.**

26 The examination procedure

27 This is a certificate which would demonstrate that goods had originated in Northern Ireland under the Northern Ireland protocol.

37. In relation to the proposed Council Decision on signature:

- a) Article 3 states that: “Immediately after the signature of the Agreement, the Commission shall notify the other parties to the international agreements as referred to in Article 2(a)(iv) of the Agreement, that, subject to the entry into force of the Agreement, during the transition period, the United Kingdom is treated as a Member State for the purposes of those international agreements”. This ties in with the provision in Article 129 of the draft Withdrawal Agreement that “during the transition period, the United Kingdom shall be bound by the obligations stemming from international agreements concluded by the Union, by Member States acting on its behalf, by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article 2”. The footnote to that Article provides “The Union will notify other parties to this agreement that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements”. Our analysis is that these provisions do not remove the need for the third country concerned to agree or acquiesce in the UK receiving the benefit of rolled-over EU international agreements during the transition/implementation period established by the draft Withdrawal Agreement. Our scrutiny of recent proposals for EU international agreements suggests that this is not being made clear by the Government, even if it is accepted in practice. We ask the Government to inform us when signature of the draft Withdrawal Agreement takes place and so when notification to third countries commences.
- b) Although most EU laws, including the European Arrest Warrant, will continue to apply to the UK during a post-exit transition/implementation period, Article 185 of the draft Withdrawal Agreement states that Member States who do not wish to extradite their own nationals outside of the EU for reasons related to fundamental principles of national law, may refuse to surrender them to the UK immediately following its exit from the EU. Article 4 of the proposed signature Decision states that in respect of Article 185: “Those Member States that wish to avail themselves of the possibility foreseen in paragraph 2 of Article 185 of the Agreement shall inform the Commission and the General Secretariat of the Council thereof before 15 February 2019”. We ask whether the Government has received any informal indications yet of notifications submitted by other Member States by the deadline set? We require an undertaking that the Government will inform Parliament promptly of any notifications made. We also require the Government to inform us whether it intends to take reciprocal action under Article 185 by refusing to surrender UK nationals to Member States who have made a notification.

38. In relation to the proposed Council Decision on conclusion:

- a) Article 3(2) sets out the EU’s conditions for authorising the UK to bring into force an international agreement it has entered into in its own capacity during the transition/implementation period. How restrictive are these in the Government’s view? What does the Government think it will have to do

to show a “specific interest” that a particular agreement should enter into force or apply during transition? In respect of what kind of agreement might the Government envisage applying for an authorisation decision?

- b) Article 3(4) provides that such authorisation decisions will be made by implementing act. Article 3(5) states that the European Parliament should be kept informed of such decisions. The same process applies to bilateral agreements authorised in respect of the Northern Ireland, Cyprus SBA and Gibraltar Protocols. We ask the Government to confirm that it will keep the UK Parliament similarly engaged by depositing such implementing acts for scrutiny.
- c) Article 3(3) provides that “the United Kingdom shall notify the Commission of its intention to express its consent, in its own capacity, to be bound by an international agreement intended to enter into force or be applied during the transition period, in an area of exclusive competence of the Union”. This is the only direct obligation imposed on the UK by the proposed Decisions and seems unobjectionable as it facilitates the operation of Article 129(4) of the draft Withdrawal Agreement which is in the UK’s national interest. At a more general level we would welcome the Minister’s confirmation that the UK considers itself legally bound by these proposed Council Decisions, regardless of the UK’s exclusion from their adoption by Article 50(4) TEU and the basis on which it does so. This might become important if further negotiations require changes to proposed Council Decisions, including any additional obligations for the UK.
- d) We insist on an assurance that where the Decision provides implementing powers for the Commission in other areas of significant interest, for example in respect of residence documents for UK nationals, the Government will deposit the relevant documents for Parliamentary scrutiny.

39. As we mentioned previously, in retaining these documents under scrutiny we draw them specifically to the attention of:

- a) the International Trade Committee, in view of the relevance of the questions we ask in paragraph 38 (a) and (c) above; and
- b) the Home Affairs Committee, in the light of our questions at paragraph 37(b) above.

Implications of an Article 50 extension for the proposed Decisions

40. The Prime Minister in her [statement](#) to the House of Commons on 26 February 2019 outlined the following three commitments to Parliament:

First, we will hold a second Meaningful Vote by Tuesday 12 March at the latest.

Second, if the Government has not won a Meaningful Vote by Tuesday 12 March then it will—in addition to its obligations to table a neutral, amendable motion under section 13 of the EU Withdrawal Act—table a

motion to be voted on by Wednesday 13 March at the latest, asking this House if it supports leaving the EU without a Withdrawal Agreement and a framework for a future relationship on 29 March.

41. She added:

Third, if the House, having rejected leaving with the deal negotiated with the EU, then rejects leaving on 29 March without a withdrawal agreement and future framework, the Government will, on 14 March, bring forward a motion on whether Parliament wants to seek a short, limited extension to Article 50—and if the House votes for an extension, seek to agree that extension approved by the House with the EU, and bring forward the necessary legislation to change the exit date commensurate with that extension.

42. She then clarified that she meant an extension that would not go beyond the end of June 2019:

An extension beyond the end of June would mean the UK taking part in the European Parliament elections. What kind of message would that send to the more than 17 million people who voted to leave the EU nearly three years ago now? And the House should be clear that a short extension—not beyond the end of June—would almost certainly have to be a one-off. If we had not taken part in the European Parliament elections, it would be extremely difficult to extend again, so it would create a much sharper cliff edge in a few months' time.

43. Following a [debate](#), on 27 February Parliament [voted](#)²⁸ in favour of these commitments to allow Members a vote on the proposed Withdrawal Agreement by 12 March, no deal by 13 March and a “short extension” of the Article 50 process on 14 March, as incorporated in Yvette Cooper MP's amendment to the Government's motion.

44. **We ask the Government to clarify what changes it considers would have to be made to the text of the draft Withdrawal Agreement if the Article 50 process were to be extended, even for the short period envisaged by the Prime Minister. As obvious examples, we would identify the following Articles as clearly requiring consideration:**

- **Article 185 which states that the Withdrawal Agreement shall enter into force on 30 March 2019, but only if notification of the completion of internal procedures of both the EU and UK has been received;**
- **Article 126 which states that the transition period shall start on the date of entry into force of the Withdrawal Agreement and end on 31 December 2020; and**
- **Article 132 which states that the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to one or two years.**

We note that without changes to Article 185 at least, the Withdrawal Agreement would fall. We also ask for an urgent reply as to whether the Government agrees with us that such changes to the text of the draft Withdrawal Agreement require reconsideration and re-adoption of the proposed Decisions by the Council and resubmission to the European Parliament of the conclusion Decision.

45. The question of elections to the European Parliament in the event of an extension of time present legal as well as political complications. We therefore ask the Government to clarify:

- a) what it considers the UK's legal obligations to be in respect of the holding of such elections; and
- b) the extent to which any EU legal obligations to hold elections could be amended in order to obviate the need to hold European parliamentary elections during a short extension to the Article 50 period.

The draft Withdrawal Agreement

Overview of the draft Agreement

46. The draft Withdrawal Agreement comprises six Parts and three Protocols.

Part one: Common Provisions

47. This part includes territorial scope, a requirement that the Withdrawal Agreement be given the same “direct effect” and “supremacy” in the UK as applicable to EU law in Member States and some definitions used throughout.

Part two: Citizens' Rights

48. The provisions in this part essentially enable EU citizens resident in the UK and UK citizens resident in a Member State at the end of the transition/implementation period to continue to enjoy the bulk of the rights they presently enjoy relating to residence, family reunification, healthcare, pensions and other benefits. There are some exceptions. A notable omission is that UK citizens to whom these rights apply in one Member State will not enjoy free movement rights in other Member States.

Part three: Separation Issues

49. The draft Withdrawal Agreement provides for the winding down and disentangling of arrangements between the UK and the EU which will end after the implementation period in relation to: goods on the market; customs, VAT and excise procedures; ongoing Union judicial and administrative procedures; ongoing public procurements; data shared or processed prior to withdrawal; ongoing Member State cooperation on police, criminal, civil and commercial judicial issues; intellectual property and geographical indications; Euratom; and privileges and immunities.

Part four: Transition

50. This part creates a transition/implementation period up to 31 December 2020 during which EU law essentially applies to the UK to the same extent as it did before exit. The UK would not, however, participate in the making of that law, in the agencies and bodies of the EU, and in any new justice and home affairs proposals unless they amend, build on or replace existing measures in which the UK took part before exit day. EU law would be imposed on the UK by Qualified Majority Voting or consensus without there being any record or transcript of the proceedings, all of which would inevitably put the UK under the constitutional and legal authority of laws made by the other 27 Member States and the European Court of Justice (CJEU) during that period or as extended. This imposition of laws would extend across the entire competences provided for in the EU Treaties. The potential impact on the UK of EU legislation and laws adopted during that period, when legislative and other procedures could be accelerated should be not be underestimated. Even in the current situation where the UK can influence and participate as a Member State in EU law and decision-making, there is a substantial number of important EU legislative proposals which have not been cleared from Parliamentary scrutiny because of outstanding concerns based on the UK's national interest.

51. The transition/implementation period is extendable by a mutually agreed decision of the Joint Committee, subject to arbitration and potentially to the ruling of the CJEU.²⁹ This must be made by 1 July 2020, for one further fixed period of up to one or two years.³⁰ Thus the transition/implementation period could extend to 31 December 2022. This would be beyond the date of the next General Election which under the Fixed-Term Parliaments Act 2011 would be 5 May 2022. Such an extension would entail a further decision of the Joint Committee on the financial arrangements applicable, and (a) treating the UK as an ordinary third country in respect of EU programmes during any extension, and (b) capping UK agricultural support.

Part five: The Financial Settlement

52. EU budgetary law will continue to apply to the UK until the end of the current multiannual financial framework (MFF) which ends at the same time as the transition/implementation period (31 December 2020). If that period is extended, the UK and EU will negotiate a separate UK contribution to the EU budget (via the Joint Committee). The new, post-31 December 2020 MFF would not apply to the UK nor would the EU's Own Resources Decision which applies the UK rebate. The UK would be treated as a third country for budgetary purposes. The settlement also includes amounts outstanding from earlier commitments due after the end of the MFF (*reste à liquider*) and contributions to future liabilities of the EU, such as the pensions of EU civil servants.

29 Article 174 of the draft Withdrawal Agreement requires the arbitration panel to refer to the CJEU questions involving the interpretation of a concept of Union law or interpretation of a provision of Union law referred to in the Agreement.

30 Article 132 of the draft Withdrawal Agreement "Extension of the transition period" provides "1. Notwithstanding Article 126, the Joint Committee may, before 1 July 2020 adopt a single decision extending the transition period for up to one or two years".

Part six: Institutional and Final Provisions

53. This part includes provisions on the interpretation of the Agreement, the institutional structure of a Joint Committee and dispute resolution by arbitration. The governance provisions envisaged in the Political Declaration setting out the Framework for the Future Relationship between the EU and the UK are based on those found in this part.

The Protocol on Ireland/Northern Ireland

54. The Protocol includes the “backstop” provisions intended to prevent a hard border. It also includes commitments on upholding the Belfast Agreement and the Common Travel Area. Again, the Political Declaration cites these provisions as inspiration for a long-term tariff free area underpinned by “ambitious customs arrangements”. Article 182 of the draft Withdrawal Agreement makes clear that as the Protocol is an integral part of the Agreement, a vote for the draft Withdrawal Agreement as it currently stands (the draft of 14 November 2018 as unamended) is a vote for the Protocol as it currently stands and in the light of the advice of the Attorney General on that part of the draft Withdrawal Agreement.

The Protocol relating to the Sovereign Base Areas (SBAs) of the UK in Cyprus

55. This Protocol preserves existing arrangements by making the SBAs part of the customs territory of the Union, applying certain EU law (and CJEU jurisdiction) to them and specifying the checks to be made on persons crossing their external borders (other than with Cyprus).

The Protocol on Gibraltar

56. This covers preparation for the application of the Citizens’ Rights part of the draft Withdrawal Agreement, permitting EU law to be applied to Gibraltar Airport if the UK and Spain reach agreement, establishing cooperation between Spain and the UK on fiscal matters, environmental protection and fishing, and police and customs matters.

Government’s view of the draft Withdrawal Agreement

57. The Government’s [Explanatory Memorandum](#)³¹ on the proposed Council Decisions for signature and conclusion is largely descriptive of the process for adopting them and the substance of the draft Withdrawal Agreement. In terms of identifying policy implications, the Secretary of State limits himself to the text of the draft Withdrawal Agreement itself:

- He describes the financial settlement with the EU as “fair” and “honouring commitments the UK made during its period of membership and ensuring a fair deal for UK taxpayers”. He adds that the Government’s central estimate of the financial settlement, which has been assessed as reasonable by the NAO, is £35–39 billion.³²

31 Explanatory Memorandum, Secretary of State for Exiting the EU (Steven Barclay), dated 21 February 2019

32 The Minister adds that the Office of Budget Responsibility has assessed that the UK would have made net EU budget payments of around £10 billion per year between 2019/20 and 2023/24 had it remained an EU member. Additional costs associated with monitoring the citizens’ rights provisions in the Withdrawal Agreement and renewing intellectual property trademarks are estimated to total around £167.1m over 10 years.

- He says that the governance arrangements for the draft Agreement “provide legal certainty and clarity to citizens, businesses and organisations and respect the autonomy and integrity of both the UK’s and the EU’s legal orders, with disputes about the application or implementation of the Agreement resolved through a Joint Committee and an independent arbitration panel”.
- On the Northern Ireland Protocol, he comments that “It is explicit that this backstop arrangement is intended to be temporary, and that the UK could choose to seek to extend the Implementation Period rather than enter into the backstop”. He adds, with reference to the Political Declaration that “ It is the intent of both the UK and the EU to develop in good faith agreements giving effect to this relationship and to begin the next stage of negotiations as soon as possible. There is a shared determination to reach an agreement to establish alternative arrangements for ensuring the absence of a hard border on the island of Ireland on a permanent footing”.
- He considers that the proposed Decisions have no financial implications themselves but refers back to the [long-term economic analysis](#) the Government published in November 2018 of the proposed future economic partnership between the UK and the EU.

Issues of legal significance arising from the draft Withdrawal Agreement

58. We identify below key legal and governance issues arising from the draft Withdrawal Agreement and set out questions on these issues in the conclusions that follow.

Relationship between the Withdrawal Agreement and the Future Arrangements Agreement

59. The performance of obligations under the draft Withdrawal Agreement is not conditional upon the agreement of a Future Arrangements Agreement. Parties must use their “best endeavours” to reach and ratify in good time such an Agreement, based on the Political Declaration which sets out a programme to facilitate reaching agreement by the end of 2020.

Continued application of EU law

60. The continued application of EU law to the UK arising from the draft Withdrawal Agreement can be summarised as follows:

- EU law will apply during the transition/implementation period, but essentially without any formal UK participation in its making.
- EU law will apply after the transition/implementation period to protect the rights of EU citizens in the UK. This could extend for some considerable time.
- EU law also will apply after the transition/implementation period in relation to the Separation Issues and the Financial Settlement. Again, this could extend for a considerable time.

- EU law will apply extensively, particularly in Northern Ireland, under the “backstop” found in the Ireland/Northern Ireland Protocol.
- EU law in relation to goods, turnover taxes, agriculture and fisheries as well as veterinary and phytosanitary rules will apply in the Sovereign Base Areas of Cyprus.
- After the end of the transition/implementation period the CJEU will continue to determine the interpretation of EU law applicable under the draft Withdrawal Agreement by the mandatory reference procedure from the arbitration panel (see also CJEU jurisdiction relating to Citizens’ Rights addressed later in the Report).

61. Linked to the continued application of EU law is the requirement in Article 4 of the draft Withdrawal Agreement that the Withdrawal Agreement must have the same legal effect for the UK as EU law does for EU Member States—including the principles of direct effect (meaning that the agreement as such can be enforced by individuals in national courts if it meets certain conditions) and implicitly supremacy. The Article explicitly requires the UK to pass an Act of Parliament to give effect to the Withdrawal Agreement, referencing in particular “the required powers of judicial and administrative authorities to disapply ... domestic provisions” which are “inconsistent or incompatible” with the Agreement. This could include, subject to the drafting of the Bill to give effect to the Withdrawal Agreement, provisions which undermine the full repeal of the European Communities Act 1972 under section 1 of the European Union (Withdrawal) Act 2018.

The “backstop” arrangement to prevent border controls on the Irish border

62. The backstop is the core of the Protocol on Northern Ireland. The Protocol, including the backstop, is intended to be temporary and to apply unless and until it is superseded in whole or in part by a Future Arrangements Agreement, which the parties will use their best endeavours to achieve by 31 December 2020.

63. Under the backstop the UK will form a customs union with the EU (except for trade in fisheries and aquaculture products which await further agreement on fishing opportunities - which the parties shall use their “best endeavours to achieve by 1 July 2020).

64. The UK will conform to specific EU legislation on customs, including with respect to third countries. To provide a ‘level playing-field’ the UK commits to non-regression on EU environmental protection, labour and social standards, state aid and competition. The Protocol includes commitments which restrict the UK’s independence in respect of measures in agriculture that might be considered state aid, and will do the same in respect of defence, if the UK and EU have not agreed to a new defence and security partnership by the end of the transition/implementation period.

65. This customs union would be a practical barrier to the UK entering separate trade agreements on goods with third countries.

66. On the UK side of the customs union, in the “United Kingdom in respect of Northern Ireland”, specific additional EU legislation applies on customs, certain VAT and excise, and certain technical standards relating to goods.

67. UK authorities are responsible for implementing and applying EU law applicable under the Protocol but, additionally, where EU law continues to apply to the UK in respect of Northern Ireland the EU institutions and bodies shall have the same powers as they have under the Treaties, CJEU jurisprudence will apply, and the CJEU shall have preliminary reference jurisdiction.

68. EU law applicable to the UK in respect of Northern Ireland can be amended or replaced. However, new EU legislation that is not listed in the Protocol but is in its scope would need to be adopted by the Joint Committee, failing which the EU can take appropriate remedial measures.

69. The Protocol is subject to review and may be ended in whole or part by decision of the Joint Committee, which is also potentially subject to the jurisdiction of the CJEU.³³

70. The question of whether legally-binding changes to the backstop can be achieved is highly contentious and imminent. As indicated above, the draft Withdrawal Agreement has not yet been signed by both parties. Until it has been it would be possible for the UK and the EU to sign a revised version of the draft Withdrawal Agreement, albeit the European Parliament would need to consent to the revised text if it varied substantively from the earlier text.

71. An international agreement can be embodied in more than one instrument. It can also take several forms.³⁴ Therefore, were it politically impossible to agree to amend the text of the draft Withdrawal Agreement itself it would be possible to expand the existing Agreement by using another instrument. However, the overall Agreement, in however many instruments that embody it, should be consistent within itself. Otherwise it would be vulnerable to interpretation—by the CJEU during the transition/implementation period and (ultimately) by the arbitration panel thereafter.

72. An international agreement must be distinguished from an understanding.³⁵ The latter is not intended to be binding in international law and as such could not overturn the clear provisions of an international agreement. However, an understanding could amount to contextual material which can be used to interpret an agreement. The tools available to interpret an international agreement are set out in Articles 31–33 of the respective Vienna Conventions on the [Law of Treaties](#) and on the [Law of Treaties between States and International Organizations or between International Organizations](#). However, whatever the interpretative material available, it can only be interpretative and has legal effect only to this extent. It cannot have the effect of contradicting the terms of the agreement itself.

33 Article 174 of the draft Withdrawal Agreement sets out when the arbitration panel must make a reference to the CJEU.

34 Vienna Convention on the Law of Treaties, Article 1(a) defines a Treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” This is not directly applicable to the Withdrawal Agreement which is not “concluded between States”. The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has an equivalent definition but is not yet in force. This would have applied to the Withdrawal Agreement, but it is not yet in force. In any event these are indicative of the current approach of international law.

35 For example, embodied in a Memorandum of Understanding.

The Institutional Structure

73. This is based on a Joint Committee of representatives of the two parties, jointly chaired, which acts by consensus. It is the forum for supervision of the Withdrawal Agreement, including the backstop. It has important powers including: amending within defined parameters the substantive provisions of the Withdrawal Agreement, extending the post-exit transition/implementation period and bringing the backstop to an end. It provides a forum to discuss and resolve disputes prior to invocation of any formal dispute resolution.

Dispute Resolution

74. The draft Withdrawal Agreement includes provision for an arbitration panel to consider disputes that are referred to it by the Joint Committee. Where invoked, this is undertaken by an arbitration panel of five, two nominated by each party and a chairperson from a list agreed by both. It is encouraged to act by consensus but can act by majority. Questions of interpretation of EU law must be referred to the CJEU for a binding ruling.

75. One question raised has been whether interpretation of the review mechanism at Article 20 of the Northern Ireland Protocol (enabling the parties, by joint decision in the Joint Committee, to determine that some or all of the Protocol's provisions are no longer necessary) would be subject to arbitration. There is a lack of clarity on this point. The House of Lords Committee [Report Brexit and the Withdrawal Agreement](#) concludes that the decision of the Joint Committee to end the backstop, wholly or partially, is amenable to arbitration.³⁶ In his [letter](#) of legal advice dated 13 November 2018, the Attorney General states that Article 20

does not expressly state that the review mechanism is intended to be arbitrable under the governance provisions of the Withdrawal Agreement, but I consider that the better view is that it is.³⁷

76. But there is no further analysis underpinning that view. Equally the EU's [Fact Sheet "Brexit Negotiations: What is in the Withdrawal Agreement?"](#) does not comment on whether arbitration could be used for disputes about Article 20, while it does explicitly make the point that arbitration is available for disputes about state aid, competition and 'level-playing field' provisions.³⁸

Supervision and Enforcement of the Withdrawal Agreement

77. Full EU supervision applies during the transition/implementation period. Thereafter there are areas where the EU institutions, particularly the Commission, retain supervision powers. Failure of a party to comply with the Withdrawal Agreement can lead ultimately to a fine and/or to the injured party suspending either parts of the Withdrawal Agreement or parts of any other Agreement between them—most likely any Future Arrangements Agreement.

36 Paragraph 179

37 Letter from the Attorney General to the Prime Minister dated 13 November 2018

38 EU Factsheet on the Protocol on Ireland and Northern Ireland dated 14 November 2018, available at: http://europa.eu/rapid/press-release_MEMO-18-6423_en.htm [accessed 6 March 2019]

Court of Justice Jurisdiction

78. The CJEU retains its full jurisdiction during the transition/implementation period, including on the interpretation and application of the Withdrawal Agreement. This bites notably on the Financial Settlement which is in force during that period. In this respect it is significant that the CJEU also retains jurisdiction after the transition/implementation period in respect of cases brought before then, so that a case brought before the end of that period continues afterwards (Article 86). In addition:

- The CJEU retains a binding jurisdiction to rule on the Citizens' Rights provisions for a period of 8 years from the end of the transition/implementation period.
- The CJEU retains jurisdiction to rule on those EU financial provisions which continue to apply after the transition/implementation period in relation to the Financial Settlement.
- The arbitration panel must refer questions of the interpretation of EU law applicable under the Withdrawal Agreement to the CJEU and is bound by the CJEU ruling.
- The CJEU has jurisdiction in respect of EU legislation applicable to Northern Ireland during the backstop and to Cyprus.

Roll over of EU External Agreements

79. During the transition/implementation period, the UK is bound by the obligations to third countries in any external agreement which the EU has entered into (with or without Member States also having entered into them - although the precise extent is unclear in the draft Withdrawal Agreement) and any agreements entered into by Member States on behalf of the EU. The UK does not automatically gain the benefit of such agreements. During this period the UK may negotiate and enter into international agreements in areas of EU exclusive competence provided they do not come into force (unless authorised by the EU).

80. We urgently draw to the attention of the House the full extent to which EU law will continue to apply to the UK under the terms of the Withdrawal Agreement, in particular the requirements in Article 4. We remind the Secretary of State and the Prime Minister of the repeated statements of the Government that the UK will control its own laws and of the provisions of the European Union (Withdrawal) Act 2018 including those repealing section 1 of the European Communities Act 1972. In the light of this, we call on them to explain to Parliament urgently how the Government intends to give effect to the obligation to ensure that the Withdrawal Agreement has direct effect and supremacy in UK law, including the disapplication of any conflicting domestic legislation passed by the UK Parliament after Brexit.

81. We note the legal advice of the Attorney General which has already been provided on the question of the backstop, though not on other aspects of the draft Withdrawal Agreement. In addition to the well-known concerns about the indefinite duration of the backstop, we are concerned about whether, as the text stands, a decision of the Joint Committee not to terminate the backstop "by mutual consent" pursuant to the Article 20 "review mechanism" is amenable to arbitration and therefore potentially

to the jurisdiction of the CJEU under the Agreement. The Attorney General considers in his letter to the Prime Minister of 13 November 2018³⁹ that it is the better view that it is, but we are not reassured. In the absence of any definitive provision in the draft Withdrawal Agreement, we consider the matter remains unclear. We ask the Government to clarify whether this is one of the issues on which it is seeking changes or clarification from the EU.

39 See the Attorney General's [letter](#) of 13 November 2018. "Article 19 does not expressly state that the review mechanism is intended to be arbitrable under the governance provisions of the Withdrawal Agreement, but I consider that the better view is that it is". See also the Annex to this Report.

3 Conclusion

82. Our scrutiny of the proposed Council Decisions for authorising the EU to sign and conclude the Withdrawal Agreement and the evidence we have gathered thus far in our “UK exit from the EU” inquiry have led us to identify key points of legal significance relating to the text of the draft Withdrawal Agreement itself. With this Report, we also draw the attention of the House to substantial concerns about the conduct of the EU exit negotiations.

83. One of the most striking themes to have emerged from our evidence so far concerns the way in which the UK Government itself has handled the process of negotiation internally. This seems to us to have left the Government vulnerable to internal division and therefore undermining its own negotiating position with the EU and potentially compromising the British position under the Withdrawal Agreement itself. These conclusions are only provisional as our inquiry is ongoing but we are concerned by what the evidence is showing us so far.

84. We recognise that we are reporting on these documents in a fast-moving situation and we are aware that the results of the Attorney General’s current negotiations with the EU are critical given the clear obligations of the Attorney General to Parliament. We consider it therefore imperative that the results of these negotiations are made available to Parliament no less than 48 hours before the debate scheduled to take place no later than 12 March in time for it to have the opportunity to give proper consideration before the second Meaningful Vote on the draft Withdrawal Agreement promised by the Prime Minister and expected to take place on that day.

85. We urge the Government, through the Secretary of State and the Prime Minister, to authorise immediately the publication of the draft Withdrawal Agreement and Implementation Bill so that Parliament can assess how the draft Withdrawal Agreement is intended to be enacted, including its effect on the express repeal of the European Communities Act 1972, under section 1 of the European Union (Withdrawal) Act 2018.

86. At the time of writing there remains uncertainty about when, if at all, the process for adopting and implementing both proposed Decisions will be completed. We therefore retain the documents under scrutiny whilst seeking further information from the Secretary of State on the specific conclusions and questions set out in the body of this Report. Given the urgency of the current situation, we expect a response to this Report before the next European Council to be held on 21–22 March.

87. In the meantime, we draw this Report and these documents to the attention of the House, in advance of the second “Meaningful Vote” expected to take place on or before 12 March. We hope that doing so will help to inform both debate in the House and our wider audience as well as Members of Parliament who, as individuals and as a collective, have weighty and urgent decisions to make in the coming days and weeks regarding the future of our nation and its relations with the EU.

4 Annex

88. This annex comprises a list of explanatory documentation produced by the EU and UK on the text of the [Withdrawal Agreement and Political Declaration](#), agreed between lead Negotiators on 14 November, which was further [endorsed](#) by Leaders of the EU on 25 November 2018.

89. UK Government's explanatory documents on the Withdrawal Agreement:

- The Government Withdrawal Agreement [Explainer and Technical Note](#) on Articles 6–8 of the Northern Ireland Protocol
- [“EU Exit: Legal Position on the Withdrawal Agreement”](#), Government Cm Paper, 9747, 3 December 2018
- [“EU Exit: The Attorney General’s advice to the Cabinet on the Withdrawal Agreement and the Protocol”](#), 5 December 2018 (consisting of his letter to the Prime Minister of 13 November 2018)
- [Exchange of letters between the Prime Minister and the Presidents of the European Council and European Commission](#), 14 January 2019
- [Letter from the Attorney General to the Prime Minister on the Northern Ireland Protocol](#), 14 January 2019

The European Commission's explanatory material on the Withdrawal Agreement:

- The European Commission's [Factsheets](#) and [Slides](#) on the Withdrawal Agreement and NI Protocol
- See 14 January 2019 exchange of letters above.

Formal minutes

Wednesday 6 March 2019

Members present:

Sir William Cash, in the Chair

Martyn Day	Mr David Jones
Richard Drax	Andrew Lewer
Marcus Fysh	Michael Tomlinson
Kate Hoey	David Warburton
Darren Jones	

Scrutiny Report

Draft Report (*The draft EU/UK Withdrawal Agreement: key legal and political questions*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 89 read and agreed to.

Annex agreed to.

Resolved, That the Report be the Fifty-eighth Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 13 March at 1.45pm]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the [inquiry publications page](#) of the Committee's website.

Wednesday 16 January 2019

Question number

Rt Hon Mr David Davis MP, Former Secretary of State for Exiting the European Union

[Q1–70](#)

Wednesday 30 January 2019

Mr Steve Baker MP

[Q71–118](#)

Wednesday 6 February 2019

Rt Hon Dominic Raab MP

[Q119–179](#)

Suella Braverman MP

[Q180–241](#)