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The European Scrutiny Committee

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Summary

On 29 March 2017 the Prime Minister, the Rt Hon Theresa May MP, wrote to the President of the European Council to trigger Article 50 of the Treaty on European Union in respect of the intention of the United Kingdom to withdraw from the European Union. In terms of timing, the UK is therefore now midway through the negotiation process.

This Committee has a clear role in monitoring the negotiations and exploring concerns as they arise, especially as regards legal and scrutiny issues which do not fall into the remit of any other committee. This Report therefore concentrates on legal concerns and on the implementation of EU legislation during the transitional arrangement.

It examines:

- the development and scrutiny of EU legislation during the implementation period
- issues arising regarding possible dispute resolution mechanisms during the implementation period and after exit; and
- questions relating to UK domestic legislation.

We recognise that among many uncertainties is the future shape of parliamentary scrutiny of EU legislation and we look forward to exploring with others what form this should take.

Conclusions and recommendations

The transitional arrangement

1. We support the Government in its efforts to seek greater rights of representation on EU committees during the implementation period. (Paragraph 50)

2. More information is needed about the Government's proposals for the Joint Committee during the transitional arrangement. In particular, we consider that greater detail is required on what unilateral safeguards would be available to the UK if it had to apply new EU law which it considered to be detrimental. The need for such safeguards will become more pressing the longer the actual length of the implementation period. We support the Government's intention to seek assurances that new legislation would not be fast-tracked to the detriment of the UK during any transition period and ask how this could be contemplated given the repeal of the European Communities Act 1972 in the House of Commons. (Paragraph 51)

3. We ask the Government to demonstrate how the Joint Committee will ensure a high level of transparency and accountability. (Paragraph 52)

4. We also ask the Government to explain how the Joint Committee would deal with the large amounts of tertiary EU legislation which the UK would have to implement during the transition, given that the time between publication and entry into force of such acts is usually only a few months. This should include not only the manner in which these would be dealt with in the Joint Committee under the Withdrawal Agreement, but also how Parliament would be given a meaningful opportunity for scrutiny of these measures when it can no longer rely on the Government's representatives to vote on these measures in the Comitology system and the Council. (Paragraph 53)

5. The possibility of either an extension or an early termination of the implementation period raises the important question of how such a change would be triggered, including whether either step would require an Act of Parliament in the UK. We ask the Government to explain how legal provision could be made for early termination or extension of the transitional arrangement. (Paragraph 54)

6. We will closely follow the financial provisions of the Withdrawal Agreement with respect to the UK's obligations—if any—under the next Multiannual Financial Framework. We note that the Chancellor explicitly told us that such "financial implications" above and beyond the estimated £35 to £39 billion cost of the financial settlement agreement with the European Commission last December, are a possibility. (Paragraph 55)

7. We also note that the UK's exclusion from the EU budget from 1 January 2021 would have knock-on effects on the transitional arrangement more generally, as it presupposes that alternative arrangements are in place by that date on areas of cooperation with the EU that require administrative arrangements and a financial contribution (for example with respect to the UK's contributions to the

administrative costs of the EU agencies, or the UK's continued participation in EU-funded programmes, like the next Framework Programme for Research or the European Defence Fund). (Paragraph 56)

8. We ask the Government to clarify if it is indeed its intention to have the various agreements necessary to be able to extricate itself from the EU budget in place by the end of 2020, thereby avoiding any interruption to the UK's 'standstill' transition in EU market access terms and its participation in specific EU-funded programmes from January 2021 onwards. (Paragraph 57)

9. *We recommend that the Government engage in dialogue with us and our counterparts in the House of Lords on how parliamentary scrutiny of EU legislation may best be achieved during the transition period.* (Paragraph 58)

10. *Further, we recommend that the Government seek to create a mechanism which amounts to an opt out during the implementation period for any new EU law which requires unanimity amongst the Member States.* (Paragraph 59)

11. *We note the Secretary of State for Exiting the European Union's position that to prepare for circumstances in which transition provisions were not to be effective on 30 March 2019 would be the act of a responsible Government, and we urge the Government to act responsibly by continuing actively to prepare border and other arrangements for the possibility of no deal having been reached and adopted by 30 March 2019 and make sure the necessary resources are available to do so.* (Paragraph 60)

Dispute resolution after exit

12. The question of whether CJEU jurisdiction is direct or indirect is central to the Government's position on suitable dispute resolution for the EU-UK Withdrawal and Future Relations agreements. However, little certainty has been provided about this distinction and we ask the Government to clarify. If there is a requirement to refer an issue to the CJEU and its interpretation is binding, there would be little difference in substance between "direct " and "non-direct" jurisdiction. It would be otherwise if the requirement was limited to taking account of the decisions of the CJEU, the ability to refer a matter to the CJEU was voluntary, or the decision of the CJEU was not binding. (Paragraph 120)

13. We agree with the Prime Minister when she recognised as a "hard fact" in her Mansion House speech the potential for ongoing influence of the Court of Justice on the UK, irrespective of the choice of dispute resolution mechanisms after UK exit from the EU. But we welcome, in particular, her emphasis throughout the speech on the need to respect the sovereign legal orders of both the EU and UK by having an "independent arbitration mechanism" as part of a future relations agreement. (Paragraph 121)

14. We also consider that the example of Switzerland in its governance negotiations with the EU leads to the apparent conclusion that it will be difficult for the UK to remain wholly unaffected by judgements of the CJEU in its relations with the EU after

exit. However, the Swiss example is based on a completely different constitutional relationship with the EU and furthermore does not take account of the repeal of section 3 of the European Communities Act 1972. (Paragraph 122)

15. This is in part due to the principle of legal autonomy imposed by the CJEU upon the EU. (Paragraph 123)

16. The Prime Minister said in her Munich and Mansion House speeches that the UK would "respect the remit" of the CJEU in respect of any future participation in agencies. We ask the Government to clarify what this means and whether it still thinks the example of the Swiss association agreement in relation to EASA holds good in the light of recent developments in EU-Switzerland governance negotiations. (Paragraph 124)

17. Future EU-UK cooperation on aspects of the "Area of Freedom, Security and Justice" based on the principles of mutual trust and recognition will be difficult to divorce from the jurisdiction of the CJEU. However, we note the example of the EU Iceland and Norway Agreement on Surrender (equivalent to the European Arrest Warrant) which involves a diplomatic solution to disputes. (Paragraph 125)

18. The progress of negotiations to date and the logic of close ongoing relations between the UK and the EU indicate that there is little prospect of a dispute resolution mechanism that is anything less than binding arbitration. (Paragraph 126)

19. The European Parliament holds some key cards in the process of putting both a Withdrawal and Future Relations agreement in place. It could either withhold its consent or request an Opinion from the CJEU on those agreements compatibility with EU law. Bearing that in mind, we ask the Government to set out its analysis of the model for future relations dispute resolution outlined in the EP resolution approved on 14 March. (Paragraph 127)

The role of the CJEU during the transition period

20. Some argue, but we think wrongly, that compulsory and exclusive CJEU jurisdiction during the implementation period might be justified in respect of the continuation of existing EU legislation, as the Government has itself recognised. But we question whether it should extend to any other parts of the Withdrawal Agreement. In this regard, we ask the Government to clarify what the practical effect might be of the proposed stipulation in Article 126 of the Commission's draft legal text of 28 February 2018 that it should also extend to the interpretation and application of other provisions of the Withdrawal Agreement. (Paragraph 140)

21. Far from incorporating a safeguard mechanism to protect UK interests as referred to by the Secretary of State for Exiting the European Union in his Teesport speech, the EU has proposed mechanisms to sanction the UK if it does not follow the rulings of the CJEU during the implementation period. These include suspending the benefits of participation in the internal market. We ask the Government whether it is confident that agreement can be reached on this aspect of the proposed transitional arrangements. (Paragraph 141)

22. We note that the Prime Minister and Brexit Secretary have both expressed the hope that during the implementation period the exclusive jurisdiction of the CJEU might be phased out and a dispute resolution mechanism reflective of future EU-UK relations phased in. We believe they are right. (Paragraph 142)

UK domestic legislation

23. As we have already indicated in correspondence with the Prime Minister, we do not consider that the UK domestic courts should be given a power after the UK's exit from the EU to disapply pre-exit primary legislation. This was a requirement of the UK's membership of the EU. To allow such a power to persist after the withdrawal of the United Kingdom from the EU would be inconsistent with the doctrine of Parliamentary sovereignty and therefore constitutionally improper. (Paragraph 159)

24. The continuation of this power is even more questionable in the light of the uncertainty as to its scope in the Withdrawal Bill as currently drafted. Our concerns have not been alleviated by the Prime Minister's response and we look forward to the further response from the Government on this issue. (Paragraph 160)

25. We ask for an explanation from the Secretary of State for Exiting the EU as to how it is proposed to entrench in UK law the citizens' rights provisions of the Withdrawal Agreement and his assessment of how robust that will be if challenged. (Paragraph 161)

26. We ask the Government to set out its legislative plans for reapplying CJEU jurisdiction during the transition period. In this respect, there appears to be no need for both clause 9 of the current European Union (Withdrawal) Bill and likely provisions of the forthcoming Withdrawal and Implementation Bill, and we ask the Government to explain its approach to these two provisions. (Paragraph 162)

1 Introduction

1. On 29 March 2017 the Prime Minister, the Rt Hon Theresa May MP, wrote to the President of the European Council to trigger Article 50 of the Treaty on European Union, giving notice of the intention of the United Kingdom to withdraw from the European Union. Article 50 provides a default of two years for negotiations in such circumstances before the intention to withdraw comes into effect, meaning that the Prime Minister signalled a leaving date of 29 March 2019.

2. Article 50 makes provision as follows: "in the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that state setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". Article 50 enables the United Kingdom to leave the European Union and two years are allowed for negotiations on the terms of withdrawal. It is to be noted that Article 50 imposes an obligation only on the EU to negotiate in accordance with the terms of the guidelines. It does not require the departing Member State to accept the provisions of the guidelines, nor does it empower the EU unilaterally to lay down the terms of withdrawal. The United Kingdom has the intrinsic constitutional right following the enactment of the European Union (Notification of Withdrawal) Act 2017 to trigger Article 50 and the right on its own terms to repeal the European Communities Act 1972, including sections 2 and 3 of that Act.

3. In terms of timing, the UK is therefore now midway through the negotiation process. In this Report we take account of some of the key developments since March 2017 and of the issues raised, ahead of the meeting of the European Council on 22/23 March where the EU's guidelines for the opening of negotiations on the overall understanding of the framework for the future relationship between the UK and the EU will be decided and while negotiations on both the initial separation issues[1] and the transitional arrangement for the immediate post-Brexit period are still ongoing. It is important to be clear that the Joint Report published on 8 December 2017 on the first phase of negotiations under Article 50 is (a) conditional on the principle that "nothing is agreed until everything is agreed" including the financial settlement and the measures relating to the border between Northern Ireland within the United Kingdom and Ireland and (b) that the Joint Report is not legally binding, nor is the draft legal text which the European Commission published unilaterally on 28 February 2018 and which contained many assertions which the Government has rejected.

4. It is important to be clear that the Prime Minister's proposal for an implementation or transition period of up to two years following March 2019, also under discussion with the European Union, means that there are two distinct periods to be considered in analysing the issues at stake in the negotiations: the implementation period beginning immediately after March 2019 and the future relationship once that period has expired.

Role of this Committee

5. The European Scrutiny Committee considers the legal and political importance of EU documents and related issues. Since the referendum we have been focussing our

1 The most high profile "phase 1" separation issues were citizens' rights, the financial settlement and the question of the border on the island of Ireland.

attentions on the implications for the UK of new EU legislative proposals in the light of Brexit. We have raised questions with the Government on a wide range of issues, drawing attention to matters which need to be resolved as part of the withdrawal process. This experience and expertise gives us a clear role in monitoring the negotiations and exploring concerns as they arise, especially as regards legal and scrutiny issues which do not fall into the remit of any other committee. For this reason we have concentrated in our Report on legal concerns and on the implementation of EU legislation during the transitional arrangements to ensure that we make our distinctive contribution to analysis of the negotiations.

Evidence base

6. To inform our Report we have taken evidence from the Chancellor of the Exchequer (Philip Hammond MP), the Secretary of State for Exiting the European Union (David Davis MP), the Minister for Immigration at the Home Office (Caroline Nokes MP), the Parliamentary Under Secretary of State at DExEU (Robin Walker MP) and the UK Permanent Representative to the European Union (Sir Tim Barrow). We have also drawn upon the responses from Ministers to our questions on a wide range of documents. We commend the transcripts of our evidence sessions and the weekly scrutiny reports and correspondence with Ministers, published on our website, as a rich source of information on many aspects of Brexit beyond those covered in this Report.

2 The transitional arrangement

The post-Brexit transitional arrangement

7. Under Article 50, the European Union Treaties will cease to apply to the UK on 29 March 2019, at which point the UK will become a "third country" vis-à-vis the EU. This means that, firstly, the UK will no longer be able to rely on a variety of public policy functions currently exercised wholly or partially by the EU (e.g. trade policy; state aid investigations; issuance of licences to airlines based abroad). This requires additional resources and infrastructure. Similarly, the Government has to convert all EU law into UK law, ready to take effect when the former ceases to apply, i.e. on 29 March 2019.

8. Secondly, as soon as it becomes a "third country" vis-à-vis the EU, the UK will have a fundamentally different relationship with the Union. This change will be most substantial for matters of trade. Within the EU's internal market, there is an underlying principle of mutual recognition (especially for trade in goods), underpinned by statutory harmonisation on matters such as tariffs, VAT and regulatory standards. These structures are backed up by extensive powers for the European Commission and the European Court of Justice to monitor and enforce compliance with EU law. Mutual recognition, where it applies, allows goods and services produced or offered in one EU country to be sold in any other, without the need for the business to establish a separate legal entity in other Member States and — where goods are concerned — without customs and regulatory controls taking place at intra-EU borders.

9. When the UK leaves the EU, it will cease to have an obligation to implement EU law, and no longer be subject to the powers of the Commission or Court. Any goods exported to the EU would have to meet EU standards, with compliance subject to customs and regulatory controls when they enter the Union's territory. Individual Member States have more leeway to permit, ban and regulate cross-border provision of services from non-EU countries since free movement of services is more complex and less developed within the EU than is the case with goods.

10. The impact of that shift to third country status would be that as a result of leaving the Customs Union, the UK and the EU will have to establish customs controls on goods going in either direction to collect customs tariffs and, in the future, apply rules of origin under any free trade agreement that may be negotiated and collect import VAT, since the UK will have left the EU's common VAT system that allows VAT to be collected on cross-border purchases without border controls.

11. As a result of leaving the Single Market, broadly speaking, the UK will no longer benefit from the automatic recognition of its regulatory frameworks for goods and services by the remaining Member States. This in turn means that border controls on movements of goods (e.g. product safety checks for food, pharmaceuticals, chemicals and cars) will have to be reimposed unless there is mutual recognition of standards and/or of conformity assessment. Similarly, providers of services which are subject to Single Market legislation will lose their automatic ability to provide such services across the EU from a UK base, with ability to provide services cross-border instead of being determined on a case-by-case basis based on the legislation of the Member State of the customer.

12. To avoid these consequences, early in the negotiation process, the Prime Minister made it clear that she wished to seek a transitional arrangement.[2] Negotiations on this began on 5 February 2018, with the aim of concluding before the European Council on 22-23 March. The period during which this arrangement would last has been referred to variously as a transition or implementation period. In this Report we generally refer to it as the implementation period.

13. It is fundamental in these negotiations that nothing is agreed until everything is agreed. We note the Secretary of State for Exiting the European Union's comment that

> It is always possible—highly improbable, let me be plain, but always possible—that the deal will come apart at the end, for some wholly unpredictable reason. You have to be ready. A responsible Government have to be ready for that outcome as a matter of good practice.[3]

14. However, the European Commission have adopted a unilateral approach and in February 2018 produced a draft legal text for the transitional arrangement, based on guidelines provided by the European Council in December 2017[4] and more detailed 'negotiating directives' by the General Affairs Council in January 2018. A discussion paper produced by the Government later that month effectively confirmed that the UK has accepted most of the EU's propositions, while seeking modifications in specific areas. In relation to the European Council's initial guidelines in April 2017, it is to be noted that they are proposing requirements on the UK which may not be wholly consistent with the UK's rights under Article 50.

15. During the implementation period the UK accepts that it will in principle continue to be bound by EU law as if it were still a Member State, including new EU legislation which only takes effect during this time.[5] Effectively, "the United Kingdom will continue to participate in the Customs Union and the Single Market (with all four freedoms[6]) during the transition", as well as Euratom. Moreover:

- EU law would have the same legal effects during the implementation period as it did while the UK was a Member State, i.e. primacy and direct effect would continue to apply.[7] However, it should be noted that the House of Commons

2 In her Lancaster House speech of 17 January 2017, the Prime Minister said: "We believe a phased process of implementation, in which both Britain and the EU institutions and member states prepare for the new arrangements that will exist between us, will be in our mutual self-interest. This will give businesses enough time to plan and prepare for those new arrangements."

3 Oral evidence taken on 6 March 2018, Q266

4 The European Council of 27 adopted its initial guidelines for the Brexit negotiations in April 2017. It also included a single paragraph on a possible transition period: "To the extent necessary and legally possible, the negotiations may also seek to determine transitional arrangements which are in the interest of the Union and, as appropriate, to provide for bridges towards the foreseeable framework for the future relationship in the light of the progress made. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms. Should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply."

5 However, new non-amending JHA measures would not apply to the UK. It would only retain the right to opt into measures which amend an existing measure in which the UK already participates.

6 Goods, services, capital and workers.

7 Although the UK's paper maintains the Commission proposal that "Union law (…) shall deploy in respect of and in the United Kingdom the same legal effects as those which it deploys within the Union", but also states that "the UK also wishes to discuss the means by which Union law will apply to the UK during the Period, recognising that the UK will no longer be a Member State and its legislature will no longer be a national parliament of the EU".

has already passed on third reading the Withdrawal Bill which repeals as from 29 March 2019 the whole of the European Communities Act 1972, including sections 2 and 3. As a consequence, the rights and obligations of the United Kingdom as a Member State of the European Union will cease from that date, and the United Kingdom will no longer be subject to the jurisdiction of the Court of Justice of the European Union;

- The UK would no longer have a right to political representation or a vote in the EU institutions, meaning the Government would "no longer participate in or nominate or elect members of the EU institutions, nor participate in the decision-making of the Union bodies, offices and agencies". Although the Government's intentions towards the UK's fisheries during any implementation period remain unclear, if the UK were to follow the policy, this would mean the UK having to accept binding decisions on the policy and quotas without any say;
- The UK could potentially have to accept fines handed down by the CJEU; and
- The EU's budgetary, supervisory, judiciary and enforcement instruments and structures would continue to apply, including UK acceptance of the jurisdiction of the Court of Justice as if the UK were still a Member State.

16. We understand the Government's desire for a transitional arrangement post March 2019. In this chapter we examine some of the issues which have yet to be resolved in this part of the withdrawal negotiations.

UK institutional representation

17. The European Commission's final negotiating mandate for a transitional arrangement would allow the UK to send a representative to a meeting of expert groups and Comitology committees of the European Commission (or analogous committees within the EU's agencies) at the EU's explicit invitation, where UK attendance was considered necessary if one of two conditions was met:

- the discussion concerned individual acts to be addressed to UK or to UK natural or legal persons (i.e. a decision to award funding to a British organisation); or
- the presence of the UK was considered necessary "for the effective implementation of the acquis during the transition".

18. We note, however, that there would be no generalised right to act as an observer or even to be consulted, and the UK would not have a vote where it was invited to attend. In addition, the exemptions would not apply to other EU bodies such as meetings of the Council or its working parties.

Application of new EU law

19. Subject to the condition that "Nothing is agreed until everything is agreed", in principle, all EU law that takes effect during the implementation period will also have to be applied in the UK (even if it is adopted after the Government loses its seat on the Council of the EU). If the UK could effectively "freeze" the acquis as it applies on 29 March 2019 but retain access to the Single Market as if it were a Member State during the

implementation period, it could in theory seek to gain a competitive advantage as it would not have to apply new regulations (an option not available to the remaining Member States).

20. When the Government published its proposals for the transitional arrangement in February, they included a safeguard mechanism embedded in a UK/EU Joint Committee. Among the specific tasks the Government proposes for this Committee are that it should:

> consider (at the request of one or both of the parties) and if necessary take a decision concerning any of the following matters:
>
> (a) determining whether new acts are within the scope of this Part;
>
> (b) determining whether any further adaptations to new acts are necessary;
>
> (c) resolving any other issues concerning the proper functioning of this Part.
>
> In relation to (c) above, if the matter cannot be resolved, the Joint Committee should be tasked with examining all further possibilities to maintain the proper functioning of this Part and taking any decision necessary to this effect (within a specified period of time).[8]

21. The crucial element of the Government's proposal for a UK-EU Joint Committee would be its power to decide that new EU legislation did not fall within the scope of the transitional arrangements (and would therefore not have to be applied in the UK), and to resolve "any other issues concerning the proper functioning of this Part". This would include cases where the UK accepts that new EU legislation does fall within the scope of the transitional arrangements, but objects to its substance.

22. The Government's text for the operation of this mechanism under the transitional arrangement is very vague, and does not make clear whether the UK is seeking a similar unilateral right to that under the EEA Agreement to refuse to implement new EU law.

23. By contrast, the European Commission draft for the Withdrawal Agreement, in article 165, provides that the EU could unilaterally "suspend certain benefits deriving for the United Kingdom from participation in the internal market" if the UK—in the EU's view—has not "fulfilled" its obligations under a judgement from the Court of Justice (either as a result of an infringement procedure under article 258 TFEU or an order for interim measures under article 279 TFEU).[9] The mechanism by which the EU would take such a

8 UK Government, Draft Text for Discussion: Implementation Period, 7 February 2018

9 Article 165 of the Withdrawal Agreement does not go as far as the Commission draft for the transition arrangement published two weeks prior, which included a footnote (on a safeguard mechanism saying that the EU should be allowed to "suspend certain benefits deriving for the United Kingdom from participation in the internal market ***where it considers that referring the matter to the Court of Justice of the European Union would not bring in appropriate time the necessary remedies***" (our emphasis).

'suspension' decision is not described.[10] This is in addition to a general "non-compliance" mechanism, under article 163, which allows both the UK and the EU to suspend parts of the Withdrawal Agreement if the Court of Justice makes a finding of non-compliance against the other Party.

24. When we asked the Chancellor of the Exchequer about the issue of new EU legislation during the implementation period, he assured us that "we have very good visibility of the pipeline of potential legislation, and, in this case, the relatively slow pace at which the EU sausage machine grinds works in our favour".[11] He considered it "quite unlikely that we will be presented with legislative proposals that come into force during the intended implementation period, and of which we are completely unsighted". Nevertheless, he went on to say that:

> One issue that we are seeking to clarify for the implementation period is a good-faith assurance that short-cut processes won't be adopted to fast-track legislation that would clearly be discriminatory against us during this period. That I think is the only real, serious risk faced, and we think that the current duty of sincere co-operation would preclude such a course of action.[12]

25. We discuss the role of the CJEU in dispute resolution during the implementation period in chapter 5 below.

Types of new EU legislation during the implementation period

26. If the European Council were to succeed in its proposals, then during the implementation period, the UK would be under a legal obligation to continue applying EU law as if it were still a Member State. That includes legislation currently being negotiated, while the UK is still a member of the Council. However, it is questionable how strong the UK's influence within the Council will be as the date of EU exit comes closer, which could lead to an increase in new legislation it has to implement during the transitional arrangements that the Government did not support (especially in instances where it can be outvoted under QMV).

27. New EU legislation during the implementation period will broadly fall into two categories:

(a) Legislative proposals published before March 2019

28. Firstly, there is the question of EU legislation proposed before the UK's exit, including proposals the Committee currently has under scrutiny. There will be two categories:

10 In an earlier Commission draft for the legal text of the transition, it included a footnote on a more draconian safeguard mechanism if the UK does not meet its obligations under the Withdrawal Agreement, including any decision not apply new EU law on the same basis as the remaining Member States. This would have allowed EU to shut the UK out of the parts of the Single Market for failure to respect its obligations on continued application of EU without needing a judgement from the Court of Justice first. At the time, Michel Barnier stated that was considered necessary "because in the case of a violation of European rules during the transition, our usual infringement procedures, which are applicable to all Member States today, risk taking too much time and will therefore not be operational to resolve any possible dispute between the UK and the EU during this very short period".

11 Oral evidence taken on 5 March 2018, Q184

12 Oral evidence taken on 5 March 2018, Q184

a) proposals which are adopted before 29 March 2019, over which the UK can exercise its full rights as a Member State (including a Qualified Majority Vote in the Council); and

b) proposals which the UK discussed within the Council of Ministers before its EU exit on 29 March 2019, but which have not yet been formally adopted by that point. These could then subsequently be adopted by the other Member States, whether or not the UK would have voted against them had it remained a Member State.[13]

29. We are concerned about the manner in which legislation is made behind closed doors and by consensus within the Council of Ministers, and our predecessor committee strongly objected to this in its report following its inquiry in 2016.[14]

30. As noted, the Government has addressed this by saying these laws would have been "drafted" while the UK was a Member State and the UK would have had "a say" in their formulation or been "sighted" of their contents. However, that in itself of course does not provide any reassurance that the UK's position on each proposal was taken into account.[15] For example, new EU legislation currently under consideration, but which is likely to be formally adopted or take effect during the implementation period includes:

- proposals on prudential supervision of investment firms and banks;[16]
- a new Regulation on clearing houses for derivatives within the financial system;[17]
- the 'definitive' VAT system for cross-border sales within the EU, including greater flexibility for EU countries to set domestic VAT rates;[18] and
- e-evidence to facilitate cross-border criminal investigations.[19]

31. There are similar examples of proposed EU legislation currently making its way through the legislative process in Brussels in many other areas, including intellectual property, agriculture, waste and the 'Digital Single Market'. If these are adopted and take effect during the implementation period, the UK would have to implement them for the duration of the transitional arrangements. This could potentially be the case in areas such as tax where the UK currently has a veto.

32. According to the EurLex legislative database, there are currently 314 legislative proposals on which discussions are "on-going" (this excludes certain types of proposals,

13 An example of this was recently brought to the attention of the Committee: the Balance of Payments Facility Regulation. While its effects in the UK would be non-existent unless it sought macro-financial assistance from the EU during the transitional period, the Government blocked its adoption in 2013. The European Commission has recently stated it hopes to bring the new Regulation into law as a consequence of Brexit.

14 Second Report from the Committee, Session 2016–17, HC128, Transparency of decision-making in the Council of the European Union

15 Existing proposals to which the UK is opposed could be deferred until after March 2019 and then adopted when it loses its veto. For legislation subject to qualified majority voting, a blocking minority will be harder to achieve when the UK leaves given that the methodology is based in part on the population of the Member States opposing a measure.

16 See our Report of 21 February 2018 on prudential supervision of investment firms and our recent Banking Reform Report

17 See our Report of 22 November 2017

18 See our Report of 6 December 2017

19 See the Commission website

for example those relating to the ratification of international agreements, but includes proposals on which negotiations have effectively stalled).[20] As of 27 February 2018, there were already 37 discrete pieces of EU legislation which have already been adopted but will not take effect until the implementation period.[21]

(b) Legislative proposals published after March 2019

33. Secondly, there will be EU legislation which is proposed and becomes applicable during the implementation period, when the UK would have had no formal say at all. This will include EU tertiary legislation (i.e. the EU equivalent to subordinate legislation) which take far less time to be agreed, but would nonetheless be legally binding on the UK. Tertiary EU legislation is used for example in financial services law to set regulatory or technical standards. It is also used for important decisions in other areas, such as the fisheries discard plans.

34. Since the 2009 Lisbon Treaty, most EU tertiary legislation takes the form of delegated or implementing acts[22] adopted by the European Commission under powers conferred onto it by secondary EU legislation (i.e. Directives and Regulations adopted by the Council and the European Parliament).

35. Implementing acts typically need to be endorsed by a qualified majority of the Member States in the so-called 'Comitology' committees. Delegated acts can be rejected by the European Parliament or by the Member States in the Council but automatically enter into force if they are not rejected (similar to the negative procedure in the House of Commons). Moreover, in certain cases, the Member States in the Council can also adopt tertiary legislation themselves (primarily in the field of foreign policy sanctions). Tertiary legislation usually takes effect within two or three months of the legal text being published by the Commission.

36. The number of tertiary acts which will take effect during the implementation period will be substantial. For example, in the period between the triggering of Article 50 on 29 March last year and 27 February 2018, over 2,000 pieces of EU legislation took effect. Some of these will be Directives and Regulations scrutinised by this Committee and voted on by the Government in Council. However, approximately half (1,078) were tertiary legislative acts which take effect very shortly after they are formally proposed.[23] For example, according to the Register of Delegated Acts, 119 delegated acts were proposed by the European Commission in the last three months alone.[24] We have already expressed our concern about the manner in which European legislation is effected by the Council.

20 http://eur-lex.europa.eu/search.html?qid=1519744631816&LP_PENDING_FL=true&DTS_DOM=LEGAL_PROCEDURE&type=advanced&lang=en&SUBDOM_INIT=LEGAL_PROCEDURE&DTS_SUBDOM=LEGAL_PROCEDURE. The figure is arrived at by noting the COD, APP and CNS legislative procedures which are 'on-going'.

21 http://eur-lex.europa.eu/search.html?qid=1519745196879&CASE_LAW_SUMMARY=false&DTS_DOM=ALL&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&date0=IF:30032019%7C31122020&DTS_SUBDOM=ALL_ALL

22 The exact delineation between 'delegated' and 'implementing' acts is an art, and not a science. Implementing acts help the Member States implement an EU law, for example by stipulating a harmonised format for a form or document required by EU law. Delegated acts supplement the secondary legislation from which they derive, for example by amending an Annex or other 'non-essential' elements of the legislation.

23 http://eur-lex.europa.eu/search.html?qid=1519810741924&CASE_LAW_SUMMARY=false&DTS_DOM=ALL&type=advanced&lang=en&SUBDOM_INIT=ALL_ALL&date0=IF:29032017%7C28022018&DTS_SUBDOM=LEGISLATION

24 https://webgate.ec.europa.eu/regdel/#/delegatedActs.

37. The substance of much of this tertiary legislation will be technical, routine or straightforward, such as:

- foreign policy sanctions;
- slight variations in customs duties for the agricultural sector;
- keeping up to date labelling requirements for individual products put on the market.

38. However, much could be substantial in nature. At present, the UK often has a weighted vote on EU delegated and implementing acts which allows it to block measures with sufficient support from other Member States. That will no longer be the case during the transitional arrangements.

39. In addition, there will also be more high-profile proposals for secondary legislation (i.e. Directives or Regulations) in the coming weeks, as the current European Commission finalises its legislative agenda before a new Commission is appointed in 2019. As the Government has not settled on a fixed length for the implementation period, it follows that the longer the transition, the larger the volume of new secondary EU law that would need to be implemented by the UK after Brexit.

The duration of the implementation period

40. The duration of the implementation period is part of the negotiations. The Government has not wanted to be pinned down on the exact length of the period. In September 2017, the Prime Minister stated it should be "around two years" (i.e. March 2019 to March 2021). At the Liaison Committee meeting on 20 December 2017, she said that the length would be a matter for discussion "because this is a practical issue about how long certain changes would need to take to be put in place".[25] For their part, the European Council has said it should be "limited in time", and the European Commission has proposed that means it should end by 31 December 2020, to coincide with the end of the EU's long-term budget (the 2014–2020 Multiannual Financial Framework).

41. As we concluded in our Report on the 2018 EU budget, to extend the implementation period beyond that date could require an additional financial settlement as the UK would be taking on a share of EU expenditure commitments beyond those covered by the financial settlement announced on 8 December 2017.[26] This is the logical implication of the EU's negotiating position, namely that during the implementation period all "budgetary instruments" continue to apply. However, the Chancellor of the Exchequer told us that:

> We are clear that if there were a question about extending the implementation period beyond the end of the MFF, that could not be by way of Britain's participating in the next MFF. That would create all sorts of potential problems and, conceivably, long-tail liabilities, which we would not be prepared to take on. If we were to entertain that possibility—we have not responded to the Commission's proposal that 31 December 2020 should be the end of the implementation period—of an extension into the next MFF,

25 Oral evidence taken by Liaison Committee from the Prime Minister on 20 December 2017, Q4

26 See our Report of 13 November 2017

> that would be on the basis of a negotiated arrangement about any financial implications of that. It would not be by way of the UK's adhering to and participating in the next MFF.[27]

42. The exact financial implications of an implementation period lasting beyond 31 December 2020 are therefore, in the Government's view, a matter for negotiation.

43. The Chancellor also told us that both the Government and the EU believe that the implementation period "would have to be fixed and that there would be no appetite for an open-ended period".[28] He added that the Government "have no plans to make provision for extension".[29] Nevertheless, it is possible to foresee circumstances where an extension of the transitional arrangement may be considered necessary; for example, if there is no UK-EU free trade agreement which can be fully in force by the envisaged end date of the transitional arrangement to cushion the impact of the UK's becoming a third country vis-à-vis the Single Market.

44. Early termination of the transitional arrangement in whole or part might also be considered in certain scenarios; for example,

- the UK and the EU manage to strike a free trade agreement quickly after March 2019, with certain elements to take effect before the end of the implementation period;
- the UK may want to have a right of termination if an EU law which it considers especially harmful is adopted after March 2019 and is due to become applicable during the implementation period;[30]
- conversely, the EU may want the right to end the arrangement if the UK fails to comply with its legal obligations under the Withdrawal Agreement.

45. It is not clear how early termination of the transitional agreement could be brought about. In the absence of a successor trade agreement, early termination would inevitably trigger the consequences of the UK becoming a "third country". In addition, it might have consequences for the elements of the Withdrawal Agreement on the "phase 1" issues, for example the financial settlement if the UK withdrew from participation in EU funding programmes before the end of 2020.

Scrutiny implications of the transitional arrangement

46. The transitional arrangement means that no assumptions can be made during the pre-Brexit period about the post-Brexit application of draft legislation. We therefore recognise that there is a continuing need for effective scrutiny by Parliament and of close engagement by Government in the decision-making processes. Post-Brexit, if the transitional arrangement is implemented as described in the European Council and Commission papers, it would require continued intensive scrutiny of EU affairs by Parliament.

27 Oral evidence taken on 5 March 2018, Q187
28 Oral evidence taken on 5 March 2018, Q230
29 Oral evidence taken on 5 March 2018, Q231
30 This depends on whether there might be an EEA-style "right of reservation" to new EU legislation. See paragraph 103.

47. The exercise of scrutiny during such a period would be complicated by the fact that the UK would no longer be represented on the Council during the transition, meaning that the Government could not supply Parliament in the form of ourselves and the Lords EU Committee with updates on the Council's internal deliberations as it does now. Nor could it present amendments to Commission proposals, or vote against or veto new legislation. The scrutiny reserve (under which the Government undertakes not to vote on documents still under consideration by this Committee) would become 'toothless', because we could no longer require the Government to abstain on a proposal, given that the UK would not have a vote in the first place.

48. It is likely that both Houses of Parliament will lose their ability to issue Reasoned Opinions to the European Commission, at least for the purposes of Protocol 2 of the Lisbon Treaty.[31] Any Reasoned Opinions issued by either House would not count towards the threshold triggering reconsideration or withdrawal of a new legislative proposal.

49. Given the UK's loss of influence within the EU institutions, it would be more pressing for Parliament to monitor developments at EU-level and to assess their implications for the UK. Additional efforts would be necessary to ensure that Parliament could effectively scrutinise EU policy-making from a "third country" position. The European Affairs Committees of the Norwegian and Swiss Parliaments may offer useful precedents for how it could be handled.

Our conclusions

50. **We support the Government in its efforts to seek greater rights of representation on EU committees during the implementation period.**

51. **More information is needed about the Government's proposals for the Joint Committee during the transitional arrangement. In particular, we consider that greater detail is required on what unilateral safeguards would be available to the UK if it had to apply new EU law which it considered to be detrimental. The need for such safeguards will become more pressing the longer the actual length of the implementation period. We support the Government's intention to seek assurances that new legislation would not be fast-tracked to the detriment of the UK during any transition period and ask how this could be contemplated given the repeal of the European Communities Act 1972 in the House of Commons.**

52. **We ask the Government to demonstrate how the Joint Committee will ensure a high level of transparency and accountability.**

53. **We also ask the Government to explain how the Joint Committee would deal with the large amounts of tertiary EU legislation which the UK would have to implement during the transition, given that the time between publication and entry into force of such acts is usually only a few months. This should include not only the manner in which these would be dealt with in the Joint Committee under the Withdrawal Agreement,**

31 The Lisbon Treaty gives national parliaments a direct role in the EU's legislative process. It provides that, if a third of national parliaments or their chambers present reasoned opinions objecting to an EU legislative proposal on the grounds that it does not comply with the principle of subsidiarity, the Commission (or other institution) would have to reconsider its proposal. (The principle of subsidiarity is that the European Union should act only if the objectives of a proposed action cannot be sufficiently achieved by the Member States and can be better achieved by the Union).

but also how Parliament would be given a meaningful opportunity for scrutiny of these measures when it can no longer rely on the Government's representatives to vote on these measures in the Comitology system and the Council.

54. **The possibility of either an extension or an early termination of the implementation period raises the important question of how such a change would be triggered, including whether either step would require an Act of Parliament in the UK. We ask the Government to explain how legal provision could be made for early termination or extension of the transitional arrangement.**

55. **We will closely follow the financial provisions of the Withdrawal Agreement with respect to the UK's obligations—if any—under the next Multiannual Financial Framework. We note that the Chancellor explicitly told us that such "financial implications" above and beyond the estimated £35 to £39 billion cost of the financial settlement agreement with the European Commission last December, are a possibility.**[32]

56. **We also note that the UK's exclusion from the EU budget from 1 January 2021 would have knock-on effects on the transitional arrangement more generally, as it presupposes that alternative arrangements are in place by that date on areas of cooperation with the EU that require administrative arrangements and a financial contribution (for example with respect to the UK's contributions to the administrative costs of the EU agencies, or the UK's continued participation in EU-funded programmes, like the next Framework Programme for Research or the European Defence Fund).**

57. **We ask the Government to clarify if it is indeed its intention to have the various agreements necessary to be able to extricate itself from the EU budget in place by the end of 2020, thereby avoiding any interruption to the UK's 'standstill' transition in EU market access terms and its participation in specific EU-funded programmes from January 2021 onwards.**

58. ***We recommend that the Government engage in dialogue with us and our counterparts in the House of Lords on how parliamentary scrutiny of EU legislation may best be achieved during the transition period.***

59. ***Further, we recommend that the Government seek to create a mechanism which amounts to an opt out during the implementation period for any new EU law which requires unanimity amongst the Member States.***

60. ***We note the Secretary of State for Exiting the European Union's position that to prepare for circumstances in which transition provisions were not to be effective on 30 March 2019 would be the act of a responsible Government, and we urge the Government to act responsibly by continuing actively to prepare border and other arrangements for the possibility of no deal having been reached and adopted by 30 March 2019 and make sure the necessary resources are available to do so.***

32 Oral evidence taken on 5 March 2018, Q187

3 International and EU dispute resolution

International dispute resolution

61. Dispute resolution comprises a number of key elements. Because the UK will be a third country from the perspective of the EU and its continuing Member States, it is helpful to outline these key elements, against the backdrop of international law in the first instance. One or more of these elements crop up in any international dispute resolution mechanisms:

- Are disputes to be settled by diplomatic means or is there a decision-making body in the form of a court or an arbitration panel?[33]
- Is the dispute resolution procedure compulsory; and if so can it be triggered by one or the parties or must all agree; and are other forms of recourse excluded?
- How is the court or arbitration panel constituted?
- Is there transparency in the dispute resolution process?
- Which particular matters are subject to the dispute resolution procedure (bearing in mind that different matters can be made subject to different procedures)?
- Are the decisions of the court or arbitration panel binding and what enforcement mechanisms are in place?
- Who may bring a matter to the dispute resolution procedure and who, in addition may make representations?
- Is there a requirement to remedy any specific breach that is found against a party?[34]
- Is an adverse decision of a court or arbitration panel backed by an enforcement mechanism such as a fine, or other penalty, or termination of the agreement in whole or in part?

62. At the international law level, dispute resolution is generally a matter limited to state parties to the agreement. This means that if a national of state A has a grievance based on state B's failure to comply with an international agreement, the national of state A can try to get the grievance redressed in one of two ways:

a) through the courts of state B. This depends on state B having domestic laws properly reflecting the international agreement and giving a right of redress; or

b) by persuading state A to take the matter up in any state to state dispute resolution provided by the agreement

33 A search for a diplomatic solution often precedes arbitration for example in the Comprehensive Economic and Trade Agreement ("CETA") between the EU and its Member States, and Canada. If a diplomatic solution proves impossible to achieve there may be a provision for some or all of the agreement to be suspended e.g. the EU, Iceland, Norway Agreement on surrender (equivalent to the European Arrest Warrant) provides for a diplomatic solution to be sought to any dispute within six months; this is backed by (a) an obligation to monitor case-law developments in each of the parties and (b) an ability of a party to terminate the agreement on six months' notice.

34 It is a significant feature of the WTO dispute resolution procedure that a state against whom an adverse finding is made is not required to remedy that fault but may provide compensatory measures.

63. The significant exception to state to state dispute resolution is an "Investor State Dispute Settlement" ("ISDS") procedure included in many bilateral Investment Treaties and as an adjunct to the investment provisions of broader Free Trade Agreements. This can take a variety of forms but enables investors to seek redress through arbitration if they consider that the state in which they have invested has not complied with obligations set out in the relevant international agreement.[35]

64. There are concerns about ISDS and its impact on democracy, human rights and the rule of law.

EU dispute resolution: Court of Justice of the European Union

65. Given the repeal of the European Communities Act 1972 and the triggering of Article 50, it is clear that the European Court of Justice cannot have exclusive or sole jurisdiction as a dispute resolution process post-Brexit. But it is right to acknowledge that for Member States, the EU has a well-developed dispute resolution process. It is court-based, rather than arbitration-based, and has many characteristics of a domestic civil justice system. For Member States this means that there is an effective dispute resolution procedure. Its essential characteristics are:

- Recourse to the CJEU is compulsory[36] for settling disputes connected to the EU Treaties;[37] and it is given exclusive jurisdiction to settle them. This will not be consistent with the repeal of the European Communities Act 1972 in respect to the United Kingdom;
- Its membership is comprised of one judge from each Member State;
- In principle, it operates in public;
- There is broad access: "Privileged" litigants such as Member States and EU institutions have broad access; natural and legal persons have more restricted access,[38] although this limitation is alleviated by the preliminary reference procedure whereby national courts (which must uphold EU law) can ask the CJEU to answer questions as to the interpretation of EU law and the validity of EU legislation;[39]
- Its rulings are binding and there is an obligation to comply with them, to the extent that it can impose a fine upon Member States for failing to do so;[40] and
- The Commission acts as "guardian of the Treaties" and can bring perceived breaches to adjudication by the Court.

35 The ISDS provisions in CETA have attracted particular notoriety.

36 Article 344 TFEU.

37 Interpretation of the EU Treaties and legislation made under them and related matters (Articles, 267 and 273 TFEU); failure to comply with the Treaties or legislation made under them (Articles 258 and 259 TFEU) ; compatibility of EU legislation with the Treaties (Article 263); compatibility of international agreements made by the EU with the Treaties (Article 218(11)); review of the actions and omissions of the EU institutions (Articles 263 and 265 TFEU); non-contractual liability of the EU institutions (Article 268 TFEU); interpretation of contracts pursuant to any arbitration clause they may contain which confers this jurisdiction (Article 272 TFEU).

38 They must be directly and individually concerned, or a party to the litigation in which a preliminary reference to the CJEU is made.

39 Article 263 TFEU

40 Articles 258 and 264 TFEU

66. The CJEU is not confined to consideration of the wording of EU Treaties alone. Article 19 provides that "It shall ensure that in the interpretation and application of the Treaties the law is observed". It therefore not only takes a less literal approach to the text of legislation by seeking to ensure the effectiveness of EU law, but also applies, where appropriate, general principles including respect for fundamental rights.[41]

67. With respect to the all these matters given the repeal of the European Communities Act 1972, there is no reason for the European Court of Justice to have exclusive or sole jurisdiction, a matter which we raised with the Secretary of State for Exiting the EU.[42]

41 Article 6 TEU

42 Oral evidence taken on 6 March 2018, Q258-261

4 Dispute resolution after exit

Background

68. This chapter looks at the UK and EU's respective positions on dispute resolution after exit, by:

- outlining their respective approaches to overall issues of governance (supervision and enforcement) of the Withdrawal and future relations agreements; and
- addressing governance for areas of particular sensitivity—citizens' rights and internal security.

The UK's position

Overall governance

69. In January 2017, in her Lancaster House speech the Prime Minister set out as a negotiating objective the ending of the jurisdiction of the CJEU:

> So we will take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain. Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country.[43]

70. This was followed in August of the same year by the UK's Future Partnership Paper "Enforcement and dispute resolution".[44] Using more precise language that might indicate a softening of position, the Government reiterated that exiting the EU will mean an end to the "direct" jurisdiction of the CJEU. This therefore means that the EU and UK need:

> … to agree on how both the provisions of the Withdrawal Agreement and our new deep and special partnership, can be monitored and implemented to the satisfaction of both sides, and how any disputes which arise can be resolved.[45]

71. The Government has not explained what is meant by "direct" jurisdiction of the CJEU. In her evidence to the Justice Sub-Committee of the House of Lords Professor Dr Christa Tobler of the Institution for European Global Studies described the distinction as "very difficult to explain".[46] It clearly includes making the CJEU first point of recourse in resolving a dispute. She thought that it might cover an arrangement as found in the EU-Ukraine Agreement for a Deep and Comprehensive Free Trade Area where a dispute as to the meaning of certain provisions relating to regulatory approximation imposing obligations defined by reference to EU law must be referred to the CJEU whose decision is binding on the arbitration panel.[47]

43 The Prime Minister's Lancaster House Speech, "The Government's negotiating directives for exiting the EU", 17 January 2017
44 HM Government " Enforcement and dispute resolution: a Future Partnership Paper", 23 August 2017
45 Ibid, paragraph 1, page 2
46 Oral evidence taken by the Justice Sub-Committee of the House of Lords on 27 February 2018, Q30
47 Article 322 of the EU-Ukraine DCFTA

72. The Government's Future Partnership paper sets out some precedents for dispute resolution ranging from the EFTA Court to the WTO dispute resolution procedure and purely diplomatic resolution. It does not, however, indicate what would be the choice of the UK, simply stating that the UK will "engage constructively to negotiate an approach to enforcement and dispute resolution which meets the key objectives of both the UK and EU in underpinning the effective operation of a new, deep and special partnership".[48]

73. However, the Government was clear that giving the courts of one party direct jurisdiction would be incompatible with the sovereignty and legal autonomy of the parties to an international agreement and would fly in the face of established practice and precedent:

> one common feature of most international agreements, including all agreements between the EU and a third country, is that the courts of one party are not given direct jurisdiction over the other in order to resolve disputes between them. Such an arrangement would be incompatible with the principle of having a fair and neutral means of resolving disputes, as well as with the principle of mutual respect for the sovereignty and legal autonomy of the parties to the agreement. When entering into international agreements, no state has submitted to the direct jurisdiction of a court in which it does not have representation.[49]

74. We agree with the Government and this principle must be adhered to. The same principle applies to the whole of this chapter, including in relation to our examination of the Secretary of State for Exiting the EU on 6 March 2018.

75. Soon after the publication of the Government paper, at the end of September 2017, the Prime Minister gave her second major speech on the future relationship of the UK and EU in Florence.[50] With respect to the future economic partnership, she ruled out the CJEU as the sole forum for resolving disputes:

> It is, of course, vital that any agreement reached—its specific terms and the principles on which it is based—are interpreted in the same way by the European Union and the United Kingdom and we want to discuss how we do that. This could not mean the European Court of Justice—or indeed UK courts—being the arbiter of disputes about the implementation of the agreement between the UK and the EU however. It wouldn't be right for one party's court to have jurisdiction over the other. But I am confident we can find an appropriate mechanism for resolving disputes.[51]

76. The Prime Minister reiterated these comments when at the Munich Security Conference, she accepted that "we will need to agree a strong and appropriate form of independent dispute resolution across all areas of our future partnership in which both sides can have necessary confidence".[52]

48 Ibid, paragraph 68, page 12
49 Ibid, paragraph 29, page 6
50 The Prime Minister's Florence speech: "A new era of cooperation and partnership between the UK and the EU", 22 September 2017
51 Ibid
52 The Prime Minister's speech at the Munich Security Conference, 17 February 2018, paragraphs 22-24, page 5

77. On 28 February 2018 the EU produced its proposed legal text of the Withdrawal Agreement.[53] This provides for the CJEU to be the ultimate arbiter of disputes concerning the interpretation and application of the Withdrawal Agreement. This is discussed in more detail below.

78. By way of response to the proposed EU text:

- The Times on 1 March[54] indicated that the Brexit Secretary wrote to Conservatives MPs saying that the UK acknowledged there had to be a mechanism for governing and enforcing the Withdrawal Agreement but "this cannot mean the continuing jurisdiction" of the CJEU.

- The Prime Minister in her Mansion House Speech[55] said that there were still some outstanding issues to be resolved on the Withdrawal Agreement, "we have made clear our concerns about the first draft the Commission published on Wednesday" and that "some points of difference remain" but that she was confident that these could "be resolved in the days ahead".

79. The focus of the Prime Minister's speech at the Mansion House was not the Withdrawal Agreement, nor the implementation period, but the UK position on a future relations agreement with the EU. She acknowledged several "hard facts" about the CJEU's continuing influence once transition was over:

- " … even after we have left the jurisdiction of the ECJ, EU law and the decisions of the ECJ will continue to affect us. For a start, the ECJ determines whether agreements the EU has struck are legal under the EU's own law—as the US found when the ECJ declared the Safe Harbor Framework for data sharing invalid".

- "When we leave the EU, the Withdrawal Bill will bring EU law into UK law. That means cases will be determined in our courts. But, where appropriate, our courts will continue to look at the ECJ's judgments, as they do for the appropriate jurisprudence of other countries' courts. And 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 ECJ judgments so that we both interpret those laws consistently".

- "As I said in Munich, if we agree that the UK should continue to participate in an EU agency the UK would have to respect the remit of the ECJ in that regard".[56]

80. However, she emphasised the need for recognition of judicial and legal autonomy after UK exit from the EU:

> But, in the future, the EU treaties and hence EU law will no longer apply in the UK. The agreement we reach must therefore respect the sovereignty of

53 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018

54 See "Brexit: Donald Tusk sets scene for tense talks with Theresa May on Irish Border", The Times 1 March 2018 [Paywall]. He is reported to have added in that letter that the UK would not accept "punitive sanctions" from Brussels for breaching the terms of the transitional deal with the EU.

55 The Prime Minister's speech on "Our Future Economic Partnership with the European Union" 2 March 2018

56 Ibid

> both the UK and the EU's legal orders. That means the jurisdiction of the ECJ in the UK must end. It also means that the ultimate arbiter of disputes about our future partnership cannot be the court of either party.[57]

81. The Prime Minister also noted that UK associate membership of EU agencies as part of a future relationship might accommodate the judicial and legal autonomy of the UK better:

> associate membership could permit UK firms to resolve certain challenges related to the agencies through UK courts rather than the ECJ. For example, in the case of Switzerland, associate membership of the European Aviation Safety Agency means that airworthiness certifications are granted by its own aviation authority, and disputes are resolved through its courts. Without its membership, Swiss airlines would need to gain their certifications through another member state or through the Agency, and any dispute would need to be resolved through the ECJ.[58]

82. The emphasis the Prime Minister placed in the Mansion House speech on the need for an independent arbitration model for dispute resolution for a future relations agreement was notable. It consisted of the second of her five "foundations" that must "underpin" our "trading relationship":

> Second, we will need an arbitration mechanism that is completely independent—something which, again, is common to Free Trade Agreements. This will ensure that any disagreements about the purpose or scope of the agreement can be resolved fairly and promptly.[59]

83. On 6 March we asked David Davis, the Secretary of State for Exiting the European Union, whether the Government intended the CJEU to have exclusive jurisdiction over the UK after exit, particularly in relation to the Withdrawal Agreement. He told us:

> Let us separate it out. On the operation of the treaty, as the Prime Minister has said, you do not allow the court of one side of a treaty to arbitrate over the whole treaty. There has to be an independent arbitration mechanism. That is separate, of course, from the fact that the Court will have rights, as it were, during the course of the implementation period in the UK over single market matters and the like. But that is not the operation of the treaty.[60]

84. He reiterated that the Government's aim is to avoid basing the future relations agreement on "principles of EU law" as "the European Court takes to itself the monopoly of decision on matters of EU law".[61] He explained "We would foresee making that European law. What we are talking about is trying to get mutual recognition arrangements on equivalence of standards" with the intention that "the arbitration mechanism" would

57 Ibid

58 We note that the Financial Times of 5 March 2018 reported that "Switzerland was softening its historic opposition to accepting the rule of foreign courts, as it seeks to secure its relationship with the EU in a deal that could set a precedent for Britain's future ties with the bloc".

59 Chatham House, EFTA Court Could Answer Post-Brexit Judicial Quandary, 31 January 2018

60 Oral evidence taken on 6 March 2018, Q258

61 Oral evidence taken on 6 March 2018, Q242

"rule on whether the action one side or the other—not just us but the European Union—had taken was some sort of unfair competition, using regulation in an unfair competitive manner. We would not expect in any case that to be a CJEU arbitration mechanism".[62]

85. We also asked whether the UK could continue to benefit from membership of EU agencies without being under the jurisdiction of the CJEU. Mr Davis stressed that the Prime Minister had only said that the UK would "explore that possibility". He conceded that there were "more difficult ones" in the "context of justice and home affairs". He also reverted to the Prime Minister's example of the Swiss association agreement with the European Aviation Safety Agency.[63]

86. Whilst not advocated by the Government, there has been some support for the other ways to construct a dispute resolution mechanism by a court but not ceding sovereignty to the CJEU. The most important are the "two pillar systems" involving separate courts, each having jurisdiction over different parties to the agreement. We prefer such a proposal.

87. It would be possible to "dock" into the EFTA Court—i.e. essentially "borrow" it as a ready-made court to act as a separate pillar for the UK. This has been advocated by the former President of the EFTA Court, Carl Baudenbacher.[64]

88. It would also be possible to create a free-standing court (an "International Treaties Court") to act as a central point providing guidance to non-specialist courts and tribunals throughout the UK on the interpretation of UK legislation which implements the Withdrawal Agreement.[65] We concur with this type of freestanding court.

89. When the UK leaves the EU on 29 March 2019, the ECJ will cease to be a multinational court in which judges from the UK and EU Member States equally participate. In international practice it is against accepted norms for a State to agree to a treaty which grant to the organs of the other treaty party (whether political or judicial) the right to interpret the State's treaty obligations.

90. That international practice is reflected in the EU's own treaties. There are virtually no cases in which any non-Member state has accepted the binding direct jurisdiction of the ECJ. Even Andorra and San Marino, despite being tiny and surrounded by EU territory, have conventional bilateral international arbitration clauses in their agreements with the EU.

91. By contrast, international practice is that the courts of one treaty party should have regard to judgments of the courts of other parties to the same treaty, in order to seek consistent interpretation on the basis of mutual respect for their judgments. What is critical to maintaining the autonomy of both parties' courts is that this process is mutual (i.e. two-way), and that such judgments are treated as persuasive but not binding.

92. If a mechanism is needed for the interpretation of a treaty which binds both treaty parties, overwhelming practice is for that to be done by a neutral international judicial or arbitration mechanism. Conventionally this can be achieved by each party nominating an

62 Ibid
63 Oral evidence taken on 6 March 2018, Q252
64 For example "Could the UK sign up to the EFTA Court after Brexit?" and in evidence taken by the Exiting EU Committee on 7 February 2018
65 Adjudication Treaty Rights in post-exit Britain by Martin Howe QC

equal number (one or more) judges or arbitrators, and a neutral chairman with a casting vote being selected by a neutral mechanism. Such a mechanism can be seen for example in CETA Article 29.7.

Citizens' Rights

93. Before the Joint Report, ending Phase 1 of the negotiations, was agreed in December 2017,[66] the UK first appeared to resist any involvement of the CJEU in relation to EU citizens' rights under a Withdrawal Agreement. In the UK's Future Partnership paper on "Enforcement and Dispute Resolution", the Government argued that in the case of rights or obligations arising under either the Withdrawal Agreement (including the provisions on citizens' rights) or the future relationship agreement both in the UK and in the EU, individuals and businesses should be able to enforce "within the internal legal orders of the UK and the EU respectively", commenting that "ending the direct jurisdiction of the CJEU in the UK "would not "weaken the rights of individuals" nor call into question the UK's commitment to comply with its international legal obligations.[67]

94. However, by the time of the Prime Minister's Florence speech,[68] the position had subtly shifted. Referring to the rights of EU citizens, the Prime Minister stated that, in addition to incorporating the Withdrawal Agreement into UK law, she wanted UK courts to be able to "take into account the judgements of the European Court of Justice with a view to ensuring consistent interpretation".[69]

95. The Joint Report goes further in providing for continuing references on matters of interpretation to the CJEU concerning EU citizens' rights:

> This Part of the Agreement establishes rights for citizens following on from those established in Union law during the UK's membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part.[70]

66 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017

67 HM Government " Enforcement and dispute resolution: a Future Partnership Paper", 23 August 2017

68 The Prime Minister's Florence speech: "A new era of cooperation and partnership between the UK and the EU", 22 September 2017

69 Ibid

70 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017

96. The Joint Report was translated by the Commission into draft legal text of a Withdrawal Agreement, published on 28 February 2018 (discussed as part of the EU's position below.).[71] The Government has yet to respond formally to that text.

Security

97. In her Munich speech, the Prime Minister set out the ambition to conclude a new Treaty " to underpin our future internal security relationship" which:

> must be respectful of the sovereignty of both the UK and the EU's legal orders. So, for example, when participating in the EU agencies the UK will respect the remit of the European Court of Justice.[72]

98. EU law underpinning the "Area of Freedom, Security and Justice" under Title V of Part 3 of the Treaty on the Functioning of the European Union (TFEU)[73] relies on the principle of mutual recognition. Based on this and the principle of mutual trust, the courts of one Member State accept and give effect to decisions of courts in another (for example, the European Arrest Warrant). Within the EU that mutual trust is underpinned by the role of the CJEU.[74] This, however, would not apply after the repeal of section 3 of the European Communities Act 1972.

The EU's position

99. The EU has set out its position in a series of papers produced by the Commission, which in some cases have been formalised into Council or European Council Guidelines. It is important to note that the European Parliament (EP) is also a key player in the UK's exit and future relations negotiations since:

- the EP's consent will be required for the Withdrawal Agreement[75] and for a future relations agreement; and
- the EP could request an opinion from the CJEU as to whether either of those agreements are compatible with the Treaties and the EU Charter of Fundamental Rights.[76]

100. This latter point raises questions about the influence of the Charter in the UK. Although the European Union (Withdrawal) Bill intends to exclude the Charter from "EU retained law",[77] it would seem likely that as regards citizens' rights at the very least, the Charter may continue to have an indirect or "back door" impact on UK law arising from obligations in a Withdrawal Agreement for the UK courts to have "due regard" to CJEU case law and to voluntarily refer questions of interpretation to the CJEU for eight years after exit.

71 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018
72 The Prime Minister's speech at the Munich Security Conference, 17 February 2018, paragraphs 22-24, page 5
73 Formerly known as Justice and Home Affairs (JHA)
74 The decision of the Irish Supreme Court in the O' Connor judgment is illustrative here of importance of CJEU oversight to mutual trust and recognition in the ASFJ field.
75 Article 50(2) TEU
76 Article 218(11) TFEU
77 Clause 5(4)

101. We asked the Secretary of State for Exiting the European Union whether the Charter could continue to apply through citizens' rights provisions. He told us:

> No, I don't believe so. This is about interpretation. Bear in mind also, when you talk about the ECJ being involved, that we are saying that the British courts have the right, effectively, to ask for advice. Whether they take the advice is up to them, but where there is no precedent, they will seek advice. The reason for that is that we are seeking to make the rights given in Britain to European citizens equivalent to the rights given in Europe to British citizens, so that is the reasoning for it. You are quite right, the referral back has a sunset clause of eight years.[78]

Overall governance

102. The EU first set out some "Essential Principles on Governance"[79] for the Withdrawal Agreement in its position paper of 12 July 2017. These arrangements are inconsistent with the repeal of section 3 of the European Communities Act 1972. In short, this states that the Agreement should "include appropriate dispute settlement mechanisms regarding the application and interpretation of the Withdrawal Agreement, which respect the Union's autonomy and its legal order, including the role of the CJEU" as regards, "in particular, the interpretation and application of Union law".[80] In more detail, it envisaged:

- A Joint Committee, comprised of UK and EU representatives, to oversee the operation and implementation of the Withdrawal Agreement;
- In the event of dispute, for matters to be first discussed in the Joint Committee and then referred to the CJEU either jointly by both parties at any time or by either party three months after the Joint Committee first being "seized" of the matter;
- An effective mechanism to ensure compliance with CJEU judgments, including the possibility of the imposition of fines or the suspension of certain parts of the Agreement.

103. The reference to the autonomy of the Union's legal order including that of the CJEU is critical. The position paper asserts that any agreement that the EU enters into with the UK must be consistent with the EU Treaties. Any dispute resolution procedure must comply with conditions laid down by the CJEU to preserve its role as the exclusive arbiter of the Treaties. This precludes, in particular:

- CJEU judges sitting on a common tribunal with judges of other countries;
- A tribunal set up under an international agreement interpreting EU law or elements of that agreement that correspond to EU law.[81]

78 Oral evidence taken on 6 March 2018, Q256

79 Position Paper on Governance, prepared by the Commission's Article 50 Taskforce, TF50 (2017) 4 – Commission to UK, 12 July 2017

80 Ibid, page 1

81 The position is conveniently set out in "The EU and international dispute settlement" by a former judge of the CJEU, Allan Rosas. The principles have recently been applied by the CJEU in its judgment of 6 March 2018 in case C-284/16.

104. Commenting on the relevance of the "autonomy" principle to dispute resolution mechanisms, Professor Dr Christa Tobler drew on the Swiss experience in negotiating with the EU on governance arrangements:

> In my opinion, whether or not there is a realistic alternative to the European Court of Justice depends on the content of any future agreement that the UK might conclude with the European Union, be it the withdrawal agreement or any future trade agreement, because we in Switzerland have learned that as soon as there is EU law in such an agreement—elements that are taken from EU law—the European Union tends to emphasise its doctrine of the autonomy of the European Union legal order. As you know, that means that the Court of Justice must be the ultimate court to rule on the meaning of that law. We have found that the European Union has become increasingly less flexible on that matter.[82]

105. It is a feature of this "autonomy" principle that the CJEU requires its rulings to be binding on questions of interpretation of EU law or EU law-based provisions as part of any dispute resolution or otherwise, for example, in the Ukraine Association Agreement.[83]

106. In the Joint Report,[84] there was no political agreement on overall governance other than in relation to citizens' rights. Before the publication of the text of the Withdrawal Agreement, the only other indications of the Commission's thinking on governance can be gleaned from the Commission's Slides on Governance published in January 2018.[85] These address governance of both the Withdrawal Agreement and Agreement(s) on future relations between the EU and the UK:

- "Overall governance" of the Withdrawal Agreement reflects the Commission's July 2017 Governance paper but adds that CJEU judgments in response to reference by either party should be binding and enforceable. We do not agree.
- In relation to governance of future relations agreement(s), the slides do not recommend a preferred model but rather set out some guiding principles.

107. In the draft text of the Withdrawal Agreement published by the Commission on 28 February,[86] overall governance is mainly[87] addressed in:

- Title II "Institutional Provisions",[88] dealing with the creation and operation of a Joint Committee and Specialised Committees (on citizens' rights, other separation provisions, Ireland, Sovereign Base Area and financial provisions); and

82 Oral evidence taken by the House of Lords Justice Sub Committee, 27 February 2018, Q31

83 Article 322 of the EU-Ukraine DCFTA

84 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017

85 Internal EU27 preparatory discussions on the framework for the future relationship: "Governance", TF50 (2018) 22/2 - Commission to the EU27, 19 January 2018

86 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018

87 However, there are also some relevant provisions in Title 1 "Consistent Interpretation and Application", namely Article 153 " Jurisdiction of the CJEU concerning Parts Three and Five" (Separation and Financial Settlement issues.

88 Articles 157-159. Article 155 merely provides for procedural matters relating to the intervention of the UK in preliminary references on the interpretation of the Withdrawal Agreement from the national courts of the 27 Member States

- Title III "Dispute Settlement",[89] setting out the process for settling disputes, which, ultimately, enables either the UK or the EU to refer the matter to the CJEU for a binding ruling.

108. The Joint Committee proposed by the EU in the draft Withdrawal Agreement would:

- be comprised of both EU and UK representatives and co-chaired;[90]
- be tasked with the supervision, implementation and application of the Agreement;[91]
- adopt decisions by "mutual consent" which would "be binding on the Union and the United Kingdom" and have "the same legal effect" as the Agreement itself;[92] and
- make non-legally binding Recommendations.[93]

109. In short, the proposed Dispute Settlement mechanism involves the CJEU as the ultimate arbiter of disputes, with enforcement involving the prospect of fines for not complying with a CJEU judgment and possible suspension of the non-citizens' rights parts of the Agreement. The mechanism is exclusive, meaning that neither party can seek to resolve their differences regarding the application or interpretation of the Agreement using any other means of dispute resolution.

110. In more detail, the proposed text envisages a series of procedural steps and requirements:

- The UK and EU must first try to resolve their dispute through cooperation and consultation.[94]
- Failing that, either party may bring the dispute before the Joint Committee.[95]
- The Joint Committee may settle the dispute through a Recommendation but it may also decide "at any point" to submit the dispute to the CJEU for a ruling which will be binding on both parties.[96]
- Either party may request a reference to the CJEU if the dispute has not been settled and the matter has not been referred by the Joint Committee within three months of being brought to the Committee.[97]
- Where either party considers the other has not complied with a ruling of the CJEU they may apply to the Court for fines to be imposed on that party.[98]

89 Articles 160-165
90 Article 157(1)
91 Specific tasks and competences are listed in Article 157(4).
92 Article 159(2)
93 Article 159 (3)
94 Article 160
95 Article 162(1)
96 Article 162(2)
97 Article 162(4)
98 Article 162(1) and (2).

- But the parties also have the power to suspend any non-citizens' rights parts of the Agreement, subject to the judicial review of the CJEU and as long as the suspension is proportionate to the breach in question.[99]

111. This is, formally, more stringent than the EU's agreement with other countries although in practice the CJEU holds sway in connection with some agreements, such as the EEA.

112. On 7 March 2018 draft European Council guidelines on a future partnership with the UK entered the public domain.[100] The draft document states:

- the role of the CJEU will be fully respected;[101]
- there will need to be "full respect for fundamental rights" and "effective enforcement and dispute settlement mechanisms" for future Area of Freedom, Security and Justice (ASFJ) cooperation;[102]
- governance will need to include "management and supervision, dispute settlement and enforcement, including sanctions and cross-retaliation mechanisms";[103]
- but governance would be determined by the "content and depth" of the future relationship, the need to ensure effectiveness and legal certainty and the autonomy of the EU legal order, including the role of the CJEU "as developed in jurisprudence".[104]

113. We do not accept the draft European Council guidelines or any proposal which assumes that the United Kingdom will remain subject to the direct jurisdiction of the CJEU after 29 March 2019 or, if agreed, the end of any transitional period (save for the eight year period in respect of EU citizens' rights). This would be incompatible with the repeal of the European Communities Act 1972.

The European Parliament's position

114. The European Parliament's position on overall governance of a Withdrawal Agreement is set out in its Resolution of 5 April 2017. It wants the Agreement to designate the CJEU as "competent authority for the interpretation and enforcement of the withdrawal agreement".[105]

115. On a future relations agreement, a European Parliament Motion for a Resolution[106] of 7 March 2018 envisages an association agreement including "a robust dispute resolution mechanism, thus avoiding a proliferation of bilateral agreements and the shortcomings which characterise the EU's relationship with Switzerland".[107] Adding that this should include "governance structures" including "the competence of the CJEU

99 Article 163(3)
100 Referred to in a statement by Donald Tusk, EUCO President and published on the BBC website, 7 March 2018.
101 Ibid, paragraph 5
102 Ibid, paragraph 10(i)
103 Ibid, paragraph 12
104 Ibid, paragraph 12
105 Paragraph 17, of the Resolution of 5 April 2017
106 Motion [B8.0135/2018] for a Resolution to wind up the debate on the framework of the future EU-UK relationship. This was approved in the EP Plenary of 14 March.
107 Ibid, paragraph 5

in the interpretation of questions related to EU law",[108] it stresses that "the design of governance arrangements should be commensurate to the nature, scope and depth of the future relationship".[109] It considers that for "provisions based on EU law concepts, the governance arrangements should provide for referral to the CJEU", but for other provisions not "relating to Union law" an "alternative dispute settlement mechanism can only be envisaged if it offers equivalent guarantees of independence and impartiality to the CJEU".[110]

Citizens' rights

116. The EU first set out its vision for special governance of EU citizens' rights in its July 2017 Governance paper. This fed into what was agreed with the UK in the Joint Report and is summarised in the Commission's January 2018 slides.

117. The agreement in the Joint Report has been translated by the Commission into the draft text of the Withdrawal Agreement[111] as follows:

- Jurisdiction for the CJEU to give binding preliminary rulings[112] to the UK courts for a period of eight years from the end of the implementation period on the interpretation of citizens' rights provisions;[113]
- The creation of an Independent Authority to supervise the implementation of the citizens' rights provisions which may bring a legal action before UK courts;[114] and
- The right for the Commission to make written and (if permitted by the court) oral submissions in citizens' rights proceedings in the UK courts.[115]

118. The European Parliament has consistently supported a role for the CJEU to interpret citizens' rights as provided by the Withdrawal Agreement and endorsed the Joint Report in that respect.[116] Moreover, in its Resolution of 5 April 2017, it stipulated that EU citizens' rights in the UK should be given "the protection of the integrity of Union law, including the Charter of Fundamental Rights, and its enforcement framework".[117]

Security

119. An indication of the EU's position on dispute resolution mechanisms for future cooperation with the UK in the AFSJ area is provided in their Slides of 24 January.[118] These indicate that the depth of cooperation will be determined by factors including the strength and effectiveness of any enforcement and dispute settlement mechanism.

108 Ibid, paragraph 38
109 Ibid, paragraph 40
110 Ibid, paragraphs 40-43
111 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018
112 As currently for a Member State's national court as provided by Article 267 TFEU
113 Article 151
114 Article 152
115 Article 155
116 Resolution of 13 December 2017
117 Resolution of 5 April 2017, paragraph 18
118 Internal EU27 preparatory discussions on the framework for the future relationship: "Police & judicial cooperation in criminal matters", TF50 (2018) 26/2, 29 January 2018

Our conclusions

120. **The question of whether CJEU jurisdiction is direct or indirect is central to the Government's position on suitable dispute resolution for the EU-UK Withdrawal and Future Relations agreements. However, little certainty has been provided about this distinction and we ask the Government to clarify. If there is a requirement to refer an issue to the CJEU and its interpretation is binding, there would be little difference in substance between "direct " and "non-direct" jurisdiction. It would be otherwise if the requirement was limited to taking account of the decisions of the CJEU, the ability to refer a matter to the CJEU was voluntary, or the decision of the CJEU was not binding.**

121. **We agree with the Prime Minister when she recognised as a "hard fact" in her Mansion House speech the potential for ongoing influence of the Court of Justice on the UK, irrespective of the choice of dispute resolution mechanisms after UK exit from the EU. But we welcome, in particular, her emphasis throughout the speech on the need to respect the sovereign legal orders of both the EU and UK by having an "independent arbitration mechanism" as part of a future relations agreement.**

122. **We also consider that the example of Switzerland in its governance negotiations with the EU leads to the apparent conclusion that it will be difficult for the UK to remain wholly unaffected by judgements of the CJEU in its relations with the EU after exit. However, the Swiss example is based on a completely different constitutional relationship with the EU and furthermore does not take account of the repeal of section 3 of the European Communities Act 1972.**

123. **This is in part due to the principle of legal autonomy imposed by the CJEU upon the EU.**

124. **The Prime Minister said in her Munich and Mansion House speeches that the UK would "respect the remit" of the CJEU in respect of any future participation in agencies. We ask the Government to clarify what this means and whether it still thinks the example of the Swiss association agreement in relation to EASA holds good in the light of recent developments in EU-Switzerland governance negotiations.**

125. **Future EU-UK cooperation on aspects of the "Area of Freedom, Security and Justice" based on the principles of mutual trust and recognition will be difficult to divorce from the jurisdiction of the CJEU. However, we note the example of the EU Iceland and Norway Agreement on Surrender (equivalent to the European Arrest Warrant) which involves a diplomatic solution to disputes.**

126. **The progress of negotiations to date and the logic of close ongoing relations between the UK and the EU indicate that there is little prospect of a dispute resolution mechanism that is anything less than binding arbitration.**

127. **The European Parliament holds some key cards in the process of putting both a Withdrawal and Future Relations agreement in place. It could either withhold its consent or request an Opinion from the CJEU on those agreements compatibility with EU law. Bearing that in mind, we ask the Government to set out its analysis of the model for future relations dispute resolution outlined in the EP resolution approved on 14 March.**

5 The role of the CJEU during the implementation period

Background

128. Once the UK has formally left the EU (likely to be on 29 March 2019) it will be subject to the transition provisions of the Withdrawal Agreement (at present envisaged by the EU to last until 31 December 2020). During this period, the UK will be subject to the overwhelming majority of substantive EU law and obligations (without participation in the institutions setting these) as if it were a Member State. A period of transition of around two years was first requested by the Prime Minister in her Florence Speech.[119]

The EU's position

129. The EU Council Negotiating Directives of 29 January 2018[120] concerning the transition period emphasise:

- The need for "effective enforcement mechanisms";[121]
- The continued direct effect and primacy of EU law;[122]
- The continued application of "existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply, including the competence of the Court of Justice of the European Union".
- As the UK will no longer participate in the EU institutions, there will be no UK judge in the CJEU.

130. This has been reflected in the legal text drafted by the Commission in its position paper of 7 February 2018.[123] This was a unilateral legal text which is not binding upon the United Kingdom and furthermore is inconsistent with the consequences of the triggering of Article 50. Furthermore, in parts it refers to the United Kingdom as a third country and in parts it refers to the United Kingdom as a Member State, which eviscerates the basis of the legal text.

131. Governance during the transition period is addressed in Articles 126 and 165 of the EU's proposed legal text for the Withdrawal Agreement of 28 February. It comprises:

- A continuation of the existing means of supervision and enforcement, including the oversight of the Commission and the direct jurisdiction of the CJEU;[124]

119 The Prime Minister's Florence speech: "A new era of cooperation and partnership between the UK and the EU", 22 September 2017

120 ANNEX to the COUNCIL DECISION supplementing the Council Decision of 22 May 2017 authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union: Supplementary directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 29 January 2018

121 Ibid, Paragraph 11

122 Ibid, Paragraph 14

123 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018

124 Article 126, first para

- An unclear reference to extending those existing supervision and enforcement mechanisms to "the interpretation and application of the Agreement";[125]
- The power for the EU to unilaterally suspend certain "benefits" of internal market participation of the UK if the UK does not comply with a CJEU judgment[126] or any interim order[127] during the transition period, if:
  - this would put at risk the functioning of the internal market, customs union or financial stability of the EU or its Member States;
  - it would be proportionate to the breach, does not exceed three months (without renewal) and 20 days grace has been given to the UK to remedy the breach.[128]

132. The last of these points represents a softening of the Commission's original text of 7 February.

133. It also appears that there is some lack of clarity in the Commission's latest legal text of 28 February. Whilst Article 126 has the effect of extending the jurisdiction of the CJEU to the interpretation and application of the Withdrawal Agreement during the transition period, Articles 157 to 159 (which are in force during this period) set up a Joint Committee responsible for any issue relating to the implementing and application of the Agreement and can adopt (by mutual consent) decisions binding the Union. This would appear to give an option for the diplomatic solution to a dispute which is binding but which is achieved without reference to the CJEU.

The European Parliament's position

134. The European Parliament has been clear that a transition period can only be envisaged under the "full jurisdiction" of the CJEU and based on "existing European Union… judiciary and enforcement instruments and structures".[129]

The UK's position

135. In her Florence speech,[130] the Prime Minister put forward a transition period saying: "The framework for this strictly time-limited period, which can be agreed under Article 50, would be the existing structure of EU rules and regulations". She added "But because I don't believe that either the EU or the British people will want the UK to stay longer in the existing structures than is necessary, we could also agree to bring forward aspects of that future framework such as new dispute resolution mechanisms more quickly if this can be done smoothly".

136. On 9 October 2017 to the House of Commons, the Prime Minister said in her statement on "UK Plans for Leaving the EU" in response to a question:

125 Article 126, second para
126 Article 126 of the Agreement and Article 258 TFEU
127 Article 129 of the Agreement and Article 279 TFEU
128 Article 165
129 Resolution of 3 October 2017, paragraph 3
130 The Prime Minister's Florence speech: "A new era of cooperation and partnership between the UK and the EU", 22 September 2017

> We will have to negotiate what will operate during the implementation period. Yes, that may mean that we start off with the ECJ still governing the rules we are part of for that period, but we are also clear that we can bring forward discussions and agreements on issues such as a dispute resolution mechanism. If we can bring that forward at an earlier stage, we would wish to do so.[131]

137. As we have discussed in chapter 2, the Government is relying on the proposal for a joint EU-UK Committee to provide a safeguard mechanism for the UK. The UK response to the European Commission's draft legal text[132] for the transition period indicates that:

> The UK agrees with the EU that a Joint Committee should be established to supervise the Withdrawal Agreement. The Joint Committee should have specific functions in relation to the implementation period, including resolving any issues which might arise concerning the proper functioning of the Agreement, having regard to the duty of mutual good faith which should apply between the UK and the EU, for example, in relation to acts of Union law adopted during the implementation period. Arrangements will need to protect the rights and interests of both parties. The UK has proposed text here as this did not form part of the Commission's text.[133]

138. The Secretary of State for Exiting the EU told the Exiting the EU Committee[134] that the UK accepts that it will be subject to the jurisdiction of the CJEU during the transition period. However, in a BBC interview in November 2017[135] he also suggested that CJEU's role could be phased out before the end of the transition on 31 December 2020: "We'll start under the regulations as they are now, and then ideally, we'll end up with a circumstance where we have another arbitration mechanism, a dispute resolution mechanism".

139. This was a point also made by the Prime Minister in her Florence speech[136] and repeated by the Parliamentary Under-Secretary of State for Exiting the EU (Robin Walker) when he gave evidence to us on 22 February:

> The Prime Minister has been clear that when we enter the implementation period it will be under the same rules and regulations. The European Court will continue to have its role for that time-limited period. But if we can bring forward dispute resolution mechanisms—we absolutely have the ambition to agree dispute resolutions mechanisms as part of the future relationship between the UK and the EU—we would like to do so."[137]

Our conclusions

140. **Some argue, but we think wrongly, that compulsory and exclusive CJEU jurisdiction during the implementation period might be justified in respect of the continuation of existing EU legislation, as the Government has itself recognised. But**

131 HC Deb, 9 October 2017, col 53
132 HM Government (DEXEU), Policy Paper " Draft Text For Discussion: Implementation Period", 21 February 2018
133 Ibid, paragraph 4, page 1
134 Oral evidence taken by the Exiting the EU Committee on 24 January 2018, Q779
135 Interview given by the Brexit Secretary to Laura Kuenssberg, BBC's political editor, 16 November 2017
136 The Prime Minister's Florence speech: "A new era of cooperation and partnership between the UK and the EU", 22 September 2017
137 Oral evidence taken on 22 February, Q179

we question whether it should extend to any other parts of the Withdrawal Agreement. In this regard, we ask the Government to clarify what the practical effect might be of the proposed stipulation in Article 126 of the Commission's draft legal text of 28 February 2018 that it should also extend to the interpretation and application of other provisions of the Withdrawal Agreement.

141. **Far from incorporating a safeguard mechanism to protect UK interests as referred to by the Secretary of State for Exiting the European Union in his Teesport speech, the EU has proposed mechanisms to sanction the UK if it does not follow the rulings of the CJEU during the implementation period. These include suspending the benefits of participation in the internal market. We ask the Government whether it is confident that agreement can be reached on this aspect of the proposed transitional arrangements.**

142. **We note that the Prime Minister and Brexit Secretary have both expressed the hope that during the implementation period the exclusive jurisdiction of the CJEU might be phased out and a dispute resolution mechanism reflective of future EU-UK relations phased in. We believe they are right.**

6 UK domestic legislation

The European Union (Withdrawal) Bill

Disapplication of UK primary legislation

143. The European Union (Withdrawal) Bill ("the Withdrawal Bill") currently provides for the CJEU to lose its binding jurisdiction on exit day, after which UK courts will no longer be able to make references to it.[138] However, UK courts will be able to:

- give precedence to "EU retained law" over pre-exit legislation, possibly resulting in disapplication of pre-exit UK primary legislation;[139] and
- take into account pre-exit judgments of the CJEU if they consider it appropriate to do so (much as they can do now with any relevant foreign judgement). However, there is a serious concern that the guidance given to judges is inadequate and therefore creates uncertainty.[140]

144. "Retained EU law" is very broadly defined without clear parameters.[141] This creates uncertainty as to the scope of the courts to disapply pre-exit primary legislation, exacerbated by uncertainty as to the role post-exit of CJEU jurisprudence.

145. We have been in correspondence with the Prime Minister on the question of the disapplication of pre-exit UK primary legislation.[142] Essentially, we have expressed concern at the legal uncertainty that may be caused by allowing courts to disapply primary legislation, as well as the constitutional propriety of such an arrangement. We also drew the issue to the attention of the Secretary of State for Exiting the EU who indicated that there would be a further written response.[143]

Implementing the Withdrawal Agreement in UK law

146. Clause 9 of the Withdrawal Bill gives, subject to conditions, a wide-ranging power to implement any withdrawal agreement including amendment of the Bill itself. At the same time, the Government has undertaken to introduce a Withdrawal and Implementation Bill.[144] In relation to the latter, the DEXEU Press Release simply states that "The Bill is expected to cover the contents of the Withdrawal Agreement, including issues such as an agreement on citizens' rights, any financial settlement and the details of an implementation period agreed between both sides."[145]

138 The European Union (Withdrawal) Bill, as introduced in the House of Lords on 18 January 2018, currently at Committee Stage in the Lords. Clause 1 repeals the European Communities Act 1972.

139 Clause 5(2) of the Bill

140 See the 9th Report Session 2017–19 of the House of Lords Constitution Select Committee on the *European Union(withdrawal) Bill*, Chapter 7

141 In particular in clauses 2 (Saving for EU-derived domestic legislation) and clause 4 (Saving for rights etc. under section 2(1) of the ECA).

142 Letters between the Chairman of the European Scrutiny Committee and the Prime Minister of 19 December 2017, 9 January 2018, and 22 February 2018.

143 Oral evidence taken on 6 March 2018, Q281

144 DEXEU Press Release " New Bill to implement the Withdrawal Agreement", 13 November 2017

145 DEXEU Press Release " New Bill to implement the Withdrawal Agreement", 13 November 2017

Entrenchment of citizens' rights

147. The Joint Report[146] states that UK domestic legislation will be enacted so that citizens will be able "to rely directly on their rights" as part of a framework which ensures 'that inconsistent or incompatible rules and provisions will be disapplied". It adds that, once the Bill to incorporate citizens' rights into UK law has been adopted, "the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future".

148. This now appears to be reflected in Article 4 of the draft Withdrawal Agreement[147] proposed by the Commission. Though there is no specific reference to "express repeal", arguably it must be tacitly understood that Parliament retains sovereignty to expressly repeal any UK primary legislation. Entitled "Methods and principles relating to the effect, the implementation and the application of this Agreement", Article 4 provides:

> 1. Where this Agreement provides for the application of Union law in the United Kingdom it shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and the Member States.
>
> In particular Union citizens and United Kingdom nationals should be able to rely directly on the provisions contained or referred to in Part 2 [Citizens' Rights]. Any provisions inconsistent or incompatible with that Part shall be disapplied.
>
> 2. The United Kingdom shall ensure compliance with paragraph 1, including as regards the required powers of its judicial and administrative authorities, through domestic legislation.

149. It is orthodox UK constitutional law that, as a matter of UK Parliamentary sovereignty, no Parliament can bind its successor.[148] It is accepted that the UK Parliament can always expressly repeal an existing statute and that normally an earlier statute can be impliedly repealed by a later inconsistent statute. However, the question is whether and, if so, how can the UK Parliament legislate for citizens' rights provisions in the Withdrawal and Implementation Bill with the effect of protecting them from implied repeal.

150. The issue has attracted considerable dispute and legal comment.[149] There is a judicial view, first expressed by Laws LJ in *Thoburn*,[150] with some support in the Supreme Court

146 Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union, TF50 (2017) 19 – Commission to EU 27, 8 December 2017

147 European Commission Draft Withdrawal Agreement on the withdrawal of the UK from the EU and the European Atomic Energy Community, 28 February 2018

148 There are some constitutional theories, such as the doctrine of "manner and form" otherwise known as the "reconstitution of Parliament" which argue that if Parliament can do anything it can "redesign itself either in general or a particular purpose" (as discussed in R (Jackson v Attorney General). (2006) According to this theory, Parliament could require, for example, a referendum of the people or certain voting thresholds in the Commons and Lords before changing certain laws.

149 See for example, "The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised? – Public Law for Everyone", by Professor Mark Elliot, 11 December 2017; "Parliamentary Sovereignty and the Implementation of the EU Withdrawal Agreement" views expressed by Professor Mikołaj Barczentewicz on Twitter.

150 Thoburn and Sunderland City Council, [2002] EWHC, 18 February 2018

in the *Jackson*,[151] *HS2*,[152] and *Miller*[153] cases, that certain UK statutes including the European Communities Act 1972 (ECA, the statute being considered) have the status of "constitutional statutes". As such, these can only be expressly repealed by Parliament. Laws LJ considered that other statutes such as the Human Rights Act and Devolution statutes would fall within this category.

151. However, Laws LJ recognised that the constitutional status of the ECA could not be accounted for by Parliament's having precluded its implied repeal because (as he put it) Parliament "cannot stipulate against implied repeal". This means it is unclear whether such status and protection against implied repeal is a function of "Parliament's legislative will or the operation of the UK common law constitution"[154] and so dependent on recognition as such by the courts.

152. We asked the Secretary of State for Exiting the European Union how EU citizens' rights could be entrenched against implied repeal. He responded:

> The withdrawal and implementation Bill will be drafted that way. I am told by the draftsmen that it can be done. It cannot be overtaken by implied repeal. It can be—were Parliament so to choose—overruled explicitly, but not by implied repeal.[155]

The implementation period

153. Currently, the jurisdiction of the CJEU and the obligation of the UK courts to follow the case law of the Court is achieved through sections 2 and 3 of the European Communities Act 1972.

154. Section 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations or certain articles of the EU Treaties, are automatically "without further enactment" incorporated and binding in national law without the need for a further Act of Parliament. The domestic courts are obliged to give full effect to section 2(1), in the light of the case law of the Court of Justice (section 3(1)).

155. The Secretary of State for Exiting the European Union was asked by the Exiting the EU Committee in January[156] whether the Withdrawal and Implementation Bill will reapply CJEU jurisdiction for the implementation period. This was on the assumption that jurisdiction would have been disapplied from 29 March by the repeal of the European Communities Act 1972 by the Withdrawal Bill. He said: "It must have that effect. It will be contingent on the legal basis that we agree, at the end of the day".

156. We took this up with the Parliamentary Under-Secretary of State for Exiting the EU (Robin Walker), asking him:

- how the CJEU could have exclusive jurisdiction in the UK once the European Union (Withdrawal) Bill had repealed the ECA; and

151 Jackson and Others v HM Attorney General {2005] UKHL 56, 13 October 2005

152 R (on the application of HS2) v the Secretary of State for Transport and another, [2013] EWHC 481 22 January 2014

153 R (on the application of Miller) v Secretary of State for Exiting the EU [2017]UKSC5, 24 January 2017

154 The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised? – Public Law for Everyone", by Professor Mark Elliot, 11 December 2017

155 Oral evidence on 6 March 2018, Q275

156 Oral evidence taken by the Exiting the EU Committee on 24 January 2018, Q782

- was it the intention to extend section 3 of the ECA beyond exit day of 29 March 2019?[157]

157. He responded that he could not speculate on the exact detail of the Bill before publishing a first draft. But he was clear that the Withdrawal and Implementation Bill would be the basis for giving effect to the implementation period in UK law.[158]

158. The question of how to give direct effect and supremacy to EU law during the transition period raises the same question of whether this will simply be achieved by reproducing similar provisions to section 2 of the European Communities Act 1972 in the Withdrawal and Implementation Bill.

Our conclusions

159. **As we have already indicated in correspondence with the Prime Minister, we do not consider that the UK domestic courts should be given a power after the UK's exit from the EU to disapply pre-exit primary legislation. This was a requirement of the UK's membership of the EU. To allow such a power to persist after the withdrawal of the United Kingdom from the EU would be inconsistent with the doctrine of Parliamentary sovereignty and therefore constitutionally improper.**

160. **The continuation of this power is even more questionable in the light of the uncertainty as to its scope in the Withdrawal Bill as currently drafted. Our concerns have not been alleviated by the Prime Minister's response and we look forward to the further response from the Government on this issue.**

161. **We ask for an explanation from the Secretary of State for Exiting the EU as to how it is proposed to entrench in UK law the citizens' rights provisions of the Withdrawal Agreement and his assessment of how robust that will be if challenged.**

162. **We ask the Government to set out its legislative plans for reapplying CJEU jurisdiction during the transition period. In this respect, there appears to be no need for both clause 9 of the current European Union (Withdrawal) Bill and likely provisions of the forthcoming Withdrawal and Implementation Bill, and we ask the Government to explain its approach to these two provisions.**

157 Oral evidence taken on 22 February, Q181
158 Ibid, Q182

7 Conclusion

163. This Report highlights some of the key issues at this stage in the process. As is evident, we are in the midst of a fast-moving process. We will continue to take oral evidence and raise issues throughout Brexit negotiations.

164. We understand that the Government, in the light of the European guidelines, is faced with challenging issues. However, we believe that it is not in the national interest to accept the European Council's proposals and the European Commission's proposals, which are incompatible with the repeal of the European Communities Act 1972, including section 3 of that Act. Furthermore, we believe that Article 50 has fundamentally changed the basis of the EU treaties and we note that the United Kingdom, by Act of Parliament, has by a majority of 499 to 120 voted to give notification as to withdrawal from the European Union under Article 50. In addition, the House of Commons on its third reading of the European Union (Withdrawal) Bill approved the repeal of the European Communities Act 1972 itself. In these circumstances which are incontestable, we take the view that the Government must be more robust and emphatic in refuting the assertions made by the European Council and the European Commission relating to any future role of the European Court of Justice. Whilst we are glad that the Government has made it clear that they do not favour any dispute resolution mechanism which would give exclusive or sole jurisdiction in such matters to the European Court of Justice, we urge the Government in the negotiations to insist that Article 50 has changed the nature of the European Union, that the United Kingdom has lawfully followed provisions of Article 50, and that this is supported by a referendum of the electorate of the United Kingdom pursuant to a sovereign Act of Parliament. The European Council and the European Commission must accept that the United Kingdom in its negotiations will respect and accept these lawful, democratic and constitutional steps.

165. Among many uncertainties is the future shape of parliamentary scrutiny of EU legislation. However, it is clear that such legislation will continue to affect UK and so some form of parliamentary scrutiny will be vital. We look forward to exploring with others what form this should take.

Formal Minutes

Wednesday 14 March 2018

Members present

Sir William Cash, in the Chair

Douglas Chapman	Darren Jones
Geraint Davies	David Jones
Richard Drax	Stephen Kinnock
Marcus Fysh	Andrew Lewer
Kate Green	Michael Tomlinson
Kate Hoey	David Warburton
Kelvin Hopkins	

1. EU withdrawal: Transitional provisions and dispute resolution

Draft Report, *EU withdrawal: Transitional provisions and dispute resolution*, proposed by the Chair, brought up and read.

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

Paragraphs 1 to 6 read and agreed to.

Paragraph 7 read as follows:

"Under Article 50, the European Union Treaties will cease to apply to the UK on 29 March 2019, at which point the UK will become a "third country" vis-à-vis the EU. This means that, firstly, the UK will no longer be able to rely on a variety of public policy functions currently exercised wholly or partially by the EU (e.g. trade policy; state aid investigations; issuance of licences to airlines based abroad). This requires additional resources and infrastructure which are unlikely to be in place by March 2019. Similarly, the Government has to convert all EU law into UK law, ready to take effect when the former ceases to apply, i.e. 29 March 2019."

Amendment proposed, in line 6, to leave out "which are unlikely to be in place by March 2019".—(*Marcus Fysh*.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 8	Noes, 3
Richard Drax	Geraint Davies
Marcus Fysh	Kate Green
Kate Hoey	Darren Jones
Kelvin Hopkins	
David Jones	
Andrew Lewer	
Michael Tomlinson	
David Warburton	

Question accordingly agreed to.

Paragraph 7, as amended, agreed to.

Paragraph 8 read.

Motion made, to leave out paragraph 8 and insert the following new paragraph:

"If negotiations conclude that the UK will leave the Single Market and Customs Union, this will fundamentally change the trading relationship between the UK and the EU. Within the EU's internal market, there is an underlying principle of mutual recognition (especially for trade in goods), underpinned by statutory harmonisation on matters such as tariffs, VAT and regulatory standards. Mutual recognition allows minimal barriers to trade. Remaining in the Customs Union reduces border checks through eliminating tariffs and rules of origin checks. The Government's own analysis, as well as the assessment of Parliament's own Committee for Exiting the EU, shows that a policy to leave the Single Market and Customs Union will have a severe negative effect on the economy. In her Mansion House speech, the Prime Minister re-iterated that the UK's negotiating position was to ensure frictionless trade. The only way to ensure full harmonisation and mutual recognition, in order to deliver frictionless trade, is if the Government seeks to remain in the European Single Market and Customs Union."—(*Geraint Davies.*)

Question put, That the new paragraph be read a second time.

The Committee divided.

Ayes, 3	Noes, 8
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	Kelvin Hopkins
	David Jones
	Andrew Lewer
	Michael Tomlinson
	David Warburton

Question accordingly negatived.

Paragraph 8 agreed to.

Paragraphs 9 to 28 read and agreed to.

Paragraph 29 read as follows:

"We are profoundly concerned about the manner in which legislation is made behind closed doors and by consensus within the Council of Ministers, and our predecessor committee strongly objected to this in its report following its inquiry in 2016."

Amendment proposed, in line 1, to leave out "profoundly".—(*Kate Green*.)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 6	Noes, 5
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Kelvin Hopkins	Kate Hoey
Darren Jones	David Jones
Andrew Lewer	Michael Tomlinson
David Warburton	

Question accordingly agreed to.

Paragraph 29, as amended, agreed to.

Paragraphs 30 to 60 read and agreed to.

New paragraph—(*Geraint Davies*)—brought up and read as follows:

"We ask the Government to seek an extended Transition Period. The UK's future relationship with the EU should not be at the mercy of the EU's Multiannual Financial

Framework. If a longer Transition Period is necessary for the UK to implement Brexit and establish the UK's future relationship with the EU, then the Government should seek this extension."

Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 3	Noes, 8
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	Kelvin Hopkins
	David Jones
	Andrew Lewer
	Michael Tomlinson
	David Warburton

Question accordingly negatived.

New paragraphs—(*Geraint Davies*)—brought up and read as follows:

"We ask the Government to provide clarity on the level of flexibility during the Transition Period to seek changes to the agreement with the EU. This should include clarity on (a) whether the UK will be able to re-join the EU, and what mechanisms are in place to achieve this, should it wish to; (b) whether the UK will be able to remain in the Single Market after the end of the Transition Period, and what mechanisms are in place to achieve this, should it wish to; and (c) whether the UK will be able to remain in the Customs Union after the end of the Transition Period, and what mechanisms are in place to achieve this, should it wish to. There should also be mechanisms in place for parliamentary and public consultation on these matters before and during the Transition Period.

"We ask the Government to seek a legal opinion on the possibilities of (a) pausing the article 50 process or extending the deadline, in the event that negotiations stall or breakdown, and (b) revoking Article 50, in the event that parliamentary or public opinion opposes leaving the EU. The Government should also produce economic impact assessments of the impact of pursuing these options and seek parliamentary and public consultation on the matter."

Question put, That the paragraphs be read a second time.

The Committee divided.

Ayes, 3	Noes, 8
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	Kelvin Hopkins
	David Jones
	Andrew Lewer
	Michael Tomlinson
	David Warburton

Question accordingly negatived.

Paragraphs 61 to 73 read and agreed to.

Paragraph 74 read.

Motion made, to leave out paragraph 74 and insert the following new paragraph:

"Although the Committee agrees with this principle, the arbitration mechanism falls short of UK standards of rule of law, and therefore offers a poor alternative. The arbitration system lacks transparency and accountability. It does not respect the Doctrine of Precedent, there are issues with the composition of tribunals, since there is no defined way of ensuring sufficient expertise or independence behind decisions, and tribunals are not bound to apply any particular area of law."—(*Geraint Davies*.)

Question put, That the new paragraph be read a second time.

The Committee divided.

Ayes, 4	Noes, 7
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Kelvin Hopkins	Kate Hoey
Darren Jones	David Jones
	Andrew Lewer
	Michael Tomlinson
	David Warburton

Question accordingly negatived.

Paragraph 74 agreed to.

Paragraphs 75 to 108 read and agreed to.

New paragraph—(*Geraint Davies*)—brought up and read as follows:

"We have concerns about the level of transparency on the proposed Joint Committee. If it is modelled on the CETA committee, the UK will be denied the level of transparency and accountability enjoyed by EU member states through the Commission and European Parliament. The Government ought to seek clarity on the composition of the committee, its transparency, and how it is to be held accountable. The UK should seek a means to nominate members to the committee, to minimise power held by officials. This is to ensure that decisions are not made behind closed doors, especially as many of these decisions will be within the public interest."

Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 4	Noes, 7
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Kelvin Hopkins	Kate Hoey
Darren Jones	David Jones
	Andrew Lewer
	Michael Tomlinson
	David Warburton

Question accordingly negatived.

Paragraphs 109 to 126 read and agreed to.

New paragraph—(*Geraint Davies*)—brought up and read as follows:

"The Committee notes the manifold problems within the Investor-State Dispute Settlement (ISDS) system, and recommends that the construction of any dispute resolution procedure should be based on substantively ensuring respect for rule of law, rather than ideological preference (regarding the CJEU or other courts)."

Question put, That the paragraph be read a second time.

The Committee divided.

Ayes, 3	Noes, 6
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Paragraph 127 read and agreed to.

New paragraphs—(*Geraint Davies*)—brought up and read as follows:

"We ask the Government to reassure Parliament that the arbitration mechanism will not be modelled on ISDS, given its impact on democracy, human rights and the rule of law. The ISDS arbitration mechanism lacks transparency and accountability, and does not respect the Doctrine of Precedent. Furthermore, there are issues with the composition of tribunals, since there is no defined way of ensuring sufficient expertise or independence behind decisions, and tribunals are not bound to apply any particular area of law. The lack of an appeal system in ISDS, and the fact that they are only accessible to foreign investors at a cost of circa £5 million each time, means that ISDS does not conform to UK principles of rule of law.

"We ask the Government to press the EU for clarification on the level of transparency and accountability in the Joint Committee. If the committee is modelled on the CETA committee, the UK will be denied the level of transparency and accountability enjoyed by EU Member States through the Commission and European Parliament. The Government ought to further seek clarity on the composition of the committee and how the committee is to be held accountable. The UK should seek a means to nominate members to the committee, to minimise power held by officials. This is to ensure that decisions are not made behind closed doors, especially as many of these decisions will be within the public interest."

Question put, That the paragraphs be read a second time.

The Committee divided.

Ayes, 4	Noes, 6
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Kelvin Hopkins	Kate Hoey
Darren Jones	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Paragraphs 128 and 129 read and agreed to.

Paragraph 130 read.

Amendment proposed, in line 2, to leave out from "This was" to the end of the paragraph.—(*Geraint Davies.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 1	Noes, 7
Geraint Davies	Richard Drax
	Marcus Fysh
	Kate Hoey
	Kelvin Hopkins
	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Paragraph 130 agreed to.

Paragraphs 131 to 141 read and agreed to.

Paragraph 142 read, as follows:

"We note that the Prime Minister and Brexit Secretary have both expressed the hope that during the transition period the exclusive jurisdiction of the CJEU might be phased out and a dispute resolution mechanism reflective of future EU-UK relations phased in. We believe they are right."

Amendment proposed, in line 4, to leave out "We believe they are right.".—(*Kate Green.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 3	Noes, 6
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Another Amendment proposed, at end, to add "Although the Committee agrees with this hope in principle, we have concerns about alternative models of dispute resolution.".—(*Geraint Davies.*)

Question put, That the Amendment be made.

The Committee divided.

Ayes, 4	Noes, 6
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Kelvin Hopkins	Kate Hoey
Darren Jones	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Paragraph 142 agreed to.

Paragraphs 143 to 165 read and agreed to.

New paragraphs—(*Geraint Davies*)—brought up and read as follows:

"The Committee asks that the Government clarifies its position on regulatory alignment and jurisdiction of the CJEU–both during transition and after. In order to achieve mutual recognition and 'frictionless trade', as set out by the Prime Minister in the Government's negotiating position, it is necessary to maintain both the same regulations and the same legal interpretations of the regulations. Regulatory alignment therefore requires the same legal authority for interpretation, as provided by the CJEU's jurisdiction. To achieve regulatory equivalence, it cannot be the case that UK courts make different interpretations to EU courts. Since the Government's stated intention is also to leave the CJEU's jurisdiction, this exposes a contradiction in the Government's negotiating strategy.

"We recommend that the Government establishes an arbitration mechanism which meets high standards for human rights, democratic accountability and rule of law. The ISDS

model falls short of UK standards of rule of law and therefore offers a poor alternative. There are concerns that the arbitration system lacks transparency and accountability. For example, the TTIP ISDS model does not respect the Doctrine of Precedent, there are issues with the composition of tribunals, since there is no defined way of ensuring sufficient expertise or independence behind decisions, and tribunals are not bound to apply any particular area of law.

"We recommend that the Government seeks a more transparent and accountable Joint Committee. If the Joint Committee is modelled on the CETA joint committee, it will not have sufficient levels of transparency and mechanisms for public accountability. Through the UK's current membership of the EU, these are guaranteed through the Commission and the European Parliament. The Joint Committee does not have the same level of democratic safeguards as these institutions, and the Government should push for this in negotiations with the EU."

Question put, That the paragraphs be read a second time.

The Committee divided.

Ayes, 3	Noes, 7
Geraint Davies	Richard Drax
Kate Green	Marcus Fysh
Darren Jones	Kate Hoey
	Kelvin Hopkins
	David Jones
	Andrew Lewer
	Michael Tomlinson

Question accordingly negatived.

Summary agreed to.

Question put, That the Report be the Nineteenth Report of the Committee to the House.

The Committee divided.

Ayes, 7	Noes, 1
Richard Drax	Geraint Davies
Marcus Fysh	
Kate Hoey	
Kelvin Hopkins	
David Jones	
Andrew Lewer	
Michael Tomlinson	

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 until Wednesday 21 March at 1.45pm.

Witnesses

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

	Question number
Wednesday 21 February 2018	
Rt Hon Caroline Nokes MP, Minister for Immigration, **Glyn Williams**, Director General, Border Immigration and Citizenship System, Home Office	Q1–101
Thursday 22 February 2018	
Robin Walker MP, Parliamentary Under Secretary of State, Department for Exiting the European Union, **Sir Tim Barrow KCMG LVO MBE**, Permanent Representative of the United Kingdom to the European Union	Q102–182
Monday 5 March 2018	
Rt Hon Philip Hammond MP, Chancellor of the Exchequer, **Mark Bowman**, Director General, International Finance, HM Treasury	Q183–239
Tuesday 6 March 2018	
Rt Hon David Davis MP, Secretary of State for Exiting the European Union	Q240–301

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the publications page of the Committee's website.

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2017–19

First Report	Documents considered by the Committee on 13 November 2017	HC 301-i
Second Report	Documents considered by the Committee on 22 November 2017	HC 301-ii
Third Report	Documents considered by the Committee on 29 November 2017	HC 301-iii
Fourth Report	Documents considered by the Committee on 6 December 2017	HC 301-iv
Fifth Report	Documents considered by the Committee on 13 December 2017	HC 301-v
Sixth Report	Enhancing law enforcement cooperation and border control: strengthening the Schengen Information System	HC 301-vi
Seventh Report	Documents considered by the Committee on 19 December 2017	HC 301-vii
Eighth Report	European Atomic Energy Community	HC 301-viii
Ninth Report	Documents considered by the Committee on 10 January 2018	HC 301-ix
Tenth Report	Documents considered by the Committee on 17 January 2018	HC 301-x
Eleventh Report	Documents considered by the Committee on 24 January 2018	HC 301-xi
Twelfth Report	Documents considered by the Committee on 31 January 2018	HC 301-xii
Thirteenth Report	Documents considered by the Committee on 7 February 2018	HC 301-xiii
Fourteenth Report	Documents considered by the Committee on 21 February 2018	HC 301-xiv
Fifteenth Report	Banking Reform Report	HC 301-xv
Sixteenth Report	Documents considered by the Committee on 28 February 2018	HC 301-xvi
Seventeenth Report	Documents considered by the Committee on 7 March 2018	HC 301-xvii
Eighteenth Report	Drinking Water Directive	HC 301-xviii