



House of Commons
European Scrutiny Committee

**EU Withdrawal:
Transitional provisions
and dispute resolution:
Government Response
to the Committee's
Nineteenth Report of
Session 2017–19**

**Second Special Report of Session
2017–19**

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European Scrutiny Committee

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

Current membership

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

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Publications

Committee reports are published on the [Committee's website](#) and in print by Order of the House. Evidence relating to this report is published on the [inquiry publications page](#) of the Committee's website.

Committee staff

The staff of the Committee are Dr Philip Aylett (Clerk), Kilian Bourke, Alistair Dillon, Leigh Gibson, Foeke Noppert and Sibel Taner (Clerk Advisers), Arnold Ridout (Counsel for European Legislation), Françoise Spencer (Deputy Counsel for European Legislation), Joanne Dee (Assistant Counsel for European Legislation), Mike Winter (Second Clerk), Sarah Crandall (Senior Committee Assistant), Sue Beeby, Rob Dinsdale and Beatrice Woods (Committee Assistants), Ravi Abhayaratne and Paula Saunderson (Office Support Assistants).

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Second Special Report

On 20 March 2018 the European Scrutiny Committee published its Nineteenth Report of Session 2017–19, [EU Withdrawal: Transitional provisions and dispute resolution](#) (HC 763). The Government has now responded through a letter from Rt Hon David Davis MP, Secretary of State for Exiting the European Union. We publish this letter as an Appendix to this Special Report.

Appendix

Dear Sir William,

Thank you for the European Scrutiny Committee's report (HC 763) published on 20 March 2018 which considered the provisions for the scrutiny of EU legislation and dispute resolution during the implementation period.

The Government recognises the longstanding and important scrutiny role played by the European Scrutiny Committee and the Committee's report is a welcome contribution.

Since the publication of the report, the UK has reached agreement with the European Union on large parts of the draft Withdrawal Agreement, including on the terms of an implementation period that will start on 30 March 2019 and last until 31 December 2020. We welcome the endorsement of this at the March European Council.

The agreement on the implementation period marks an important step forward, giving citizens and businesses confidence about the arrangements that will apply immediately after the UK's exit.

I am pleased to set out the Government's response to the recommendations made in the report below.

RT HON DAVID DAVIS MP

SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION

GOVERNMENT RESPONSE TO THE EUROPEAN SCRUTINY COMMITTEE REPORT TRANSITIONAL PROVISIONS AND DISPUTE RESOLUTION

1. 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)

It usually takes around two years for major legislation to become EU law, therefore the vast majority of significant new legislation that comes into effect during the implementation period will have been drafted whilst the UK was a Member State, given it is a time-limited agreement ending in December 2020. However, as outlined in his Teesport speech, the Secretary of State for Exiting the European Union has been clear on the need for safeguards to resolve any issues that arise during that period.

We have therefore agreed that there will be a Joint Committee to ensure the smooth functioning of the period, where both sides will be able to raise concerns. The Withdrawal Agreement will be underpinned by a duty of good faith. This will ensure that the EU and the UK approach the application of the agreement with fairness, consistency and sincerity. Any attempt to specifically harm the interests of the UK would be in breach of this obligation.

Should the UK consider that there are issues with specific EU laws being brought in during the implementation period, we will be able to raise our concerns at the Joint Committee.

The agreement that we have reached will also enable UK participation in EU bodies, agencies and meetings where it is agreed it is beneficial and in the interest of both sides. This will provide multiple fora for the EU to continue to draw on UK expertise and for the UK to raise any concerns on EU rules during the period. The exact nature of that participation will be a matter for further discussion.

2. 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)

The scope of tertiary legislation is set by secondary legislation. As it usually takes around two full years for secondary legislation to pass through the EU system into law, virtually all of the laws that will come into effect during this time will have been drafted while the UK was a Member State.

Whilst the UK will no longer be a Member State from March 2019 and will therefore neither be a member of the formal institutions or retain the voting rights of a Member State, as the draft Withdrawal Agreement sets out, the UK will continue to participate in those EU bodies and agencies where it is agreed it is beneficial and in the interest of both sides. The UK will thereby retain the ability to influence policy development, and will remain able to raise concerns over new EU rules as they are developed much in the same way as we do now.

In the instance that the Government identifies any EU legislation that remains a concern – for example any legislation which appears to contravene the good faith clause governing the agreement – the Government will be able to trigger a discussion at the Joint Committee.

As now, the Government anticipates that Parliament will want to continue to have a role scrutinising EU legislation during the implementation period. The degree of scrutiny Parliament wishes to give to ongoing EU business is of course a matter for Parliament, as is set out below in response to recommendation 12.

3. *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)*

Both the UK and the EU are in agreement that the implementation period should be strictly time-limited. The draft legal text therefore states that the end date will be 31 December 2020 and we are confident that the UK will have all the necessary arrangements for the future relationship in place by that time.

This part of the agreement is essential to delivering economic certainty and a smooth and orderly exit. It means citizens and businesses in both the UK and EU will only have to prepare for one set of changes as we move to our new relationship is ready to be implemented at the end of the time-limited period.

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

5. *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)*

As already outlined, the Withdrawal Agreement will be underpinned by a duty of good faith, to ensure that the implementation period works properly for both sides.

This duty creates an explicit obligation to approach the application of the agreement with fairness and consistency.

As set out in Article 157 of the draft Withdrawal Agreement, the Joint Committee shall issue an annual report on the functioning of this Agreement. Further specifics on the detailed functioning of the Joint Committee will be a matter for the ongoing negotiations.

We have agreed that the Joint Committee will have the ability to discuss any issues that might arise concerning the management and operation of the agreement during the implementation period. It will, for example, provide the UK with a means to raise concerns regarding new laws, which we consider might be harmful to our interests.

It has also been agreed in some specific areas that the UK will have further safeguards or an opt out where decisions require unanimity. For example, in the area of Common Foreign and Security Policy, the UK will have the right to not apply a decision for vital and stated reasons of national policy.

6. *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)*

We have been clear that in leaving the EU we will bring an end to the direct jurisdiction of the CJEU in the UK.

We have agreed that for the implementation period, the existing EU mechanisms for supervision and enforcement will apply, this includes continued ECJ jurisdiction. This is necessary so that there's one set of changes for businesses and people.

This does not change the fact that in the long term, outside of the EU, the UK will no longer be under the direct jurisdiction of the ECJ.

Our future partnerships paper on enforcement and dispute resolution sets out the UK's position on enforcement and reviews examples of mechanisms for resolving disputes in international agreements. There are a number of existing precedents where the EU has reached agreements with third countries which provide for a close cooperative relationship without the CJEU having direct jurisdiction over those countries.

The appropriate dispute resolution mechanism is a matter for negotiation and will depend on the final substance and context of our agreement. However, we are clear that the Withdrawal Agreement and the future partnership must respect the autonomy and integrity of both the UK and the EU.

7. *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)*

As the Prime Minister said at Mansion House, we want to explore with the EU the terms on which we could remain part of EU agencies such as those that are critical for the chemicals, medicines and aerospace industries: the European Medicines Agency (EMA),

the European Chemicals Agency (ECHA), and the European Aviation Safety Agency (EASA). There are other agencies, such as those related to our future security partnership, that the UK may see a mutual benefit in remaining a part of.

If we agree the UK should continue to participate in an EU agency, the UK would have to respect the remit of the ECJ in that regard. For example, if the CJEU were to rule that a European agency that we wanted to cooperate with must abide by certain rules in its operation, the UK's cooperation would be under those rules as would any other participating third country. But, crucially, our Parliament would remain ultimately sovereign. It could decide not to accept these rules, but with consequences for our membership of the relevant agency and linked market access rights.

8. *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 European Parliament resolution approved on 14 March underlines that future UK-EU agreements should include robust dispute settlement mechanisms as well as a consistent governance framework, and respect the competence of the CJEU in the interpretation of questions related to EU law.

Our future partnership paper on enforcement and dispute resolution sets out the UK's position on enforcement, and reviews examples of mechanisms for resolving disputes in international agreements. It states that as part of the deep and special partnership that we seek with the EU, it is in the interests of both the UK and the EU that the rights and obligations agreed between us can be relied upon and enforced by individuals and businesses; and that where disputes arise between the UK and the EU on the application or interpretation of these obligations, those disputes can be resolved efficiently and effectively. In this paper, the UK set out four principles, which are to: maximise certainty for individuals and businesses; ensure that they can effectively enforce their rights in a timely way; respect the autonomy of EU law and UK legal systems while taking control of our own laws; and continue to respect our international obligations.

The Prime Minister has been clear that in leaving the European Union, we will bring about an end to the direct jurisdiction of the CJEU in the UK.

The Prime Minister has also been clear that the agreement we reach must respect the sovereignty of both the UK and the EU's legal orders. The CJEU will continue to interpret EU law and be the ultimate arbiter of EU law within the EU and its Member States.

We will respect that role as we would the courts of any of our close partners, and as we would expect our partners to respect the role of the Supreme Court within the UK.

Our ambition is to secure an agreement that has the support of the Member States, European Parliament, Council and Commission.

9. *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)*

We have agreed that for the implementation period, the existing EU mechanisms for supervision and enforcement will apply, including continued ECJ jurisdiction. This is necessary so that there is one set of changes for businesses and people.

This does not change the fact that in the long term, outside the EU, the UK will no longer be under the direct jurisdiction of the ECJ.

The detail of the overall governance arrangements for the Withdrawal Agreement, as well as the arrangements for individual separation issues, will be discussed in negotiations.

10. *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)*

We have agreed with the EU, as set out in the draft Withdrawal Agreement, that a Joint Committee will be established. It will be composed from representatives from both parties, and provide a means to ensure the smooth functioning of the implementation period, and for either side to raise any concerns which could arise during the implementation period.

This will provide the UK with a means to raise concerns regarding new laws, which we consider might be harmful to our interests.

Significant progress has been made to turn the Joint Report from December into the legal text of the Withdrawal Agreement, which we will conclude in full by October. We have made rapid progress, reaching agreement on much of the legal text, and locking down all of the provisions on citizens’ rights, the implementation period and the financial settlement.

We will carry this momentum forward as we work to agree the remaining areas of the Withdrawal Agreement, alongside the development of the framework for the future partnership.

11. *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)*

Programmes for the next Multiannual Financial Framework have not yet been designed. We will take decisions on participation in future programmes in due course and as the

proposals are developed. As the Prime Minister said in her speech in Mansion House, the UK is keen to continue to participate in programmes which benefit both the UK and the EU, alongside our EU partners.

12. 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)

The Government recognises the longstanding and important scrutiny role played by the European Scrutiny Committee alongside the European Union Committee in the House of Lords. The degree of scrutiny Parliament wishes to give to ongoing EU business is of course a matter for Parliament. It will be for both Houses to determine the level of scrutiny they will want to undertake during the period, on the basis of the detailed arrangements for the period agreed between the UK and the EU.

The Government supports a strong scrutiny process, and will continue to support and facilitate this for as long as EU legislation will continue to affect the UK. We are happy to engage in dialogue with the Committees as to how this may best be achieved.

13. 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)

The Government does not want or expect a no deal outcome, but as a responsible Government we are planning for all potential outcomes, including the unlikely scenario in which there is no mutually satisfactory agreement. That is exactly what we are doing across the whole of Government.

The Government is on course to deliver a functioning border in a 'no deal' scenario that enables trade to flow, the Government to collect revenues, and the UK to have a secure border. The Government formally established the Border Delivery Group in March 2017.

This is a cross-Whitehall group of senior officials, set up by Permanent Secretaries, that provides oversight and assurance of departmental plans for managing all border-related impacts of EU exit both for Day 1 and beyond.

In the event of no agreement, we would look to ensure that there is no return to the borders of the past in Northern Ireland and Ireland.

14. 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)

In the interests of providing as much certainty as possible to citizens we will ensure that the provisions agreed on citizens' rights will be fully incorporated into UK law. The Secretary of State for Exiting the European Union confirmed in a written ministerial statement in November 2017 that the Withdrawal Agreement and Implementation Bill will implement the major elements of the Withdrawal Agreement.

The Withdrawal Agreement provides that citizens shall be able to rely directly on their rights as set out in the citizens' rights part of that agreement. It is therefore our intention that this Bill will give effect to what has been agreed on citizens' rights in accordance with our domestic constitutional arrangements.

15. 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)

The major elements of the Withdrawal Agreement - including the detail of the implementation period agreed between both sides - will be given effect in primary legislation through the Withdrawal Agreement and Implementation Bill. Having only recently reached an agreement on the implementation period, it would be premature for us to publish the exact detail of how we will legislate for it now. However, once we have reached a full withdrawal agreement, Parliament will be given time to debate and scrutinise our plans as part of the full legislative process.

There are also likely to be a number of more technical changes required to implement the withdrawal agreement which may be better suited to secondary legislation. These changes could be made through Clause 9.