



House of Commons  
European Scrutiny Committee

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**The draft EU/UK  
Withdrawal Agreement:  
Key Legal and  
Political Questions:  
Government Response  
to the Committee's  
Fifty-eighth Report**

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

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## The European Scrutiny Committee

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

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## Third Special Report

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The European Scrutiny Committee published its Fifty-eighth Report of Session 2017–19, [The draft EU/UK Withdrawal Agreement: Key Legal and Political Questions](#) (HC 1798) on 8 March 2019. The Government responded on 13 May 2019 through a letter from Rt Hon Steve Barclay MP, Secretary of State for Exiting the European Union. We publish this letter as an Appendix to this Special Report.

## Appendix

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Dear Sir Bill,

Thank you for your report of 8 March 2019 ‘The Draft UK/EU Withdrawal Agreement: Key Legal and Political Questions’, relating to the Explanatory Memorandum submitted by the Department of Exiting the European Union on 21 February 2019. The Department is pleased to have the opportunity to respond to the conclusions and recommendations of the report. We have set these out below.

**RT HON STEVE BARCLAY MP**

**SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

## GOVERNMENT RESPONSE TO THE EUROPEAN SCRUTINY COMMITTEE REPORT KEY LEGAL AND POLITICAL QUESTIONS

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

On 24 July 2018 the Government published its White Paper on Legislating for the Withdrawal Agreement. This made clear that the European Union (Withdrawal Agreement) Bill would amend the European Union (Withdrawal) Act 2018 to save the legal effect of the European Communities Act 1972 (ECA) for the duration of the implementation period. This will provide legal certainty to businesses and individuals during the implementation period by ensuring that there is continuity in the way that EU law applies in the UK during this period. Crucially, the Withdrawal Agreement Bill will make provision to end this saving of the effect of the ECA at the end of the implementation period. The Government will introduce the Bill as soon as possible.

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

The steps that must be followed before the UK is able to ratify the draft Withdrawal Agreement are governed by UK domestic law. The Government agrees that the relevant provisions are those set out in section 13 of the European Union (Withdrawal) Act 2018 and in Part II of the Constitutional Reform and Governance Act 2010. However, as the Prime Minister made clear to Parliament on 12 February this year, to complete the process, the Government will make provision in the Withdrawal Agreement Bill to ensure that we are able to ratify on time to guarantee our exit in an orderly way. Clearly, any such legislative provision will require Parliament's consent.

The Committee is also correct in saying that the draft Withdrawal Agreement has been endorsed by both the UK and the European Council, but has not been signed. We agree that signature subject to ratification only creates an obligation to refrain from acting in a way which would frustrate the purpose of the treaty.

3. *The Minister states in his Explanatory Memorandum that the proposed Council Decisions will be adopted after the UK Parliament has signalled it is content with the draft Withdrawal Agreement as required by Section 13 of the Withdrawal Act. We ask*

***the Government to explain how this statement fits with the EU's own announcement that the Council Decision on signature has already been adopted by the EU. When does he expect the UK to sign the draft Withdrawal Agreement?***

At this stage, as the Committee notes, the Withdrawal Agreement represents a version of the text which has been agreed, but has not yet been formally signed. The Government's intention is to sign the agreement after it is approved by the House of Commons.

The original decision on signature was adopted on 11 January 2019. However, the decision on adoption has not yet been formally adopted.

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

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

On points (a) and (b), internal discussions within the EU are ongoing, but ultimately the role of the European Parliament in this respect is a matter for the EU27 to determine. Similarly, changes made to the proposed Council Decisions are a matter for the EU27. All updated versions are available on the Consilium Website.

On point (c), we have noted that the proposed Council Decisions state that, with regards to the Joint Committee, "the European Parliament shall be put in a position to exercise fully its institutional prerogatives throughout the process in accordance with the Treaties". The UK Parliament and the EU Parliament will rightfully expect that they will be able to undertake oversight of the work of the Joint Committee. As the exact arrangements for the Joint Committee develop between the UK and the EU, the UK and the EU will need to have further conversations about how best to provide for the necessary parliamentary scrutiny of its operation.

The Government is keen to engage with the Committee, and with Parliament more broadly, on how we can best facilitate proper scrutiny of the activity of the Joint Committee. When we work with the EU institutions to bring the Joint Committee into operation, we should therefore likewise take forward discussions on the appropriate mechanism for ensuring that scrutiny.

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

The Government has committed to continuing to support and facilitate the parliamentary scrutiny process for draft EU legislation during the implementation period.

As part of this, our working assumption is that we would continue with the current model for providing written evidence to the committees through Explanatory Memoranda (EMs).

We will of course be happy to have discussions with the Committee regarding the range of documents to be deposited, and also the form and content of EMs to ensure that they properly fulfil the Government's scrutiny commitments.

**6. Article 3 states that: "Immediately after the signature of the Agreement, the Commission shall notify the other parties to the international agreements as referred to in Article 2(a)(iv) of the Agreement, that, subject to the entry into force of the Agreement, during the transition period, the United Kingdom is treated as a Member State for the purposes of those international agreements". This ties in with the provision in Article 129 of the draft Withdrawal Agreement that "during the transition period, the United Kingdom shall be bound by the obligations stemming from international agreements concluded by the Union, by Member States acting on its behalf, by the Union and its Member States acting jointly, as referred to in point (a)(iv) of Article 2". The footnote to that Article provides "The Union will notify other parties to this agreement that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements". Our analysis is that these provisions do not remove the need for the third country concerned to agree or acquiesce in the UK receiving the benefit of rolled-over EU international agreements during the transition/implementation period established by the draft Withdrawal Agreement. Our scrutiny of recent proposals for EU international agreements suggests that this is not being made clear by the Government, even if it is accepted in practice. We ask the Government to inform us when signature of the draft Withdrawal Agreement takes place and so when notification to third countries commences.**

The EU's notification will cover international agreements entered into by the EU and by which the United Kingdom is covered by virtue of its membership of the European Union, and international agreements entered into by the United Kingdom in its capacity as an EU Member State.

The third countries with whom we have engaged on this agree with the objectives of the notification, and we understand that some intend to make a formal response. In our view, whilst it is open to treaty partners to make a formal response to the notification in writing, so as to evidence the shared intention of the parties that the UK continues to be covered by



the agreements, such a response is not a prerequisite for the UK to continue to enjoy rights under such agreements provided that the relevant third country intends the UK to be covered. The shared intention of the parties may be evidenced by other means, including subsequent state practice.

As we continue to work with the EU and third countries on the transition of international agreements, we are happy to inform the Committee, and Parliament more broadly, at the point at which the notification is issued.

**7. *Although most EU laws, including the European Arrest Warrant, will continue to apply to the UK during a post-exit transition/implementation period, Article 185 of the draft Withdrawal Agreement states that Member States who do not wish to extradite their own nationals outside of the EU for reasons related to fundamental principles of national law, may refuse to surrender them to the UK immediately following its exit from the EU. Article 4 of the proposed signature Decision states that in respect of Article 185: "Those Member States that wish to avail themselves of the possibility foreseen in paragraph 2 of Article 185 of the Agreement shall inform the Commission and the General Secretariat of the Council thereof before 15 February 2019". We ask whether the Government has received any informal indications yet of notifications submitted by other Member States by the deadline set? We require an undertaking that the Government will inform Parliament promptly of any notifications made. We also require the Government to inform us whether it intends to take reciprocal action under Article 185 by refusing to surrender UK nationals to Member States who have made a notification.***

As set out in your letter, Article 185 of the Withdrawal Agreement allows the EU, on behalf of any of its Member States (for reasons related to fundamental principles of national law) to declare, at the point of ratification, that those Member States will not extradite their own nationals to the UK under the European Arrest Warrant (EAW) during the implementation period.

Any notifications made under this article would be made privately between an EU Member State, the European Commission and the General Secretariat of the Council as set out in the draft Council Decision of 5 December 2018. Although that Decision initially contained a deadline for declarations of 15 February 2019, a deadline was not included in the final Council Decision.

It is not appropriate for the Government to comment on matters between EU Member States and Institutions. However, Germany has stated publicly that they intend to make a notification under Article 185 because their constitutional law does not permit the extradition of its own nationals to countries outside of the European Union.

We believe it is in the interests of both the UK and EU Member States that important operational capabilities, which are currently provided for by the EAW, are preserved during the implementation period.

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

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

Our view is that the authorisation procedure set out in the Council Decisions will only apply to a limited range of agreements. The Withdrawal Agreement (Article 129 (4)) confirms the UK's right to negotiate, sign and ratify new international agreements which come into force after the implementation period, even where the subject matter of those agreements would ordinarily be within the exclusive competence of the Union. The authorisation process described in the Council Decisions on conclusion is limited to the agreements which are both in exclusive competence of the Union and which the UK wishes to bring into force during the implementation period.

We are clear that the international agreements we are putting in place as we leave the EU would only come into force when the UK ceases to be a Member State and is no longer bound by EU law at the end of the implementation period, since the notification to third countries provides the basis for continuity for EU international agreements for the duration of the implementation period. There are a limited set of circumstances in which international agreements in Union competence may need to enter into force during the implementation period - and therefore would be submitted for authorisation in advance. We do not currently have plans to use this mechanism, but we cannot rule out the possibility of doing so should circumstances change. We would be happy to update the Committee should those circumstances arise.

**9. *Article 3(4) provides that such authorisation decisions will be made by implementing act. Article 3(5) states that the European Parliament should be kept informed of such decisions. The same process applies to bilateral agreements authorised in respect of the Northern Ireland, Cyprus SBA and Gibraltar Protocols. We ask the Government to confirm that it will keep the UK Parliament similarly engaged by depositing such implementing acts for scrutiny.***

The Government is happy to confirm that our clear working assumption is that such proposals would fall to be deposited. We would be happy to have discussions with the Committee regarding the documents subject to deposit in the implementation period to ensure that the process focuses on what is important and relevant to the UK.

**10. *Article 3(3) provides that “the United Kingdom shall notify the Commission of its intention to express its consent, in its own capacity, to be bound by an international agreement intended to enter into force or be applied during the transition period, in an area of exclusive competence of the Union”. This is the only direct obligation imposed on the UK by the proposed Decisions and seems unobjectionable as it facilitates the operation of Article 129(4) of the draft Withdrawal Agreement which is in the UK's national interest. At a more general level we would welcome the Minister's confirmation that the UK considers itself legally bound by these proposed Council Decisions, regardless of the UK's exclusion from their adoption by Article 50(4) TEU and the basis on which it does so.***

The United Kingdom is bound by the terms of the Withdrawal Agreement. It follows that, under article 129(4), the United Kingdom is obliged to seek authorisation from the

European Union to enter into agreements which fall within exclusive competence during the implementation period. The Council Decision sets out the procedure that the United Kingdom must follow to seek such authorisation under Article 129(4).

**11. *We insist on an assurance that where the Decision provides implementing powers for the Commission in other areas of significant interest, for example in respect of residence documents for UK nationals, the Government will deposit the relevant documents for Parliamentary scrutiny.***

The Government notes the Committee's request. In line with the current approach agreed with the Committee on Commission implementing acts, the Government will continue to identify those acts with implications for the UK and consult with the committee clerks on whether the documents should be deposited.

This consultative approach will continue to ensure that the scrutiny process concentrates on what is important and relevant. Of course, if helpful, we would be happy to further discuss any changes to the approach for implementing acts during the implementation period.

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

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

The Government has agreed with the European Commission the limited technical changes necessary to the draft Withdrawal Agreement to reflect the extension of the Article 50 period (as agreed between the United Kingdom and the European Council on 11 April 2019). As well as Article 185, it was agreed that changes were also required in the last recital of the Agreement and in Article 2 of the Protocol on Gibraltar.

Full details are set out in an exchange of letters between Michel Barnier and myself on 11 April 2019, which was separately provided to the Committee on that day.

Articles 126 and 132 have not been amended. Changes to these articles are not necessary in order for the agreement to be able to operate in light of the extension.

**13. *We note that without changes to Article 185 at least, the Withdrawal Agreement would fall. We also ask for an urgent reply as to whether the Government agrees with us***

***that such changes to the text of the draft Withdrawal Agreement require reconsideration and re-adoption of the proposed Decisions by the Council and resubmission to the European Parliament of the conclusion Decision.***

The new Council decision on [signature](#) and the [adapted draft Council decision](#) on the conclusion of the Withdrawal Agreement for submission to the European Parliament has now been published on the Consilium website. Both have been deposited for examination by the Committee, and an Explanatory Memorandum will be provided in the usual way.

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

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

The European Parliament elections are scheduled to take place between 23 and 26 May, with the new European Parliament meeting for the first time on 2 July.

While the UK continues to remain a Member State and be represented in the European Parliament, it is required to participate in the European Parliamentary elections for two reasons:

- first, the EU Treaties provide that EU citizens have the right to be represented in the EP, and there is no legal mechanism by which the UK could return MEPs to the new EP other than by participating in the elections; and
- second, the EP needs to be properly constituted - with duly elected MEPs from all Member States - for it to perform its functions, including the appointment of the Commission and the adoption of any legislation.

The EU was clear that it would not agree an extension unless the functioning of the EU institutions can be ensured. It is a fundamental requirement, under the EU Treaties, that EU citizens are represented in the European Parliament. The new European Parliament would not be properly constituted if a Member State did not have MEPs, putting all of its actions and hence the proper functioning of the EU's institutions at risk - and there is no legal mechanism by which the UK could return MEPs to the new European Parliament other than by participating in the elections in May. Seeking to obviate the need for the UK to participate in these elections would require Treaty or legislative change at EU level, which would require the agreement of all member states (and in respect of Treaty change, ratification by national Parliaments) such that they were not feasible in the timeframe. Further the European Council Decision of 11 April 2019 made it clear that an extension of the Article 50 period to 31 October 2019 was predicated on the UK holding the European Parliament Elections. If the UK did not hold these elections, in the absence of the withdrawal agreement being ratified, the extension period would end on 31 May 2019.

***15. We remind the Secretary of State and the Prime Minister of the repeated statements of the Government that the UK will control its own laws and of the provisions of the European Union (Withdrawal) Act 2018 including those repealing section 1 of the***

***European Communities Act 1972. In the light of this, we call on them to explain to Parliament urgently how the Government intends to give effect to the obligation to ensure that the Withdrawal Agreement has direct effect and supremacy in UK law, including the disapplication of any conflicting domestic legislation passed by the UK Parliament after Brexit.***

The Withdrawal Agreement winds down the rights established during our membership, including the rights to certain remedies before the courts. Article 4 ensures that UK individuals and businesses who have rights under the Withdrawal Agreement in the EU and EU individuals and businesses who have rights under the Withdrawal Agreement in the UK are treated equally. In the same way UK citizens and businesses in the EU can seek to enforce their rights, EU nationals will be able to rely directly upon the rights derived from the agreement and seek to have any rules contrary to them disapplied. This approach is a sensible way of ensuring citizens and businesses have both consistency and certainty through a single set of changes where EU law continues to apply. The EU (Withdrawal Agreement) Bill will give legislative effect to Article 4.

***16. In addition to the well-known concerns about the indefinite duration of the backstop, we are concerned about whether, as the text stands, a decision of the Joint Committee not to terminate the backstop “by mutual consent” pursuant to the Article 20 “review mechanism” is amenable to arbitration and therefore potentially to the jurisdiction of the CJEU under the Agreement. The Attorney General considers in his letter to the Prime Minister of 13 November 2018<sup>39</sup> that it is the better view that it is, but we are not reassured. In the absence of any definitive provision in the draft Withdrawal Agreement, we consider the matter remains unclear. We ask the Government to clarify whether this is one of the issues on which it is seeking changes or clarification from the EU.***

As set out in the Withdrawal Agreement, if the UK believed that the EU had not complied with the review process in good faith then the UK could refer this to an independent arbitration panel and the arbitration panel would be able to rule on whether the EU had complied in good faith or not.

On 20 February, the UK and the EU published a joint legally binding instrument related to the Withdrawal Agreement and the Northern Ireland Protocol. The instrument provides a new, concrete legal commitment that the EU cannot act with the intention of applying the backstop indefinitely - and makes clear that if the EU did so, the UK could use this commitment to take the matter to independent arbitration. If the EU was found to be in breach, the UK could ultimately suspend the Protocol, and such a suspension could remain in place unless and until the EU came into compliance.

Were the backstop to enter into force, a dispute related to it would be dealt with by the independent arbitration panel, and not by the Court of Justice of the European Union (CJEU). The CJEU will only provide an interpretation of EU law - but the commitment to act in good faith is not a matter of EU law.

I am copying this letter to the Chair of the European Union Committee, Lord Boswell; to the Clerks of both Committees, Jessica Mulley (Commons) and Christopher Johnson (Lords); and to Les Saunders, Department for Exiting the European Union.