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European Union Committee

15th Report of Session 2017–19

Dispute resolution and enforcement after Brexit

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The European Union Committee

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Evidence is published online at https://www.parliament.uk/brexit-enforcement-dispute-resolution/ and available for inspection at the Parliamentary Archives (020 7219 3074).

Q in footnotes refers to a question in oral evidence.

SUMMARY

When the United Kingdom leaves the European Union, the Government has said that it will end the direct jurisdiction in the UK of the Court of Justice of the European Union (CJEU). On the assumption that this happens, it is essential for the rule of law in the UK that an adequate replacement is found, both to help resolve any disputes between the UK and EU post-Brexit, and to ensure that there is a robust system that will allow individuals and businesses to enforce their rights.

The necessary provisions for enforcement and dispute resolution after Brexit relate to three distinct matters: the enforcement of the Withdrawal Agreement concluded under Article 50 of the Treaty on European Union; arrangements during the proposed transition period; and, the dispute resolution system that is implemented under any separate agreement that is reached on the future relationship between the EU and the UK. There is also the related question of how to deal with justice cooperation issues in civil, family and criminal law.

Outside the CJEU, no 'one size fits all' dispute resolution model could deal with these issues. The Government will have to agree multiple dispute resolution procedures post-Brexit. While it was suggested that the EFTA Court, which has jurisdiction over the EFTA States (Iceland, Liechtenstein and Norway), might take jurisdiction over all these matters, this proposed solution is not without technical problems—though the Government should not discount using the EFTA Court as a means of adjudicating disputes over the Withdrawal Agreement, if this can be agreed with the EU 27 and the EFTA States.

Liabilities and obligations under the Withdrawal Agreement may arise for many years after the UK has left the EU. It would be problematic to leave the interpretation of the entirety of this agreement to the CJEU, since it is associated with one of the parties to the agreement, and any perception of bias should be avoided. However, the Government will need to be mindful of the fact that the legal autonomy of the EU, as defined by the CJEU, means that only the CJEU can have the final say on the interpretation of EU law. This means that innovative solutions may prove problematic, particularly since the Withdrawal Agreement may be referred to the CJEU to determine whether it is legally compatible with the EU Treaties.

The Government's proposed solution appears to be that any disputes relating to the Withdrawal Agreement would be settled in the political sphere by the proposed UK-EU Joint Committee that will be established under the agreement. But this could leave intractable disputes between the UK and the EU unsettled. A pragmatic solution will need to be found and time is short.

During the transition, the UK will continue to be bound by the jurisdiction of the CJEU and, since this period should be relatively short, it may be too burdensome to seek to establish a separate dispute resolution mechanism. Nonetheless, this continued jurisdiction of the CJEU should be for a reasonable, time-limited, period; and, it is important for legal certainty that there is a longstop period for any claims that arise during the transition.

In relation to the future relationship, it is not possible to recommend a precise model since much will depend on the closeness of the partnership between the UK and the EU. The Prime Minister has already recognised that, if the UK

wishes to pursue a deep and special partnership which involves participating in EU agencies, it will have to respect the remit of the CJEU in those areas. This is also an issue with EU law based mechanisms such as the European Arrest Warrant (EAW). Whatever formal structure is adopted, it is likely to be composite in nature and there may be different levels of integration in different spheres. This may allow the UK to restrict CJEU jurisdiction to specified and limited areas, such as those involving direct co-operation with EU agencies, or within the field of justice and home affairs. Rejecting the remit of the CJEU entirely would mean the UK losing access to EU agencies upon which it relies, including those responsible for the regulation of aviation, medicines and chemicals, as well as the EAW.

More broadly, it is important that any enforcement and dispute resolution established under the future relationship should be accessible to citizens and business and should be transparent. It would be prejudicial to the interests of citizens and businesses if the future dispute resolution system were conducted entirely at a state-to-state level.

We have previously reported on issues relating to the mutual recognition of civil, family and commercial judgments. The Government's response to our report highlighted limited progress. We continue to have grave concerns about these issues and will revisit them in our future work.

UK lawyers and judges have played an important role in the evolution of EU law, but after Brexit the ability of the UK to affect the development of case-law in the EU is likely to diminish significantly. Given the importance of the jurisdiction of the CJEU internationally, this may have a negative impact on the international standing of the UK's common law system. We also note that the ability to request a preliminary reference from the CJEU, combined with the direct effect and supremacy of EU law, has sometimes acted as a check on Government action. This check will be lost as a result of Brexit, and so the rights of individuals will be weakened.

Dispute resolution and enforcement after Brexit

CHAPTER 1: INTRODUCTION

This report

1. This report considers the structures that may be created to ensure effective enforcement and dispute resolution after Brexit. We have sought to provide both a summary of the potential challenges ahead and a practical model for dispute resolution procedures between the UK and the European Union going forward.

2. Under the provisions of Article 50 of the Treaty on European Union (TEU) the treaties will cease to apply to the UK after Brexit. The UK will become a 'third country' and will no longer have an obligation to implement EU law. The Government intends to repeal the European Communities Act 1972 through the European Union (Withdrawal) Bill, which will end the primacy and direct effect of EU law in the UK. This will have a profound effect on the UK legal system. The Government will also have to convert all the EU laws that it wishes to retain into domestic UK law, where this is possible.

3. One of the aims of the Government's Brexit strategy is to end the direct jurisdiction in the United Kingdom of the Court of Justice of the European Union (CJEU). Finding an adequate replacement that will allow for the resolution of disputes between the UK and EU post-Brexit, while retaining a system through which individuals and businesses can rely on and enforce their rights, will be critical for the maintenance of the rule of law in the UK.

4. Any arrangements for enforcement and dispute resolution post-Brexit are likely to relate to three quite distinct matters:

   (a) enforcement of any Withdrawal Agreement agreed under Article 50 of the TEU;

   (b) arrangements during the proposed transitional (or implementation) period; and,

   (c) arrangements relating to the future relationship (which have yet to be agreed, and which may simply focus on trade, but are likely to be more wide ranging).

5. Over the course of our inquiry, it became apparent that there was no 'one size fits all' dispute resolution model that could deal with all the issues caused by Brexit. The need for dispute resolution will arise in different circumstances. This is reflected in the structure of the report. The three above-mentioned issues are dealt with in turn. Following a short chapter which sets out the background (Chapter 2); Chapter 3 focuses on the Withdrawal Agreement; Chapter 4 considers the transitional period; and Chapter 5 examines the various options available for the future relationship.

6. The picture is further complicated by the fact that some elements of the Withdrawal Agreement (for example the arrangements relating to the Irish

border) may be superseded by the future partnership agreement, while others (such as citizens' rights and the financial settlement) will not.

7. In addition to the mechanisms relating to dispute resolution, we have also posed questions about how the UK legal landscape will be transformed (having specific regard to the rights of individuals and businesses). These issues are considered in Chapter 6.

The European Union Committee's work

8. The report is part of a co-ordinated series of Brexit-themed inquiries launched by the European Union Committee and its six sub-committees following the referendum on 23 June 2016, which have aimed to shed light on the main issues likely to arise in negotiations on the UK's exit from, and future partnership with, the European Union. It draws on evidence provided to us in six evidence sessions held between November 2017 and March 2018.

Our inquiry

9. On 21 November 2017 we held a scoping session, taking evidence from four retired senior judges: Lord Neuberger of Abbotsbury (the former President of the UK Supreme Court); Lord Thomas of Cwmgiedd (the former Lord Chief Justice of England and Wales); Lord Hope of Craighead (the former Deputy President of the Supreme Court); and Sir Konrad Schiemann (a former judge of the European Court of Justice). We subsequently published a call for evidence with detailed terms of reference on 6 December. This is set out at Appendix 3 to this report.

10. On 16 January 2018, we took evidence from the former President of the EFTA Court, Carl Baudenbacher, and a senior official from the EFTA Surveillance authority, Catherine Howdle. We heard evidence from Professor Catherine Barnard (University of Cambridge) and Hugh Mercer QC (Essex Court Chambers) on 6 February. On 27 February we took evidence from Professor Christa Tobler (Europainstitut der Universität Basel and Leiden University); Professor Graham Gee (University of Sheffield); Professor Valsamis Mitsilegas (Queen Mary, University of London) and Raphael Hogarth (Institute for Government). On 20 March we heard from Martin Howe QC (8 New Square) and Sir Richard Aiken (a former judge of the Court of Appeal). Finally, on 27 March we took evidence from Ministers representing both the Department for Exiting the European Union (DExEU) and the Ministry of Justice: Suella Fernandes MP and Lucy Frazer QC MP.

11. We received 21 written submissions in response to our call for evidence. A list of those who contributed is included at the back of this report and all written submissions can be found on our website.[1] We are grateful to all those individuals and organisations who have engaged with our inquiry and provided us with useful evidence.

12. **We make this report to the House for debate.**

1 House of Lords EU Justice Sub-Committee, 'Brexit: enforcement and dispute resolution inquiry': https://www.parliament.uk/brexit-enforcement-dispute-resolution/ [accessed 30 April 2018]

CHAPTER 2: BACKGROUND

The role of the Court of Justice of the European Union (CJEU)

13. The CJEU is the judicial organ of the European Union and is entrusted with the task of upholding the rule of law. It reviews the legality of the acts and omissions of Member States and of the EU institutions and interprets EU law at the request of Member States' national courts. Article 19(1) TEU provides that the CJEU "shall ensure that in the interpretation and application of the Treaties the law is observed", and that "Member States shall provide remedies sufficient to ensure effective legal protection in the field covered by Union law".

14. The same Article also provides that the CJEU has three components: the Court of Justice (which is also often referred to as the European Court of Justice, or ECJ); the General Court (previously the Court of First Instance) and a specialised court (the Civil Service Tribunal—which is currently being disbanded).[2]

15. The Court of Justice consists of 28 judges (one from each Member State) and 11 Advocates General (who deliver independent opinions in cases that raise new questions of law). The current UK judge at the Court of Justice is Christopher Vajda QC. He was re-nominated in September 2017, but is expected to leave the Court post-Brexit.[3] The UK also has an Advocate Generate at the Court (Eleanor Sharpston, QC) and a judge at the General Court (Ian Stewart Forrester QC). In the interests of brevity, throughout this report we simply use the term CJEU without distinguishing between its component parts except where necessary.

16. The CJEU considers two main types of proceedings: direct actions[4] and references for a preliminary ruling.[5] The former are brought directly before the Court of Justice or General Court and are dealt with entirely by those courts; whereas the latter proceedings are begun in a national court. In short, where a national court of a Member State encounters a question on the interpretation or validity of EU law it may (or sometimes is obliged to) make a preliminary reference to the Court of Justice. Once the Court of Justice makes a preliminary ruling on the specific issue of EU law, the national court will apply the ruling to the facts of the case and determine the dispute between the parties.

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2 The Civil Service Tribunal is in the process of being dismantled following a staged increase in the number of judges serving the General Court and the re-assignment of jurisdiction in staff cases to the General Court as of 1 September 2016.

3 Department for Exiting the European Union, 'UK to renominate Judge Vajda to the Court of Justice of the European Union (CJEU)', 18 September 2017: https://www.gov.uk/government/news/uk-to-renominate-judge-vajda-to-the-court-of-justice-of-the-european-union-cjeu [accessed 18 April 2018]

4 There are four main types of direct actions: infringement (or enforcement) proceedings (Articles 258-260, Treaty on the Functioning of the European Union, OJ C326 (consolidated version of 26 October 2012); actions for annulment (Articles 263 and 264, Treaty on the Functioning of the European Union); actions for failure to act (Articles 265 and 266, Treaty on the Functioning of the European Union); and actions for damages (Articles 268 and 340(2), Treaty on the Functioning of the European Union). Enforcement proceedings are brought by the Commission, or a Member State against a Member State that has failed to comply with obligations under EU law. The actions for annulment and failure to act are used, respectively, to challenge illegal acts and omissions of the institutions, bodies and agencies of the EU. Finally, the action for damages is used to obtain compensation for loss suffered as a result of an unlawful Union act. For more on this, see: Catherine Barnard and Steve Peers (eds), European Union Law, 2nd Edition, (Oxford: OUP, 2017), pp 262–309

5 Article 267, Treaty on the Functioning of the European Union

17. The Institute for Government (IfG) produced a report in December 2017, which sought to chart the UK's relationship with the CJEU.[6] It concluded that the number of actions brought against the UK before the CJEU is well below the European average. Of the 15 Member States considered, only the Scandinavian states were "taken to court by the Commission less often than the UK". It also noted that "the UK also ends up in court less often than it used to", and that when the UK does end up before the CJEU "it wins more often than most other member states". The study concluded that when considering Commission actions against the UK, "cases on the environment are the most likely to end up in court".[7]

18. The IfG also considered the cases that the UK courts referred to the CJEU, noting that approximately two cases per year concerning citizens' rights have been referred from the UK courts to the CJEU in recent years, and that such cases "represent a reasonably small proportion of UK references".[8]

What sort of disputes may arise after Brexit?

19. The Government acknowledges that, post-Brexit, there are several ways in which a dispute might arise between the UK and the EU. These include:

    (a) Implementation: where one party considers that the other has not appropriately or properly implemented the agreements, for example in domestic law;

    (b) Subsequent actions: where one party considers subsequent legislation, executive actions, or decisions of the other party to be incompatible with the obligations under the agreements;

    (c) Divergence: the way in which the agreements, or implementing legislation, is interpreted by the parties' respective courts, or other bodies or agencies, has diverged in areas where the parties have agreed to seek to avoid divergence.[9]

20. In addition to potential EU-UK disputes, private actors, including individuals and companies, can currently take enforcement action where they are able to invoke violations of EU law before the national courts and also seek referrals to the CJEU. Private actors can also take actions against Member States for damages—so called Member State liability—if a Member State has committed a serious breach of EU law that has caused that damage. Thus, as Dr Tobias Lock (a senior lecturer at the University of Edinburgh) observed, private actors play "a very important part in the enforcement of EU law".[10] The Government will have to determine what role private actors will have in any new regime.

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6 Institute for Government, *Who's afraid of the ECJ? :Charting the UK's relationship with the European Court*, December 2017: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_ECJ_v10FINAL%20web.pdf [accessed 18 April 2018]

7 Between 2003–2016 the Institute for Government recorded that some 29 of the 63 judgments (46%) handed down by the CJEU on UK infringements in this period related to the environment.

8 The study suggests that between 2011–2016 the UK Courts referred approximately 16 cases a year for a preliminary ruling.

9 Department for Exiting the European Union, *Enforcement and dispute resolution: a future partnership paper* (2017), para 27: https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper [accessed 18 April 2018]

10 Written evidence from Dr Tobias Lock (BED0016)

The European Council's draft guidelines

21. The European Council's draft guidelines following the UK's notification under Article 50 were published in March 2017. The guidelines were designed to define "the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the Union will pursue throughout the negotiation".

22. The guidelines set out a series of core principles, including the fact that:

> "A non-member of the Union, that does not live up to the same obligations as a member, cannot have the same rights and enjoy the same benefits as a member. In this context, the European Council welcomes the recognition by the British Government that the four freedoms of the Single Market are indivisible and that there can be no 'cherry picking'."

23. On the question of the CJEU, and dispute resolution more generally, the guidelines said:

> "Arrangements ensuring legal certainty and equal treatment should be found for all court procedures pending before the Court of Justice of the European Union upon the date of withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. The Court of Justice of the European Union should remain competent to adjudicate in these procedures. Similarly, arrangements should be found for administrative procedures pending before the European Commission and Union agencies upon the date of the withdrawal that involve the United Kingdom or natural or legal persons in the United Kingdom. In addition, arrangements should be foreseen for the possibility of administrative or court proceedings to be initiated post-exit for facts that have occurred before the withdrawal date.
>
> "The withdrawal agreement should include appropriate dispute settlement and enforcement mechanisms regarding the application and interpretation of the withdrawal agreement, as well as duly circumscribed institutional arrangements allowing for the adoption of measures necessary to deal with situations not foreseen in the withdrawal agreement. This should be done bearing in mind the Union's interest to effectively protect its autonomy and its legal order, including the role of the Court of Justice of the European Union."[11]

Government's starting point

24. In August 2017, the Government published a Future Partnership Paper entitled *Enforcement and Dispute Resolution* ('the Paper'). In the Paper, the Government spelled out clearly that "in leaving the European Union, we will bring about an end to the direct jurisdiction of the Court of Justice of the European Union (CJEU)".[12]

25. The Government accepted that "it is in the interests of both the UK and the EU—and of our citizens and businesses—that the rights and obligations

11 European Council, *European Council (Art.50) guidelines for Brexit negotiations*, (29 April 2017): http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/ [accessed 20 April 2018]

12 Department for Exiting the European Union, *Enforcement and dispute resolution: a future partnership paper* (2017), para 1: https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper [accessed 18 April 2018]

agreed between us can be relied upon and enforced in appropriate ways".[13] Dispute resolution procedures are integral to this and therefore the UK and the EU "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".[14]

26. The Paper acknowledges that following the UK's withdrawal, "the CJEU will continue to interpret EU law and be the ultimate arbiter of EU law within the EU and its Member States".[15] It also recognises a potential problem: namely that the EU's position is that "there are limitations, under EU law, as to the extent to which the EU can be bound by an international judicial body other than the CJEU". This issue will be addressed in Chapter 3.

27. The Paper notes that there are several existing precedents where the EU has reached agreements with third countries, which provide for a close co-operative relationship without the CJEU having direct jurisdiction over those countries:

> "[M]any EU free trade agreements with third countries include provisions on resolving disputes through a binding arbitration model in addition to mechanisms for political agreement. Examples include the EU-Canada Comprehensive Economic and Trade Agreement (CETA), the EU-Singapore Free Trade Agreement as well as the Ukraine and Moldova Association Agreements. There are currently no precedents for the CJEU to act as the means of enforcing an international agreement between the EU and one or more third countries.
>
> "Even where agreements refer to terms or concepts in EU law, those agreements can be enforced or interpreted outside the EU by means other than the CJEU. This can be through political bodies, or through judicial or quasi-judicial bodies. For example, under the European Economic Area (EEA) Agreement, the European Free Trade Area (EFTA) Court can interpret and enforce the agreement, which includes terms and concepts of EU law, in the EFTA States that are within the EEA. The EFTA Court does not bind the EU or its institutions, and so the model is compatible with EU law."[16]

28. While the Paper helpfully set out some further details of these various models, it did not give any clear expression of the Government's preferred option.

29. Moreover, the Government's 'red line' in respect of future CJEU jurisdiction is subject to two provisos. First, the Paper acknowledged that it might be possible for "account … to be taken of CJEU decisions … where there is a shared interest in reducing or eliminating divergence in how specific aspects of an agreement with the EU are implemented".[17]

30. Second, when discussing the future role of the CJEU, the Government has indicated that it wishes to end the 'direct' jurisdiction of the CJEU. This suggests that the Government may be willing to contemplate some form of indirect jurisdiction. The Prime Minister has also accepted that the CJEU

13 *Ibid.*, para 7
14 *Ibid.*, para 1
15 *Ibid.*, para 18
16 *Ibid.*, paras 20–21
17 *Ibid.*, paras 46–51

would have continuing influence after Brexit, in her speech at Mansion House on 2 March 2018:

> "[E]ven 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 Harbour Framework for data sharing invalid."[18]

31. The Prime Minister has also suggested, on more than one occasion, that if the UK wishes to participate in an EU agency, it would have to "respect the remit of the CJEU in that regard". What this means in practice is discussed in more detail at Chapter 5.

What is the Government seeking to achieve?

32. The Paper sets out the Government's red line and some potential policy options. We asked the Government to explain in more detail what this red line meant in policy terms. In response, the Parliamentary Under-Secretary of State at DEXEU, Suella Fernandes MP, provided a useful summary of what the Government was seeking to achieve:

> "The rationale and principles behind this policy decision were well rehearsed during the referendum campaign: to support the restoration of the UK's legal sovereignty. The most practical manifestation of that is the ECJ no longer having jurisdiction over the UK, or rather its rulings no longer having the status of binding authority for UK courts. The binding nature of ECJ jurisprudence is a fundamental characteristic.
>
> "It is also about breaking the intrinsic link between the EU's legal order and the legal systems of the UK. Withdrawal will mean a return to the EU and the UK having their own autonomous legal orders. Those autonomies are to be respected in the withdrawal agreement and the agreement pertaining to the future economic partnership.
>
> "Direct jurisdiction will come to an end when we depart from the European Union. We will no longer be a member state and EU treaties will cease to apply in the UK. By virtue of that, the doctrine of direct effect and the supremacy of EU law will cease to apply in the UK. The practical effect of that is that EU-UK agreements will not automatically form part of the UK legal order and it will be necessary for domestic legislation to be enacted to give effect to them."[19]

The options available

33. The IfG provided us with some helpful evidence on the various models of enforcement and dispute resolution that we might wish to consider after Brexit.[20] These are briefly described below with a short summary of their various advantages and disadvantages:

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18 The Rt Hon Theresa May MP, Prime Minister, Speech on 'Our future economic partnership with the European Union', 2 March 2018: https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union [accessed 18 April 2018]

19 Q 47

20 Institute for Government, *Dispute resolution after Brexit*, October 2017: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_dispute_resolution_WEB.pdf [accessed 18 April 2018]. See also the evidence of Raphael Hogarth at Q 31.

(a) 'Docking' with the EFTA Court. This is an 'off the shelf' model: in principle, this would mean joining the EFTA Court, with British judges added. It would allow the UK to leave the single market, and the UK would not be subject to the direct jurisdiction of the CJEU, but it would mean accepting, at the very least, the indirect influence of the CJEU after Brexit.[21] We took extensive evidence on this option and explore it in greater detail below;

(b) Creating a UK-only court to supervise the agreements. This is unlikely to be acceptable to the EU 27 who may see this option as the UK 'marking its own homework';[22]

(c) An arbitration arrangement. This would be workable for a free trade deal but potentially problematic for the Withdrawal Agreement, since the EU has strict rules about who interprets EU law. Issues would also arise if the UK wanted to continue to participate in EU agencies and mechanisms;

(d) A joint court to interpret the agreement for both sides. It is thought that the CJEU is not likely to accept this option (it previously rejected a proposal for a joint EU-EEA court in 1991);[23]

(e) A 'Swiss-style' dispute resolution system (essentially bi-lateral treaties monitored by committee). The EU is already negotiating with Switzerland to reform this system and we received evidence that it is extremely unlikely that it would accept such a model;[24]

(f) The WTO dispute system. In the absence of an agreed deal, the UK may well have to use this system for trade disputes—but it will not work as a way of enforcing the non-trade elements of any agreements, like citizens' rights, the financial settlement, and UK-EU co-operation.[25]

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21 It is not entirely clear whether the EFTA Court is bound by the post-1992 judgments of the CJEU: See for example Q 5 and Q 13. At Q 13, the former President of the EFTA Court argued that it is "an oversimplification" to state that in the case of a divergence of views "the solution of the ECJ will prevail". Nonetheless, the system is designed to foster a homogenous legal order and thus any divergence from CJEU jurisprudence is likely to be, at the most, at the margins.

22 The IfG notes that Swiss proposals to create a national court to enforce bilateral agreements with the EU, akin to an EFTA-style court, have previously been rejected , see: Institute for Government, 'Could the UK sign up to the EFTA Court after Brexit?' 14 December 2017: https://www.instituteforgovernment.org.uk/blog/could-uk-sign-efta-court-after-brexit-baudenbacher [accessed 18 April 2018]

23 The CJEU found that such a new court system posed a threat to the autonomy of the Community legal order. It concluded that this threat was not reduced by the fact that CJEU judges were to sit on the court: the different goals of the EEA and the (then) European Community would mean that the judges of the CJEU who were also on the EEA Court would have to interpret the same provisions using different approaches, which would make it difficult for them to keep an open mind in the CJEU if they already tackled similar issues in the EEA Court. See CJEU, Opinion 1/91, ECLI: EU: C: 1991:490.

24 See Q 31 (Professor Christa Tobler) See also Professor Christa. Tobler, 'One of many challenges after Brexit: the institutional framework of an alternative agreement: lessons from Switzerland and elsewhere', *Maastricht Journal of European and Comparative Law*, vol 23, issue 4, (2016), pp 575–594: http://journals.sagepub.com/doi/pdf/10.1177/1023263X1602300402 [accessed 18 April 2018]

25 Institute for Government, *Dispute resolution after Brexit*, October 2017: https://www.instituteforgovernment.org.uk/sites/default/files/publications/IfG_Brexit_dispute_resolution_WEB.pdf [accessed 18 April 2018].

The EFTA Court option

Background

34. The idea of 'docking' with the EFTA Court has been proposed as an off the shelf solution to a technically challenging problem. This option was supported by some witnesses and we explored it extensively.

35. The EFTA Court has jurisdiction over the EFTA States which are parties to the EEA Agreement[26] (at present Iceland, Liechtenstein and Norway). The Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority[27] against an EFTA State about the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in EFTA States on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority. The jurisdiction of the EFTA Court largely corresponds to the jurisdiction of the CJEU over EU States. The Court consists of three judges, one nominated by each of the EFTA States party to the EEA Agreement. The judges are appointed by common accord of the Governments for a period of six years. The judges elect their President for a term of three years.

The evidence relating to the EFTA Court

36. In September 2017 it was reported that the then President of the ETFA Court, Carl Baudenbacher, had suggested that the EFTA Court might provide a solution to the impasse between the UK and the EU over enforcement and dispute resolution. He has expanded on this in several presentations in the UK. In one of these (currently unpublished) speeches, 'Without the ECJ, but within the Single Market', he considered the various options and argued that:

    - Joint Committees are out of the question (see the case of Switzerland);
    - Arbitration appears to be too weak (this was rejected by the EU in the case of Switzerland);
    - A common court UK—EU is out of the question (see ECJ Opinion 1/91, discussed at para 33 above); and,
    - a UK court will not be acceptable for the EU.

37. He concluded that "the deeper a future agreement is, the more likely the EU will insist on a court mechanism".

38. It initially appeared that to avail itself of the EFTA model the UK would be required to accept membership of the EEA (often referred to as the 'Norway model'), which has been ruled out by the UK Government. In his speech on 23 November 2017, President Baudenbacher floated the idea of

26 The purpose of the EEA Agreement is to guarantee, in all 31 EEA States (Iceland, Liechtenstein and Norway and the current EU 28), the free movement of goods, people, services and capital – "the four freedoms". As a result of the agreement, EU law on the four freedoms is incorporated into the domestic law of the participating EFTA States. All new relevant EU legislation is also introduced through the EEA Agreement so that it applies throughout the EEA, ensuring uniform application of laws relating to the internal market.

27 The EFTA Surveillance Authority monitors compliance with the EEA Agreement in Iceland, Liechtenstein and Norway, enabling those States to participate in the European Union's Single Market. The Authority is independent of the States and safeguards the rights of individuals and undertakings under the EEA Agreement, ensuring free movement, fair competition and control of state aid.

the UK "docking" to the EFTA Court, without full EEA Membership. He considered three potential models and noting that this might involve full EEA membership; docking to EFTA Surveillance Authority and the EFTA Court so that the UK "could use the EFTA Court as a compromise for supervising UK-EU relations"; or docking for a transitional period.

39. While he dismissed the final option as problematic, he suggested that the 'full docking model' could mean that "Britain would not have to accept the whole EEA *acquis* but would subject its new trade agreement with the EU to the supervisory competence of the EFTA Surveillance Authority and the jurisdiction of the EFTA Court".

40. Judge Baudenbacher highlighted several advantages of this approach. He described it as "an improper simplification" to say that in a conflict between the EFTA Court and the CJEU the EU court would prevail. He also noted that, in relation to the question of sovereignty, there was no written obligation on domestic courts of last resort to refer cases to the EFTA Court (although there is a "duty of loyalty and reciprocity"), and that the EFTA Court gave judgment in the form of an advisory opinion (with national courts left to decide the case based on the EFTA Court's ruling, subject to the duty of loyalty).

41. In a written paper, submitted to us on 4 January, he expanded on these points, arguing that under the "judicial constitution of the EFTA pillar" there was "no direct effect and no primacy, no written obligation on courts of last resort to make a reference ('more partner-like' relationship than in the EU) [and] preliminary rulings are 'advisory'".[28]

42. Raphael Hogarth from the Institute for Government argued that docking "has a number of obvious advantages, essentially in negotiability". He stressed the point that "historically, the Court of Justice has been a little resistant to courts in its backyard interpreting rules of law that are identical to rules of EU law, as rules of EEA law are". He suggested that the EFTA Court was "a court with which the Court of Justice has made its peace", and that a similar model had been suggested to Switzerland. However, he continued: "Obviously, there are potential political disadvantages to docking in that it might not be considered a clean enough break by those for whom taking back control is particularly important."[29]

43. We put the option of 'full docking' to a number of other witnesses. Hugh Mercer QC was positive, suggesting that the EFTA Court was "quite a good solution", which avoided reinventing the wheel.[30] Professor Catherine Barnard also suggested that "the EFTA Court and docking is quite an attractive model, because at least the Court of Justice has given the green light to that".[31]

44. However, several issues were also raised. Professor Valsamis Mitsilegas told us that "it is not ideal in the sense that the EFTA Court does not cover all areas of EU law, so you will have to find something for the elements that are not within the trade or the single market remits".[32] He gave the example that

28 Written evidence from Professor Carl Baudenbacher (BED0021)
29 Q 31
30 Q 20
31 Q 20
32 Q 34

the EFTA Court would not have the jurisdiction to deal with any future EU-UK agreement on security, or the European Arrest Warrant (EAW).[33]

45. Professor Crista Tobler noted that for docking to occur, "everybody involved has to agree on that": that means not only the EEA EFTA states but also the EU. She added that "at the moment, the court is a mini court …, consisting of three judges only, with some personnel around them taking a few cases per year. It would have to be enlarged considerably; I cannot imagine only three people—or possibly four, with a UK judge—dealing with the many cases coming from the much larger fourth country." Nonetheless, she thought that the practical challenges might be overcome if the parties wanted to do so.[34]

46. Professor Graham Gee, on the other hand, as well as highlighting the problems of how you upscale "a tiny court with three judges, 20 staff and a budget of €5 million and whether you will get the agreement of the EU and EFTA states", contended that "the real problem for the UK Government will be that they said no to direct jurisdiction of the Court of Justice". He questioned whether docking simply led "to indirect jurisdiction, which will be indistinguishable from direct jurisdiction, because the EFTA Court will hew so closely to the case law of the Court of Justice and will not depart from it in any substantial way and over any standard period of time".[35]

47. Martin Howe QC was entirely dismissive: "Personally I can see no benefit whatever in docking to the EFTA Court. It is a little poodle that goes yap, yap, yap along behind the Luxembourg court."[36]

48. Suella Fernandes MP, was very clear that "the UK Government are not in favour of docking with the EFTA Court, to put it simply and directly". She said that the EFTA Court "does not provide a forum for disputes between the EFTA states and the EU. Rather, it is for disputes within EFTA states. So it is not necessarily a model that we would want or that necessarily applies to our situation." She went on to note that the EFTA Court "does not cover all areas of EU law. There are jurisdictional gaps."

49. Finally, she said that joining the EFTA Court would not restore sovereignty, "due to the principle of homogeneity of EU law via the EEA".[37] Thus the 'full docking' EFTA Court option does not provide a solution and is potentially technically problematic if the UK does not wish to join the EEA.

A tailored solution?

50. In oral evidence to the EU Select Committee on 29 January 2018, the Secretary of State for Exiting the EU, Rt Hon David Davis MP, indicated that the UK would be looking for a tailored approach to dispute resolution, which might deal with issues such as trade, citizens' rights and justice and home affairs in different ways. For example, he indicated that trade might be governed by an arbitration panel, whereas justice and home affairs issues could be dealt with by a "much more political body in the form of a political committee". He said that the "reason for the multiple options set out in the

33 Q 31
34 Q 34
35 Q 34
36 Q 44
37 Q 53

disputes resolution paper was not to avoid the question but to set out the options from which you can pick what is appropriate for each area".[38]

51. The Ministers who appeared before us on 27 March expanded on this argument. Lucy Frazer QC MP indicated that "[w]e can already see a distinction between the implementation and post-implementation periods".[39]

52. Suella Fernandes MP said:

> "Yes, there is definitely a variable approach. For example, EU citizens … will have an ultimate right to ECJ jurisdiction. Depending on the subject matter and where we are on our journey outwards, there will be differing dispute resolution mechanisms and aspects of connection between our respective legal orders."[40]

53. Table 1 illustrates the wide range of issues under negotiation. It would potentially leave significant jurisdictional gaps were no agreement to be attained. The Table notes the current proposals from the UK and the EU, and whether agreement has yet been reached.

Table 1: Potential jurisdictional gaps post-Brexit

Area of legal agreement	EU's proposed mechanism	UK Government's proposed mechanism	Status of negotiations
Transition Period	CJEU	CJEU accepted in principle	Agreed
Dispute Resolution relating to the Withdrawal Agreement	CJEU	Political via Joint Committee	Not agreed
Trade	Depends on terms of future relationship	Possibly arbitration, but not clear	Not agreed
Regulatory Agencies	Likely CJEU, but details unclear	Respect CJEU remit in limited spheres	Not agreed
Security and Justice	Likely CJEU, but details unclear	Respect CJEU remit in limited spheres	Not agreed
Mutual recognition of civil, family and commercial judgments	Unclear	Lugano Convention and/or new agreement	Not agreed

54. The remainder of this report will address each of these stages in turn, commencing with the issues arising in respect of the proposed Withdrawal Agreement, then considering the specific proposals for the transitional period, before finally turning to the options for enforcement and dispute resolution in respect of the future relationship.

38 Oral evidence taken before the European Union Committee, 29 January 2018 (Session 2017–19), Q 14
39 Q 48
40 *Ibid.*

Conclusions

55. **There is no 'one-size-fits-all' solution to dispute resolution after Brexit. Each of the proposed options we have considered has its own pros and cons. None of them provides a complete solution.**

56. **Given the Government's red line of withdrawing from the CJEU, either a new court covering essentially the same areas as the CJEU, or multiple dispute resolution procedures, will be needed post-Brexit. Neither option has been costed. Not only may different arrangements be needed to deal with the Withdrawal Agreement, the transitional period, and the future relationship with the EU, but it may also be that future trade arrangements are dealt with differently to any agreement on co-operation on, for example, justice and security matters.**

57. **The EFTA court was presented as a potential off-the-shelf solution to the problem of dispute resolution. 'Full docking' with the Court is a limited solution. It is essentially an economic court and its jurisdiction does not extend to justice and home affairs issues, including EU co-operation on civil and family law matters and criminal law, such as the European Arrest Warrant. There would also be practical challenges in upscaling the EFTA Court to deal with the number of cases from the UK.**

58. **Unless the Government eventually choses to join the European Economic Area, we do not consider that 'full docking' with the EFTA Court would resolve all the enforcement and dispute resolution issues that will arise post-Brexit.**

CHAPTER 3: THE WITHDRAWAL AGREEMENT

The draft texts

59. The European Commission published a first draft text of the proposed Withdrawal Agreement on 28 February 2018. A revised draft text was sent to the Government on 15 March and a further text, in which the articles agreed in principle by the negotiating teams were highlighted in green, was published by the Commission on 19 March.[41]

60. The purpose of the Withdrawal Agreement is to translate into legally binding form the December 2017 Joint Report,[42] in which the UK and EU negotiators set out their agreement in principle on the key 'phase 1' issues,[43] as well as other necessary separation provisions.

Analysis of the draft text

61. This Chapter will consider the draft of the Withdrawal Agreement published on 19 March. It will first examine the special regime that the draft Withdrawal Agreement would create for citizens' rights, and then consider the wider ranging institutional dispute resolution provisions which would apply to the remainder of the Withdrawal Agreement.

A special regime for citizens' rights

62. Notably, the draft Withdrawal Agreement makes special provision for the enforcement of the citizens' rights provisions after Brexit. The main provisions are contained in Part Two of the draft Withdrawal Agreement. They broadly reflect the agreement contained in the Joint Report of December 2017 and have been agreed in principle.

63. Article 4 of the draft Withdrawal Agreement, only part of which has been agreed, makes provision for what it describes as "methods and principles relating to the effect, the implementation and the application of the Agreement". It provides that where the Agreement calls for the application of Union law in the UK "it shall produce … the same legal effects as those which it produces within the Union and its Member States". It goes on to indicate that this means that the UK and EU nationals should be able to rely directly on the provisions contained or referred to in Part Two of the Agreement, and that "any provisions inconsistent or incompatible with that Part shall be disapplied".

64. Article 4 is a novel constitutional provision. It would be tantamount to continuing the supremacy of EU law in respect of the relevant provisions even after the transitional period has ended. At present this is deemed to occur by virtue of the European Communities Act 1972 and associated CJEU and domestic caselaw. As noted above, the European Union (Withdrawal) Bill

41 European Commission and HM Government, *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (19 March 2018): https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf [accessed 30 April 2018]

42 European Commission and HM Government, *Joint Report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU* (8 December 2017): https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf [accessed 30 April 2018]

43 Protecting the rights of Union citizens in the UK and UK citizens in the Union; the framework for addressing the unique circumstances in Northern Ireland and the financial settlement.

would repeal the 1972 Act, ending direct effect and the supremacy of EU law.

65. The Government has indicated that Article 4 of the draft Withdrawal Agreement would be implemented via a future Withdrawal and Implementation Bill. Paragraph 36 of the Joint Report states that the necessary effect would be achieved by providing, in that Bill, that the provisions on citizens' rights would "have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament repeals this Act in the future". We have corresponded with the Home Office as to the precise meaning of this proposed provision (and whether it would mean that it would not be possible to repeal expressly the provisions relating to citizens' rights without repealing the entire Act).[44] We have not received a satisfactory answer to this question.[45] Such a provision would be an unusual constitutional innovation, and, should it be included in a future Bill, might be of some interest to the House of Lords Constitution Committee.

66. Part Six of the draft Withdrawal Agreement would also allow for continued references to the CJEU for eight years following the end of the transition period (Article 151). This would require an amendment to the European Union (Withdrawal) Bill currently before Parliament, Clause 6 of which, as introduced in the House of Lords, provides, *inter alia*, that:

> "(1) A court or tribunal—
>
> (a) is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court, and
>
> (b) cannot refer any matter to the European Court on or after exit day."

67. Article 152 of the draft Withdrawal Agreement would require the UK to set up an Independent Authority to monitor the implementation and application of the citizens' rights provisions contained in Part Two. That Authority would have a complaints investigation function and would have the right to bring proceedings in the UK courts and to discuss such actions with the European Commission.

68. Certain of the provisions relating to dispute resolution on citizens' rights were criticised by Martin Howe QC. He indicated that he was "very concerned" about "what has been agreed in principle by the Government in their negotiations with the European Union in Article 4(1) of the draft transitional agreement".[46] In a report published on 14 March 2018, entitled *EU Withdrawal: Transitional provisions and dispute resolution*, the House of Commons European Scrutiny Committee also expressed concerns about the proposed implementation of the draft Withdrawal Agreement. It said that it had asked 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

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44. Letter from Lord Boswell of Aynho to Rt Hon Caroline Nokes MP, Minister of State for Immigration, 27 February 2018: https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Brexit-AcquiredRights/citizens-rights-letter-from-committee-270218.pdf [accessed 18 April 2018]
45. Letter from Rt Hon Caroline Nokes MP, Minister of State for Immigration to Lord Boswell of Aynho, 13 March 2018: https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Brexit-AcquiredRights/citizens-rights-letter-from-committee130318.pdf [accessed 18 April 2018]
46 Q 41

of the Withdrawal Agreement and his assessment of how robust that will be if challenged".[47]

69. From the detailed evidence we took during our inquiry into citizens' rights[48], we recognise the fears of EU citizens residing in the UK who will have a desire for certainty about their future legal rights. We raised this in correspondence with the Immigration Minister in December 2017.[49] The provision to allow references to the CJEU for eight years after the end of the transition period may offer some reassurance to EU nationals (particularly those who will not immediately qualify for permanent residency). It also reflects the concern of the EU 27 that a future Parliament could seek to alter the rights of those EU nationals who remain in the UK after Brexit.

Northern Ireland

70. At present, the Withdrawal Agreement contains a separate Protocol on Northern Ireland/Ireland which would have the effect of establishing a "common regulatory area" between those territories. This Protocol has not been agreed by the Government. It is currently being described as a 'fall-back' position while the Commission awaits proposals from the UK as to how a frictionless border might be established between Ireland and Northern Ireland.[50]

71. The Protocol makes provision for the CJEU to have jurisdiction over its application. We have not taken evidence on this issue, as the Protocol remains at this stage no more than a fall-back. If the Government succeeds in negotiating arrangements for Northern Ireland/Ireland as part of the agreement on the future relationship with the EU, as the Joint Report anticipates, that agreement, rather than the Withdrawal Agreement, will provide for appropriate enforcement and dispute resolution.

The Institutional provisions

72. We turn now to the general institutional provisions contained in the draft Withdrawal Agreement. The most relevant provisions are contained in Articles 157–165. Article 157 (which has been agreed by the UK) establishes a Joint Committee, co-chaired by the UK and EU, which will be responsible for the implementation and application of the Agreement. Article 162 (which has not yet been agreed), sets out the Commission's view that any disputes in relation to the Withdrawal Agreement that cannot be resolved politically by the Joint Committee structure will ultimately be settled by the CJEU.

73. Articles 4(4) and 4(5) are also relevant. These state that the provisions of the Agreement which refer to Union law (or concepts or provisions thereof) shall be interpreted in conformity with the relevant case-law of the CJEU handed

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47 European Scrutiny Committee, *EU Withdrawal: Transitional provisions and dispute resolution*, (Nineteenth Report, Session 2017–19, HC 763), para 161

48 House of Lords EU Justice Sub-Committee, 'Brexit: citizens' rights inquiry': https://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-justice-subcommittee/inquiries/parliament-2017/brexit-citizens-rights/ [accessed 30 April 2018]

49 Letter from Lord Boswell of Aynho to the Rt Hon Brandon Lewis MP, Minister of State for Immigration, 19 December 2017: https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/Brexit-AcquiredRights/N_A%20-%20Citizens'rights-lettertoImmigrationMinister%20-%2019.12.17_.pdf [accessed 19 April 2018]

50 European Commission and HM Government, *Joint Report on progress during phase 1 of negotiations under Article 50 TEU on the UK's orderly withdrawal from the EU* (8 December 2017), paras 49 and 50: https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf [accessed 20 April 2018]

down before the end of the transition period; and that, in the interpretation of the Agreement, the UK's judicial and administrative authorities "shall have due regard to" relevant case-law of the CJEU handed down after the end of the transition period.

The Joint Committee

74. The role of the Joint Committee will be important. Under Article 159, the Joint Committee would have the power to adopt decisions which would be "binding on the Union and the United Kingdom". All decisions by the Joint Committee would be made by mutual consent. The draft Withdrawal Agreement also establishes specialised committees, on citizens' rights, "other separation provisions", the island of Ireland, Sovereign Base Areas, and on the financial provisions. Recommendations by the specialised committees would be referred for adoption to the Joint Committee.

The Commission's proposed role for the CJEU

75. Articles 162–165 provide for the settlement of disputes by the CJEU. In particular, Article 163 makes clear that any intractable disputes, which have not been settled within three months, may be submitted to the CJEU by either party, that the CJEU would have jurisdiction over such cases, and that "its rulings shall be binding on the Union and the United Kingdom".

76. If the CJEU's ruling in such a case was not complied with, the CJEU could be asked to rule again, and it would have the power to impose a fine (Article 163(1)). The draft Withdrawal Agreement also provides for the possibility of either side imposing sanctions on the other (Article 163(2)). The proposed procedural rules and powers are contained in an Annex (Annex y+3), which has not yet been published.

77. Articles 162–165 have yet to be agreed, but if they are, an institution that is part and parcel of the EU would, for an indefinite period, determine the UK's obligations towards the EU.

78. There is some logic to this approach, in that the act of withdrawal is being undertaken by the UK as an EU Member State, under the terms of Article 50 TEU, and any obligations the UK enters into will flow ultimately from that source. Nevertheless, Article 50(3) TEU provides that the Treaties "shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement".

Should the CJEU have jurisdiction over the Withdrawal Agreement?

79. The IfG argued that it was "probably undesirable" for the CJEU to be the arbiter of any disputes between the UK and the EU concerning the Withdrawal Agreement:

> "As the CJEU itself argued in Opinion 1/91, 'the Court of Justice has to secure observance of a particular legal order and to foster its development with a view to achieving the objectives set out in particular in Articles 2, 8a and 102a of the EEC Treaty and to attaining a European Union among the Member States'. The court's role is, in part, to achieve the objectives of the EU treaties. After Brexit, the UK will no longer be a signatory to those treaties. The UK's own objectives could even depart from those of the EU treaties. The court might, therefore, struggle to approach disputes between the EU and a third party in an entirely

> neutral way. In order to allay precisely this worry, the vast majority of judicial and quasi-judicial dispute resolution mechanisms provide for the states (or, as the case may be, groups of states) on both sides of any dispute to be represented among the adjudicators."[51]

80. Hugh Mercer QC argued that "lack of neutrality is not a charge that you could make against the Court of Justice of the European Union",[52] but several other witnesses cast doubt on whether the CJEU could be seen as a fair arbiter of what has sometimes been referred to as the 'divorce bill'. Professor Graham Gee told us that the EU's approach was "at first blush an extraordinary and unprecedented requirement". He said:

> "The international practice is that international treaties commonly provide for dispute resolution through binding adjudication, but sovereign states generally do not agree in an international treaty to submit to adjudication by a court to another party to that international treaty. The reason is simply stated: any state so agreeing would be at the mercy of the other party. Instead … you would normally have the relevant international tribunal or arbitral body constituted in such a way as to be neutral and evenly balanced between the parties."[53]

81. Sir Richard Aikens also argued that:

> "so far as the withdrawal agreement is concerned, plainly the CJEU should not have jurisdiction over it … If you are going to have some kind of dispute resolution mechanism for any disputes that arise in connection with the withdrawal agreement, you have to have some independent body."[54]

Martin Howe QC expanded on this point:

> "The Court of Justice of the European Union sees itself as developing the European Union and promoting European integration in the judgments it reaches. It is not neutral, and it would be even more lopsided in its approach if it were adjudicating between the EU and a departed United Kingdom."[55]

82. Professor Catherine Barnard believed that the CJEU would "do the best it could", while recognising that "the reality of course is that if it sees this as EU law, which it would be because it is under Article 50, it will borrow doctrines of EU law and use EU tools of interpretation". She continued: "Of course, the EU understanding is the integrity of the internal market and all the other pillars of EU law protection, and it will of course interpret it against that background."[56]

83. The Law Society of England and Wales recognised that there was an issue insofar as the Withdrawal Agreement, as an act of the EU, would be subject to the supreme autonomy of the CJEU in its interpretation and compliance with EU law. However, it argued that "when the UK-EU's final agreement comes into force, the direct jurisdiction of the CJEU in the UK should

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51 Written evidence from the Institute for Government (BED0005)
52 Q 20
53 Q 32
54 Q 43
55 Q 43
56 Q 20

end. The UK would no longer have judges at the Court and the UK legal profession would not have the right to plead in front of it".[57]

84. The question therefore is whether it is reasonable for the dispute resolution provisions to be subject to the courts of one of the parties to the agreement. It has long been recognised that a perception of bias can be equally as powerful as demonstrable bias.[58] There is also a longstanding acceptance that "a man shall not be a judge in his own cause" (*nemo judex in sua causa*).[59] And it is a famous and longstanding maxim of English law that "justice should not only be done, but should manifestly and undoubtedly be seen to be done".[60]

85. An indefinite role for the CJEU would also appear to contradict both the Government's red line in respect of CJEU jurisdiction and, more broadly, part of the basic rationale for Brexit, which is that the UK should cease to be part of the EU, or subject to the obligations of EU membership.

86. Moreover, given that any disputes which arise in respect of the Withdrawal Agreement will already have gone through a political process, via the Joint Committee, it is likely that any dispute that is still unresolved will be both contentious and sufficiently serious to generate political concern.

87. Liabilities and obligations under the Withdrawal Agreement may arise for many years after the UK has left the EU. For example, in its Economic and Fiscal Outlook, published in March 2018, the Office for Budget Responsibility estimated that while the bulk of the "divorce bill" will be paid in the first five years, the final payment under the financial settlement may not be made until 2064.[61] Meanwhile, some of the citizens' rights provisions will apply to the children of EU nationals in the UK. Thus legal obligations could extend for a longer period than the UK was a member of the European Union.

Might the Withdrawal Agreement be referred to the CJEU?

88. There are specific risks in seeking to exclude the CJEU from the Withdrawal Agreement entirely. There are two reasons for this. The first is the argument that the 'legal autonomy of the Union', as defined by the CJEU in past cases, demands that only the CJEU have the final say on the interpretation of EU law.

89. The IfG's written submission suggested that this principle might apply only in respect of "EU actors"; but even this means that where the Withdrawal Agreement contains provisions identical in substance to EU law, the EU will

57 Written evidence from the Law Society (BED0014)

58 In the domestic context, the text for the appearance of bias was set out in the case *of Porter v Magill [2002] 2 AC 357*. In a well-known judgment, Lord Hope of Craighead observed that "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

59 *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2) [1999] UKHL 1, [2000] 1 AC 119*: https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm *Dimes v. Grand Junction Canal (1852) 3 H.L.C. 759, 793*, per Lord Campbell.

60 *R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256*

61 Office for Budget Responsibility, *Economic and fiscal outlook: March 2018*, Cm 9572, 13 March 2018, p 18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/689581/CCS207_CCS0318157642-1_OBR_EFO_March_2018_Accessible.pdf [accessed 18 April 2018]. The total "divorce bill" is estimated at £37.1 billion (€41.4 billion), payable between 2019–2064.

demand that the CJEU has the final say on the meaning of those provisions for EU actors.[62]

90. The second reason is that, beyond the general power of review[63], under Article 218 TFEU the CJEU may be asked for an opinion on the agreements between the UK and the EU prior to ratification. Article 218(11) provides that:

> "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

Thus even if the UK and the Commission were to seek to exclude the jurisdiction of the CJEU, that might not be an end to the matter.

91. We first flagged this risk in our report *Brexit: deal or no deal*, published on 7 December 2017. We noted that issues relating to the legality of both the Withdrawal Agreement and any transitional arrangements might "fall to be determined by the CJEU, following references by the European Parliament or by a Member State, before withdrawal takes effect".[64]

92. We discussed the risk of referral to the CJEU with several witnesses. Professor Christa Tobler told us that "it is most likely that these agreements will be sent to the Court of Justice for an opinion under Article 218 TFEU". She suggested that the CJEU could rule that "if there is any sort of system that is not in line with its doctrine of the autonomy of Union law, the agreement cannot go through". This potential legal challenge was "quite independent of all political realities and sensible approaches".[65]

93. Professor Gee also commented on this risk:

> "There are a handful of occasions where the Court of Justice has been jealous of the adjudicatory arrangements in agreements that the EU has sought to undertake. We mentioned Opinion 1/91 on what was to be the predecessor of the EFTA Court, and we should look also at the draft accession agreement to the European Convention on Human Rights and the unified patent court litigation. So, it is a real, not just theoretical, risk."[66]

Nevertheless, Professor Gee took the view that if the Withdrawal Agreement had been agreed by the European Council and the European Parliament, the CJEU would probably "balk at the idea of finding the agreement incompatible".[67]

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62 Written evidence from Marina Wheeler QC (BED0020). Marina Wheeler QC was one of the few witnesses to question this doctrine. She argued that while many commentators and witnesses present the autonomy of the EU legal order as a "legal reality", which constrains the options available to the EU, in her view it was "a policy choice". See: written evidence from Marina Wheeler QC (BED0020), para 14.

63 Article 263, Treaty on the Functioning of the European Union

64 European Union Committee, *Deal or No Deal*, (7th Report, Session 2017–19, HL Paper 46)

65 Q 33

66 Q 37

67 *Ibid.*

The Government's view

94. In her Florence speech of 22 September 2017, the Prime Minister was clear that while it was vital that any agreement reached would have to be interpreted in the same way by the European Union and the United Kingdom, "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." In particular, she argued: "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."[68]

95. The DExEU Minister, Suella Fernandes MP, reinforced this view. When it was put to her that the Withdrawal Agreement currently envisaged disputes being settled by the CJEU, she said that the UK "does not agree with that proposition from the EU". She indicated that the Government objected for two reasons:

> "First, it is very rare for the highest court of one party to an international agreement to be the final arbiter of disputes under that agreement where another nation state is involved … Secondly, this will mean that there will be a bias or a steer towards EU interpretation of EU laws, EU principles, EU tools when it comes to resolving questions. Those principles would pertain to the integrity of the internal market and the pillars of EU law, which would be very different from what would be required in an international agreement between the EU and a third country such as the UK."[69]

96. She went on to acknowledge that some aspects of the Withdrawal Agreement might contain some elements of EU law: "From the EU's perspective, of course it would have aspects of EU law when it comes to the position of EU citizens. That is very much flavoured and informed by principles of EU law and ECJ jurisprudence, as would the financial settlement, for example."

97. As noted above, the Government has agreed the limited jurisdiction of the CJEU in relation to citizens' rights.[70] And it appears from Article 153 of the draft Withdrawal Agreement (parts of which are coded 'green' to signify agreement) that the Government has also acceded to the CJEU retaining jurisdiction on the applicable EU law referred to in relation to the parts of the financial settlement contained in Articles 129 and 131(1) and (2) of the draft Agreement.[71]

98. The Secretary of State for Exiting the EU, Rt Hon David Davis MP, wrote to the EU Select Committee on 19 April 2018 that "for specific areas of the financial settlement, we have agreed that existing enforcement mechanisms will apply—but only in relation to budget contributions made up to 2020 and

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68. The Rt Hon Theresa May MP, Prime Minister, Speech on 'A new era of cooperation and partnership between the UK and the EU', 22 September 2017: https://www.gov.uk/government/speeches/pms-florence-speech-a-new-era-of-cooperation-and-partnership-between-the-uk-and-the-eu [accessed 18 April 2018]
69 Q 49
70 See paragraph 65.
71 Namely the provisions which relate to 'Provisions applicable after 31 December 2020 in relation to own resources' and 'Union law applicable after 31 December 2020 in relation to the UK's participation in the implementation of the Union programmes and activities committed under the MFF 2014–2020 or previous financial perspectives'.

to programmes the UK participated in during the 2014–2020 period, and not to the financial settlement as it relates to the period after implementation".[72]

99. But with these specific exceptions, the Government proposes that there should be no ultimate, impartial, dispute resolution mechanism in respect of the Withdrawal Agreement. Suella Fernandes MP told us that the Government's view was that the proposed Joint Committee would have to deal at a political level with any disputes:

> "Our position is that there should be a joint committee that provides the dispute resolution mechanism. That is set out in quite a lot of detail in Article 157 of the agreement. It is a mechanism that is common to many international agreements whereby a committee, comprising representatives of the Union and the UK, will meet to resolve disputes."[73]

100. This leaves it far from clear what would occur if an intractable dispute were to arise in respect of the Withdrawal Agreement. With no judicial or quasi-judicial mechanism for dispute resolution, reliance upon the Joint Committee would potentially lead to political deadlock.

101. The Minister was unconcerned by the possibility that the Withdrawal Agreement itself might be referred to the CJEU. On the question of a reference for an opinion under Article 218 TFEU she told us:

> "That is always a possibility, yes. It is always possible to legally challenge an agreement in court. However, I consider that to be very unlikely, for one main reason: assuming that we proceed as planned and intended, the agreement will receive the approval and agreement of the EU and the UK. In practice, that means that it will have the agreement of the Council, of the Parliament and of the Commission, which all have to expressly endorse this agreement. The member states have to be part of that decision-making process. It would be quite surprising, if we initially get that agreement after considerable involvement from all those various parties at the European Union level, for one of those parties then to turn around and legally challenge it.
>
> "There is also a time pressure inherent in this process, of which all parties are aware. I am very confident that there is immense good will, on both sides of the channel, to strike an agreement and implement it."[74]

Some potential ways forward

102. This section briefly examines the available options for establishing a neutral judicial or quasi-judicial mechanism for binding dispute resolution.

Borrowing the EFTA Court to interpret the Withdrawal Agreement

103. Marina Wheeler QC asked whether it might be possible "to borrow" the EFTA Court as a dispute resolution mechanism for the Withdrawal Agreement. She suggested an "*ad hoc* arrangement", arguing that there was a significant advantage in using a Court as opposed to an arbitration panel,

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72 Letter from Rt Hon David Davis MP, Secretary of State for Exiting the European Union to Lord Boswell of Aynho, 19 April 2018: https://www.parliament.uk/documents/lords-committees/eu-select/scrutiny-brexit-negotiations/david-davis-withdrawal-letter-reply.pdf [accessed 27 April 2018]

73 Q 49

74 Q 50

in that "decision-making is transparent, and a body of accessible, precedent setting judgments can be developed".[75]

104. The IfG also claimed that docking to the EFTA Court for the purpose of interpreting the Withdrawal Agreement had "a number of advantages". These are broadly summarised at paragraph 42.[76] Hugh Mercer QC put it most bluntly, when he said "the risk if we do not adopt something like the EFTA Court solution is that you get to the end, you have all your agreements, you are trying to implement them, and then suddenly the Court of Justice says, 'Hang on, no'".[77]

105. In spite of these perceived advantages, highlighted above, the Government has not supported this option. It argues that the EFTA Court is not currently a forum that would accept these types of disputes. On that basis it does not appear to have asked the EU 27 whether it would accept the EFTA Court as a neutral arbiter for disputes about the Withdrawal Agreement. If this option is to be explored further, it will have to be tabled by the parties with some urgency.

Arbitration

106. In its Future Partnership Paper, the Government noted that while joint committees can be the sole route for resolving disputes, in respect of some elements of agreements, additional binding mechanisms "may be appropriate or desirable". Arbitration panels can be seen in free trade agreements such as EU-Canada Comprehensive Economic Trade Agreement (CETA).[78] But the Paper acknowledges that such an arbitration panel cannot adjudicate on the interpretation of EU law so as to bind the EU and its member states.[79]

107. A recent example of this difficulty is demonstrated by the judgment of the CJEU in the case of *Slovak Republic v Achmea*.[80] In that case, despite a contrary opinion by the Advocate General in the case,[81] the CJEU ruled that an arbitration clause contained in the Netherlands-Slovakia bilateral investment treaty had an adverse effect on the autonomy of EU law and was therefore incompatible with EU law. The CJEU considered that the arbitral tribunal might be called on to interpret or apply EU law. It took account of the fact that the arbitral tribunal had no power to make a reference to the CJEU for a preliminary ruling, and that the decision of the arbitral tribunal was, in principle, final.

75 Written evidence from Marina Wheeler QC (BED0020)
76 Written evidence from the Institute for Government (BED0005)
77 See also Q 26.
78 CETA provides an arbitration process, in which parties mediate and, only if the case is not resolved within a specific time, is a reference for arbitration then made. The CETA investment dispute settlement system applies only to investment disputes and does not apply to the entirety of the CETA Agreement. (See: written evidence from The Law Society (BED0014)).
79 Department for Exiting the European Union, *Enforcement and dispute resolution: a future partnership paper* (2017) paras 34, 35 and 38: https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper [accessed 18 April 2018]
80 Case C-284/16, (6 March 2018) [accessed 30 April 2018]
81 Opinion of Advocate General Wathelet, (19 September 2017) [accessed 20 April 2018]

108. While the case related to an arbitration agreement between Member States on a bilateral investment treaty, there has been speculation that the judgment might have more far reaching effects.[82]

109. There are other agreements (for example the Moldova, Ukraine and Georgia Association Agreements)[83] which make provision for an arbitration panel which can then make references to the CJEU where specific questions of EU law arise.[84] Such an option, while it would satisfy the objections of the CJEU, and would be one step removed from asking the CJEU to adjudicate on the Withdrawal Agreement itself, might still give rise to concerns on the UK side.

110. Another commonly expressed concern about arbitration is that it is usually conducted in private. This means that not only is it not transparent, but the decisions taken do not create the sort of clear binding precedent that emerges following the public judgment of a court. Raphael Hogarth summarised these concerns: "Some people worry that arbitration is not as good at promoting the rule of law as a court-based system, because it might be less transparent and less good at ensuring that the law is interpreted consistently across time."[85] In contrast, Lord Neuberger of Abbotsbury saw no reason why arbitration should not be "open and in public".[86] If the UK presses for an arbitration agreement, the Government should explore the options for public access to any arbitration process.

An international treaties court

111. A group called Lawyers for Britain, in a paper entitled 'Adjudicating Treaty Rights in Post-Brexit Britain', has proposed the idea of an international treaties court as part of the UK domestic legal order'.[87] The paper suggests that an international treaties court, staffed by UK judges and operating under UK law, should be set up to act as a central point giving guidance to non-specialist courts and tribunals throughout the UK on the interpretation of the UK legislation which implements the Withdrawal Agreement.

112. On the EU side, the Group suggests that "the CJEU could act as a central point of reference for interpreting the treaty rights of UK nationals when cases are referred to it from the courts of the EU 27 Member States, without this needing to be included in any international agreement". The authors argue that under this jurisdiction the CJEU interpretations "would be binding within the EU but would not bind the UK or its courts … This would create a symmetrical system between the EU and the UK, where each

82 See for example Clément Fouchard and Marc Kristin, 'The judgment of the CJEU in Slovak Republic v Achmea: A loud clap of thunder on the intra-EU BIT sky', *Kluwer Arbitration Blog* (7 March 2018): http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ [accessed 27 April 2018] and Joerg. Risse and Max Oehm, 'The European Court of Justice stops investment arbitration in intro-EU disputes', *Lexology.com* (7 March 2018): https://www.lexology.com/library/detail.aspx?g=4b933d32-d9ee-43c8-bff4-7aa39a2faa88 [accessed 27 April 2018].

83 For further details of the dispute resolution mechanisms used in the association agreements with Ukraine, Moldova and Georgia, see written evidence from the Institute for Government (BED0005), para 43.

84 See also Professor Christa Tobler's evidence about the Ukraine association agreement at Q 31.

85 Q 31

86 Oral evidence taken on 21 November 2017 (Session 2017–19), Q 6

87 Martin Howe QC, Francis Hoar, Dr Gunnar Beck, *Adjudicating Treaty Rights in Post-Brexit Britain*, 2nd Edition, November 2017: http://www.lawyersforbritain.org/files/adjudicating-treaty-rights-after-brexit.pdf [accessed 18 April 2018]

would have a central court … reaching decisions in individual cases on the interpretation of the agreed treaty provisions on the rights of EU citizens in the UK and UK citizens in the EU27".[88]

113. To deal with any divergence between the two regimes, Lawyers for Britain propose "a bilateral international arbitral body which would sit ad hoc when required". Martin Howe QC, the Chair of Lawyers for Britain, spoke to this paper when he gave oral evidence. He contended unlike the proposed EEA Court, which was rejected by the CJEU, an international treaties court and associated arbitral body would not cause a difficulty:

> "The European court will accept both itself and the European Union as a whole being bound by an external treaty court or arbitral body under an international agreement … What [the CJEU] will not accept is external bodies dictating to it on the administration of internal European Union law under the EU treaties. That is where the proposed EEA court foundered, because it would involve the EEA court being a structure on top of and binding the Luxembourg court and interpreting the rules of the EU internal market in a way that would have affected the ECJ's internal jurisprudence."[89]

114. Martin Howe's view was echoed by Sir Richard Aiken, the former President of Lawyers for Britain. He argued that although the CJEU had to be the master of the internal legal order of the EU, "If you have another legal order that is an external legal order because it is something between the EU and an external sovereign entity, then with respect to the CJEU it does not have, and nor should it have any, control of that."[90]

115. These arguments seem to be predicated on the basis that this new structure would deal primarily with disputes originating in individual cases on the interpretation of the agreed treaty provisions on the rights of EU citizens in the UK and UK citizens in the EU 27:

> "Our proposals involve giving to the bilateral international body the power to make binding rulings on the rights of EU citizens in the UK and the rights of UK citizens in the EU. Those rights will arise under the withdrawal agreement and will not be rights under EU law, even if many aspects of those rights are likely to be based on the rights enjoyed by EU citizens at the date of the UK's withdrawal."[91]

116. Such an arrangement would not appear to deal with the other disputes which might arise under the Withdrawal Agreement (for example relating to the financial settlement and other separation issues)—although the authors contend that it could "readily be extended to cover other international treaty-derived rights".

117. Even if this were agreed, it is hard to see how the proposed *ad hoc* arbitral body would avoid the problem of an international body other than the CJEU seeking to rule on EU-derived laws. It is also worth recalling that the Government has already conceded that the UK courts will continue to

88 *Ibid.*
89 Q 42
90 *Ibid.*
91 Martin Howe QC, Francis Hoar, Dr Gunnar Beck, *Adjudicating Treaty Rights in Post-Brexit Britain*, 2nd Edition, November 2017: http://www.lawyersforbritain.org/files/adjudicating-treaty-rights-after-brexit.pdf [accessed 18 April 2018]

be able to make references to the CJEU for some years after Brexit on the question of citizens' rights.

The CJEU

118. Professor Anthony Arnull (University of Birmingham) argued that the UK should simply accept that the CJEU was best placed to ensure that that "any withdrawal agreement is interpreted and applied in a uniform manner". Rather than seeking to exclude the jurisdiction of the CJEU, the Government should instead seek the right to nominate "an ad hoc judge or Advocate General to sit on cases concerning the interpretation or application of Brexit law"; and it should try to ensure that the UK retained a capacity to influence the development of the CJEU's case law by, for, example, seeking continued rights to intervene in all cases before the Court.[92]

Conclusions

119. **Given that Article 50 TEU provides explicitly that the Treaties shall cease to apply to the UK on exit, there is a legitimate argument that disputes arising under the Withdrawal Agreement, if they cannot be resolved politically by the Joint Committee, should be referred to a neutral court, or for arbitration. We share the Government's concern that the interpretation of the Withdrawal Agreement should not be left to the CJEU, which is a Court associated with one of the parties to the Agreement. Whether or not the CJEU is objectively neutral, even a mere perception of bias should be avoided.**

120. **However, the Government and Parliament will need to be mindful that the legal autonomy of the Union, as defined by the CJEU in past cases, demands that only the CJEU have the final say on the interpretation of EU law. Moreover, the final Withdrawal Agreement may be referred to the CJEU to determine whether it is compatible with the Treaties. From past precedent, innovative solutions can prove problematic and could well be deemed incompatible with EU law.**

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

122. **As we have previously noted, time is now very short: over the next few months the UK and the EU must finalise the remaining articles of the Withdrawal Agreement. If the Government and the EU do not bring forward pragmatic proposals, it will be too late. The risk is that the Commission will shape the terms of the negotiations, or there will be no Withdrawal Agreement.**

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

92 Written evidence from Professor Anthony Arnull (BED0003)

CHAPTER 4: THE TRANSITION PERIOD

Background

124. The Prime Minister outlined what she described as a "phased process of implementation" of Brexit in her Lancaster House speech of 17 January 2017. She accepted that there was a need to avoid a "disruptive cliff edge", and to "give businesses enough time to plan and prepare for those new arrangements". She indicated that "for each issue, the time we need to phase-in the new arrangements may differ. Some might be introduced very quickly, some might take longer. And the interim arrangements we rely upon are likely to be a matter of negotiation."[93]

125. The European Council acknowledged the potential need for a transition period in its Draft guidelines following the United Kingdom's notification under Article 50 TEU:

> "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. Any such transitional arrangements must be clearly defined, limited in time, and subject to effective enforcement mechanisms."[94]

126. As we noted in our report on *Brexit: deal or no deal* transition serves various purposes. These include: easing uncertainty (to allow businesses and citizens time to prepare); buying time (to allow for discussions of the future relationship); and orderly adaptation.[95]

127. Negotiations on the transition period began following the conclusion of the December 2017 Joint Report. The first detailed picture of what the transition might look like emerged in February 2018, when the European Commission published its first draft legal text for the Withdrawal Agreement.

Analysis of the draft text

128. The provisions of the draft Withdrawal Agreement relating to transition are Articles 82–87, 91 and 121–126. During the transition, as a general principle, all EU law will apply (Article 122(1)) and produce within the UK "the same legal effects as those which it produces within the Union and its Member States" (Article 122(3)). Transition will be overseen and enforced by the EU's institutions and agencies, including the CJEU, which are given all the powers they currently enjoy to police and enforce the EU Treaties during transition (Article 126).

129. Article 83(1) would allow new cases to be brought before the CJEU in circumstances where the Commission or a Member State considered that the UK had failed to fulfil an obligation under the Treaties or under Part

93 The Rt Hon Theresa May MP, Prime Minister, Speech on 'The government's negotiating objectives for exiting the EU' 17 January 2018: https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech [accessed 18 April 2018]

94 European Council, *European Council (Art.50) guidelines for Brexit negotiations*, (29 April 2017): http://www.consilium.europa.eu/en/press/press-releases/2017/04/29/euco-brexit-guidelines/ [accessed 20 April 2018]

95 European Union Committee, *Brexit: deal or no deal*, (7th Report, Session 2017–19, HL Paper 46) para 62

Four of the Agreement (which relates to the transition period) before the end of the transition period.

130. Article 83(2) would allow the UK courts to continue to make references for preliminary rulings to the CJEU (under Article 267 TFEU) on matters relating to the interpretation of the Treaties or the validity or interpretation of acts of the institutions, bodies, offices or agencies of the Union, where such references relate to facts which occur before the end of the transition period and where the reference is "necessary" for the domestic court to give judgment. Articles 86 and 87 provide for interventions, the right to submit written observations and rights of audience during the transition period.

131. Article 165 provides for the "suspension of benefits during the transition period" in circumstances where the UK has not fulfilled an obligation arising under EU law as found in a judgment rendered under Article 126. In certain circumstances (namely where the functioning of the internal market, the customs union, or the financial stability of Member States would be jeopardised) this provision would allow the EU to "suspend certain benefits deriving for the UK from participation in the internal market". Such a suspension would have to be "proportionate" and should not exceed three months (although this is renewable).

132. In short, the transitional period can essentially be described as a standstill period during which the UK will, in effect, enjoy continuing EU membership, but shorn, with limited exceptions, of the institutional rights and privileges enjoyed by an EU Member State. This means that the UK would continue to be subject to the jurisdiction of the CJEU for the duration of the transition period, but that it would not have any judges (or an advocate general) at the CJEU.

133. The Government has accepted this situation. In the words of Suella Fernandes MP:

> "After 29 March 2019, we will essentially carry on according to the same rules and regulations that we currently have. As both parties agreed last week, that will be strictly time limited to the end of December 2020 … The jurisdiction of the ECJ will essentially continue during the implementation period."[96]

She continued: "We are in the process of extricating ourselves and taking a step away from the European Union, but because of the need for a smooth exit that will essentially mean that the ECJ will have the final say on legal matters to do with the UK" during the transition period.[97]

134. We acknowledge that this will be only a short-term arrangement. The Law Society of England and Wales argued: "In the expectation that the transitional period will be relatively short, it would be too burdensome and time-consuming to establish a separate dispute settlement mechanism solely for the period of transition."[98]

135. Nonetheless, it is worth highlighting several issues. The first is that during the transition period the UK would be subject to the continued jurisdiction of the CJEU, but would not have a judge on the Court. This may not appear

96 Q 48
97 Q 48
98 Written evidence from The Law Society (BED0014)

ideal, although we recognise that, as Sir Konrad Schiemann explained, the tradition at the CJEU "is that you lose your nationality the moment you join the court, which makes no distinction between judges of one nationality and another … The tradition was that you were not there to plug the point of view of your national Government. That was not your job. Your job was to try to decide the law in the light of the general European interest."[99]

136. We put two points to the Parliamentary Under-Secretary of State at the Ministry of Justice, Lucy Frazer QC MP: first, that the absence of a UK judge might mean that the UK's common law tradition would not be well reflected in arguments put before the CJEU; and second, that given the collegiate nature of the court, the absence of a UK judge might mean that there would be no one present to provide informal information about the UK system to the remaining CJEU judges.

137. In response the Minister argued that the common law would not "fade away from every country other than our own". She gave a counter-example:

> "Outside Europe, for example, we are establishing courts in Dubai and in Qatar that are drawing on our common-law system, and we can still influence international law through a number of other means."[100]

However, these courts are limited exclusively to commercial matters.

138. As for informal co-operation between the judges, the Minster acknowledged that if that "is a role that a British judge plays and there is no British judge there, of course that is a consequence that will ensue".[101]

139. The acceptance of the jurisdiction of the CJEU during the transition would also require either the amendment of Clause 6 of the European Union Withdrawal Bill, to provide for continued references to the CJEU, or for some special provision to be made in the proposed Withdrawal and Implementation Bill.

140. With regard to the continuing application of EU law, Dr Tobias Lock argued that it was "not clear whether the UK's courts will accept the primacy and direct effect of the transitional arrangement as laid down in the withdrawal agreement in the same manner as they did with the European Communities Act 1972".[102]

141. It follows that clear domestic legislation would be needed, in effect to replicate the provisions of the 1972 Act which ensure the primacy and direct effect of EU law, albeit for a time limited period. In November 2017 Lord Hope of Craighead reminded us that the EU (Withdrawal) Bill

> "was drafted before the Government were prepared to recognise that there would be a transitional period at all. It runs right through the whole Bill that there was to be an absolute clean break on exit day. We are going to find that there will have to be changes in the Bill to reflect that. I would have thought that something will have to be done about Clause 6(1)(b), for example."[103]

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99 Oral evidence taken on 21 November 2017 (Session 2017–19), Q 2
100 Q 48
101 *Ibid.*
102 Written evidence from Dr Tobias Lock (BED0016), para 10
103 Oral evidence taken on 21 November 2017 (Session 2017–19), Q 9

142. We agree. It is unfortunate, given that the Government has now agreed this point in negotiations with the EU, that it has not yet brought forward an amendment to Clause 6 to deal with this problem.

143. There also remain concerns about whether the transitional period might need to be extended further, for instance if arrangements for the future relationship have not been agreed by the end of December 2020. This possibility has been ruled out by both the Government and the European Commission, and we have previously expressed doubts about its legality under EU law.[104]

144. That said, the Government and the EU 27 still have to negotiate a potentially complex 'mixed agreement' in a very short timeframe. This will prove challenging. Were a short term transitional arrangement to be succeeded by a longer-term implementation period then the UK might, in principle, be subject to the continued jurisdiction of the CJEU for many years (as well as being subject to future legislative proposals in which it had not had a hand in drafting).

145. Some technical issues will also arise. Notably, the current draft Withdrawal Agreement text does not appear to provide for any longstop or limitation period for cases being commenced in the CJEU where a cause of action arises during the transition period. To ensure legal certainty, it seems likely that the Government will want to provide for some end date for the commencement of such claims.[105]

Conclusions

146. **The UK will continue to be bound by the jurisdiction of the CJEU during transition. We accept that, given that the transitional period will be relatively short, it would be too burdensome and time-consuming to establish a separate dispute settlement mechanism solely for the period of transition.**

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

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

104 European Union Committee, *Brexit: deal or no deal*, (7th Report, Session 2017–19, HL Paper 46), para 131

105 We note that, at the time of writing, the Government had tabled an amendment to the EU (Withdrawal) Bill to allow for a longstop provision in domestic law. Additionally, it should be made clear to individuals and businesses with cases in the pipeline whether (and for how long) a reference can be made to the CJEU after the end of the transition period.

CHAPTER 5: THE FUTURE RELATIONSHIP

The options available

149. The wide range of options available for enforcement and dispute resolution in relation to the future relationship have been set out at paragraph 33 of this report, and can be summarised as follows: a political system based on a Joint Committee, arbitration or perhaps a Joint Court of some type; the EFTA Court; or the continued jurisdiction of the CJEU in some contexts.

150. Professor Adam Łazowski noted that such issues have often been contentious when the EU has negotiated agreements with third countries:

> "The deeper the economic integration between the parties, the more robust homogeneity in law-books and courtrooms is required by the European Union. Methods of securing such homogeneity are traditionally the bones of contention in negotiations between the EU and its neighbouring countries. For instance, it took the EFTA and the EEC countries over five years to design the *modi operandi* for securing homogeneity in the EEA (including the enforcement and dispute settlement machinery). Most recently this phenomenon has been witnessed in negotiations with Ukraine, Georgia and Moldova."[106]

151. In other words, the precise model for dispute resolution depends in large part on the closeness of the partnership. Given the current lack of clarity as to the Government's preferred arrangements for the future relationship, it is thus somewhat premature to identify appropriate enforcement and dispute resolution provisions. The most suitable option will depend on the type of relationship the UK seeks to agree with the EU. Accordingly, this Chapter highlights certain challenges that have been raised in evidence with us, and suggests a possible way through to a practical solution.

152. It is important to note at the outset that while the UK may be able to exclude the direct jurisdiction of the CJEU after Brexit, it will still be subject to its influence. Professor Valsamis Mitsilegas provided us with some useful examples:

> "If there is an EU-UK security treaty and the European arrest warrant continues in some shape or form, and, for example, a European arrest warrant is issued by a British authority to a French authority and will be executed under this agreement, nothing prevents the French judge sending a preliminary reference to the European Court of Justice on the compatibility of this request with EU law …
>
> "Whatever the shape of dispute resolution post Brexit, the Court of Justice will remain relevant… and the substance of the case law will have a direct effect on the relationship between the UK and the EU."[107]

153. Professor Mitsilegas provided a second example in the case of access to data after Brexit, noting the well-known case of *Schrems*,[108] in which the

106 Written evidence from Professor Adam Łazowski (BED0012)

107 Q 31.He highlighted the case of *Petruhhin* (Case C-182/15, 6 September 2016), which concerned an extradition request from Russia. This was referred to CJEU, which interpreted the issue in accordance with EU law and determined that surrender would be contrary to EU law. See: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-182/15

108 Case C-362/14, 6 October 2015, [2016] QB 527: http://curia.europa.eu/juris/liste.jsf?num=C-362/14

CJEU found that the 'EU-USA safe harbour agreement' did not provide an adequate level of data protection:

> "Take the issue of data protection, which exercises people who work within the security field as well as companies, and the flow of data across the private sector but also between the private and public sectors and the state authorities. After Brexit, for the United Kingdom to ensure that its companies can be part of the data flow system across the European Union, the Commission will have to adopt an adequacy decision, which attests that the United Kingdom's system is essentially equivalent to the system of the European Union, and EU data protection law also has extraterritorial effect …
>
> "The European Commission's assessment, which will be a unilateral assessment, will be based on the case law of the Court of Justice. So whether the United Kingdom wants it or not, it will have to comply with the assessment of the European Commission if it wants its companies to have any relationship as regards the flows of personal data."[109]

154. There will also be similar difficulties in relation to the autonomy of EU law, discussed in Chapter 3. It is notable that both the European Council's Guidelines for future relations, published on 23 March 2018, and the European Parliament's Guidelines on the framework of future EU-UK relations, published on 14 March 2018, refer to this principle and the role of the CJEU.[110] Indeed, the Parliament's Guidelines go further, and assert that a deep and comprehensive free trade area requires "a binding mechanism for convergence with the EU *acquis* and a binding role for the CJEU in the interpretation of Union law".[111]

155. Thus, as Professor Tobler warned us "as soon as there is EU law in [the agreement], the EU will insist on the Court of Justice". This would leave the UK "in the uncomfortable position of saying, 'If we really want to get rid of this court, the ultimate consequence is having no EU law element in our future agreements'".[112] The ramifications of such a decision could be profound: many of the areas of current co-operation, for example over police and judicial matters, may come to an end.

Access to justice

156. Several witnesses considered whether, after Brexit, individual litigants and companies would have access to any court or arbitral arrangements that were eventually established to deal with relations between the UK and the EU.

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109 Q 35

110 European Parliament, *Guidelines on the framework of future EU-UK relations*, (14 March 2018), para 39: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN&language=EN [accessed 23 April 2018] and European Council, *European Council (Art. 50) guidelines on the framework for the future EU-UK relationship*, (23 March 2018), para 15: http://www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018/ [accessed 23 April 2018]

111 European Parliament, *Guidelines on the framework for future EU-UK relations*, (14 March 2018), para 12: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN&language=EN [accessed 23 April 2018]

112 Q 33

157. Currently, while individuals and businesses only have limited rights to bring direct actions to the CJEU,[113] the domestic courts can make preliminary references to the CJEU This procedure, set out in Article 267 TFEU, allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the CJEU about the interpretation of European Union law or the validity of a European Union act. The CJEU does not decide the entire dispute itself, but rules on points of interpretation. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

158. Several witnesses expressed concerns at the possibility that a dispute resolution system, post-Brexit, might exclude all access to judicial remedy for individuals and businesses. Lord Neuberger Abbotsbury told us: "I start with the proposition that if you give people rights but not the ability to enforce them you bring the law into disrepute."[114] On the other hand, Professor Tobler noted that under many treaties founded in public international law dispute resolution is conducted only between states.[115]

159. Lord Thomas of Cwmgiedd observed:

> "When issues emerge that are effectively of an inter-state or constitutional type, it is often highly desirable that an individual, particularly a commercial enterprise, who is seriously affected by it, can go directly to the court … My preliminary view would be that the balance in favour of direct access must be quite high. However, you then have to counter it with the number of cases that might come through direct access. A better mechanism might be a system that mirrored the current one whereby you went to the courts of the parties to the treaty and they referred it to the court. There is something to be said for either."[116]

160. Raphael Hogarth noted that if a new state-to-state system were established, and a business were concerned that it was being discriminated against or in some way mistreated by a Government, then it would be obliged to lobby its own Government to bring a complaint. He noted that such a model did not favour smaller businesses, since "as far as government is concerned it is worth kicking up a fuss only when quite a lot of money is at stake".[117] By contrast, he observed that much EU law has direct effect, meaning that citizens and businesses can enforce their rights under EU law before their own domestic courts, or the domestic courts of other EU countries. There is no need to go to the CJEU.[118]

161. Hugh Mercer QC and Professor Catherine Barnard highlighted the fact that similar concerns arose under investor-state arbitration arrangements, which are sometimes used in bilateral investment treaties to allow investors to bring claims against states for alleged discriminatory practices.[119] Professor Barnard noted: "When we think of trade, we often think of big corporations, but one of the successes of European Union law has been to open up the

113 Article 263, Treaty on the Functioning of the European Union imposes strict standing conditions on natural or legal persons who wish to challenge a potentially unlawful EU act.
114 Oral evidence taken on 21 November 2017 (Session 2017–19), Q 5
115 Q 37
116 *Ibid.*
117 *Ibid.*
118 *Ibid.*
119 For more on these arrangements, see written evidence from CityUK (BED0009), paras 16–17.

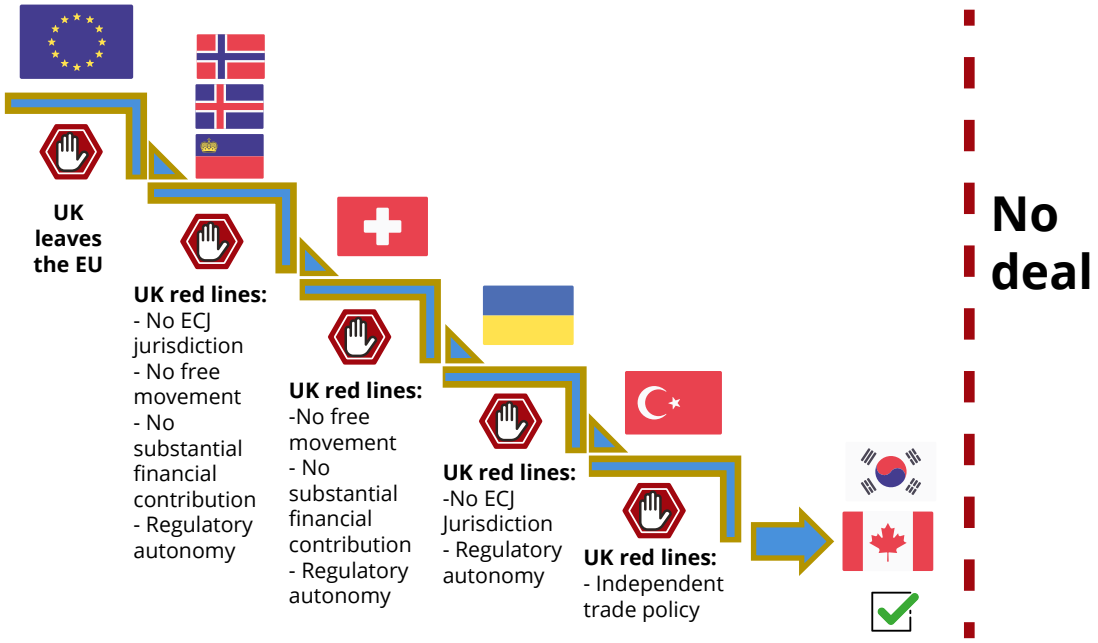
market to small businesses." Hugh Mercer argued that "the idea of investor-state arbitration for such a company seems a bit unreal".[120]

162. There may be no easy answers to this conundrum, but whatever model of dispute resolution is ultimately decided upon, the question of individual access to justice will be of particular importance.

What is the impact of the Government's red line on the UK's possible future relationship with the EU?

163. The European Commission's Chief Negotiator, Michel Barnier, has been very clear that the UK's refusal to entertain the jurisdiction of the CJEU will have consequences for the type of future relationship that will be possible with the EU. The Commission has published a helpful diagram in the form of a staircase (reproduced at Figure 1), noting the effect of each of the UK Government's red lines. The Commission's initial view was that the combination of rejecting the single market, free movement of people, the customs union and the jurisdiction of the CJEU would only leave the option of a free trade agreement in the style of CETA.

Figure 1: Commission's diagram on possible future relationships



Source: European Commission, 'Slide presented by Michel Barnier, European Commission Chief Negotiator, to the Heads of State and Government at the European Council (Article 50) on 15 December 2017': https://ec.europa.eu/commission/publications/slide-presented-michel-barnier-european-commission-chief-negotiator-heads-state-and-government-european-council-article-50-15-december-2017_en [accessed 27 April 2018]

A four-pillar option?

164. Since the publication of the 'staircase diagram', Michel Barnier has taken a slightly more nuanced approach, acknowledging that the future relationship will be broader than merely a free trade agreement. In February 2018, he suggested that a future relationship might be predicated on 'four pillars', containing multiple agreements:

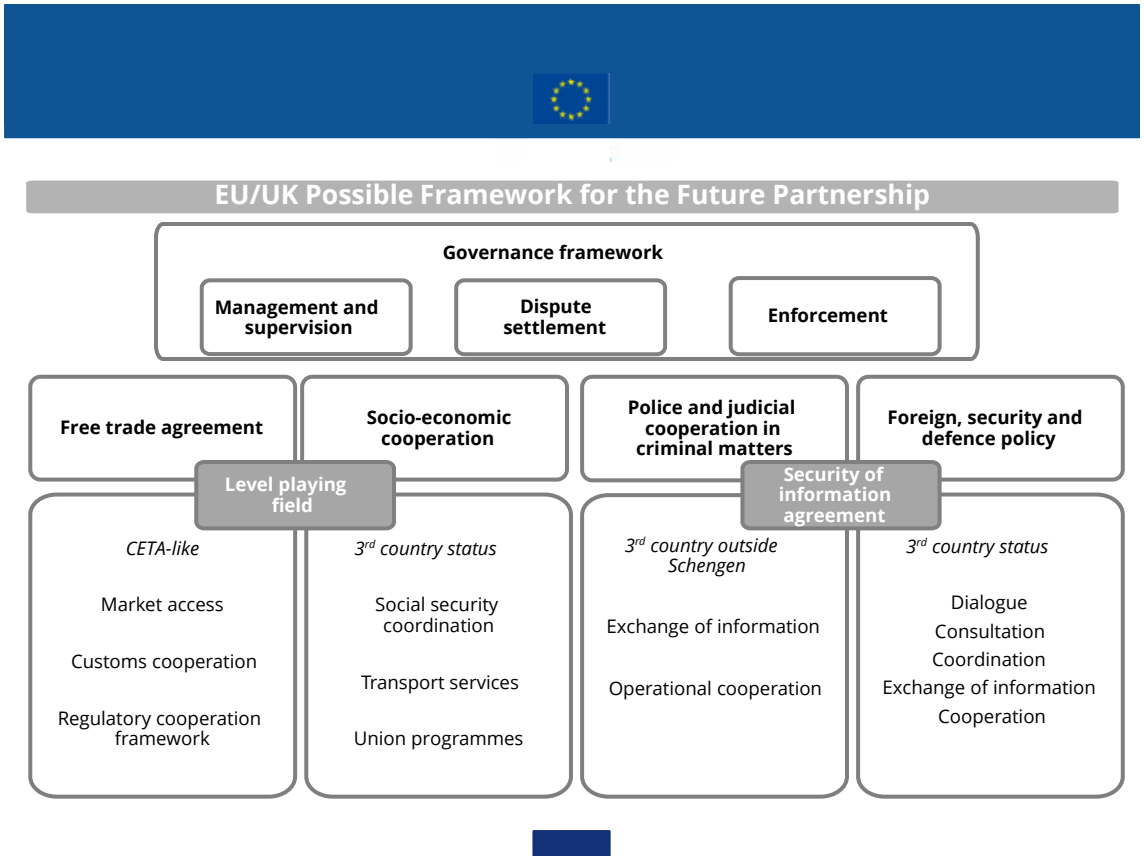
120 Q 21

"To conclude on the future architecture of our relations with the United Kingdom post Brexit, I can envisage four main pillars. The first pillar is a free trade agreement along the lines of the Canada model, with certain specific provisions. The second pillar contains bilateral agreements between the EU and the UK on issues of joint interest, such as aviation … I am thinking of the co-operation networks between our universities and co-operation in the research field.

"The third pillar is that of co-operation on justice and home affairs … There is a lot of room for cooperation in this third pillar when it comes to the exchange of information, operational cooperation with Europol, judicial co-operation in the field of criminal law and mutual judicial co-operation. Your country is not part of the Schengen area. You will not want to recognise free movement of persons after withdrawal. Therefore, there are limits on what can be achieved, but we will have to continue working on the issues. The fourth pillar is [a] future partnership for security and defence, the stability of our relations and the future of our foreign policy."[121]

165. This proposal has also been turned into a diagram, which we reproduce at Figure 2:

Figure 2: Possible framework for the future partnership proposed by the European Commission



Source: European Commission, April 2018

121 Oral evidence taken before the European Union Committee, 21 February 2018, (Session 2017–19), Q 2

166. This broader understanding of the future relationship may provide room for compromise on both sides. Professor Barnard discussed with us the question of potential 'carve outs' for specific issues such as the European Arrest Warrant (for which see Box 1), European Aviation Area and "other areas that are dependent on the operation of the Court of Justice as a final arbiter".[122] For example, many of the witnesses who gave evidence to us took the view that the UK could not benefit from mechanisms, such as the European Arrest Warrant, without recognising the jurisdiction of the CJEU in some way.[123]

Box 1: The European Arrest Warrant

The EAW was adopted by the EU to facilitate the extradition of individuals between Member States. The Government has previously recognised the importance of the EAW, and the then Home Secretary, Rt Hon Amber Rudd MP, has called it an "effective tool", noting that it is a priority for the Government "to ensure that we remain part of the arrangement". The UK issues over 200 EAW requests annually. The EAW has brought high-profile criminals back to the UK, such as the fugitive, Hussain Osman, who sought to carry out a terrorist attack in London in July 2005 and then fled to Italy. It is far from clear that the EU will accede to the UK's continued access to the EAW post-Brexit. Most of the witnesses who appeared before us concluded that it would be impossible to use the mechanism without recognising the jurisdiction of the CJEU.

Source: European Union Committee, Brexit: judicial oversight of the European Arrest Warrant (6th Report, Session 2017–19, HL Paper 16)

167. The Prime Minister seemed to hint at such 'carve outs' in two recent speeches in Munich and at the Mansion House. In the first speech, delivered on 17 February 2018, she addressed some of the issues that the UK might wish to see in a treaty on security and justice co-operation. She acknowledged the benefits of the European Arrest Warrant and the European Investigation Order, and said that the UK, "when participating in EU agencies" would "respect the remit of the European Court of Justice".[124]

168. The speech at Mansion House, delivered on 2 March 2018, focused on the future economic relationship. The Prime Minister reiterated the point she made in Munich, indicating that "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". Yet despite these apparent concessions, she continued:

> "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 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."[125]

122 Q 24
123 See for example Q 14 and Q 36.
124 The Rt Hon Theresa May MP, Prime Minister 'Speech at Munich Security Conference', 17 February 2018: https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018 [accessed 18 April 2018]
125. The Rt Hon Theresa May MP, Prime Minister Speech on 'Our future economic partnership with the European Union', 2 March 2018: https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union [accessed 18 April 2018]

169. It is not yet clear whether the EU will accede to this somewhat 'in and out' model in respect of its agencies. It has previously described such an approach as "cherry-picking". But what is clear is that the four-pillar model proposed by Michel Barnier at least opens up the possibility of a differentiated approach to enforcement and dispute resolution.

170. An alternative to the four-pillar model may be an association agreement with the European Union. Guy Verhofstadt MEP, the European Parliament's Brexit co-ordination told the EU Select Committee:

> "An association agreement is a bespoke partnership that can be very close or very broad, that can cover only trade or economics or can cover all fields. How you do it depends essentially on the two parties discussing it."[126]

171. Notwithstanding the position of the European Parliament, we heard concern from Robert McDougall that association agreements "generally have in common the objective of extending the requirements of the EU internal market to the non-EU parties, treating the later essentially as rule-takers".[127] Such association agreements are often an intermediate step for countries on a path to EU accession—although we do note that Article 217 TFEU, which provides the legal base for EU association agreements, does not prescribe the circumstances, and thus would not preclude either the possibility of a range of agreements, such as those outlined in Michel Barnier's four-pillar model, being grouped under the general heading of an association agreement.

172. We asked Suella Fernandes MP about Michel Barnier's four pillar option. She said that it was "very interesting and helpful" and "very comprehensive". Nonetheless, she stated that "it is not the Government's official reflection of how we would see the relationship panning out. It is not our position".[128]

173. The Minister did not expand on what the Prime Minister meant by respecting the remit of the CJEU when participating in EU agencies. Indeed, the Government's position was undeveloped:

> "We are on the brink of commencing the negotiations on these particular issues. Some agencies have been referenced—the aviation and medicines agencies. Those are agencies with which we have extensive dependency, you could say, and co-operation. They may well be agencies that we want to maintain our membership of … The Prime Minister referenced three specific sectors—chemicals, medicines and aviation—and their associate agencies. We would respect the remit of the ECJ in those instances."[129]

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126 Oral evidence taken before the European Union Committee, 20 February 2018 (Session 2017–19), Q 9. See European Parliament, *Guidelines on the framework of future EU-UK relations*, (14 March 2018), para 39: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0069+0+DOC+XML+V0//EN&language=EN [accessed 23 April 2018] and European Council, *European Council (Art. 50) guidelines on the framework for the future EU-UK relationship*, (23 March 2018), para 5: http://www.consilium.europa.eu/en/press/press-releases/2018/03/23/european-council-art-50-guidelines-on-the-framework-for-the-future-eu-uk-relationship-23-march-2018/ [accessed 23 April 2018]

127 See for example the written evidence from Robert McDougall (BED0018). For details of the dispute resolution mechanisms used in the association agreements with Ukraine, Moldova and Georgia, see written evidence from the IfG (BED0005), para 43.

128 Q 51

129 Q 51

174. Whatever the merits of Michel Barnier's four-pillar model, or the European Parliament's proposed association agreement, the Government has yet to espouse either model. Nevertheless, it is reasonable to assume that the future relationship will cover a number of different areas, such as trade, internal security, or data protection, and that it will be closer in some areas than others. This could present benefits, for instance in that there would be no need to adopt a 'one-size-fits-all' approach to enforcement and dispute resolution; it could also present difficulties, as Hugh Mercer QC pointed out. He said that "multiplying the number of bodies multiplies the risk of people taking [legal] points … whether it is desirable to have separate bodies for different aspects is another question. As lawyers, we all think of the jurisdictional and demarcation disputes that can arise. My instinctive reaction is that perfection is the enemy of the good."[130]

175. Questions may also arise in respect of areas falling within more than one treaty (for example data sharing and data protection). Moreover, even in the free trade element of the agreement there may be complexities—differing levels of harmonisation, equivalence and autonomy. Raphael Hogarth suggested that that this could introduce "yet another layer of complexity for business in that it needs to say, 'Which basket is this regulation in? Which dispute resolution system underpins the interpretation of this basket?'"[131]

Conclusions

176. **In relation to the future relationship, the approach to enforcement and dispute resolution will depend on the level of co-operation that the Government wishes to have with the European Union after Brexit. If the Government settles for a simple free trade agreement, then any disputes could be dealt with via arbitration. However, this would not be appropriate for many other areas of UK-EU cooperation, including the important sphere of judicial and security cooperation.**

177. **If the Government wishes to pursue a "deep and special partnership", which involves participation in EU agencies and mechanisms such as the European Arrest Warrant then, as the Prime Minister has recognised, it will have to "respect the remit" of the CJEU in those areas. If it does not do this, the UK will lose access to EU agencies upon which it relies, including those responsible for the regulation of aviation, medicines and chemicals.**

178. **It is clear to us that whatever formal structure is adopted for the future UK-EU relationship, it is likely to be composite in nature: there will be different levels of integration in different areas. It follows that there will be no 'one-size-fits-all' mechanism for enforcement and dispute resolution. This could mean that the UK would only be obliged to accept the jurisdiction of the CJEU in specific and limited areas, for instance those involving direct co-operation with EU agencies, or within the field of justice and home affairs.**

179. **We urge the Government to be much clearer, by being more detailed, about its approach to these issues. If the Prime Minister wishes to make such an offer to the EU 27 this should be done with precision**

130 Q 21
131 Q 34

and clarity, by means of a draft text that can be properly scrutinised by all sides.

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

CHAPTER 6: THE IMPACT OF BREXIT ON THE LEGAL LANDSCAPE

Introduction

181. This Chapter highlights some potentially negative impacts on the legal system as a result of Brexit, which were raised in evidence. These are: the impact of Brexit on the influence of the UK legal system and the potential effect on individual rights.

The impact of Brexit on the influence of the UK legal system

182. We took up this issue with the senior judges who gave evidence at our initial scoping evidence session. Lord Thomas of Cwmgiedd told us:

> "One of the very big issues that the Committee may wish to think about in due course is how we, in a relatively small jurisdiction set between two very large jurisdictions, the United States and the European Community, will have an influence on the fashioning of the law for this new marketplace once we leave the Community. It is … inconceivable that being a relatively small country interposed between many other large trading blocs we would have a regime that people would be very happy to go along with. Our better course is to try to influence the other regimes and hope that they produce some kind of overall uniformity."[132]

183. Lord Hope of Craighead noted that post-Brexit there would be no opportunity for a non-Member State to be heard by the CJEU:

> "Normally where a case affects a number of states, a number of them would intervene … Once we leave we will not have that opportunity, so our voice would not be heard, not only because we would not have a member of the court but because we will not even have an opportunity to attempt to guide or influence the way the court looks at a problem."[133]

184. Hugh Mercer QC and Professor Barnard stressed the positive influence UK lawyers had played in developing EU law,[134] and the General Council of the Bar of England and Wales agreed that "it is widely recognised that British barristers, advocates and judges have made an outstanding contribution and have wielded very significant influence in the CJEU since UK accession in 1973".[135]

185. Looking ahead, however, Dr Hélène Tyrrell (a lecturer at Newcastle University) believed that "the ability of the UK to influence the development of law in other EU jurisdictions post-Brexit is likely to be reduced in matters governed by EU law". In particular, she said: "Given the altered domestic legal regime, it will be less-likely that courts of jurisdictions in the EU would refer to the jurisprudence of UK courts because the UK would no longer share the same interpretative obligations."[136]

132 Oral evidence taken on 21 November 2017 (Session 2017–19), Q 2
133 *Ibid*, Q 9.
134 See for example Q 22, Q 25.
135 Written evidence from the General Council of the Bar of England and Wales (the Bar Council) (BED0011)
136 Written evidence from Dr Hélène Tyrrell (BED0015)

186. This point was also made by the General Council of the Bar of England and Wales, which argued that the Brexit was likely "inevitably to weaken the international standing of the UK as a source of EU law". It noted various direct impacts, including the loss of UK judges and advocates general in the CJEU; the detachment from the preliminary ruling procedure; and the lack of any right to participate in cases before the CJEU, which it described as "one of the most powerful and influential international courts".[137] It also noted what it described as "indirect impacts", including the fact that "parties may be deterred from selecting English law as their applicable law for contracts or the English Courts as their choice of forum for dispute resolution if judgments will not be automatically recognised and enforced in other Member States".

187. The impact of Brexit on the common law world is more difficult to assess. Dr Tyrrell suggested that:

> "The UK's influence in the common law jurisdictions would not necessarily be affected by the altered relationship with the EU. Given the shared legal heritage, the courts of common law countries frequently refer to each other's jurisprudence."[138]

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

Mutual recognition of judgments

189. We considered the issue of the impact of Brexit on the EU legislation facilitating the mutual recognitional of civil and commercial judgment in our report *Brexit: justice for families, individuals and businesses?* (see Box 2).

Box 2: Justice co-operation in family law cases

In our report, *Brexit: justice for families, individuals and businesses?*, we identified a number of examples where, if the so called 'Brussels regime' of Regulations were not replaced, the personal lives of adults and children would be affected and the family law rights of UK citizens would be undermined. We said that to walk away from these Regulations without putting alternatives in place would be "an act of self-harm". An example of the sort of issue that could arise is contained in the following case study on the EU Maintenance Regulation (4/2009). An English woman marries an Italian man in England. The relationship breaks down and a divorce is agreed in England. After the divorce, the father returns to Italy and refuses to make maintenance payments. Under the Maintenance Regulation, the mother can apply to a court in England and Wales for an order and can seek to enforce that order in Italy through a court order from England and Wales. Alternatively, she can apply through a central authority in Italy for an order for maintenance. After Brexit, it is far from clear how she would be able to enforce her rights.

Source: European Union Committee, Brexit: justice for families, individuals and businesses (17th Report, Session 2016–17, HL Paper 134)

137 Written evidence from the General Council of the Bar of England and Wales (the Bar Council) (BED0011)

138 Written evidence from Dr Hélène Tyrrell (BED0015)

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

What impact will Brexit have on rights?

191. In its 'Future Partnership Paper on Enforcement and Dispute Resolution', the Government asserted 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 complying with its obligations under international agreements".[139]

192. Professor Barnard, in contrast, was clear that the European Union (Withdrawal) Bill, as introduced into the House of Lords, would cause "losses of rights for businesses and citizens". She gave three examples. The first was the loss of the Charter of Fundamental Rights, which would "generate a lot of problems". She noted that the EU (Withdrawal) Bill "says that the general principles that are expressed in the Charter will be carried over". However, she contended that the Charter "is at least reasonably transparent on what the rights are, but the general principles are not clear. I imagine that every lawyer in this room would come up with a slightly different list of what constitutes a general principle."[140]

193. Second, she noted that Schedule 1 of the Bill provides that "those general principles do not have direct effect and cannot be enforced". She argued that "if you cannot enforce the general principles, by definition you cannot get a remedy". Finally, she noted that Schedule 1 also says that after Brexit there would be no ability to bring an action for what are known as '*Francovich* damages.'[141]

194. Hugh Mercer QC expanded on Professor Barnard's second point. He said that in circumstances where general principles of UK law were not available to challenge a Minister's decision, that was "a clear downgrading of rights". He added that it "seems to be trying to isolate the Government from judicial review and reduce access to justice at the cost of individuals and businesses".[142]

195. Perhaps more far-reaching is the fact that, by ending the jurisdiction of the CJEU and the supremacy of EU law, one of the restraints on Parliament's freedom of action will be removed. At present, an individual may challenge legislation enacted by Parliament that deals with matters of EU competence—for instance, equality law relating to equal pay. The individual may seek to have the courts disapply the statute if it conflicts with EU law, and the

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139 Department for Exiting the European Union, *Enforcement and dispute resolution:a future partnership paper* (2017), para 24: https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper [accessed 18 April 2018]

140 Q 26.We note that on 23 April 2018, the House of Lords voted to accept amendments relating to the retention of the Charter of Fundamental Rights. It also voted to remove the provision in Schedule 1, paragraph 3 of the Bill which stated that although the general principles of EU law are to be part of retained EU law they cannot provide a cause of action.

141 Francovich damages were first developed by the CJEU in the case *of Francovich v. Italian Republic*, C-6/90, [1992] IRLR 84: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0006 That judgment made clear that if a State is in breach of EU laws—specifically, in that case, by not implementing a Directive—and an individual suffered loss as a result of that failure, that individual could bring an action for damages against the State.

142 Q 26

domestic courts may, in considering such an application, refer questions of EU law to the CJEU. After Brexit, this would not be possible.

196. Sir Richard Aikens did not see this as a diminution in rights: "A democratic decision has been taken, and assuming that we are going to leave, you cannot say that somebody's rights are diminished when the whole legal framework has changed."[143] Martin Howe QC agreed that "there is a distinction between the substantive content of rights and the mechanisms by which they are adjudicated on or enforced. The substantive rights … will not change."[144]

197. We asked the Minister, Lucy Frazer MP QC, about the impact on litigants who would no longer be able to seek an interpretation on EU law from the CJEU. She replied: "Some would regard being stuck with parliamentary sovereignty as a good thing, but you are right; there would be no reference" to the CJEU post-Brexit.[145]

198. Without the supremacy of EU law, the loss of access to the CJEU is not the end of the matter. The Government argues that the UK has rigorous domestic equalities legislation, parts of which predate or go beyond EU provisions.[146] This is true, but it remains at least theoretically possible that substantive rights could be subject to amendment by a future Parliament. If such a Parliament enacted a clear statutory provision which directly repealed, or curtailed, even fundamental rights, the domestic courts would no longer be in a position to draw on EU law to overturn such a provision.[147]

199. **The Government asserts that ending the direct jurisdiction of the CJEU will not weaken the rights of individuals. The evidence received in this inquiry demonstrates that the ability to request a preliminary reference from the CJEU, combined with the direct effect and supremacy of EU law, has sometimes acted as a check on Government action. This check will be lost as a result of Brexit, and so the rights of individuals will be weakened.**

143 Q 40
144 Q 41
145 Q 52
146 Government Equalities Office, *Equalities legislation and EU exit*, December 2017
147 See for example the judgment of Lord Hoffmann in *R v. Secretary of State for the Home Department ex parte Simms* [*2000] AC 115:* https://publications.parliament.uk/pa/ld199899/ldjudgmt/jd990708/obrien01.htm

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Background

1. There is 'no one-size-fits-all' solution to dispute resolution after Brexit. Each of the proposed options we have considered has its own pros and cons. None of them provides a complete solution. (Paragraph 55)

2. Given the Government's red line of withdrawing from the CJEU, either a new court covering essentially the same areas as the CJEU, or multiple dispute resolution procedures, will be needed post-Brexit. Neither option has been costed. Not only may different arrangements be needed to deal with the Withdrawal Agreement, the transitional period, and the future relationship with the EU, but it may also be that future trade arrangements are dealt with differently to any agreement on co-operation on, for example, justice and security matters. (Paragraph 56)

3. The EFTA court was presented as a potential off-the-shelf solution to the problem of dispute resolution. 'Full docking' with the Court is a limited solution. It is essentially an economic court and its jurisdiction does not extend to justice and home affairs issues, including EU co-operation on civil and family law matters and criminal law, such as the European Arrest Warrant. There would also be practical challenges in upscaling the EFTA Court to deal with the number of cases from the UK. (Paragraph 57)

4. Unless the Government eventually choses to join the European Economic Area, we do not consider that 'full docking' with the EFTA Court would resolve all the enforcement and dispute resolution issues that will arise post-Brexit. (Paragraph 58)

The Withdrawal Agreement

5. Given that Article 50 TEU provides explicitly that the Treaties shall cease to apply to the UK on exit, there is a legitimate argument that disputes arising under the Withdrawal Agreement, if they cannot be resolved politically by the Joint Committee, should be referred to a neutral court, or for arbitration. We share the Government's concern that the interpretation of the Withdrawal Agreement should not be left to the CJEU, which is a Court associated with one of the parties to the Agreement. Whether or not the CJEU is objectively neutral, even a mere perception of bias should be avoided. (Paragraph 119)

6. However, the Government and Parliament will need to be mindful that the legal autonomy of the Union, as defined by the CJEU in past cases, demands that only the CJEU have the final say on the interpretation of EU law. Moreover, the final Withdrawal Agreement may be referred to the CJEU to determine whether it is compatible with the Treaties. From past precedent, innovative solutions can prove problematic and could well be deemed incompatible with EU law. (Paragraph 120)

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

8. As we have previously noted, time is now very short: over the next few months the UK and the EU must finalise the remaining articles of the Withdrawal Agreement. If the Government and the EU do not bring forward pragmatic proposals, it will be too late. The risk is that the Commission will shape the terms of the negotiations, or there will be no Withdrawal Agreement. (Paragraph 122)

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

The transition period

10. The UK will continue to be bound by the jurisdiction of the CJEU during transition. We accept that, given that the transitional period will be relatively short, it would be too burdensome and time-consuming to establish a separate dispute settlement mechanism solely for the period of transition. (Paragraph 146)

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

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

The future relationship

13. In relation to the future relationship, the approach to enforcement and dispute resolution will depend on the level of co-operation that the Government wishes to have with the European Union after Brexit. If the Government settles for a simple free trade agreement, then any disputes could be dealt with via arbitration. However, this would not be appropriate for many other areas of UK-EU cooperation, including the important sphere of judicial and security cooperation. (Paragraph 176)

14. If the Government wishes to pursue a "deep and special partnership", which involves participation in EU agencies and mechanisms such as the European Arrest Warrant then, as the Prime Minister has recognised, it will have to "respect the remit" of the CJEU in those areas. If it does not do this, the UK will lose access to EU agencies upon which it relies, including those responsible for the regulation of aviation, medicines and chemicals. (Paragraph 177)

15. It is clear to us that whatever formal structure is adopted for the future UK-EU relationship, it is likely to be composite in nature: there will be different levels of integration in different areas. It follows that there will be no 'one-size-fits-all' mechanism for enforcement and dispute resolution. This could mean that the UK would only be obliged to accept the jurisdiction of the CJEU in specific and limited areas, for instance those involving direct co-operation with EU agencies, or within the field of justice and home affairs. (Paragraph 178)

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

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

The impact of Brexit on the legal landscape

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

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

20. The Government asserts that ending the direct jurisdiction of the CJEU will not weaken the rights of individuals. The evidence received in this inquiry demonstrates that the ability to request a preliminary reference from the CJEU, combined with the direct effect and supremacy of EU law, has sometimes acted as a check on Government action. This check will be lost as a result of Brexit, and so the rights of individuals will be weakened. (Paragraph 199)

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Lord Anderson of Swansea
Lord Cashman
Lord Cromwell
Lord Gold
Lord Judd
Baroness Kennedy of The Shaws (Chairman)
Earl of Kinnoull
Lord Lester of Herne Hill
Baroness Ludford
Baroness Neuberger
Lord Polak
Baroness Shackleton of Belgravia

Declarations of interest

Lord Anderson of Swansea

No relevant interests declared

Lord Cashman

Member of the European Parliament (1999–2014)

Lord Cromwell

To the extent that CJEU affects business and individual rights, it is conceivable that this Member's business interests could in some way be affected by CJEU

Lord Gold

Director at David Gold & Associates LLP

Lord Judd

Member of the Advisory Board of LSE Centre for the Study of Human Rights

Life Member of Court at Lancaster and Newcastle Universities

Emeritus Governor of LSE

Baroness Kennedy of The Shaws

Member of the Bar and has appeared before the CJEU

Earl of Kinnoull

Barrister (non practising)

Lord Lester of Herne Hill

Self-employed practising member of the English Bar, specialising in constitutional and administrative law, employment, media, commercial and European law

Baroness Ludford

Receives a pension from the European Parliament in her capacity as a former MEP

Baroness Neuberger

No relevant interests declared

Lord Polak

No relevant interests declared

Baroness Shackleton of Belgravia

Solicitor (partner) Payne Hicks Beach specialising in family law

The following Members of the European Union Select Committee attended the meeting at which the report was approved:

Baroness Armstrong of Hill Top
Lord Boswell of Aynho (Chairman)
Baroness Brown of Cambridge
Baroness Browning
Lord Crisp
Baroness Faulkner of Margravine
Lord Jay of Ewelme
Baroness Kennedy of The Shaws
Earl of Kinnoull
Baroness Neville-Rolfe
Lord Selkirk of Douglas
Baroness Suttie
Lord Teverson
Baroness Verma
Lord Whitty
Baroness Wilcox
Lord Woolmer of Leeds

During consideration of the report the following Member declared an interest:

Earl of Kinnoull
Barrister (non practising)
Lord Whitty
Vice President Chartered Trading Standards Institute
Baroness Wilcox
President National Consumer Federation

A full list of Members' interests can be found in the Register of Lords Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests/

APPENDIX 2: LIST OF WITNESSES

Evidence is published online at https://www.parliament.uk/brexit-enforcement-dispute-resolution/ and available for inspection at the Parliamentary Archives (020 7219 3074).

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with a ** gave both oral and written evidence. Those marked with * gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only

Oral evidence taken on 21 November 2017 (Session 2017–19)

	The Rt Hon The Lord Hope of Craighead, Convener of the Crossbench Peers and Former Deputy President of the Supreme Court of the United Kingdom	QQ 1–13
	The Rt Hon The Lord Neuberger of Abbotsbury, Former President of the Supreme Court of the United Kingdom	QQ 1–13
	The Rt Hon The Lord Thomas of Cwmgiedd, Former Lord Chief Justice of England and Wales	QQ 1–13
	The Rt Hon Sir Konrad Schiemann, Former judge at the European Court of Justice of the European Union	QQ 1–13

Oral evidence in chronological order from Brexit: enforcement and dispute resolution inquiry

**	Professor Carl Baudenbacher, Senior Judge and Former President, European Free Trade Association (EFTA) Court	QQ 1–18
*	Ms Catherine Howdle, Deputy Director, European Free Trade Association (EFTA)	QQ 1–18
*	Professor Catherine Barnard, Professor of European Law, Cambridge University	QQ 19–29
**	Mr Hugh Mercer QC, Essex Court Chambers and Chair of the Bar Brexit Working Group, the Bar Council	QQ 19–29
*	Professor Graham Gee, Sheffield University and Policy Exchange's Judicial Power Project	QQ 30–37
**	Mr Raphael Hogarth, Institute for Government	QQ 30–37
*	Professor Valsamis Mitsilegas, Queen Mary University of London	QQ 30–37
*	Professor Dr Christa Tobler, Institute for European Global Studies, University of Basel, Switzerland	QQ 30–37
*	Sir Richard Aikens, former Court of Appeal judge, Brick Court Chambers	QQ 38–46
*	Mr Martin Howe QC, 8 New Square Chambers	QQ 38–46

**	Suella Fernandes MP, Parliamentary Under-Secretary of State for Exiting the European Union	QQ 47–57
**	Lucy Frazer MP, QC, Parliamentary Under-Secretary of State for the Ministry of Justice	QQ 47–57

Alphabetical list of all witnesses

	Professor Anthony Arnull	BED003
*	Sir Richard Aikens, former Court of Appeal judge, Brick Court Chambers (QQ 38–46)	
*	The General Council of the Bar of England and Wales (the Bar Council)	BED0011
*	Professor Catherine Barnard, Professor of European Law, Cambridge University (QQ 19–29)	
**	Professor Carl Baudenbacher, Senior Judge and Former President, European Free Trade Association (EFTA) Court (QQ 1–18)	BED0021
	Equality and Human Rights Commission	BED0007
	Faculty of Advocates	BED0008
	Mr Mark Feldner	BED0017
**	Suella Fernandes MP, Parliamentary Under-Secretary of State for Exiting the European Union (QQ 47–57)	BED0022
**	Lucy Frazer MP, QC, Parliamentary Under-Secretary of State for the Ministry of Justice (QQ 47–57)	BED0022
*	Professor Graham Gee, Sheffield University and Policy Exchange's Judicial Power Project (QQ 30–37)	
	Dr Thomas Horsley	BED0004
**	Mr Raphael Hogarth, Institute for Government (QQ 30–37)	BED0005
*	Ms Catherine Howdle, Deputy Director, European Free Trade Association (EFTA) (QQ 1–18)	
*	Mr Martin Howe QC, 8 New Square Chambers (QQ 38–46)	
	The Law Society of England and Wales	BED0014
	The Law Society of Scotland	BED0013
	Professor Adam Łazowski	BED0012
	Mr James Lee	BED0010
	Dr Tobias Lock, University of Edinburgh	BED0016
	Mr R McDougall	BED0018
*	Mr Hugh Mercer QC, Essex Court Chambers and Chair of the Bar Brexit Working Group, the Bar Council (QQ 19–29)	

⋆	Professor Valsamis Mitsilegas Queen Mary University of London (QQ 30–37)	
	Mr C Morcom	BED0002
	Mr Magnus Schmauch	BED0006
	Spinelli Group	BED0019
	TheCityUK	BED0009
⋆	Professor Dr Christa Tobler, Institute for European Global Studies, University of Basel, Switzerland (QQ 30–37)	
	Dr Hélène Tyrell	BED0015
	Marina Wheeler QC	BED0020

APPENDIX 3: CALL FOR EVIDENCE

The Committee issued a formal call for evidence on 6 December 2017. It asked for submissions to address the following issues:

- Whether there could be a role for the CJEU in the UK post-Brexit.
- The most appropriate method of enforcement and dispute resolution in respect of the Withdrawal Agreement and subsequent partnership arrangements with the EU.
- How the Government can deal with questions relating to EU law in the domestic courts post-Brexit and during any period of transition (including the potential for divergence between UK law and EU law).
- Whether anything can be learned from the EFTA Court model, or other alternative models for dispute resolution.
- The impact Brexit will have on the UK's ability to influence the development of the law in other jurisdictions including the EU and the United States.
- If UK citizens should have a direct right of access to any new enforcement or dispute resolution procedures (or whether there should be a reference procedure, as currently exists with the CJEU).
- The potential impact of excluding the jurisdiction of the CJEU, both on UK domestic law and on securing a workable Withdrawal Agreement and any transitional arrangements under Article 50.