

The Withdrawal Agreement and the Political Declaration: A Preliminary Rule of Law Analysis



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Comparative Law**



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Rule of Law Questions

The Process

- Has the Government published any explanatory material outlining the legal and legislative implications of approving the Withdrawal Agreement and the Political Declaration?
- Has the Government published the EU (Withdrawal Agreement) Bill in draft alongside the Withdrawal Agreement so that parliamentarians can evaluate the legislative implications of approving the Withdrawal Agreement?
- Has the Government outlined the role that Parliament will play in approving and implementing the Treaty on the Future Relationship between exit day and the end of transition?
- Has the Government enabled parliamentary committees in both Houses to scrutinise and report on both the Article 50 agreements and the EU (Withdrawal Agreement) Bill?

The Withdrawal Agreement and the EU (Withdrawal Agreement) Bill

- Has the Government explained the intended constitutional and legal status of the Withdrawal Agreement in the UK after exit day?
- Has the Government explained how any constitutional mechanisms designed to enable domestic courts to give priority to Citizens' Rights over conflicting primary legislation in both the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill are designed to work in practice?
- Has the Government expressly provided for the content of Citizens' Rights to be set out on the face of the EU (Withdrawal Agreement) Bill?
- Has the Government set out how the Citizens' Rights in the Withdrawal Agreement will be protected in practice?
- Has the Government set out in detail the applicable procedures and available compensation in the event that Settled Status is denied?
- Has the Government demonstrated the extent to which new domestic legal provisions will be required to ensure that EU citizens living and working in the UK will benefit from equal treatment?
- Has the Government explicitly stated in the European Union (Withdrawal Agreement) Bill what the additional procedural step to safeguard Citizens' Rights from repeal by a future Parliament will entail, that it will be provided for by law and that it will be legally enforceable?

- The EU (Withdrawal Agreement) Bill will effectively create a second exit day on 31 December 2020. Has the Government explained how it intends to prepare the statute book for the constitutional and legislative changes that will need to take place before that date?
- If the delegated powers in the EU(Withdrawal) Act 2018 are amended for the purpose of preparing for the end of transition, will the Government explain how any of the limits on those powers will be changed to reflect that change?
- Has the Government justified why the Withdrawal Agreement confers a jurisdiction on the Court of Justice of the EU (CJEU) to settle disputes over the interpretation and application of the Agreement?
- Has the Government made any progress on agreeing on a final arbiter of disputes that cannot be resolved in the UK-EU Joint Committee?
- Has the Government clarified what constitutes an adequate domestic remedy for a violation of Part Two of the Withdrawal Agreement? In particular, have they considered that the commitments in Part Two will require the reintroduction of *Francovich* damages into domestic law?
- Does the Protocol on Northern Ireland and Ireland need to be implemented in domestic legislation? If so, how will it be implemented through the EU (Withdrawal Agreement) Bill? Has the Government explained how the EU (Withdrawal Agreement) Bill might affect the devolution statutes?
- Has the Government outlined how the provisions in the EU (Withdrawal) Act 2018 will be affected by the provisions of the EU (Withdrawal Agreement) Bill?

The Political Declaration on the Future Relationship

- Has the Government clarified the legal implications of any legal commitment in the Withdrawal Agreement to turn the Political Declaration on the Future Relationship into a legally binding Treaty after exit day?
- Has the Government set out how the proposals for a common rulebook will affect the way in which domestic courts will be required to treat the judgments of the CJEU?
- Has the Government clarified how the Governing Body's mandate will be defined?
- Has the Government explained how delegated powers will be used to prepare the statute book for the end of transition on 31 December 2020?
- Has the Government clarified the role that the European Union Withdrawal Act 2018 will play after the end of transition on 31 December 2020?
- Has the Government set out how the statute book will function if the Treaty on the Future Agreement cannot be approved and implemented by 31 December 2020?

Executive Summary

The six months before exit day, on 29 March 2019, are a critical period for Parliament's role in the Brexit process. Before exit day Parliament will be asked to approve the Withdrawal Agreement, the Political Declaration on the Future Relationship and the EU (Withdrawal Agreement) Bill. This report identifies a number of Rule of Law issues that can inform their scrutiny in Parliament.

The Rule of Law, a central principle of the UK's uncodified constitution, provides a set of standards that can inform both the process and substance of Brexit. The final six months before exit day are unlikely to provide ideal conditions for effective parliamentary scrutiny. However, it is vital that parliamentarians ensure that the Rule of Law implications of the legal and legislative changes proposed are scrutinised.

There are a number of steps that the Government could take in order to enable the Rule of Law implications to be identified in Parliament. The first is to publish an explanatory memorandum on both the Withdrawal Agreement and the Political Declaration on the Future Relationship that sets out their respective legal and legislative implications. The second is to publish a draft of the EU (Withdrawal Agreement) Bill at the same time the Withdrawal Agreement and the Political Declaration are laid in each House. The third would be to set out the role that Parliament will play in negotiating, approving and implementing the Treaty on the Future Relationship between exit day and the end of the transition period.

The Withdrawal Agreement will cover a number of major issues: Citizens' Rights, the Protocol on Ireland and Northern Ireland, the transition period and the role of the Court of Justice of the EU (CJEU). To deliver on the content in the Withdrawal Agreement, the EU (Withdrawal Agreement) will contain constitutional provisions designed to empower the courts and attempt to entrench Citizens' Rights. In relation to the practical arrangements for Citizens' Rights, parliamentarians will need to be able to identify how the protections for EU citizens will be delivered. In particular, there are uncertainties surrounding free movement rights for certain non-EU nationals and the extent to which UK nationals and their family members residing in an EU Member State will be permitted to move to other EU Member States to live or work. In addition, it is unclear whether and to what extent the UK Government intends to legislate to secure equal treatment for EU citizens living and working in the UK. Reciprocal arrangements will likely be required in the domestic legislation of other EU Member States.

The Protocol on Ireland and Northern Ireland is likely to generate significant controversy during the debate on the Withdrawal Agreement. Implementing the Protocol is likely to require a detailed legislative framework in the EU (Withdrawal Agreement) Bill. This highlights how the effective scrutiny of the Rule of Law implications of the Withdrawal Agreement will require the Government to be as transparent as possible in its approach to legislative implementation.

The Government's White Paper on implementing the Withdrawal Agreement indicates that the legal basis for transition is likely to require the adaptation of the EU (Withdrawal) Act 2018. The transition period will create a second exit day, when the major domestic legislative changes relating to Brexit will take effect. Legal certainty will require that the Government sets out, at the earliest possible opportunity, how it will prepare for the effect of the end of transition, on 31 December 2020, in the statute book.

When the Withdrawal Agreement is presented, it will be important to identify the role of the CJEU in interpreting and resolving disputes about the Agreement itself. The CJEU's role as the authoritative interpreter of EU law will ensure that it continues to play a role after exit day. But Parliamentarians must ensure that the CJEU's role in the new institutional framework within the Withdrawal Agreement is properly confined to the interpretation of EU law, and that an independent and impartial tribunal will decide on disputes about the agreement itself.

The Political Declaration on the Future Relationship is a political agreement. It will provide a basis for the formal negotiations on the Future Relationship that will begin after exit day. The UK has argued that the Withdrawal Agreement should contain a provision committing the UK and the EU to giving effect to the contents of the Political Declaration. It is imperative that the Government clarifies the legal implications of approving the Political Declaration. Parliament must ensure that the full implications for the legislative process are properly spelled out, including outlining how legislation that has already been enacted might be used.

The nature of the Political Declaration may mean that the domestic legal and constitutional implications of the agreement are difficult to establish. The Government's White Paper on the Future Relationship sets out that the UK would remain aligned with certain elements of EU law. Any proposed common rulebooks could result in parliamentarians having less control over legislation originating in the EU than they have now. Any new institutional relationships with the EU will need to be carefully scrutinised to ensure that they provide adequate parliamentary oversight of new legislation that enters the UK statute book.

Introduction

Brexit and the Rule of Law

1. The forthcoming debates on the Withdrawal Agreement, the Political Declaration on the Future Relationship and the European Union (Withdrawal Agreement) Bill will be Parliament's principal opportunity to debate, scrutinise and approve the Government's approach to the UK's new relationship with the EU that will begin on 29 March 2019. This Report aims to outline the most significant Rule of Law issues that are likely to arise from the Withdrawal Agreement, the Political Declaration on the Future Relationship and the European Union (Withdrawal Agreement) Bill.
2. On 23 June 2016, the UK made a decision through a referendum to leave the EU. The electorate's decision did not provide a clear instruction as to the form of Brexit. The Rule of Law does not itself provide answers to the question of what form Brexit should take. The Rule of Law does, though, supply a set of standards that Government and Parliament can and should use to ensure that Brexit is compatible with the UK's own well-established constitutional values.

Brexit as a challenge and an opportunity for the Rule of Law

3. A central aim of Brexit is to grant the UK's political and legal institutions a greater degree of constitutional autonomy than they currently possess. The victorious Vote Leave campaign argued that leaving the EU would grant the UK Parliament and the devolved legislatures greater control over the statute book, and would free domestic courts from the requirement of following the rulings of the EU's Court of Justice.¹ In the Prime Minister's Lancaster House speech, which set out the UK Government's approach to the Brexit negotiations, Theresa May said that the UK would "take back control of our laws and bring an end to the jurisdiction of the European Court of Justice in Britain".² To deliver on these promises, new political, institutional and legal relationships must be created between the UK and the EU.
4. The EU's negotiating position has sought to defend the fundamental principles of its own legal order. The status of the EU Treaties within the EU's legal hierarchy, and the CJEU's role as the enforcer of the Treaties, have left limited room for flexibility. Neither side is willing to compromise on their own constitutional fundamentals. Neat solutions for new post-Brexit relationships are in short supply. It is likely that innovative institutional and legal relationships will be proposed to balance each side's constitutional "red lines".
5. The major constitutional and legislative changes required by Brexit represent both a risk and an opportunity for the Rule of Law. It is a risk in that the sheer scale and complexity

¹ Vote Leave, 'Briefing: Taking back control from Brussels', at: http://www.voteleavetakecontrol.org/briefing_control.html.

² Prime Minister Theresa May, 'The government's negotiating objectives for exiting the EU: PM speech' (17/01/2017), at: <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

of the process and substance of changes required in a short time could generate legal uncertainty that is almost impossible to mitigate. It is an opportunity in that the new architecture that supplies political and legal autonomy could serve to strengthen the clarity, accessibility and accountability of both the UK's constitution and its legal systems. However, it is also possible that the long-term consequences for the Rule of Law are not appreciated when they are agreed.

6. When parliamentarians are presented with the Withdrawal Agreement and the Political Declaration, one of the central political questions will be whether these agreements will grant the UK's political and legal institutions the autonomy that was promised by the Vote Leave campaign before the referendum and the UK Government since. This Report is designed to supply the questions that can help parliamentarians to establish whether the new relationship with the EU supplies institutional autonomy for Parliament and the courts in a way that respects the Rule of Law.
7. Maintaining legal certainty, a core element of the Rule of Law, has been a central concern of the UK Government's approach to both the negotiations and legislating for Brexit. However, legal certainty is not guaranteed either by the EU (Withdrawal) Act 2018's mass conversion of EU law or by the mere existence of a transitional period. It also depends on the nature of the constitutional and legal frameworks that will regulate the UK's new relationship with the EU once the transition period ends.

Our approach

8. When the Withdrawal Agreement and the Political Declaration are presented to Parliament under the terms of section 13 of the EU (Withdrawal) Act 2018, it will be difficult to identify their long-term legal consequences. To do that, parliamentarians would need to be able to predict the shape of the treaties and legislation that are due to follow between the approval of the Withdrawal Agreement and the Political Declaration and the end of the transition on 31 December 2020. Further, parliamentarians may have a relatively short period between the date of their publication and the day of the decision on whether to approve the resolution required under the terms of section 13(1)(b).
9. For this reason, this Report seeks to identify in advance the core Rule of Law issues that are likely to arise from the Withdrawal Agreement and Political Declaration ahead of their publication. Some of the main Rule of Law issues can already be identified from three publications in particular:
 - The draft Withdrawal Agreement published on 19 March 2018;
 - [The UK Government's White Paper on the Future Relationship between the UK and EU published in July 2018; and](#)
 - [The UK Government's White Paper on Legislating for the Withdrawal Agreement between the UK and the EU published in July 2018.](#)
10. We acknowledge that the withdrawal process includes a number of complexities relating to devolved arrangements, including substantive arrangements for areas that have, until now, been devolved, e.g., agriculture and fisheries. This report does not address the potential devolution issues that are likely to arise from the Withdrawal Agreement, the

Political Declaration on the Future Relationship and the European Union (Withdrawal Agreement) Bill.

The Rule of Law

11. The Rule of Law analysis in this Report is informed by the conception of the Rule of Law articulated by Lord Bingham in his book *The Rule of Law*.

Lord Bingham's 8 Rule of Law Ingredients

1. The Accessibility of the Law – The law must be accessible and so far as possible intelligible, clear and predictable.
2. Law not Discretion – Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. Equality Before the Law – The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.
4. The Exercise of Power – Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.
5. Human Rights – The law must afford adequate protection of fundamental human rights.
6. Dispute Resolution – Means must be provided for resolving without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.
7. A Fair Trial – Adjudicative procedures provided by the state should be fair.
8. The Rule of Law in the International Legal Order – The rule of law requires compliance by the state with its obligations in international law as in national law.

12. Lord Bingham's conception has been adopted and elaborated by the Venice Commission of the Council of Europe in the *Rule of Law Checklist*.³

The Venice Commission's Rule of Law Checklist

1. Legality
2. Legal certainty
3. Prevention of abuse (misuse) of powers
4. Equality before the law and non-discrimination
5. Access to justice (including to enforce human rights)

³ Council of Europe Commission on Democracy through Law ('Venice Commission'), 'The Rule of Law Checklist' (March 2016), para 49, at: http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

Parliament, Brexit and the Rule of Law

13. The Rule of Law is relevant to the role that Parliament will play in scrutinising the Withdrawal Agreement, EU (Withdrawal Agreement) Bill and the Political Declaration. In particular, the Venice Commission Rule of Law Checklist emphasises the importance of the supremacy of the legislature and its role in safeguarding against unlimited powers of the executive. One way this can occur is by ensuring that parliaments participate in the process of treaty-making, and that proposed legislation is adequately justified by the state.
14. The EU (Withdrawal) Act provides the House of Commons with a legal right to scrutinise and approve the Withdrawal Agreement and Political Declaration. This presents MPs with an opportunity to evaluate the legal implications of the Government's approach to withdrawal from the EU and the Future Relationship before they are finalised.
15. Parliament's role in the legislative process is central to the securing the accessibility of the law, a core element of the Rule of Law. Parliament has a key role in ensuring both that changes to the law are publicly debated, and that the substance of the law is sufficient clear. When the EU (Withdrawal Agreement) Bill is introduced into Parliament MPs will have the opportunity to scrutinise the constitutional implications of withdrawal from the EU.

Section 13 of the EU (Withdrawal) Act 2018

16. Section 13 of the EU (Withdrawal) Act 2018 provides a number of requirements for the parliamentary process of approving and ratifying the Withdrawal Agreement.

How does Section 13 of the EU (Withdrawal) Act 2018 work?

Section 13(1)(a) sets out three requirements for documents that must be laid before each House:

- A statement that political agreement has been reached;
- A copy of the negotiated withdrawal agreement; and
- A copy of the framework for the Future Relationship.

Subsection 13(1)(b) is the most significant statutory requirement in the provision. The subsection states that the Withdrawal Agreement can only be ratified if:

- The negotiated withdrawal agreement and the framework for the Future Relationship has been approved by a resolution of the House of Commons on a motion moved by a Minister of the Crown.

Section 13(1)(d) requires the European Union (Withdrawal Agreement) Bill to be enacted before the Withdrawal Agreement can be ratified.

If a majority of the Commons disagrees with the subsection 13(1)(b) motion, then this is a decision "not to pass" as defined by subsection 13(3):

- Subsection (4) applies if the House of Commons *decides not to pass* the resolution mentioned in subsection (1)(b).

Section 13 then provides a series of procedural steps for what should happen in that scenario, namely Government statement on the next steps in the negotiations and a parliamentary debate on that statement.

The Challenges for Parliament

17. There are three main procedural challenges for Parliament in terms of scrutinising the Rule of Law implications of the Withdrawal Agreement, the Political Declaration and the EU Withdrawal Agreement.

Publishing the EU (Withdrawal Agreement) Bill in draft

18. The first is whether parliamentarians will be able to identify the legislative consequences of approving the Withdrawal Agreement when it is being debated.
19. The Government has promised that it will only introduce the EU (Withdrawal Agreement) Bill, which would implement the Withdrawal Agreement into domestic law, after the Commons has passed the section 13(1)(b) resolution approving the Withdrawal Agreement and the Political Declaration. Nevertheless, it is clearly important that MPs consider how the Withdrawal Agreement will be implemented in domestic law, when they are considering the section 13(1)(b) motion. This means that the inter-relationship between the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill will be a vital part of the debate, but also one that risks confusion. **One solution would to publish a draft version of the EU (Withdrawal Agreement) Bill alongside the Withdrawal Agreement and the Political Declaration. Publishing the EU (Withdrawal Agreement) Bill before the vote on the section 13(1)(b) motion could be especially valuable if the EU (Withdrawal Agreement) Bill is subject to a relatively truncated parliamentary timetable.**

Publishing explanatory material

20. When the Government introduces a Bill it is accompanied by explanatory notes. It is not yet known whether the Government will publish explanatory material to explain the domestic constitutional implications of the Withdrawal Agreement and the Political Declaration.⁴ There is a complex web of Brexit legislation already on the statute book,⁵ and it is imperative that parliamentarians can identify how approving these agreements could affect the Brexit framework that has already been enacted.
21. The second major challenge relates to the lack of legal certainty as to the consequence of the Commons approving the Political Declaration. In relation to the section 13(1)(b) motion, the provision requires the Commons to approve both the Withdrawal Agreement and the Political Declaration. As the Political Declaration covers the Future Relationship and the nature of the UK's economic relationship with the EU, it is likely to attract a considerable amount of attention during the debate. The UK Government has repeatedly emphasised that the Withdrawal Agreement and the Political Declaration are a package, however it is clear that in terms of the legal and legislative consequences the two are fundamentally different. **The Commons' decision on the Government's motion (as required by section 13(b)) will only have direct legal consequences for the Withdrawal Agreement. By agreeing this resolution this will enable the Withdrawal**

⁴ When a treaty is laid under the terms of the Constitutional Reform and Governance Act 2010, it must be accompanied by an explanatory memorandum before it can be ratified.

⁵ For example: the European Union (Withdrawal) Act 2018 and the Sanctions and Anti-Money Laundering Act 2018 have already been enacted. By exit day a number of further Brexit Acts will have received Royal Assent.

Agreement to be ratified (assuming the other requirements of section 13 are met). If the Political Declaration is approved, the next steps for Parliament regarding the process of approving and implementing the Treaty on the Future Relationship are much less certain.

22. The Government has said that the Treaty on the Future Relationship, to be negotiated after exit day, will be subject to the normal parliamentary procedures. This means it must meet the terms of the Constitutional Reform and Governance Act 2010 (CRAG) and also be implemented through primary legislation before the end of transition on 31 December 2020. However, the Government has also suggested that the European Union (Withdrawal) Act 2018 will also provide some of the statutory basis for the Future Relationship. **The Government should clarify how existing primary legislation, and especially any powers to make secondary legislation, could be used to prepare the statute book for the end of transition.**
23. The legal status of the Political Declaration is likely to be a significant feature of the parliamentary debate. The Withdrawal Agreement, once ratified, will be a legally binding treaty. By contrast, if approved the Political Declaration will be a political agreement, with no binding legal force, which will form the basis of negotiations on the Treaty on the Future Relationship after exit day. The form of the Political Declaration has already provoked controversy, with speculation over the level of detail it will contain. Further, the UK Government has argued that the Withdrawal Agreement should contain a binding commitment to turn the content of the Political Declaration into a treaty after exit day.⁶ Such a commitment could risk causing confusion of the legal status of the Political Declaration.
24. Even if such a commitment is included it will not change the basic legal distinction between the Withdrawal Agreement and the Political Declaration. Commons' approval of the Withdrawal Agreement (as long as the European Parliament also gives its consent and that Parliament enacts the EU (Withdrawal Agreement) Bill) will result in its provisions taking effect after exit day. By contrast, in relation to the Political Declaration, any approval will take place in the context of the knowledge formal negotiations on the Treaty on the Future Relationship will only begin after exit day. Further, the EU Treaties (Article 217 of the TFEU) require that the Treaty on the Future Relationship, will, if it takes the form of an Association Agreement, require the European Parliament's approval before it can be formally concluded.
25. The EU Treaties stipulate certain procedural requirements for agreements between the EU and 3rd countries.⁷ Article 50 provides a legal basis for agreeing a Treaty that covers matters relating to an orderly withdrawal of a Members State.
26. The distinction between the legal status of the Withdrawal Agreement and the Political Declaration is therefore a major Rule of Law issue. There is risk that the Political Declaration, which will not contain provisions that take effect in law, dominating and obscuring the debate on the Withdrawal Agreement. **It is imperative that the**

⁶ HM Government, White Paper, 'The Future Relationship between the United Kingdom and the European Union', Cm 9593 (July 2018), paras 53 et seq, at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf.

⁷ Treaty on the Functioning of the European Union, arts 216-219, OJ C-202, consolidated as of 07/06/2016).

Government produces explanatory material that details the legal status of both the Withdrawal Agreement and the Political Declaration. Any such explanatory material should also set out how Parliament will be involved in the process of turning the Political Declaration into a new constitutional and legislative framework that can take effect on 31 December 2020.

Timetabling the EU (Withdrawal Agreement) Bill

27. The third challenge relates to the timetable for parliamentary scrutiny of the EU (Withdrawal Agreement) Bill. The EU (Withdrawal Agreement) Bill will be a Bill of “first-class constitutional importance”. The White Paper on the EU (Withdrawal Agreement) Bill outlines that the Bill will include some notable constitutional innovations, including powers for the courts to disapply primary legislation and additional procedural hurdles to make repeal more difficult. Such measures could have long-term constitutional consequences. The date of exit day, 29 March 2019, means that there could be relatively little time for these potentially novel and certainly significant constitutional measures to be debated and scrutinised. **As the Draft Withdrawal Agreement has been available since March 2018, the Government should consider publishing any of the draft clauses of the EU (Withdrawal Agreement) Bill which have already been prepared, before the final version of the Withdrawal Agreement is published. This will enable parliamentary committees to begin scrutinising the constitutional changes that are likely to be proposed before exit day.**

Estimated Timeline for the UK Parliament’s scrutiny of the Withdrawal Agreement

20 Nov – 3 Dec 2018	Withdrawal Agreement, Political Declaration and Government statement laid before both Houses of Parliament Debate in the House of Commons on the Withdrawal Agreement and Political Declaration Commons’ decision on the Government’s motion
10 Dec 2018-	The EU (Withdrawal Agreement) Bill’s second reading in the House of Commons
17 Dec 2018-	Committee stage and remaining stages in the House of Commons
January 2019-	The EU (Withdrawal Agreement) Bill’s second reading in the House of Lords Committee stage and remaining stages in the House of Lords
February 2019	Ping-pong and Royal Assent
29 March 2019	Exit day

The Withdrawal Agreement and the EU (Withdrawal Agreement) Bill: A Preliminary Rule of Law Analysis

28. Before exit day, Parliament will only get the chance to approve and implement one international treaty with the EU. The scrutiny, approval and implementation of the legal provisions in the Withdrawal Agreement are, from a Rule of Law perspective, the most significant element of Parliament's pre-exit day role in the Brexit process.
29. The domestic constitutional implications of the Withdrawal Agreement, which are the focus of this section, will only be clear once the text of the EU (Withdrawal Agreement) Bill is revealed. As a result, in this section we focus on what are likely to be the major Rule of Law implications of the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill.
30. The Rule of Law is likely to be central to the way in which the Government justifies the content of the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill. Providing legal certainty through transition and guaranteeing the rights of EU citizens in the UK and UK citizens in the EU are core aims of the Withdrawal Agreement. However, the implementation of the Withdrawal Agreement is likely to raise a number of Rule of Law issues.
31. The Withdrawal Agreement and EU (Withdrawal Agreement) Bill will cover four main issues of constitutional significance:
 - Citizens' rights
 - Transition
 - Northern Ireland and Ireland Protocol
 - The institutional framework and dispute resolution
32. Each of which will prompt a number of Rule of Law questions, including:
 - Are the rights within the Withdrawal Agreement and EU (Withdrawal Agreement) Bill sufficiently clear and accessible?
 - How does the EU (Withdrawal) Act interact with the provisions of the EU (Withdrawal Agreement) Bill?
 - To what extent does the EU (Withdrawal Agreement) Bill rely on delegated powers to implement the Withdrawal Agreement?
 - Do the provisions on the new relationships between UK and EU political and legal institutions give an indication of how they will work in practice?
 - How is the Protocol on Ireland and Northern Ireland reflected in the EU (Withdrawal Agreement) Bill?

33. In addressing each of the Rule of Law questions, parliamentarians will also want to evaluate how the content of the Withdrawal Agreement and EU (Withdrawal Agreement) Bill relates to what is proposed in the Political Declaration. Even though the provisions of the Political Declaration are not legally binding, the substance of the Political Declaration will be relevant in determining how arrangements in the Withdrawal Agreement and EU (Withdrawal Agreement) Bill, particularly transition, will work in practice.
34. Part 1 of this Chapter addresses four elements of the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill: its legal status, Citizens' Rights, transition and the Northern Ireland and Ireland Protocol. Part 2 of this Chapter covers dispute resolution and the institutional arrangements in the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill.

Contents of the Draft Withdrawal Agreement	
<i>Part One</i>	<i>Common Provisions</i>
<i>Part Two</i>	<i>Citizens' Rights</i>
<i>Part Three</i>	<i>Separation Provisions</i>
	Goods placed on the market
	Ongoing customs procedures
	Ongoing VAT and excise duty matters
	Intellectual property
	Ongoing police and judicial cooperation in criminal matters
	Ongoing judicial cooperation in civil and commercial matters
	Data and information processed or obtained before transition end
	Ongoing public procurement and similar procedures
	Euratom
	Union judicial and administrative procedures
	Administrative cooperation procedures
	Privileges and immunities
	Other issues relating to EU institutions, bodies, agencies, offices
<i>Part Four</i>	<i>Transition</i>
<i>Part Five</i>	<i>Financial Provisions</i>
<i>Part Six</i>	<i>Institutional and Final provisions</i>
<i>Protocols</i>	<i>Protocol on Ireland/Northern Ireland</i>
	<i>Protocol relating to the Sovereign Base Areas in Cyprus</i>

Part 1: Legal Status

Legal status of the Withdrawal Agreement

35. The Withdrawal Agreement will be an international treaty. The EU and the UK have been negotiating the Withdrawal Agreement under the legal authority of Article 50 of the TEU. Article 50 provides a defined legal authority to negotiate a legally binding

treaty relating to some, but not all of the UK's new relationship with the EU. As it is an agreement between the UK and the EU, international law dictates that its provisions will legally bind both parties.

36. Within the EU, treaties that the EU enters into with non-EU states (i.e., the UK after 29 March 2019) are normally directly enforceable in the EU Member States.⁸ This means that in EU Member States the substance of the agreement will benefit from EU law's status within domestic legal systems of the EU-27. Therefore, the provisions will have both Direct Effect (i.e. be directly enforceable in domestic courts) and be supreme over conflicting domestic law. They do not have to be enacted through domestic legislation before they can become binding at the national level. This does not preclude EU Member States from enacting domestic legislation, however, and it is expected that Members States will have to adopt detailed implementing legislation to give effect to the provisions on Citizens' Rights.
37. The UK constitution's dualism dictates that the Withdrawal Agreement will not by itself, grant directly effective or supreme legal rights in the UK. This explains why the EU (Withdrawal Agreement) Bill will be so important for the debate on the Withdrawal Agreement. The Withdrawal Agreement will contain legal commitments that the UK can only fulfil by enacting a Bill that creates rights and obligations with a special constitutional status, akin to that granted to rights under EU law at present.
38. The legal status of the Withdrawal Agreement will also be significant in terms of the debate on the Protocol on Ireland and Northern Ireland. In evidence to the House of Lords EU Committee in August 2018 Dominic Raab, the Secretary of State for Exiting the EU, said: "as a matter of law under Article 50, there are constraints on the period for which a backstop could last".⁹ This reinforces the need for the Government to publish explanatory material that outlines its own analysis of the legal status of the Withdrawal Agreement and the Political Declaration ahead of the Commons debate.

Legal status of the EU (Withdrawal Agreement) Bill

39. The constitutional status of the EU (Withdrawal Agreement) Bill is likely to be controversial. The draft Withdrawal Agreement makes certain commitments in relation to the constitutional effect that the EU (Withdrawal Agreement) Bill should have once enacted. These commitments may require the Government to include innovative constitutional instruments in the EU (Withdrawal Agreement) Bill. The Government's White Paper on implementing the Withdrawal Agreement says that the Bill will require Parliament "to activate an additional procedural step" in order to repeal the Citizens' Rights provisions. This could create a Rule of Law paradox in that such instruments will be designed to grant legal certainty, but will also create some uncertainty, in that it may be unclear how such instruments will operate in practice. If the EU (Withdrawal Agreement) Bill contains novel constitutional instruments, it will be incumbent on the

⁸ There is a recent practice in EU treaty making that such agreements are expressly not given direct effect. However, the Withdrawal Agreement will be different because it expressly provides for direct effect (and the UK has agreed as far as Citizens' Rights are concerned).

⁹ Select Committee on the European Union, Uncorrected oral evidence: Scrutiny of Brexit Negotiations Wednesday 29 August 2018, Dominic Raab MP, Secretary of State for Exiting the European Union.

Government to provide a detailed explanation of how they be supposed to work, and how they might affect existing constitutional principles.

40. The UK constitution has numerous examples of Acts of Parliament that implement international treaties, which will serve as useful comparators for the relationship between the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill. Two of the most notable are likely to be:
 - The Human Rights Act 1998, which implements the European Convention on Human Rights into domestic law. It is likely to be particularly relevant in terms of the nature of the instructions it provides domestic courts, both in relation to the interpretation of primary legislation and the status of the judgments of the European Court of Human Rights.
 - The European Communities Act 1972, which provides the courts with a power to disapply primary legislation, is likely to provide a comparison in terms of the way in which the EU (Withdrawal Agreement) Bill seeks to create a distinct constitutional status for the Citizens' Rights provisions in the Withdrawal Agreement.
41. The Supreme Court case of *Miller* (2017) served to illustrate that the way in which the domestic implementing legislation conceptualises the relationship with the relevant international treaty can have significant consequences. Parliamentarians will want to be sure that the principal constitutional implications of the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill are known before exit day, so that they are in no doubt about the effect of the legislation they are passing and the courts, in turn, are clear about the constitutional effect that Parliament intended when enacting the implementing legislation.
42. The central challenge of the EU (Withdrawal Agreement) Bill is captured in Article 4(1) of the Draft Withdrawal Agreement, which provides that the provisions in the Withdrawal Agreement on Citizens Rights must take precedence over any conflicting domestic legislation. The Human Rights Act 1998, in sections 3 and 4, and the European Communities Act 1972, in section 2, offer different models for how the EU (Withdrawal Agreement) could seek to enable Citizens Rights to have priority over legislation enacted by subsequent Parliaments.
43. The UK's courts have shown that they will give effect to Parliament's intention when it enacts provisions that are designed to give a legal priority to certain provisions over primary legislation made by subsequent Parliaments. The courts' recognition of a separate category of constitutional legislation, in *Thoburn* by LJ Laws and confirmed by the Supreme Court in *Miller* (2017), was developed in order to interpret the legislative effect of the European Communities Act 1972. The rule provides that constitutional legislation, unlike ordinary legislation, cannot be impliedly repealed. The value of the rule in this context is that it shows that the courts have been willing to give effect to Parliament's intention when it enacts provisions that are designed to have a legislative effect over the primary legislation which future Parliaments enact. This is exactly what Article 4 of the Withdrawal Agreement requires the EU (Withdrawal Agreement) Bill to provide for. Whatever solution the EU (Withdrawal Agreement) provides, it will be important that the Government sets out how the courts are supposed to give effect to any special status given to Citizens' Rights.

44. Any legislative provision that accorded Citizens' Rights special constitutional status would not protect those rights from express repeal. Parliamentary sovereignty means that Parliament can make or unmake any law. And as the repeal of the ECA 1972 Act in the EU (Withdrawal) Act 2018 demonstrates, there is no special legislative procedure attached to the repeal of provisions that are constitutional in character. To provide additional safeguards against repeal for the Citizens Rights elements in the Withdrawal Agreement, the UK Government has promised, in the White Paper on implementing the Withdrawal Agreement, to provide an "additional procedural step" in the EU (Withdrawal Agreement) Bill.¹⁰
45. Assessment of the constitutional implication of this step will only be possible when the EU (Withdrawal Agreement) Bill is published. This very fact highlights the importance of examining the Withdrawal Agreement alongside the EU (Withdrawal Agreement) Bill.
46. There are precedents for the "additional procedural step" alluded to, namely the referendum lock in the European Union Act 2011 (cited by the Government in its White Paper).¹¹ In this context, a procedural step could also include special parliamentary procedures. However, there is likely to be debate over both whether it is constitutionally desirable to attempt to bind future Parliaments, and whether any such attempted procedural step would be effective.
47. In particular questions are likely to be asked as to what the courts would do if Parliament ever sought to repeal the Citizens Rights' provisions without complying with the proposed procedural requirement. The UK's courts cannot, according to the principle of parliamentary privilege, examine or question proceedings in Parliament. Any legislative provisions that would require Parliament by statute to take specific steps in order to repeal Citizens' Rights could, if deemed enforceable, put the courts in a difficult position. For this reason, it is important that any explanatory material addresses the potential impact on existing constitutional principles.
48. The debates over the status of the EU (Withdrawal Agreement) Bill are likely to require the Government to publish detailed legal analysis to support its justification for the legislative mechanisms included in the Bill. **To ensure the main Rule of Law implications are evaluated, it is imperative that the EU (Withdrawal Agreement) Bill and any accompanying explanatory material are published as early as possible, in draft if necessary, and ideally alongside the Withdrawal Agreement and the Political Declaration.**

Part 2: Constitutional Rights and Transition

Citizens' Rights in the Withdrawal Agreement

49. Clarity concerning the future rights and obligations of EU citizens living and working in the UK, and UK citizens living and working in EU Member States is one of the most

¹⁰ Department for Exiting the EU, White Paper, 'Legislating for the Withdrawal Agreement between the United Kingdom and the European Union' Cm 9674 (July 2018), para 46(d), at: <https://www.gov.uk/government/publications/legislating-for-the-withdrawal-agreement-between-the-united-kingdom-and-the-european-union>.

¹¹ The ECA 1972 was not itself protected by an "additional procedural step".

important substantive Rule of Law issues in the context of Brexit. Indeed, providing legal certainty for individuals is one of the key aims of the UK Government and the EU. The extent to which this is conveyed in the Withdrawal Agreement and the EU (Withdrawal Agreement) Bill is vital to enhancing individuals' awareness of their benefits and obligations after the end of the transition period.

50. Part Two of the draft Withdrawal Agreement governs Citizens' Rights during the transitional period and in some cases, beyond. This text has been agreed by the UK and the EU. Titles I and II govern free movement and residence rights for EU nationals in the UK and UK nationals in EU Member States, and apply to those who exercised their rights to reside or work in the UK or a Member State before the end of the transition period. This includes provisions on rights related to residence and residence documents (Chapter 1), rights of workers and self-employed persons (Chapter 2), and the recognition of professional qualifications (Chapter 3). Title III concerns the coordination of Member State and UK social security systems, and Title IV includes other general provisions relating to, e.g., the obligation of the UK and EU Member States to publicise the rights and obligations of those covered by Part Two.
51. In addition to the substantive rights and obligations in Part Two, Article 122(3) of the draft Withdrawal Agreement provides that the CJEU shall continue have jurisdiction over all EU law matters during the transition period. This text has been agreed to by the UK. Furthermore, the draft Withdrawal Agreement provides in Article 151 that UK courts and tribunals are required, for a period of eight years from the end of the transition period, to request a preliminary ruling from the CJEU where a question is raised regarding the interpretation of Part Two and the interpretation is necessary for the UK court or tribunal to give judgment.
52. Several points of uncertainty surround the substantive provisions of the draft Withdrawal Agreement, despite the fact that they have been marked as agreed in the 19 March draft. First, there is uncertainty as to whether everyone who currently has free movement rights under EU law will continue to have them under the Withdrawal Agreement.¹² For example, the text as currently drafted seems to include those known as *Chen* children.¹³ In that case, Chinese parents of a child with Irish citizenship were permitted to use the child's EU citizenship and right to free movement to reside in the UK. The CJEU ruled that EU children of non-EU parents/primary carers have a right to reside in any EU Member State that extends to their parents/primary carers. Conversely, it does not seem to include *Zambrano* children.¹⁴ In that case, Belgium refused a resident permit to the Columbian parents of a Belgian national child. The CJEU held that Member States are not permitted to refuse non-EU parents/primary carers residence in cases where the EU child would be deprived of his/her EU citizenship rights by forcing the child to leave the EU.
53. There is also a lack of certainty regarding the status of UK nationals and their family members residing in an EU Member State who want to move to another Member State. In the [28 February 2018 draft Withdrawal Agreement](#), Article 32 prohibited further free

¹² House of Commons Library, '[Brexit: the draft withdrawal agreement](#)', Briefing Paper No 8269, 23 March 2018, p. 14.

¹³ Case C-200/02 *Chen v Home Secretary*.

¹⁴ Case C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEm)*.

movement for such people, including the right of establishment and the right to provide services. Article 32 is not included in the 19 March 2018 draft Withdrawal Agreement, which confuses an already complicated matter even further. Former Secretary of State for Exiting the EU David Davis was asked for a clarification on 20 March, but a response was not made.

54. It should be emphasised that Part Two of the Withdrawal Agreement is intended only to apply to UK and EU citizens who have exercised their free movement rights prior to the end of the transition period. This means that such people will continue to benefit from the protections of EU citizenship law, including the safeguards guaranteed by the Charter of Fundamental Rights, as the CJEU has interpreted Citizens' Rights by reference to the Charter. In practical terms, this means that there will be two categories of EU citizens post-transition: those who have exercised free movement before the end of the transition and are therefore entitled to the safeguards of EU citizenship law (assuming they have registered under the Settled Status Scheme, of course), and those who have not exercised free movement and consequently will not enjoy the benefits of EU law. The registration requirement is essential in this regard, especially in light of the controversy surrounding Windrush. Indeed, it could be that in practice there is a third category of EU citizens post-transition: those who exercised their free movement rights before Brexit but failed to register under the Scheme and therefore cannot technically benefit from EU law. This is a highly complex state of affairs in which it could be difficult to establish entitlement to rights, especially years into the future when evidence is harder to obtain. Though complexity and unpredictability may be an unavoidable outcome of withdrawal, efforts should be made within the Withdrawal Agreement and EU (Withdrawal Agreement) Bill to mitigate its impact on Citizens' Rights.
55. **Though the text of Part Two of the Withdrawal Agreement is agreed, there are several points of uncertainty that need to be resolved. This includes uncertainty regarding whether the full scope of individuals covered by free movement rights under EU law will continue to enjoy such rights and ambiguity surrounding whether EU and UK nationals and their family members will be able to exercise further free movement to EU Member States. It is of the utmost importance that UK nationals living and working in EU Member States and EU nationals living and working in the UK are given absolute clarity regarding the status of their rights and obligations after the end of the transition period. It is therefore vital that the final Withdrawal Agreement makes clear the scope of Part Two.**

Citizen's Rights Monitoring Authority (Art 152)

56. The UK has agreed that the implementation and application of Part Two will be monitored by a new, independent authority (the "Independent Monitoring Authority").¹⁵ The Government has committed to creating the authority in the EU (Withdrawal Agreement) Bill.¹⁶ The Future Relationship White Paper notes that the powers of the Independent Monitoring Authority "will have effect from the end of the implementation [i.e., transition] period."¹⁷ The Independent Monitoring Authority will continue to function for a period of at least eight years after the end of the transition, at which point

¹⁵ Draft Withdrawal Agreement, art 152(1).

¹⁶ DExEU White Paper (n 10), para 47.

¹⁷ HM Government White Paper (n 6), para 47.

the Withdrawal Agreement-based Joint Committee (more below) will undertake an assessment of the Authority according to Article 152(3), and make a determination whether or not to abolish it.

57. The Independent Monitoring Authority will have both “equivalent powers to those of the Commission acting under the Treaties to conduct to conduct inquiries on its own initiative concerning alleged breaches of Part Two”, and the power to conduct hear complaints from “Union citizens and their families” who allege that the UK administrative authorities are acting in violation of Part Two. This restricts both the standing of individuals to make complaints, and the bodies that can be the subject of a valid complaint (a complaint could not, for instance, be made about any legislation except until the administrative authorities had acted in conformity with it). Art 152 specifically envisions the Independent Monitoring Authority seeking redress for violations by taking legal action in domestic UK courts, and by passing information about complaints onto the Joint Committee.¹⁸
58. The provisions establishing the Independent Monitoring Authority are meant to mirror the corresponding provisions in the EU Treaties, which empower the EU Commission to oversee and ensure the implementation and application of EU law, and which allow it to bring a Member State before the CJEU if it considers that they have not discharged their obligations under the EU Treaties.¹⁹ It is worth noting that Art 258(1) TFEU requires the Commission to “deliver a reasoned opinion on the matter [i.e., the alleged failure of a Member State to discharge its obligations] after giving the State concerned the opportunity to submit its observations.” Presumably a parallel requirement is intended to apply in respect of the Independent Monitoring Authority’s conclusions, so that it must notify the Government before pursuing a judicial remedy. If so, the future EU (Withdrawal Agreement) Bill will need to make this clear.

What counts as an “adequate remedy”?

59. The Independent Monitoring Authority is empowered to bring proceedings in UK courts to seek “[an] adequate remedy” following complaints from individuals that there have been breaches of Part Two.²⁰ The Withdrawal Agreement does not define what is “adequate” for this purpose.
60. However, Art 4(1) of the Withdrawal Agreement provides an indication as to what the UK and EU consider adequate. That Article states that the provisions of Part Two are to be directly effective, and moreover that any inconsistent or incompatible provision of UK law “shall be disapplied”. This would presumably be done in the course of ordinary judicial review proceedings in which the Independent Monitoring Authority would seek to prevent a UK authority from doing whichever acts were inconsistent with those rights.
61. In its White Paper, The Government has said it will bring forward a Bill that will allow individuals to rely directly on the rights in Part Two. Importantly, that Bill will also make clear that “the rights conferred on individuals by the Withdrawal Agreement will take precedence over any inconsistent provision in domestic law.”²¹ Presumably, then, the

18 Via the sub-committee on Citizens’ Rights.

19 Art 17 TEU; Art 258 TFEU.

20 Draft Withdrawal Agreement Art 152(1).

21 DExEU White Paper (n 10), para 46(b).

thought is that the “adequate remedy” will be the disapplication of inconsistent provisions of UK law, in the same way that UK courts currently disapply UK law incompatible with EU law under the auspices of the European Communities Act section 2(1).²²

62. For the Independent Monitoring Authority to be able to seek a court order preventing a UK authority from doing acts inconsistent with the rights under Part Two, including where those acts are required by primary legislation, is consistent with its role as an enforcer of the UK’s obligations under Part Two of the Withdrawal Agreement. However, it is not obvious that the overall schema of remedies contemplated by the Withdrawal Agreement is adequate. EU law currently requires the payment of damages by member states to those who have suffered damage from a sufficiently serious breach of EU law. Moreover, the CJEU considers it an essential part of a system of obligations on member states that they are in principle liable to pay damages for breach of EU law to individuals who suffer harm as a consequence of those breaches.²³ Given that view, the CJEU may even rule that the Withdrawal Agreement is only compatible with EU Treaties if the Withdrawal Agreement includes an individual right to damages.²⁴ The Withdrawal Agreement at present does not commit the UK to providing such a right, and is therefore missing a crucial element of EU rights protection. The implementation of any such right in the UK would require primary legislation, as discussed further below.

Citizens’ Rights in the EU (Withdrawal Agreement) Bill

Settlement Scheme

63. Chapter 2 of the White Paper on Legislating for the Withdrawal Agreement between the UK and EU states that “A key step in providing a smooth and orderly exit from the EU is to provide certainty for EU citizens living in the UK, and UK nationals living in other countries.”²⁵ It is intended that the EU (Withdrawal Agreement) Bill be the primary instrument for giving effect to the Citizens’ Rights in Part Two of the draft Withdrawal Agreement. The Government’s White Paper on the EU (Withdrawal Agreement) Bill states that it is committed “to legislating for the substantive provisions of the Agreement in a way that is accessible and understandable for those citizens who rely on their rights”. This commitment indicates that the Government is aware of the significance of ensuring that the EU (Withdrawal Agreement) Bill implements Citizens Rights in a way that is consistent with Rule of Law values. The White Paper addresses five aspects of Citizens’ Rights.
64. As regards rights related to residence (section 2A), the White Paper sets out its intentions of the new Settlement Scheme for EU citizens and their family members. The scheme will allow EU citizens who have been continuously and lawfully living in the UK for at least five years by 31 December 2020 to obtain settled status. This means that they will be able to stay in the UK indefinitely, have access to public funds and services and apply

²² For a recent example, see *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

²³ *Francovich* [1991] ECR I-5357 and *Factortame (No. 3)/Brasserie de Pêcheur* [1996] ECR I-1029.

²⁴ The CJEU could be asked to make such a ruling under Art 281(11) TFEU.

²⁵ DExEU White Paper (n 10), para 16.

for British citizenship if they choose. EU citizens who arrive in the UK by 31 December 2020, but have not yet acquired five years of residence, will be permitted to stay until they reach the five-year minimum, and then apply for settled status. Family members of EU citizens in the UK who satisfy those conditions can also apply for settled status, or stay until they are able to apply.

65. Close family members will be able to come to the UK to join their EU citizen family members after 31 December 2020 if the close family relationship existed on that date. Close family members are defined as “spouses, civil partners, unmarried partners, dependent children and grandchildren, and dependent parents and grandparents”.²⁶ Family members who do not qualify as “close family” and want to join their EU citizen family members after 31 December 2020 will have to apply for entry and residence under the UK Immigration Rules as they exist at that time (i.e. outside the scheme set up under the EU (Withdrawal Agreement) Bill). The EU (Withdrawal Agreement) Bill will also protect UK and EU nationals working as frontier workers in other Member States. The White Paper provides that settled status can only be lost through an absence from the UK of more than five years or if it is taken away by the Home Office, for example because of fraud or criminality.²⁷
66. The White Paper indicates that the EU (Withdrawal Agreement) Bill will serve as the basis for the rights of residence just described, as well as provide a means of redress if the rights are not implemented properly or if other legislation conflicts with the Withdrawal Agreement. This includes a right of appeal if Settlement Status has been denied.²⁸ It is not yet clear what sort of redress will be available and how such procedures would work in practice.

Equal Treatment

67. The White Paper also discusses legislating for equal treatment rights for EU citizens living and working in the UK and UK citizens doing the same in EU Member States. It states that “The UK already provides significant equal treatment protections”, but notes that the Bill might provide additional provisions, likely to be technical in nature. There is no further discussion of what these provisions might cover and by what sort of legislative process they will be safeguarded in UK law.²⁹

Protection of Citizens’ Rights

68. The final section of the White Paper’s discussion of Citizens’ Rights discusses protections for rights and the creation of the monitoring authority. It is the Government’s intention to include in the Bill provisions that: (1) allow EU citizens within the scope of Part Two to rely directly on the rights in the Withdrawal Agreement; (2) explain that these rights take

²⁶ *ibid*, para 25(d). Additional rights are conferred on children who are born or adopted by any citizen within the scope of Part Two of the Withdrawal Agreement, whether or not they were born in the UK.

²⁷ Interestingly this is more generous than the loss of permanent residence under the Citizens’ Rights Directive; arguably it’s justified, however, because CRD rights can easily be re-acquired by moving back after a number of years whereas that option won’t exist as far as the UK is concerned.

²⁸ DExEU White Paper (n 10), paras 29(b), 32.

²⁹ The White Paper also suggests that the EU (Withdrawal Agreement) Bill will provide for the mutual recognition of professional qualifications and the coordination of social security systems for EU citizens and their family members who come within the scope of Part Two. Detail on this is beyond the scope of this paper.

precedence over conflicting provisions in domestic law; and (3) provide for a limited, but continued, role for the CJEU in the interpretation of Part Two through the preliminary reference procedure up to eight years after the end of the transition period. As discussed in relation to Article 151 of the draft Withdrawal Agreement, this presumably means that the CJEU can make preliminary rules on EU law matters within Part Two and not on the whole of Part Two.

Damages for Breach of Part Two

69. The EU (Withdrawal) Act 2018 specifically removes the *Francovich* action from domestic law after exit day.³⁰ This means individuals will no longer be able to use that action to claim compensation for loss caused by breaches of their rights under EU law, including their rights under Part Two.³¹ There are two problems with this.
70. First, insofar as the rights under Part Two constitute an application of EU law to the UK, Art 4(1) of the Withdrawal Agreement applies, according to which that EU law must produce the same effect in the UK as it would in a member state. One of those effects is the availability of *Francovich* damages. The upshot is that the EU (Withdrawal) Act 2018 will need to be amended to at least allow an action for damages where EU law is being applied, else the UK will be in breach of its obligations under the Withdrawal Agreement.
71. Second, the Withdrawal Agreement does not require those damages to be made available in respect of all of the provisions of Part Two, because certain of those provisions support the implementation and application of EU law rights to EU citizens residing in the UK, rather than being direct applications of EU law. If damages are only made available through Art 4(1), they will not be available in relation to those supporting provisions. This will mean that individuals' protection from loss as a result of the failure to properly implement Part Two will be fragmentary and confusing, turning on questions of the proper classification of a provision as one which applies EU law to the UK (so as to engage Art 4(1)), or an independent provision of the Withdrawal Agreement.
72. This problem could be solved by the EU (Withdrawal Agreement) Bill extending the *Francovich* action to breach of any part of Part Two, irrespective of whether it is strictly an implementation of EU law. Alternatively, the Government could introduce a novel action for breach of the rights conferred by Part Two. If it did, the implementing Act would need to explain the circumstances under which such an action could be brought, and in particular, explain whether and what kind of fault is required for a cause of action to be available.
73. Under either of these alternatives, the Bill will need to set out the nature of the damages available to the claimant (i.e., are they meant to compensate for loss, using tort law principles, or to vindicate a rights violation by analogy with the Human Rights Act?).³²

³⁰ EU (Withdrawal) Act 2018, Schedule 1, para 4.

³¹ Other private law remedies may be available to them.

³² See ECHR Art 41 and HRA s.8. This point is also important because, if the damages are purely vindicatory, individuals are likely to bring a second claim in tort anyway for compensation of consequential losses, which is a different kind of damage.

74. Without these clarifications, significant uncertainty is likely to arise from litigation over whether damages for breaches of the rights conferred by Part Two are recoverable under some other private law action.³³ Thus, regardless of how this problem is solved, it is important that it is stated on the face of both the Future Relationship Agreement and the implementing Act whether any action is available for breach of Part Two.

Other implementation issues

75. Implementation of the Withdrawal Agreement through the EU (Withdrawal Agreement) Bill is likely to require a number of changes to the EU (Withdrawal) Act 2018. Article 151 is in apparent conflict with section 6(1)(b) of the EU (Withdrawal) Act 2018, which prohibits UK courts and tribunals from making preliminary references on or after exit day. In addition, the House of Commons European Scrutiny Committee has pointed out that the EU Charter of Fundamental Rights will likely play a continued role in the interpretation and application of Part Two of the draft Withdrawal Agreement, a situation which would conflict with section 5(4) of the EU (Withdrawal) Act 2018, which excludes the Charter from the Act's saving provisions.³⁴
76. This raises the broader issue of how the scheme for protecting Citizens' Rights within the EU (Withdrawal Agreement) Bill will interact with framework for retained EU law created by the EU (Withdrawal) Act 2018. The Government will need to explain how any special status for Citizens' Rights is intended to relate to the complex hierarchy created by the EU (Withdrawal) Act 2018.
77. The EU (Withdrawal Agreement) Bill will contained detailed provisions establishing the Independent Monitoring Authority, which will have the power to monitor the implementation and application of Citizens' Rights. These provisions will have to provide constitutional significant details on the powers of the Independent Monitoring Authority, its structure and how it will be held to account.

Concluding Remarks

78. **On the whole, the White Paper reiterates the provisions in the draft Withdrawal Agreement rather than explaining in any detail how the Withdrawal Agreement's provisions are going to be implemented. Though the White Paper explains occasionally when secondary versus primary legislation will be employed for implementation, we are still left without any clarity regarding what the legislation will look like, what form it will take and how it will be scrutinised.**
79. **The White Paper makes a number of significant undertakings, but does not provide a satisfactory level of detail regarding a number of issues including: the applicable procedures and available compensation in the event that Settled Status is denied; the extent to which the UK will need to legislate for equal treatment protections, including any detail concerning the sort of technical provisions that might be required; and whether the Government's intention to provide an additional procedural step to**

³³ Most obviously, breach of statutory duty and negligence.

³⁴ House of Commons European Scrutiny Committee, 'EU Withdrawal: Transitional provisions and dispute resolution', Nineteenth Report of Session 2017-19, 20 March 2018, HC 763, para 100, at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/763/763.pdf>.

safeguard against a future Parliament's repeal of primary legislation implementing Part Two of the Withdrawal Agreement can and will be provided by law and enforceable.

Transition in the Withdrawal Agreement

80. Part 4 of the Withdrawal Agreement provides for a transition period, which will begin on exit day, 29 March 2019 and end on 31 December 2020. The transition period, or implementation period as the UK Government refers to it, is designed to provide legal certainty for a fixed period of time immediately after the UK has ceased to be a Member State. The period grants the UK and the EU additional time to negotiate a Treaty on the Future Relationship, which the EU has consistently argued, can only be done legally once the UK is no longer a Member State.
81. Article 122 sets out that the entire body of EU law ("the *acquis communautaire*") will apply in the UK during the transition period. Article 122 (3) provides express confirmation that EU law shall apply in the same way that it applies in Member States. Article 126 confirms that CJEU jurisdiction continues, as now, for the duration of the transition period.
82. The provisions on transition are crucial to the overall structure of the Withdrawal Agreement as many of the most significant provisions, include many of those relating to Citizens' Rights and the Protocol on Ireland and Northern Ireland, will only take effect at the end of the transition period. The arrangements on transition do not prejudice the substance of the Treaty Future Relationship.
83. The EU and the UK are intending for the Treaty on the Future Relationship to take effect at the end of the transition period. From a Rule of Law perspective this basic structure creates a period of legal certainty, but equally pushes the "cliff edge", in terms of the potential for black holes in the statute book, to the end of transition. This provides a longer window for the UK to prepare and for Parliament to legislate. However, the phased approach to the negotiations means that immediately after exit day, the UK will have left the EU without knowing the legal framework that will regulate its future relationship with the EU.

Transition in the EU (Withdrawal Agreement) Bill

84. There is a strong Rule of Law justification for the Government's approach to implementing transition. In terms of domestic constitutional law, preserving the existing arrangements until when the Future Relationship can be implemented, at the end of the transition period, means that there will only be one moment of decisive constitutional change. The White Paper on the EU (Withdrawal Agreement) Bill emphasises the way in which transition is beneficial for legal certainty and the predictability of the law: "Businesses and Citizens should only have to plan for one set of changes as the UK moves to the future relationship with the EU".³⁵
85. However, legislating for transition in the EU (Withdrawal Agreement) Bill is nonetheless likely to give rise to a number of Rule of Law issues. The main issue relates to the complexity of the arrangements for transition. Even if the Government is intending for

³⁵ DExEU White Paper (n 10), para 52.

the post-transition Brexit legislative framework to take effect at one moment, the 31 December 2020, the changes themselves are being phased in gradually through a series of legislative proposals. This phased approach means that transition will be constructed through a complex web of legislative instruments.

86. The EU (Withdrawal) Act 2018, which is not designed to provide for transition, will be adapted for transition through the EU (Withdrawal Agreement) Bill. This will create what is effectively a second “exit day”. The first exit day, on 29 March 2019, will not result in major domestic constitutional and legislative change because the legal effect of the European Communities Act 1972 (ECA) will have to be “saved” for the duration of the transition period.³⁶ The first exit day will essentially result in changes in relation to the UK’s role in the EU’s institutions.³⁷ By saving the ECA, this means that the second exit day, on 31 December 2020, will be the moment when the domestic constitutional and legislative changes resulting from Brexit will take effect.
87. In domestic constitutional terms, the EU (Withdrawal Agreement) Bill’s provisions on transition would create legal certainty in relation to the first exit day. However as the EU (Withdrawal Agreement) Bill does would not provide for the Future Relationship, it would create an unavoidable degree of legal uncertainty as to what will happen immediately after 31 December 2020. In terms of the parliamentary debate on the EU (Withdrawal Agreement) Bill, the Political Declaration will be able to assuage some of that uncertainty. However, in legal terms, that uncertainty will not be resolved until the Treaty on the Future Relationship is finalised. The White Paper on the EU (Withdrawal Agreement) Bill indicates that the Government plans that the European Union (Withdrawal) Act 2018 will provide some of the legislative foundations for the post-transition relationship with EU law.
88. The White Paper on the EU (Withdrawal Agreement) Bill outlines that in order to adapt the EU (Withdrawal) Act 2018 to transition, the main delegated power in the 2018 Act, the “correcting power” (Section 8), will be amended so that it can be used to prepare for the end of the transition period. Broadly framed delegated powers raise two main Rule of Law concerns. The first is that such powers, if broadly defined, can grant the executive a degree of law-making discretion that arguably should be reserved to the legislature. The second is that such powers creates legal uncertainty and makes the law inaccessible, not least for the parliamentarians who are tasked with scrutinise and enacting them.
89. When the “correcting power” was presented to Parliament it was justified, as indeed were most of the provisions, in terms of preparing the statute book for exit day. The Government’s phased legislative approach means that this framework is now being adapted to take account of the Withdrawal Agreement. The Government claims the EU (Withdrawal Agreement) Bill’s proposed changes to the EU (Withdrawal) Act 2018 will not change the purpose of the 2018 Act.

³⁶ *ibid*, para 60.

³⁷ And also some other peripheral issues, such as Citizens’ Rights to take part in EU elections will no longer exist etc.

90. The scope of the “correcting power” (section 8 of the EU (Withdrawal) Act 2018) is circumscribed by a number of limitations on the power, many of which were added as a result of parliamentary pressure. One of the limitations on the power is that it cannot be used to implement the Withdrawal Agreement (section 8 (7)(e)). However, if the Government is proposing to amend the power so that it can be used to prepare for the end of transition, this raises the question whether this limitation and others will also need to be adapted. The White Paper states that other limitations on the “correcting power”, namely the sunset clause, will be adapted to allow more time for the power to be used.
91. This raises the question of how other delegated powers in other Brexit legislation, for example in the Taxation (Cross-border Trade) Act 2018 and the Trade Bill will be used (or adapted) for the end of transition. The White Paper indicates that the Government is planning to defer most of the legal changes made by the Brexit legislation until the end of transition.³⁸
92. The Government’s plan for legislating for transition indicate that the second exit day, on 31 December 2020 is likely to see a significant amount of legislative change. The Government’s phased approach to Brexit means that Parliament has enacted a number of multi-purpose Brexit Acts. The result is a complex legislative framework, which makes the task of effective legislative scrutiny challenging.
93. A connected question is whether the Government will outline how the EU (Withdrawal) Act 2018 would be adapted in the event that the Treaty on the Future Relationship was not ready to take effect at the end of transition. The Government is likely to have to continue to legislate for different outcomes to the negotiations until the Future Relationship Treaty is approved.

Protocol on Ireland and Northern Ireland in the Withdrawal Agreement

94. The Protocol on Ireland and Northern Ireland (The Protocol) is likely to be the most controversial element of the Withdrawal Agreement. The UK Government agreed in principle to include a Protocol in the Withdrawal Agreement in the Joint Report published in December 2017. The Joint Report set out that:

In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement.³⁹

But the Draft Withdrawal Agreement, published in March 2018, showed that the UK and the EU had not yet agreed on the final legal version of this commitment. The UK Government has consistently argued that the substance of the Future Relationship will mean that the Protocol will never have to be used. The Protocol will only come into effect, as set out in Article 168 of the Withdrawal Agreement, at end of the transition

³⁸ DExEU White Paper (n 10), para 77.

³⁹ Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union. (December 2017) para 49

period: 31 December 2020. It would only be used if the Future Relationship would not of itself lead to the avoidance of border infrastructure.

95. The final version of the Protocol will be the focus of much of the Commons debate on the Government's motion on approving the Withdrawal Agreement and the Political Declaration. The Protocol is distinct from the rest of the Withdrawal Agreement in that it covers subject matter that will be addressed by the Treaty on the Future Relationship. The Protocol could represent part of the legal framework that regulates the UK's relationship with the EU *after* 20 December 2020. In order to evaluate the consequences of approving the Protocol, parliamentarians will need to have a clear picture of the legal framework that will kick in at the end of transition. This is one of the reasons it is vital that the Political Declaration is being considered alongside the Withdrawal Agreement. However, the fact that the Political Declaration will not represent a binding legal framework, in contrast to the Protocol, which will, is significant. The Government may argue that the Political Declaration contains the relevant solutions, however, from a Rule of Law perspective it is vital that the Protocol's legal implications, which will bind the UK by virtue of being included in the Withdrawal Agreement, are nonetheless thoroughly examined.
96. An additional legal issue relating to the Protocol is whether its scope is limited by virtue of being part of the Withdrawal Agreement. As noted above, Dominic Raab, the Secretary of State for Exiting the European Union, has questioned whether in practice Article 50 constrains how long the backstop could operate for.⁴⁰ Herbert Smith Freehills have argued that if the Protocol can be concluded under Article 50, then the rest of the economic partnership of the UK could also have been agreed through the Withdrawal Agreement.⁴¹

Protocol on Ireland and Northern Ireland in the EU (Withdrawal Agreement) Bill

97. If the Protocol is to form part of the United Kingdom's constitutional framework, it will need to be implemented in domestic legislation. The Protocol will only take effect, if at all, at the end of transition, and so it could be argued that Parliament could legislate to give effect to the Protocol during transition so that the relevant laws are in place before 31 December 2020. However, it is expected that the UK Government will commit to legislating so that the legal basis for the Protocol is in place before the UK ceases to be a Member of the EU on 29 March 2019. If the Protocol is to provide legal certainty during transition, and while the Future Relationship is finalised, the Government will need to demonstrate that it can be translated into primary legislation.
98. This means that the EU (Withdrawal Agreement) Bill will have to implement the Protocol. At this stage it is not possible to predict how this might be achieved. However, once the final version of the Protocol is published, it will be important for parliamentarians to establish the constitutional and legal implications that it could have if it is implemented in domestic law. There is a danger, that if the Government suggests that the Protocol would not have to be used, but that it nonetheless has to be enacted in domestic law,

⁴⁰ Select Committee on the European Union, Uncorrected oral evidence: Scrutiny of Brexit Negotiations Wednesday 29 August 2018, Dominic Raab MP, Secretary of State for Exiting the European Union.

⁴¹ Herbert Smith Freehills, Brexit 'The View From Brussels' – Developments In February (March 2018)

that the Protocol could be implemented without a comprehensive evaluation of its potential legal impact.

Part 3: The Institutional Framework and Dispute Resolution

99. The Withdrawal Agreement's institutional framework, and particularly the role of the CJEU, are critical to understanding how the treaty will work in practice. The CJEU presently has a limited jurisdiction over the UK that applies only when (i) the UK operates within the scope of EU law; and (ii) when it is requested by UK courts to give rulings clarifying EU law.
100. The basic position is that by withdrawing from the EU, the CJEU will cease to have jurisdiction over the UK after exit day. Any change to that position will need to be accomplished by fresh legislation, and/or by new future agreements that once again subject the UK to the CJEU's jurisdiction.
101. However, although withdrawal from the EU may remove its jurisdiction, that does not necessarily mean it will cease to influence the content of UK law. Jurisdiction needs to be distinguished from other ways in which the rulings of courts can produce legal effects. A domestic court might, for instance, treat the judgments of a foreign court as a basis for interpreting domestic legislation. That is not the same as that foreign court having jurisdiction, because its judgments do not automatically produce binding legal consequences in the legal system of the domestic court. But that technical point should not obscure the fact that the foreign court can become a source of legal rules that are *de facto* treated as binding for any legal system that opts to follow its rulings.
102. The Withdrawal Agreement creates a new institutional framework, which employs the CJEU in a number of different roles. The institutional arrangements, and particularly the provisions that determine who has the right to issue authoritative interpretative judgments on the provisions of the Withdrawal Agreement, are particularly significant for the Rule of Law.
103. The Withdrawal Agreement's new arrangements will need to be carefully scrutinised so that the constitutional implications of granting the CJEU a new role post-Brexit are fully understood before exit day.

New Institutions in the Withdrawal Agreement

104. The Withdrawal Agreement creates two main new institutions: the Joint Committee and the Citizens' Rights Monitoring Authority. The relationship between these institutions and the CJEU is central to understanding the working of the Withdrawal Agreement's legal framework.

The Joint Committee

105. The UK and EU have, in the draft Withdrawal Agreement (WA), agreed the creation of a new Joint Committee.⁴² The Withdrawal Agreement envisages the Joint Committee as

⁴² Such bodies are a standard feature of most international agreements concluded by the EU. See, e.g., the EFTA and EEA agreements.

the primary mechanism for resolving disputes as to (i) the interpretation of the agreement; and (ii) disputes about whether either of the parties to the Withdrawal Agreement have complied with its requirements. Moreover, the UK and EU have agreed that any dispute arising over matters falling within the scope of the Withdrawal Agreement is to be resolved only via such mechanisms as are provided in the Withdrawal Agreement itself.⁴³ How those mechanisms work is therefore vital for the Rule of Law, in particular for legal certainty, since they will be responsible for determining how the Withdrawal Agreement operates in practice.

106. The Joint Committee is to be comprised of representatives from both the UK and EU, and co-chaired by both parties.⁴⁴ It is to be responsible for supervising the “implementation, application and interpretation” of the Withdrawal Agreement.⁴⁵ This jurisdiction of the Joint Committee will apply immediately upon the Withdrawal Agreement coming into effect.⁴⁶
107. The Joint Committee will discharge its supervisory function by:
- making decisions that are binding on the UK and EU, and by making non-binding recommendations.⁴⁷
 - adopting amendments to the Withdrawal Agreement, so far as this is allowed by the Withdrawal Agreement.⁴⁸
 - creating specialised sub-committees to supervise particular areas of the Withdrawal Agreement, for example, the part covering Citizens’ Rights.⁴⁹
108. The Joint Committee’s decisions are declared in the agreement to have “the same legal effect” as the Withdrawal Agreement itself, and for that reason are clearly intended to flesh out its requirements.⁵⁰ Its decisions and recommendations are to be adopted on the basis of “mutual consent”. Given that requirement, and the Joint Committee’s composition, it is clearly intended as a primarily political forum in which the UK and EU can resolve issues arising from the implementation of the Withdrawal Agreement.
109. This function of the Joint Committee is problematised by Art 126(2) of the agreed text of the Withdrawal Agreement. It is worth setting out that Article in full:

⁴³ Draft Withdrawal Agreement Art 161.

⁴⁴ *ibid*, Art 157(1). Although not made explicit in the Withdrawal Agreement, there will presumably be an equal number of representatives from the UK and EU.

⁴⁵ *ibid*, Art 157(3), (4)(a).

⁴⁶ *ibid*, Art 157(1).

⁴⁷ *ibid*, Art 159. The non-binding nature of recommendations is implied by their omission from Art 159(2).

⁴⁸ *ibid*, Art 157(4)(g). At present this is only allowed for in relation to changes in EU coordinating legislation on social security. See Withdrawal Agreement Art 31.

⁴⁹ *ibid*, Art 158.

⁵⁰ *ibid*, Art 159(2).

Article 126 Supervision and Enforcement

- [1] *During the transition period, the institutions, bodies, offices and agencies of the Union shall have the powers conferred upon them by Union law in relation to the United Kingdom and natural and legal persons residing or established in the United Kingdom. In particular, the Court of Justice of the European Union shall have jurisdiction as provided for in the Treaties.*
- [2] *The first paragraph shall also apply during the transition period as regards the interpretation and application of this Agreement.*¹

110. Art 126(1) makes clear that the CJEU has jurisdiction over the UK in respect of that EU law which continues to apply to the UK during transition.⁵¹
111. Art 126(2) appears to confer an additional jurisdiction over the Withdrawal Agreement itself, rather than just the EU law to which the Withdrawal Agreement refers. The subject matter of the jurisdiction is phrased in identical terms to Art 157(3) Withdrawal Agreement, which confers on the Joint Committee responsibility “for the implementation and application” of the Withdrawal Agreement. Moreover, if it did not confer this additional jurisdiction on the CJEU, it would not add anything to Art 126(1).⁵² Thus, the effect of Art 126(2) is to grant to the CJEU a jurisdiction that overlaps with the jurisdiction of the Joint Committee to determine the very same set of issues.⁵³
112. If this overlapping jurisdiction remains part of the final Withdrawal Agreement, the Government should explain how it will work in practice. As the European Scrutiny Committee has noted, granting the CJEU such a jurisdiction lacks an obvious rationale.⁵⁴ Second, granting overlapping jurisdiction to the CJEU could allow either party to avoid resolving disputes in the Joint Committee.
113. As to rationale, there are at least two possibilities. One is suggested by the context in which jurisdiction over the Withdrawal Agreement is conferred. Art 126(2) may simply be meant to (i) make clear that *for the purposes of EU law*, the duties that the Withdrawal Agreement imposes must be compatible with EU law; (ii) acknowledge that the CJEU is ultimately responsible for determining whether the Withdrawal Agreement is compatible with EU law; and therefore (iii) insofar as the UK remains bound by EU law during the transition, it will be required to act in a way that is consistent with the CJEU’s

⁵¹ *ibid*, Art 122.

⁵² If the initial qualification to Art 126(2) (which reads: ‘The first paragraph’) qualified Art 126(2) so that it meant: “the CJEU will have such jurisdiction over this Agreement as is provided for by the EU Treaties”, that would give the CJEU no jurisdiction over the Agreement (since the Treaties do not provide for it). The only jurisdiction the CJEU would have would be the ability to rule on the Withdrawal Agreement’s compatibility with the EU Treaties, because the Withdrawal Agreement would become binding in EU law by operation of Art 216(2) TFEU. But the CJEU will gain that jurisdiction just in virtue of the EU concluding the Withdrawal Agreement with the UK. So Art 126(2), read in this way, would be redundant.

⁵³ Draft Withdrawal Agreement, Art 121.

⁵⁴ This lack of clarity has also been noted by the European Scrutiny Committee’s report of 20 March 2018 (HC 763) at paras 20-21 and 131-133, at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmeuleg/763/763.pdf>.

decisions on the (EU law) lawfulness of the duties imposed by the Withdrawal Agreement on the UK qua subject of EU law.

114. This unlikely to be the main rationale for Art 126(2). The EU legal order is autonomous, and the CJEU has strong powers of judicial review, the CJEU will necessarily have the ultimate say over whether the Withdrawal Agreement is compatible with superior norms of EU law.⁵⁵ There is therefore no point in the Withdrawal Agreement attempting to specify the CJEU's jurisdiction for the purposes of EU law, because no provision of the Withdrawal Agreement could alter that jurisdiction. Moreover, given that the Withdrawal Agreement already makes clear that the UK will be bound by most EU law for the transition period, and be subject to the jurisdiction of the CJEU in respect of its EU law obligations, there is no need for Art 126(2) to reiterate this point.⁵⁶
115. A second rationale is suggested by the Government's White Paper, "Legislating for the Withdrawal Agreement between the United Kingdom and the European Union". The White Paper contains only two references to Art 126, and both of these concern the CJEU's interpretation of EU law, rather than the Withdrawal Agreement itself.⁵⁷ Since one of the UK's obligations under the Withdrawal Agreement is to comply with EU law during transition, and the CJEU ultimately determines what those EU obligations are, the thought is presumably that the CJEU has an indirect role in determining whether the UK has complied with its Withdrawal Agreement obligations. Thus, Art 126(2) might just be a reaffirmation of the fact that the CJEU will play an (indirect) role in determining what the Withdrawal Agreement requires the UK to do. Granting the CJEU jurisdiction over the Withdrawal Agreement might then be justified on grounds of efficiency, since it would consolidate into one process the questions of (i) the requirements of EU law; (ii) whether the UK had complied with those requirements; and (iii) whether the UK had therefore complied with its obligation to implement and abide by EU law under the Withdrawal Agreement. Without the jurisdiction conferred by Art 126(2), the CJEU could make a declaration as to whether, in its view, the UK had complied with the Withdrawal Agreement, but that would not be binding on the UK under the Withdrawal Agreement itself.
116. This is a possible rationale for Art 126(2). However, the drafting of that article confers a broader jurisdiction on the CJEU than is necessary to achieve it.
117. As to circumventing the Joint Committee, the draft Withdrawal Agreement does not explain how the overlapping jurisdictions of the CJEU and Joint Committee would operate. It would therefore be possible, during transition, for the EU or UK to avoid resolving a dispute in the Joint Committee and instead bring the case before the CJEU for a decision. This is almost certainly unintentional, given that the UK has specifically not agreed to the EU's proposal that the CJEU act as a fall-back dispute resolution mechanism when the Joint Committee cannot agree.⁵⁸

⁵⁵ International treaties are binding on the EU institutions by virtue of Art 216(2) TFEU, subject to their compatibility with the EU Treaties and CFR.

⁵⁶ See Art 122 of the draft Withdrawal Agreement for the UK's commitment to being bound by EU law during transition.

⁵⁷ DExEU White Paper (n 10), paras 52 and 78.

⁵⁸ See Draft Withdrawal Agreement, Art 162(4), which is not agreed text.

118. Moreover, what would be the status of any CJEU decision made under Art 126(2) is unclear. Unlike the decisions of the Joint Committee, whose decisions are declared to have “the same legal effect” as the Withdrawal Agreement itself, no such clarification is given as to the status of CJEU decisions.⁵⁹ This is problematic, because, post-transition the UK would no longer be bound as subject of EU law to treat the CJEU’s interpretations of the Withdrawal Agreement as authoritative. This is important both internationally (so the EU and UK know what their respective obligations are); and domestically, given that UK courts are given a discretion to have regard to any CJEU judgments that are relevant to deciding a case before them by the EU (Withdrawal) Act 2018. To exercise that discretion predictably, they need to know whether CJEU judgments are of relevance to the interpretation of the Withdrawal Agreement.⁶⁰

Dispute resolution when the Joint Committee cannot agree

119. The Withdrawal Agreement states that the overarching aim in resolving disputes is to do so on the basis of cooperation.⁶¹ This is reflected in the fact that the Joint Committee may only issue binding decisions on the basis of the mutual consent of the members of the Joint Committee.⁶²

120. The need for mutual consent in dispute resolution leaves a lacuna in cases where the members of the Joint Committee cannot agree. How this gap is to be filled has not yet been agreed by the parties.

121. The EU’s proposal is that the Joint Committee be able to refer disputes to the CJEU ‘at any point’.⁶³ The idea seems to be that any such reference would be on the basis of mutual consent by the parties. If the Joint Committee found itself unable to agree on how to resolve a dispute after three months, either the UK or EU could refer the case to the CJEU for a decision binding on both parties.⁶⁴ This mirrors the approach under the EEA agreement.⁶⁵

122. The UK Government’s proposal is that disputes would be referred to an “arbitration panel”, comprised of representatives from both the UK and EU, and independent experts where necessary.⁶⁶ The decision of the panel would be binding on the parties.⁶⁷ The Government’s proposal also explicitly leaves open the possibility of resolving

⁵⁹ *ibid*, Art 159(2).

⁶⁰ A version of this problem will still exist post-transition even if Art 126(2) is removed, because a decision by the CJEU which required the Withdrawal Agreement to be interpreted in a particular way so as to be compatible with the EU Treaties/Charter of Fundamental Rights would bind the UK in transition, but not afterwards. Strictly speaking the Joint Committee would need to issue a decision with the same content to bind the UK to that interpretation.

⁶¹ Draft Withdrawal Agreement, Art 160,

⁶² *ibid*, Art 159(3).

⁶³ *ibid*, Art 162(2). The draft text does not make explicit that this is to occur only where the Joint Committee is unable to agree about how to decide a dispute, which is peculiar given that the CJEU is meant as a secondary, fall-back dispute resolution mechanism. The argument could be made, given the wording of art 162(3), the Joint Committee must “decide” to submit a dispute to the CJEU, and since that would be a decision of the Joint Committee, art 159 would apply so that the reference could only be made on the basis of mutual consent.

⁶⁴ Withdrawal Agreement, Art 162(4).

⁶⁵ See the EEA Agreement, Art 111.

⁶⁶ HM Government White Paper (n 6), §4.5.1.

⁶⁷ *ibid*, para 41.

disputes arising under other international agreements in other forums, e.g., before the WTO.⁶⁸

123. In the case of non-compliance, the EU proposes two remedies: either that there be a second set of proceedings in the CJEU, which can then impose a monetary penalty on the breaching party; or, that any part of the Agreement, except for Part Two on Citizens' Rights, be suspended. The second referral to the CJEU is not mandatory, and so either remedy is available to the parties.⁶⁹ Any suspension of obligations must be proportionate to the breach of the Agreement.⁷⁰ A similar set of remedies for non-compliance has been proposed by the UK Government, except that the role of the CJEU is replaced by an arbitration panel.⁷¹
124. The EU's proposal is incompatible with the principle of judicial impartiality. As was noted in the House of Commons Library report on the Withdrawal Agreement, 'in no international agreement is the neutral "decision-making" authority the (de facto) constitutional court of one of the parties.'⁷² It is not difficult to see why. What is required by the Rule of Law is an independent and impartial mechanism for resolving disputes. As the Venice Commission notes in its Rule of Law checklist, there must be not only an absence of actual bias, but an absence of the appearance of bias as well.⁷³ For the CJEU to be the final arbiter of disputes between the UK and EU clearly fails that test.
125. The Government's proposal for an arbitration panel is preferable in respect of justice appearing to be done, although it is worth noting that the inclusion of representatives from both the EU and UK would make such a panel equally partial, rather than impartial.
126. It is also worth noting that, insofar as the Withdrawal Agreement overlaps with other international agreements, the UK Government's proposal that it would still have recourse to other dispute resolution mechanisms (such as the WTO) is prima facie inconsistent with the exclusivity clause to which it has agreed in the Draft Withdrawal Agreement.⁷⁴ That clause prohibits the UK and EU from resolving disputes arising under the Withdrawal Agreement by mechanisms other than those provided for in the Withdrawal Agreement. Even if consistent with that clause, it is not clear that an attempt to resolve some dispute covered by the Withdrawal Agreement by referring it to some external forum would be consistent with the agreed duty to resolve disputes on the basis of cooperation, and to discharge that duty in good faith.⁷⁵ Such an attempt would likely raise a complaint by the EU that would itself need to be resolved by the Joint Committee.

⁶⁸ *ibid*, para 43.

⁶⁹ Draft Withdrawal Agreement, Art 163(1) and (2) respectively. Art 163(1) is phrased permissively – 'the Union or the United Kingdom [...] may bring the case before the Court of Justice of the European Union' – and so does not require that money damages be sought before parts of the Agreement are suspended.

⁷⁰ Draft Withdrawal Agreement Art 163(2).

⁷¹ White Paper on the Future Relationship, §4.5.2.

⁷² House of Commons Library (n 12), p.65.

⁷³ Venice Commission (n 3), para 89. The requirement of justice being done and being seen to be done is also reflected in the common law.

⁷⁴ Draft Withdrawal Agreement, Art 161; HM Government White Paper (n 6), para 43.

⁷⁵ Draft Withdrawal Agreement, Arts 160 and 4a.

127. Neither proposal makes clear what would be the precedential value, if any, of any decision reached by the CJEU/arbitration panel. Unlike the decisions of the Joint Committee, which seem intended to accrete to the overall content of the agreement, the decisions of an arbitration panel could be decided on a purely case-by-case basis. Even if a convention developed that new cases raising matters substantially similar to previously decided cases would be decided in the same way, this would still leave a period of uncertainty as the convention developed over time.⁷⁶ It would therefore be preferable for the Withdrawal Agreement to specify in advance how similar cases would be treated, and on what basis the dispute resolution mechanism would be likely to hear a fresh dispute raising similar issues to some previous decision.
128. It is imperative that the UK and EU agree an impartial mechanism for resolving disputes before the Withdrawal Agreement comes into operation. One feature of the Rule of Law is the existence of a mechanism that can finally and authoritatively resolve disputes. This is of critical importance, because where the law is unclear, those authoritative decisions clarify what it is that the law requires its subjects to do. Without a settled resolution mechanism, potentially important disputes on which the Joint Committee cannot reach a consensus will remain unresolved, and the obligations of the UK and EU left unclear.

⁷⁶ Such a convention has developed in the WTO, and indeed in the CJEU, where there is no formal rule of precedent.

The Political Declaration: A Preliminary Rule of Law Analysis

129. The Political Declaration is a statement by the EU on the Framework for the Future Relationship between the UK and EU. It is intended to explain, in outline, what the content of that relationship will be, and to be fleshed out in more detail in a future treaty between the UK and EU. The UK Government has said that it views the Withdrawal Agreement and the Political Declaration as a single package, such that “neither document can be considered final until this is true of both”.⁷⁷ Moreover, the Government intends for the Political Declaration to “accompany and be referred to in the Withdrawal Agreement”. Notwithstanding those commitments, the Political Declaration is not a legally binding document. Equally, the fact that it is not legally binding does not mean that it is unimportant. The legal status of the Political Declaration is important because it is central to understanding the Brexit process, and Parliament’s role within it.
130. The Political Declaration is likely to dominate the debate on the section 13(1)(b) motion. The Political Declaration covers the substance of the Future Relationship, which ultimately will determine the substance of the vast majority of the UK’s new relationship with the EU. It is the Future Relationship, rather than the Withdrawal Agreement, which will have the greater impact on people’s daily lives.
131. Whereas October 2018 is expected to see the beginning of the final stage in the process of approving and implementing the Withdrawal Agreement, for the Future Relationship, October 2018 represents the first stage in the process of agreeing a legally binding Treaty which will need to then be implemented before 31 December 2020.
132. Recognition of the different legal status of the Withdrawal Agreement and the Political Declaration is not in conflict with the UK Government’s position that the two are “inextricably linked”. The logic of concluding the Political Declaration alongside the Withdrawal Agreement is so that they can be assessed together, and so that approval of the latter can occur with an understanding of the final arrangement which follows the end of transition.
133. However, despite the link between the two documents, it would be wrong to regard the process of translating the Political Declaration into a legally binding Treaty as a mere formality. The legal status of the Political Declaration matters. Not least because the EU Treaties require that, post Brexit, the Treaty on the Future Relationship is subject to the approval of the European Parliament. And more likely than not it’ll be a mixed agreement requiring approval of EU MS according to their domestic legal requirements which usually involves their parliament. The EU Treaties set out specific requirements for approving agreements with 3rd countries, notably in Articles 207 and 217 of the TFEU, and Article 50 cannot be used to circumvent those provisions. Further, the UK constitution requires Parliament to pass the relevant implementing legislation and

⁷⁷ HM Government White Paper (n 6), para 5.

the CRAG requirements to be met, before the Future Relationship can come into effect on 1 January 2021.

134. There are two main Rule of Law questions that arise from the Commons' scrutiny of the Political Declaration. The first is procedural. What are legal consequences of approving the Political Declaration? To know, the Government will need to set out the roadmap to delivering the Treaty on the Future Relationship, and the role that Parliament will play in that process between exit day and 31 December 2020? The second relates to the substance of the Political Declaration. How will the new constitutional and institutional arrangements, that are likely to be set out in the Political Declaration, impact on the Rule of Law?
135. When the Political Declaration is presented to Parliament, there is a real risk that the Rule of Law issues will be overlooked. However, the Rule of Law is an important prism for understanding the legal status of the Political Declaration, and for assessing how the Government intends to grant the UK's political and legal institutions greater autonomy after the end of transition.
136. The overall legal effect of Brexit is to remove the constitutional guarantees that underpinned the relationship between EU law and UK law when the UK was a Member of the EU. After the end of transition, the new constitutional framework that regulates EU law will be fundamentally different. However, if the UK wants to maintain regulatory alignment in particular areas, Parliament will need to make sure this approach does not compromise the accessibility of the law, and in particular the clarity and accountability of the institutional framework that underpins the legislative process.

The Political Declaration, Parliament and the Rule of Law

137. To assess the Rule of Law implications of the Political Declaration it is necessary to understand of how this political agreement will be converted into a legally binding Treaty and then into domestic legislation.
138. The UK Parliament has had no formal role in the process of negotiating the Withdrawal Agreement. The parliamentary process for approving the Withdrawal Agreement was finalised in June 2018 through the EU (Withdrawal) Act 2018. The UK Government has yet to set out the role that Parliament will play in the process of approving and implementing the Treaty on the Future Relationship.
139. The principal elements of the constitutional and legislative framework that will take effect on 31 December 2020 will not be legally defined before exit day. However, the UK Parliament is being asked to grant political approval for the arrangements set out in the Political Declaration. From a Rule of Law perspective, parliamentarians should be able to evaluate the Political Declaration alongside a detailed plan, presented by the Government, which sets out the role that they will play in delivering the legal basis for the Future Relationship by the 31 December 2020.
140. If the model of the Withdrawal Agreement is to be followed, Parliament will play no formal role in the negotiations, but instead will be presented with a Treaty and then the implementing legislation a few months before 31 December 2020. It will then be asked to approve and then implement the new constitutional and legislative arrangements

which have been negotiated and agreed by the UK Government acting under its prerogative powers. The debate on the motion to approve the Withdrawal Agreement and the Political Declaration could be Parliament's best opportunity to assert its role in the process of approving and implementing the Treaty on the Future Relationship. If Parliament wishes to have more oversight over the constitutional framework, then it may have to ask the Government to agree to greater parliamentary involvement before the negotiations begin after exit day on 29 March 2019.

141. The principal Rule of Law justification for greater Parliamentary oversight of the negotiations on the Treaty on the Future Relationship would be that the content of that Treaty would have profound domestic constitutional implications. The Treaty is likely to have direct implications on Parliament's legislative role, on the constitutional legislation Parliament has already enacted, and particularly for the delegated powers granted to the Government. It will be difficult for Parliament to ensure that Rule of Law standards are upheld if its only oversight over the new constitutional and legislative arrangements is when the relevant implementing legislation is presented in 2020.
142. In order to assess the Rule of Law implications of approving the Political Declaration, parliamentarians should ask how the Treaty on the Future Relationship will be implemented. The Government's phased approach to legislating for Brexit means that approving the Political Declaration could have some indirect legislative consequences *before* the Treaty on the Future Relationship is finalised.
143. The Government has said that the EU (Withdrawal) Act 2018 and other pre-exit day legislation will form part of the legislative framework that takes effect on 31 December 2020. Further, the delegated powers in the EU (Withdrawal) Act 2018 and other Brexit legislation could be used to implement the Treaty on the Future Relationship. The Government has consistently argued that the Brexit legislation it has produced is designed to deal with multiple outcomes to the negotiations. However, this phased approach has meant that Parliament has consented to legislation *before* finding out the complete picture of the new domestic constitutional and legislative framework that will take effect on the domestic exit day: 31 December 2020. The economic imperative of ensuring the statute book functions properly justifies extraordinary measures, however, Parliament should not lose sight of the long-term Rule of Law implications of the solutions proposed.
144. The Government's White Paper on the Future Relationship indicates that the proposed structure of the Treaty on the Future Relationship is likely to have significant implications for Parliament's role in legislating for Brexit. The White Paper sets out that there will be an overarching Treaty on the Future Relationship, containing the major constitutional and institutional provisions, which will take the form of an Association Agreement. Beneath this overarching agreement there will be a number of agreements on the Economic Partnership, the Security Partnership and Cross-cutting Cooperation. This structure is likely to have a direct impact on both when and how Parliament is asked to legislate to give effect to these arrangements. It could mean a rolling programme of treaty approval and legislative implementation over a long period, extending beyond the end of transition. The White Paper sets out that each of the agreements with the EU will require domestic legislation.⁷⁸ However, by the time legislation is implemented, it

⁷⁸ HM Government White Paper (n 6), para 53.

may not be possible for Parliament to influence the detail of the mechanisms proposed. When scrutinising the Political Declaration it is vital that Parliament understands the long-term implications for its own legislative role.

Likely Contents of the Treaty on the Future Relationship

<i>Chapter 1</i>	<i>Economic Partnership</i>
	Goods
	Services and investment
	Framework for mobility
	Digital
	Open and fair competition
	Socio-economic cooperation
	Independent trade policy
<i>Chapter 2</i>	<i>Security Partnership</i>
	Shared security context
	Law enforcement and criminal justice cooperation
	Foreign policy, defence and development
	Wider security issues
<i>Chapter 3</i>	<i>Cross-cutting and other cooperation</i>
	Data protection
	Classified information
	Cooperative accords
	Fishing opportunities
<i>Chapter 4</i>	<i>Institutional arrangements</i>
	A practical and flexible partnership
	New forms of dialogue
	Administrative provisions
	Resolving disputes
	Accountability at home

The Government's White Paper on the Future Relationship between the UK and the EU

145. The White Paper on the Future Relationship between the United Kingdom and the European Union forms the basis of the analysis of this section. While the final Political Declaration will necessarily be different from the plan set out in the White Paper, a number of Rule of Law issues that are highly likely to be relevant to the debate on the substance of the Political Declaration can be identified from the Government's White Paper:

- The proposed common rulebook for goods;
- New institutions; and
- The relationship between domestic courts and the CJEU.

A Common Rulebook, New Institutions and Parliament

146. The White Paper's proposal for a common rulebook with the EU governing manufactured goods, agriculture, food and fisheries products raises a number of Rule of Law issues.⁷⁹ A common rulebook is not strictly "common" in that it would involve the UK making an "upfront choice to commit by treaty to ongoing harmonisation with the relevant rules".⁸⁰ This would be a binding commitment in international law to maintain harmony with a proportion of EU law. Parliament would, as it does currently, retain a right to legislate contrary to such a commitment. Further, as the White Paper also points out, any such decision by Parliament to break such a commitment would have consequences "for market access, border frictions or security cooperation".⁸¹ However, as Stephen Laws, former first parliamentary counsel, notes "in a democratic country that accepts the rule of law, neither government nor parliament should – or would – make a deliberate decision to break the UK's legal obligations".⁸² In practice, this reality will limit any legal right for Parliament to depart from a commitment to maintain a common rulebook in a Treaty.
147. Committing by treaty to a common rulebook would also have domestic constitutional consequences for Parliament and the courts. The White Paper indicates that new additions to the common rulebook would not flow automatically, as certain EU laws do through the ECA, but instead there would be a new institutional and legal framework set out in the Treaty on the Future Relationship. The White Paper indicates that the new framework may could enable the Government of the day to object to new additions to the common rulebook through the Joint Committee. However, this would not enable Parliament to play a formal role in the process of scrutinising new additions to the common rulebook. The White Paper sets out that the UK Government would seek the UK Parliament's (and where relevant the devolved legislatures) "opinion" in order to inform how it approaches scrutiny of new additions to the common rulebook.⁸³ If the Joint Committee accepted new additions to the common rulebook, then Parliament would have a formal role, as these additions would then need to be implemented in domestic law by primary or secondary legislation.⁸⁴ It would seem likely that a common rulebook approach will need new delegated powers in order to function effectively.
148. The major difference between the ECA 1972 and any equivalent mechanism to give effect to the common rulebook is that the arrangement would not be underpinned by the UK's Membership of the EU. This means that the UK will no longer play the same role it does currently in the development and scrutiny of EU legislation through the EU's institutions. Further, it means that these laws would not have the same status they have now. It is not yet clear what status any EU laws, which took effect through the common rulebook, would have.⁸⁵ The EU (Withdrawal) Act 2018 provides that the principle of the supremacy of EU law would not apply to any laws made after exit day. It is not yet clear

⁷⁹ *ibid*, para 12.

⁸⁰ *ibid*, para 22.

⁸¹ HM Government White Paper (n 6), para 54

⁸² Stephen Laws, 'Clearing up confusion on Brexit, Chequers and the "common rulebook"', *Prospect Magazine* (10/08/2018), at: <https://www.prospectmagazine.co.uk/politics/brexit-chequers-common-rules-single-market>.

⁸³ HM Government White Paper (n 6), paras 22 and 54(b).

⁸⁴ *ibid*, para 54.

⁸⁵ An additional dimension in this whole discussion would be devolution: if there were a common rulebook including e.g. agricultural goods, then this might involve taking powers from the devolved legislatures.

whether this provision (section 5(1)) would apply to the laws in question. It is likely that bespoke constitutional provisions would have to be designed to enable a common rulebook to operate effectively.

149. In Rule of Law terms, there is a risk that the new arrangements, in an attempt to grant the UK greater institutional autonomy, create a confusing addition to the domestic law-making procedure that replaces one supranational decision-making process with an inter-governmental one which does not grant MPs any greater involvement in the process than they currently have. It might be argued that even if this is no *better* than the present situation, it is also no worse than the way in which rules are made in the EU and reach the UK. But that argument is false: at the EU level, the legislative process at least includes the input of UK MEPs. That input, from a range of elected UK representatives who not dominated by the governing political party, will be lost under the Government's proposals.
150. An additional Rule of Law issue relates to the White Paper's proposal to develop the detailed content of the Future Relationship after the Future Relationship Agreement is agreed. As the Government notes in the White Paper, its proposal mirrors that of several other international agreements.⁸⁶ However, institutional arrangements of this kind are only compatible with the Rule of Law where the Association Agreement sets sufficiently detailed parameters within which the Governing Body is required to work. The more that is left to be worked out by discussions in the Governing Body, the less certainty there is for those who must rely on the agreement. This is especially important given that the agreement covers rules regulating large parts of the economy. This does not mean that the Association Agreement must exhaustively specify the entire content of the Future Relationship. But it does mean that it must provide a reasonably well-defined mandate within which the Governing Body is intended to work, so that there is a degree of predictability about the nature of the Future Relationship, and the domestic legal changes that relationship will produce.
151. The preceding point is also important for the separation of powers, because the more of the Future Relationship that is left to be worked out by the Governing Body, the less formal involvement Parliament will have in shaping that agreement. The members of the Governing Body will presumably be appointed by the Government. Again, unless the Governing Body has a well-defined mandate, large parts of the Future Relationship between the EU and UK could be left to be worked out by an Executive-appointed body operating at one degree of remove from Parliament.⁸⁷
152. One potential benefit of Brexit for the Rule of Law is that it could enhance the oversight of domestic democratic institutions over the law-making process. The White Paper indicates that to deliver on this promise will need innovative institutional design, which arguably Parliament should have a role in scrutinising and devising.

⁸⁶ *ibid*, para 8.

⁸⁷ This concern is not entirely met by the accountability proposals in §4.4 of the Future Relationship White Paper. The White Paper at [54] sets out a relatively detailed process for the consultation of Parliament when new legislation in the EU requires an update to the "common rulebook". It does not contain any similarly detailed proposal for the working out of other, novel aspects of the Future Relationship. This may make it more difficult for Parliament to hold the Governing Body to account than it would be to hold Ministers directly accountable in Parliament for working out the content of the new relationship.

The Role of the CJEU

153. If the UK is going to commit to a common rulebook in certain areas; to participation in certain agencies; and, via the Withdrawal Agreement protecting Citizens Rights, to adopt EU laws made after the end of transition, then the jurisprudence of the CJEU is going to remain important part of the UK's courts decision-making. The Prime Minister has said the end of the transition will see the end of the CJEU's jurisdiction over the UK. However, the White Paper indicates that in practical terms the CJEU's interpretation could remain relevant for significant portions of the statute book. Given the CJEU's role as the authoritative interpreter of EU law, this is an unavoidable feature of any future relationship in which the UK undertakes, either formally or informally, to maintain similar rules with the EU.
154. At present, the CJEU's primary influence in the legal systems of Membership is through its role as the authoritative interpreter of EU law, rather than through the exercise of its direct 'jurisdiction'. As the White Paper notes, where there are common rulebooks, it will be vital that the relevant laws are "interpreted consistently" in the UK and the EU. In practice, this is likely to lead to the UK courts' following the approach of the CJEU in areas where the UK has committed to maintain consistency with EU law, either through common rulebooks or participating in EU agencies.
155. In terms of the domestic legislative consequences, the Government does not indicate whether this will require legislation to instruct the domestic courts to take into account of relevant CJEU case law.⁸⁸ The EU (Withdrawal) Act 2018 provides that domestic courts "may have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal" (section 6(2)). But it is not clear that this permission is sufficient. The Government's proposal that 'the UK would *commit* by treaty that its courts *would* pay due regard to CJEU case law', suggests a stricter instruction is required. As with other interpretive guidance in constitutional legislation, it is more desirable for the sake of legal certainty that when implementing the Future Relationship Parliament clarifies the strength of that obligation in advance. Within the EU, it is a breach of EU law. Post Brexit, it will be a breach of the Treaty on the Future Relationship. It is not yet clear whether they will be exactly analogous.
156. There are also other elements of the White Paper's proposals that indicate the nature of the CJEU's role after transition.
157. In relation to the new institutional framework, and the role of Joint Committee in evaluating additions to the common rulebook, any proposal that EU and UK rules are "equivalent" may require reference to the CJEU by EU officials sitting on the Joint Committee. Given the potential commitment by the UK to a harmonised rulebook, were the CJEU to hold that some measures were not equivalent, the UK may then need to amend its domestic law to align with EU law in order to avoid defaulting on its obligation under the Treaty to maintain harmonised rules.
158. The White Paper emphasises that disputes over harmonisation and interpretation would be resolved by the Joint Committee or the arbitration panel. However, the White Paper

⁸⁸ HM Government White Paper (n 6), para 33.

recognises that on questions relating to the interpretation of EU rules, the CJEU would have a role.

159. The Government's proposal that the UK will participate in a number of EU regulatory agencies will also ensure a further role for the CJEU.⁸⁹ The proposal includes a commitment to 'respect the rules under which those bodies or agencies operate.'⁹⁰

160. All of the EU's regulatory agencies currently have the CJEU as the final arbiter of disputes over decisions taken by the relevant agency.⁹¹ The White Paper on the Future Relationship addresses this aspect of CJEU jurisdiction as follows:

the UK would respect the remit of the CJEU such that if there was a challenge to a decision made by an agency that affected the UK, this could be resolved by the CJEU, *noting that this would not involve giving the CJEU jurisdiction over the UK.*⁹²

161. Presumably what the Government has in mind with the final qualification is that there will be three elements in any dispute over an agency decision. The first is the decision of that agency; the second is the lawfulness and interpretation of that decision by the CJEU where a dispute arises about the agency's decision. Both of those elements produce legal consequences in EU law only. The third element is the obligation on the UK to comply with the agency's (CJEU-approved) decision. That third element is an obligation in international law imposed by the Future Relationship, not by EU law. Since the CJEU is not the final arbiter of whether the UK has complied with its international obligations,⁹³ the UK cannot be held to account in the CJEU for breach of its obligation to comply with an agency's decision. Thus, the UK is not subject to the jurisdiction of the CJEU.

162. While that is true, as with the common rulebook proposal, it will in practice mean that the UK is bound to follow the rulings of the CJEU in the areas where the UK has committed to agency participation, because failure to do so would put it in breach of its obligations under the Future Relationship Agreement.

⁸⁹ European Chemicals Agency, the European Aviation Safety Agency, and the European Medicines Agency.

⁹⁰ HM Government White Paper (n 6), para 38.

⁹¹ For a useful summary of the dispute resolution mechanisms used in each agency, see the House of Commons Library Briefing Paper Number 7957, 28 April 2017, 'EU Agencies and post-Brexit options', at: <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7957>.

⁹² HM Government White Paper (n 6), para 38.

⁹³ Or at least, ought not to be.

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