

Jurisdiction upon and after the UK's withdrawal:

The perspective from the UK Constitutional Order

KEY FINDINGS

- The UK is a **dualist state**, which gives domestic legal effect to international treaties only to the extent provided for in Acts of Parliament or other secondary legislation. However, UK courts may choose to take account of non-UK courts' rulings if they choose.
- The UK government intends the **usual rules of UK law** to apply to any CJEU rulings after exit day, but proposes that CJEU rulings adopted before that date will still have some legal effect in domestic law, to ensure legal certainty and continuity.
- There will be an Act of Parliament to give effect to the **withdrawal agreement**, but its impact on the legal effect of CJEU rulings in domestic law remains to be seen.

1. ENFORCEMENT OF INTERNATIONAL TREATIES IN UK DOMESTIC LAW

The United Kingdom is a dualist state, meaning that in principle international treaties have no legal effect within the domestic legal order until an Act of Parliament or secondary legislation gives them some kind of domestic legal effect. Courts may, however, choose to take such treaties into account even before any such domestic transposition.

For instance, the European Convention on Human Rights (ECHR) had an impact in UK law after the UK ratified the Convention but before the *Human Rights Act* provided for a form of its transposition into domestic law.

In the absence of a hierarchical constitution in the form found in most other countries, a departure from this normal rule is in principle up to Parliament to agree, rather than requiring some special form of constitutional amendment in order to be legally acceptable.

EU law in the UK

The main means of giving effect to EU law in the UK legal order was the *European Communities Act*. This Act provided in general for the domestic legal effect of EU law (as it is now known) in section 2(1):

All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be

enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies.

In practice, the UK courts interpreted this as a requirement to give effect to direct effect and supremacy of EU law, overturning the traditional rule that courts cannot set aside Acts of Parliament (parliamentary sovereignty). However, the possibility of Parliament expressly repealing EU law was still accepted in UK court jurisprudence.

In particular, in the House of Lords judgment in *Factortame*,¹ Lord Bridge noted that the principle of supremacy of European Community law existed before the UK joined the Communities, and so 'whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary.'

A fuller statement of the law is set out in the recent UK Supreme Court judgment in *Miller*, where the majority judgment noted, at paragraph 60, that, due to the 1972 Act:

EU law not only becomes a source of UK law, but actually takes precedence over all domestic sources of UK law, including statutes. This may sound rather dry or technical to many people, but in constitutional terms the effect of the 1972 Act was unprecedented [...]. Of course, consistently with the principle of Parliamentary sovereignty, this unprecedented state of affairs will only last so long as Parliament wishes: the 1972 Act can be repealed like any other statute. For that reason, we would not accept that the so-called fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.

And at paragraph 61:

EU law enjoys its automatic and overriding effect only by virtue of the 1972 Act, and thus only while it remains in force. That point simply reflects the fact that Parliament was and remains sovereign.

In the intervening years, section 18 of the *European Union Act 2011* had addressed again the issue of the legal effect of EU law within the UK:

Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972) falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.

As confirmed by the above mentioned *Miller* judgment (paragraph 66), the effect of this provision was to reiterate the existing position. What was ruled out by the *European Communities Act* was *implied* repeal by a later Act of Parliament, which would otherwise have taken precedence in the event of a conflict between statutes: '*The primacy of EU law means that, unlike other rules of domestic law, EU law cannot be implicitly displaced by the mere enactment of legislation which is inconsistent with it.*'

This was in particular the case due to the doctrine of 'constitutional statutes' developed by the UK judiciary.² The *Miller* ruling goes on to explain in this context that Acts of Parliament impinging upon the role of the EU institutions more generally can also take precedence over the 1972 Act:

Following the coming into force of the 1972 Act, the normal rule is that any domestic legislation must be consistent with EU law. In such cases, EU law has primacy as a matter of domestic law, and legislation which is inconsistent with EU law from time to time is to that extent ineffective in law. However, legislation which alters the domestic constitutional status of EU institutions or of EU law is not constrained by the need to be consistent with EU law. In the case of such legislation, there is no question of EU law having primacy, so that such legislation will have domestic effect even if it infringes EU law (and that would be true whether or not the 1972 Act remained in force). That is because of the principle of Parliamentary sovereignty which is [...] fundamental to the United Kingdom's constitutional arrangements, and EU law can only enjoy a status in domestic law which that principle allows. It will therefore have that status only for as long as the 1972 Act continues to apply, and that, of course, can only be a matter for Parliament.³

Other basic principles of UK constitutional law are also protected from being overturned by EU law, as the UK Supreme Court ruled in *HS2*,⁴ as regards the rule that the courts cannot inquire into the parliamentary process:

[T]hat question cannot be resolved simply by applying the doctrine developed by the Court of Justice of the supremacy of EU law, since the application of that doctrine in our law itself depends upon the 1972 Act. If there is a conflict between a constitutional principle, such as that embodied in article 9 of the Bill of Rights, and EU law, that conflict has to be resolved by our courts as an issue arising under the constitutional law of the United Kingdom. Nor can the issue be resolved, as was also suggested, by following the decision in [Factortame], since that case was not concerned with the compatibility with EU law of the process by which legislation is enacted in Parliament (paragraph 79).

Similarly, at paragraphs 110 and 111 of that judgment, the majority opinion notes that the separation of powers is part of the national constitution in many countries, and agrees with the German Federal Constitutional Court that 'a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order'. This is a useful reminder that while the constitution of the UK has distinct features, the idea that EU law cannot overturn the essential elements of the national constitution has been asserted by constitutional or supreme courts in other Member States as well.

Similarly, the UK Supreme Court, like the constitutional or supreme courts of other Member States, has suggested that it might be willing to question whether a judgment of the CJEU which impacts upon constitutional principles exceeded the EU Court's jurisdiction:

I see considerable force in the criticisms made by [Lord Justice Laws] of some of the reasoning in Rottmann. In particular he raises the more fundamental issue of competence (paragraph 54 above): that is, in his words, "whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction".⁵

More broadly, the Supreme Court majority noted in that case that 'European law is part of United Kingdom law only to the extent that Parliament has legislated that it should be', and that although when interpreting a national statute, 'United Kingdom courts apply a strong presumption that Parliament intends legislation enacted to implement this country's European Treaty obligations to be read consistently with those obligations [...] it is not axiomatic that consistency is either always achievable or what Parliament intended or did achieve' (paragraphs 76 and 77). At paragraph 80, the majority restates the fundamental rule:

For a domestic court, the starting point is, in any event, to identify the ultimate legislative authority in its jurisdiction according to the relevant rule of recognition. The search is simple in a country like the United Kingdom with an explicitly dualist approach to obligations undertaken at a supranational level. European law is certainly special and represents a remarkable development in the world's legal history. But, unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act.

The current intention is to repeal the *European Communities Act* as from the UK's exit day from the EU, according to Clause 1 of the European Union (Withdrawal) Bill. The impact of the Bill is further discussed in section 2. Further sections also discuss the impact of the recent joint report on the Brexit negotiations at the time of concluding this briefing (5 January 2018).

2. LEGAL AND POLITICAL ARGUMENTS ON CONTINUED CJEU JURISDICTION IN UK

The UK government's position is that, as a general rule, following withdrawal from the European Union, the relationship between EU law and the UK, including the case law of the

CJEU, will have two different forms, depending on whether the EU law in question was adopted before exit day or afterward.

Having said that, the UK government has shown willingness to make exceptions from the general rule and to agree additional jurisdiction for the CJEU, at least in the specific case of guaranteeing the rights of EU27 citizens who moved to the UK before exit Day (see discussion below).

Some national constitutions restrict the possibility of giving jurisdiction to foreign courts. However, there is nothing in the case law of the UK Supreme Court to indicate that it would be constitutionally impossible for the UK to give jurisdiction to the CJEU after Brexit. But then again, the issue has not been raised before the Supreme Court. It may be argued that this is a distinct question from the legal status of EU law and the jurisdiction of the CJEU while the UK was a member of the EU.

It is conceivable that a critic of the principle of the CJEU having continued jurisdiction after Brexit may want to challenge the withdrawal agreement by means of judicial review, to the extent that it provides for such jurisdiction. However, such a challenge would face difficulties in that the UK has committed during the Brexit negotiations to give effect to the citizens' rights provisions in the withdrawal agreement by Act of Parliament (see section 4). Presuming that this legislation sets out not only the substantive rules of the citizens' rights part of the agreement, but also the jurisdiction of the CJEU, any challenge would have to overcome the traditional constitutional rule of parliamentary supremacy (discussed in section 1) that courts in the UK cannot rule acts of Parliament invalid.

Prior case law

Case law adopted before exit day will, in effect, form part of EU law which will be 'retained' by the UK in principle as part of its domestic law as provided in Clause 6(2) of the European Union (Withdrawal) Bill. Such pre-exit day CJEU case law will continue to be a binding precedent as a matter of domestic law, and the principle of supremacy will still apply to that law (Clause 5(2)).

However, there are limits on this continued legal effect. In addition to the power of Parliament or secondary legislation to alter retained EU law (which was largely only a hypothetical possibility when the UK was a Member State), the UK Supreme Court will be able to overturn CJEU precedent (Clause 6(4) of the Bill). But if it has not done so (and if there are no relevant changes to primary or secondary domestic law) then the relevant CJEU case law will remain binding upon the lower courts.

Subsequent case law

The European Union (Withdrawal) Bill provides that CJEU case law adopted after exit day *may* be taken into account when deciding on cases, at the option of the courts in the UK (Clause 6(2) of the Bill). One might expect general rules to develop in the jurisprudence of the UK courts giving guidance as to how this discretion ought to be exercised.

This position would give effect to the general rule of courts in the UK as regards the case law of non-UK jurisdictions – a domestic court may choose to take into account rulings of such jurisdictions, but is not bound to do so, in the absence of domestic legislation to the contrary.

The UK government's position is that this usual rule should also govern the relationship between CJEU case law and UK domestic law after withdrawal from the UK. The special position of CJEU case law adopted prior to the exit day in domestic law is justified by the desire to maintain legal continuity after Brexit, as an exception from the normal rules about the domestic legal effect of non-UK court rulings.

The treatment of post-exit CJEU rulings is justified politically by the argument that the Brexit vote should have the effect in practice of making the usual rules relating to the rulings of non-

UK courts in the UK legal order applicable as much as possible. To some extent the CJEU could have been regarded as part of the domestic legal system while the UK was a member of the EU, but it would no longer be appropriate to do so (bar the exception for pre-exit case law, which has special justification) following exit day.

From that point onwards, the CJEU is a non-UK court like any other – even more so, perhaps, than the European Court of Human Rights, which at least has a UK member among its judges and which interprets a treaty to which the UK is still a party.

The UK government is, however, willing to consider the usual methods of international dispute settlement to regulate its relationship with the EU after exit day, both as regards the withdrawal agreement and the post-withdrawal relationship with the EU. The rulings of any such dispute settlement bodies, in UK law, will bind the UK at international level, not as a matter of domestic law.

The government is not wedded to any particular form of international dispute settlement, and refers to a number of examples of such systems which already apply to the EU's relationship with non-EU states in treaties binding the EU and non-EU countries, such as the WTO rules and various forms of dispute settlement under association, trade and other agreements.⁶

Special rules in the withdrawal agreement

In the joint report on the Brexit negotiations,⁷ the two sides have agreed (at paragraph 38):

The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens' rights Part.

This provision raises certain questions. First of all, it should be noted that it differs from Article 267 TFEU, in that final UK courts are not obliged to refer questions – although it maintains the rule that all lower courts and tribunals can do so. This raises the additional question of whether the definition of courts and tribunals will be the same as under Article 267.

Secondly, it should be noted that the rule is limited in subject matter (to 'those rights', defined in paragraph 38 as '*rights for citizens following on from those established in Union law during the UK's membership of the European Union*'). The joint report does not limit the scope of this provision only to cases where the withdrawal agreement refers back to EU law (although it has been agreed in the joint report that it will do so frequently).

Thirdly, the provision is limited in time, to eight years from the date of application of the citizens' rights provisions. It is notable that the joint report refers to the 'date of application', not the 'date of withdrawal'; the date of applying these provisions may be deferred, depending on what the parties agree as regards the future transition period.⁸ It remains to be seen what happens to cases which are pending before the CJEU, or before the UK courts, when this period expires. This issue has been discussed as regards pending cases in general, as of Brexit Day, where the two sides have agreed that cases pending before the CJEU on that date shall remain there, but have not yet agreed what happens to cases pending in the UK courts on that date.⁹

Fourthly, there is no provision for other jurisdiction of the CJEU, most notably as regards actions brought by the Commission or another Member State as set out in Articles 258-260 TFEU. It is possible that the independent authority which the UK has agreed to establish will have such powers,¹⁰ or it might instead be agreed that this body will have powers to challenge the UK government before the UK courts (by analogy with the EFTA Surveillance Authority, which challenges EFTA EEA states before the EFTA Court, not the CJEU).¹¹ Or it might be agreed that this authority has a different role: wholly advisory, perhaps also with the power

to intervene in judicial and/or administrative cases; or with the power to make final decisions which the EU27 citizen or the UK authorities would then have to appeal to the courts in case of disagreement (this would follow instead the model of data protection supervisory authorities).

Although the joint report does not say so, it must follow that any rulings of the CJEU will be binding on the UK courts which asked the relevant questions, for the CJEU has said that the binding effect of its judgments in all circumstances is an essential element of the Court's functioning.¹²

As for other special cases, the issue of whether the CJEU has any role as regards dispute settlement is still pending.¹³ On this point, the established position of the CJEU is that a body such as a joint committee established by an international agreement cannot adopt a definitive interpretation of EU law which binds the EU or its institutions;¹⁴ and as noted already, the citizens' rights provisions of the agreement make many references to EU law.¹⁵

It also remains to be seen if the UK side will agree to the position of the EU27 side, that the CJEU should have jurisdiction over the UK's continued application of EU law during the planned transition period,¹⁶ or, alternatively, whether some compromise entailing more limited jurisdiction (as with the citizens' rights provisions) will be found. If there is some jurisdiction for the CJEU, similar issues to those arising as regards citizens' rights (the definition of court or tribunal; the position of pending cases when the transitional period expires) will apply.

Finally, the two sides have not yet fully agreed on what happens to cases pending on exit day (and/or the end of the transition period). The joint report indicates that they have agreed that all cases pending before the CJEU on exit day relating to the UK will remain within the CJEU's jurisdiction, but not yet on whether cases pending in the courts in the UK raising EU law issues could still be subject to such CJEU jurisdiction.

3. LEGAL AND CONSTITUTIONAL EFFECTS OF WITHDRAWAL AGREEMENT IN UK LEGAL ORDER

The joint report on the Brexit negotiations entrenches the prior statement of the UK government that it will provide for the implementation of the withdrawal agreement by means of an Act of Parliament. Paragraph 36 provides:

The UK Government will bring forward a Bill, the Withdrawal Agreement & Implementation Bill, specifically to implement the Agreement. This Bill will make express reference to the Agreement and will fully incorporate the citizens' rights Part into UK law. Once this Bill has been adopted, the provisions of the citizens' rights Part will have effect in primary legislation and will prevail over inconsistent or incompatible legislation, unless Parliament expressly repeals this Act in future.

Moreover, paragraph 35 of the joint report provides that '*The provision in the Agreement should enable citizens to rely directly on their rights as set out in the citizens' rights Part of the Agreement*'. (It is not clear what 'the provision' refers to here).

The withdrawal agreement will therefore form an exception from the usual rule in which international treaties which the UK has ratified only bind the UK at the international level, rather than provide for rights which can be enforced as a matter of domestic law. The joint report appears to refer to the concepts of direct effect and supremacy, taking account however of the prospect of express repeal of the Act of Parliament giving effect to the withdrawal agreement.

As we saw in section 1, it would not be constitutionally possible without a Copernican revolution in the UK constitution for the UK to commit to rule out express repeal of the Act giving effect to the withdrawal agreement. There are also issues arising from other case law

discussed in section 1 which limits the effect of EU law in the UK legal order; presumably those constitutional constraints will continue to apply to the withdrawal agreement. Arguably there might be further constraints but if the Act giving effect to the Withdrawal Agreement is drafted identically to the European Communities Act that would be a clear signal to the courts that Parliament wants the previous legal position to apply. This would be even more the case if the European Communities Act is kept in force for these purposes, or referred to expressly.

Such a *renvoi* would settle the question of whether supremacy of EU law should apply in the same way under the withdrawal agreement (which appears to be the intention of the joint report) and whether direct effect should apply in the same way too (this is less clear from the wording of paragraph 35).

While paragraph 36 entails a commitment for the UK to place the withdrawal agreement as a whole into the UK domestic legal order by means of an Act of Parliament, the commitments relating to the legal effect of the provisions of the agreement only relate to the citizens' rights parts of the agreement. The issue of whether such commitments should also apply to other provisions of the agreement may well arise as regards the transitional rules, and could also arise as regards the remaining parts of the treaty (as regards the Irish border, the financial settlement and 'winding up' rules). This is important in practice because it raises questions of how the provisions on the Irish border and winding up rules might be enforced by individuals affected by them, and whether any dispute about the financial settlement provisions would be settled by the route of a CJEU infringement procedure or via the withdrawal agreement dispute settlement rules yet to be agreed.

While international treaties usually leave it to the parties to determine the legal effect of those treaties in their domestic legal orders, the withdrawal agreement will form an exception to the usual rule, in particular as regards citizens' rights, given its links with the EU legal order, which also formed an exception to that rule.

4. DRAFT EU (WITHDRAWAL) BILL AND ENACTMENT OF LEGISLATION ON WITHDRAWAL AGREEMENT

As noted in section 3, the UK government has committed to give domestic legal effect to the withdrawal agreement by means of a separate Act of Parliament, with at least some provisions of the agreement having an internal legal effect broadly similar, if not identical, to the current status of EU law in the UK.

At present, the draft EU (Withdrawal) Bill provides that secondary legislation can be adopted to give effect to the withdrawal agreement (Clause 9 of the Bill). This can entail changes to the Bill itself (or rather, the future Act), or indeed any Act of Parliament (clause 9(2); this is known as a 'Henry VIII clause' in the UK).

However, there are limits. Clause 9(3) states that the powers cannot be used to:

- (a) *impose or increase taxation,*
- (b) *make retrospective provision,*
- (c) *create a relevant criminal offence, or*
- (d) *amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it.*

Furthermore, Clause 9(4) states that these powers will expire on exit day.

This provision might be considered redundant in light of the UK government's commitment to give effect to the withdrawal agreement by Act of Parliament (see section 3). However, the EU Withdrawal Bill powers might still be relevant because that Bill is likely to pass onto the statute book before any Bill on the withdrawal agreement. It may be expected that overlaps

or conflicts between the two Acts would be addressed in the Act giving effect to the Withdrawal Agreement (UK statutes typically include a schedule setting out consequential amendments to other legislation). Or perhaps Clause 9 of the Withdrawal Bill could be used to sort out any inconsistencies.

The Act giving effect to the withdrawal agreement may well give the UK government further powers to act by means of secondary legislation, presumably including powers to adopt such measures to give effect to the withdrawal agreement after the exit date, so going beyond the powers conferred by Clause 9(4) of the EU Withdrawal Bill. Indeed, such powers will likely be necessary if the UK agrees to the EU27 position that all (or even some) EU legislation adopted after exit day will have to be applied by the UK.¹⁷

It may well be that the UK decides to adopt the same rules that apply to the adoption of secondary legislation to give effect to its EU law obligations, or even to keep the European Communities Act in force for this purpose. This is linked to the question of the legal effect of the transitional rules in the withdrawal agreement (see above section 3).

5. LEGAL POSSIBILITIES OF RELYING ON CJEU CASE LAW AFTER WITHDRAWAL

Traditionally, UK courts have been willing to take into account the case law of any jurisdiction when deciding upon issues, at their own discretion (upon urging of the parties) and on a persuasive basis only, i.e. not binding. An Act of Parliament could, however, specify further what legal effect the ruling of the courts of another jurisdiction may have. So could secondary legislation.

An example is the *Human Rights Act*, section 2(1) of which states that 'a court or tribunal determining a question which has arisen in connection with a Convention right must take into account', inter alia, a judgment of the European Court of Human Rights.

If the UK enters into a commitment at international level regarding the legal effect of the rulings of the court of another jurisdiction, but there is no primary or secondary domestic legislation giving effect to that commitment, then the UK courts are not bound as a matter of domestic law by that international law commitment, due to the doctrine of dualism. However, in that scenario the UK courts may be willing to take account of the international commitment in practice and to refer frequently to the rulings of the relevant court.

In the scenario of UK withdrawal from the EU, the general rules on the legal effect of the case law of the CJEU is provided for in the EU (Withdrawal) Bill, as discussed above. However, the UK is willing to agree special rules for particular situations. Even before the joint report on the Brexit negotiations, the UK government had already expressed its willingness to be bound by the rule in the Lugano Convention on civil and commercial jurisdiction that the parties shall take account of the case law of the others' courts.¹⁸

The joint report goes further, including a commitment (not limited in time) that the UK will provide that courts in the UK have 'due regard' to CJEU case law that interprets concepts of EU law relevant to the citizens' rights provisions in the withdrawal agreement.¹⁹ The joint report also provides for 'an exchange of case law between the courts and regular judicial dialogue', and rights for the UK Government and the European Commission to intervene 'in relevant cases before the CJEU and before UK courts and tribunals respectively'.

These provisions apply to citizens' rights only. It remains to be seen whether there will be any agreement on the further role of CJEU as regards dispute settlement, and in the context of the transitional rules which both sides are soon to start negotiating.

By analogy with the discussion in section 2, it is conceivable that a critic of the principle of the continued legal effect of CJEU rulings may want to challenge the withdrawal agreement

by means of judicial review, but this would run into the difficulty that the relevant provisions are likely to form part of an Act of Parliament. Only in the (improbable) event that the UK government committed itself to rule out express repeal of the relevant legislation, or to violate some other fundamental rule of the UK constitution as identified by the courts, would there be a likely chance of success on these grounds.

6. CONCLUSIONS AND RECOMMENDATIONS

In light of the joint report and the declaration of sufficient progress in the talks of December 2017, it is more likely that a withdrawal agreement will be concluded, and there are some clearer indications of what it will include. As regards CJEU jurisdiction, the withdrawal agreement will certainly (unless talks subsequently fail or the agreement is not ratified) include provisions on more limited CJEU jurisdiction for a period after the exit day. It will also include at least some provisions on cases pending before the CJEU on exit day, and may well also include provisions on CJEU jurisdiction during the transition period and as regards dispute settlement of issues which concern the interpretation of EU law.

Although the UK constitutional order adapted to EU membership while the UK was a member of the EU, like other Member States' constitutional orders this was subject to limits: in particular the continued application of the doctrine of express repeal to preserve parliamentary sovereignty, as well as the preservation of other core features of the constitutional order. It logically follows that such limits will still apply after Brexit. Moreover, critics of the EU might be willing to pursue litigation arguing that even further limits exist, although the prospects of their success will be limited if the post-Brexit settlement is fully set out in an Act of Parliament – given that parliamentary supremacy is itself a cornerstone of the constitutional order.

A stable and balanced post-Brexit compromise is likely to build upon the foundations that have already been agreed. Outside the transition period, there seems no pressing need for continued CJEU jurisdiction over the UK, leaving aside cases pending at the end of that period and the special situation of EU27 nationals. Rather, the twin interests of ensuring consistent interpretation of EU law as applied in the UK and the distinctiveness of the UK legal order following Brexit could be satisfied by an agreement containing the other aspects of the rules agreed concerning EU27 citizens: an exchange of case law, a domestic enforcement body and an obligation for UK courts to take account of relevant post-Brexit day CJEU case law.

Dispute settlement will be constrained by CJEU case law on this issue: the basic choice will be between referring issues concerning the interpretation of EU law to the CJEU (the solution in the Ukraine DCFTA, for instance) or simply disapplying the relevant aspects of post-Brexit EU/UK cooperation in the event that the two sides cannot agree on an interpretation of the rules consistent with CJEU case law (largely the solution in the EEA). The UK side is likely to press strongly for the latter solution, which entails (as does most of the Brexit discussion) a trade-off between sovereignty and market access. In practice, however, the EU usually manages to find a political resolution to disputes with its preferential trading partners without resorting to dispute settlement or sanctions procedures; and despite the difficult political environment of the Brexit negotiations, this may ultimately prove to be the case as regards the UK also. For that reason, the latter option is preferable.

¹ [1991] AC 603.

² Paras 66 and 67 of *Miller*, referring to *Thoburn* [2003] QB 151 and *HS2* [2014] UKSC 3.

³ Para 67 of *Miller*.

⁴ *R (on the application of HS2 Action Alliance Limited) (Appellant) v The Secretary of State for Transport and another (Respondents)*, [2014] UKSC3.

⁵ [2015] UKSC 19, para 58; see also para 90 and the concurring view in para 111.

⁶ See the paper on Enforcement and Dispute Settlement:

<https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper>.

⁷ https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

⁸ See the Commission communication on the state of negotiations:

https://ec.europa.eu/commission/publications/communication-commission-european-council-article-50-state-progress-negotiations-united-kingdom-under-article-50-treaty-european-union_en.

⁹ See para 93 of the joint report and the Commission communication (ibid).

¹⁰ See para 40 of the joint report: the powers of the authority will be discussed in the next stage of negotiations.

¹¹ In that case there would be an issue whether the authority could be judicially reviewed if it refused to bring a complaint. The Commission cannot be sued by individuals for failure to bring an Article 258 proceeding, but there is no reason why the EU rules should necessarily apply by analogy to the UK post Brexit. The issue would also arise whether jurisdiction equivalent to Article 260 TFEU would apply (i.e. fines for failure to apply prior judgments); and whether the process would be the same as that applicable in EU law (letter of notice and reasoned opinion).

¹² See, for instance, Opinion 1/00, [2002] ECR I-3493, para 33.

¹³ See the Commission communication.

¹⁴ See, for instance, Opinion 1/00, [2002] ECR I-3493, paras 37-45.

¹⁵ It seems likely that at least the provisions in the withdrawal agreement on the financial settlement and the 'winding up' of the UK/EU relationship will also make specific references to EU law.

¹⁶ European Council guidelines of 15 Dec 2017, para 4: <http://www.consilium.europa.eu/en/press/press-releases/2017/12/15/european-council-art-50-guidelines-for-brex-it-negotiations/>.

¹⁷ See para 4 of the European Council conclusions of Dec 15, 2017.

¹⁸ Paper on future civil law cooperation: <https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-ork-a-future-partnership-paper>.

¹⁹ Para 38 of the joint report; see also para 9.

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