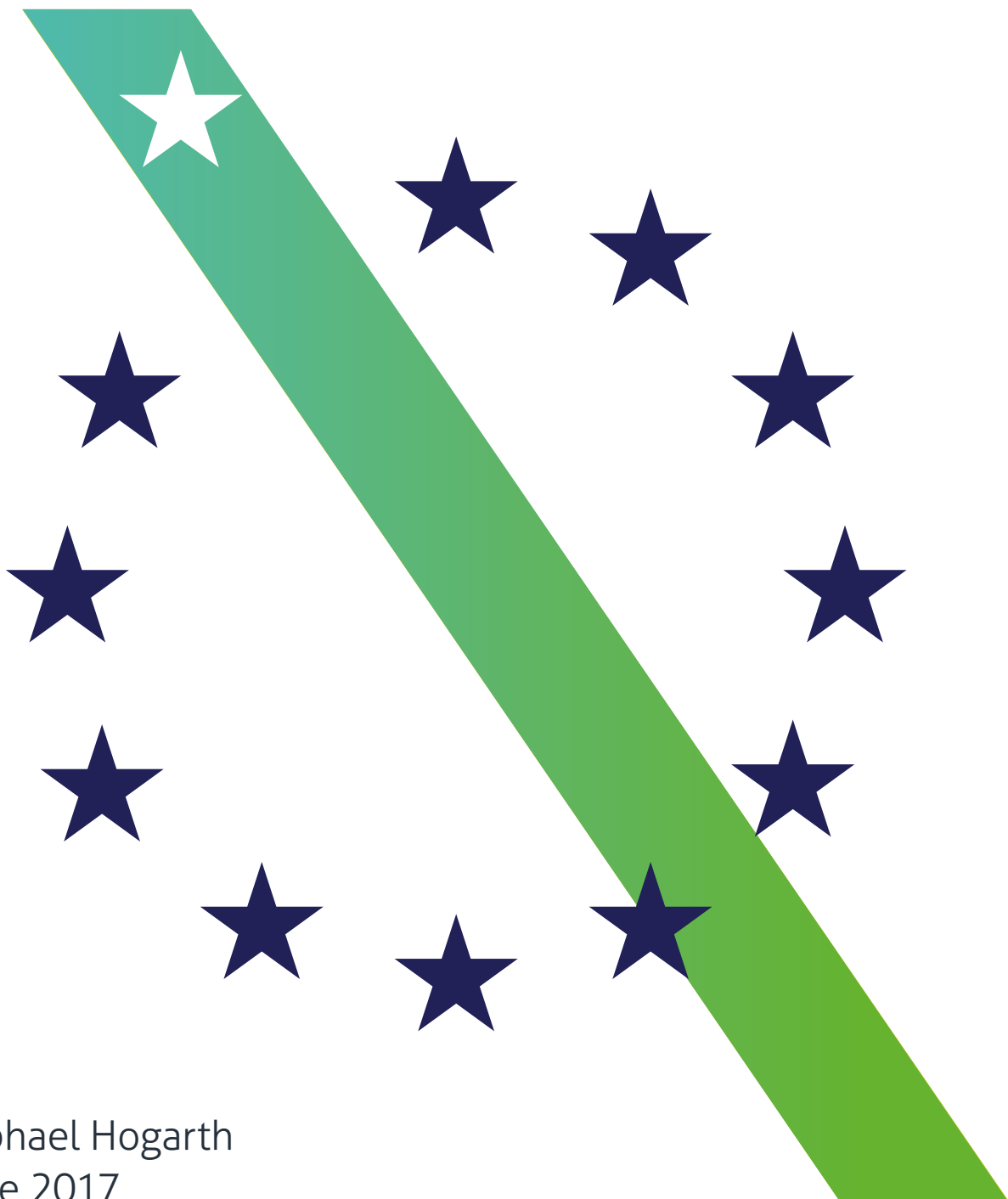


# Brexit and the European Court of Justice



Raphael Hogarth  
June 2017

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## Our Brexit work

Following the UK's vote to leave the European Union (EU), the Institute for Government has launched a major programme of work looking at the negotiations, the UK's future relationship with the EU and the impact of Brexit on the UK union. Keep up to date with our comment and Brexit explainers, read our media and broadcast coverage, and find out about our events at: [www.instituteforgovernment.org.uk/brexit](http://www.instituteforgovernment.org.uk/brexit)

## About this IfG analysis

Brexit means a new relationship with the Court of Justice of the European Union. This analysis paper sets out the key questions and trade-offs for the UK Government as it begins to legislate for that new relationship at home and negotiate it abroad.

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## Key messages

1. Before and during the election campaign, the Prime Minister promised to end “the jurisdiction of the European Court of Justice in Britain”. So far, however, the Government has dodged the hardest questions on how that will work in practice. The 2017 political parties’ election manifestos provided no further detail. The new Government needs to clarify its position on fundamental aspects of the UK’s future legal system.
2. The Government will soon bring forward a ‘Great Repeal Bill’ to ‘convert’ pre-Brexit European Union (EU) law into UK law.\* The Government has explained its approach to pre-Brexit decisions of the Court of Justice of the European Union (CJEU), but not post-Brexit decisions of the CJEU. The Repeal Bill ought to tell the courts to take account of post-Brexit CJEU decisions when they are relevant to the case at hand. This would deliver clarity and certainty, but not give the CJEU a higher status than any other foreign court. The next best thing would be to give no instruction at all.
3. EU laws are interpreted in a different way from UK laws, with less focus on the literal meaning of the text and more on the purpose of the measure. This should be allowed to continue when EU laws are ‘converted’ post-Brexit. There is no point imposing a literal style of interpretation on laws that were not designed for it.
4. Before the election, the Government said that it intended for the UK Supreme Court to be able to depart from pre-Brexit decisions of the CJEU in some circumstances. The Government and Parliament should not be tempted to give the Supreme Court a detailed legislative instruction on the circumstances in which such a departure would be appropriate. By their nature, these cases will often involve unforeseen facts or legal issues. The courts are best placed to decide whether a departure is warranted, case by case.
5. The role of the CJEU in the UK post-Brexit is not just an issue for legislators at home. It will also be a live issue in negotiations with Brussels. As the Government approaches the negotiation, it will need to develop a position on:
  - what to do about cases still pending before the CJEU on Brexit day\*\*
  - what regard regulators should have to CJEU case law as it develops after Brexit

\* Jeremy Corbyn, leader of the Labour Party and leader of the Opposition, said in the immediate aftermath of the election that the “Great Repeal Bill has now become history”. Whether or not the bill to repeal the European Communities Act 1972 and import EU law onto the UK statute is called the ‘Great Repeal Bill’, and whether or not it takes the precise shape set out in the Government’s March white paper, such a bill is imperative to avoid legal black holes. For brevity and ease of understanding, it is hereafter referred to as the ‘Repeal Bill’.

\*\* The day on which EU treaties cease to apply to the UK under Article 50 of the Lisbon Treaty.

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- the long-term dispute resolution mechanism for disputes between the UK and the EU post-Brexit, whether it involves the CJEU or not
  - the role of the CJEU during any transitional period.
6. The recent general election has transformed the political context in which the Government must legislate and negotiate Brexit. In particular, the Government has come under pressure to afford greater priority to the UK's economic interests in Brexit negotiations. If the Government's negotiating priorities change as a result of the general election, it may decide to blur its red line on leaving the jurisdiction of the CJEU.
  7. If the Government changes tack and seeks to stay in the single market by remaining a member of the European Economic Area (EEA) – the so-called 'Norway option' – then this would mean a substantial role for the future case law of the CJEU in UK law, but it would not mean direct CJEU jurisdiction. Instead the UK would come under the jurisdiction of the Court of Justice of the European Free Trade Association (EFTA Court). The Government could therefore stay in the single market and keep to the letter of its commitment to end CJEU jurisdiction.

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# 1. Introduction

The Prime Minister has said that “we will take back control of our laws” after Brexit.<sup>1</sup> Yet urgent questions remain as to how those laws will be interpreted and applied. Theresa May’s first administration drew only a sketchy outline of the future role of Court of Justice of the European Union (CJEU), glossing over some of the most important details of the UK’s legal order. The treatment of CJEU issues during the election campaign was similarly superficial.

The Government intends to bring forward a so-called ‘Great Repeal Bill’ to ‘convert’ the existing body of European Union (EU) law into UK law. That bill will determine which laws remain on the statute book after Brexit day. It will also affect how the courts interpret them.

Mrs May has made no secret of her intention to end the jurisdiction of the CJEU in Britain,<sup>2</sup> and the Government’s white paper on the Repeal Bill<sup>3</sup> gave some indication as to what that will mean in practice. The Conservatives’ failure to win a majority of seats in Parliament may hamper the Prime Minister in her efforts to enact the policies set out in that document, but it did provide useful information on the following issues:

- **The supremacy of EU law.** The Government intends that new UK laws that come into force after Brexit day will take precedence over old EU laws.
- **Interpreting new UK laws.** The Government intends that the case law of the CJEU will have no role in the domestic interpretation of UK laws that come into force after Brexit day. This would be a continuation of the pre-Brexit state of affairs.
- **Pre-Brexit CJEU case law.** The Government intends that pre-Brexit case law of the CJEU will be given a legal status equivalent to UK Supreme Court judgments.

However, the white paper said little about the Government’s approach to a number of other important issues. Many of these concern the role of the European Court in UK law after Brexit:

- **Post-Brexit CJEU case law.** What role will post-Brexit CJEU case law have in the domestic application and interpretation of EU-derived laws?
- **How to interpret EU-derived law.** To what extent should British judges continue to consider the EU treaties and EU policy objectives when interpreting EU-derived law?
- **Overruling the CJEU.** In what circumstances will British judges depart from the pre-Brexit judgments of the CJEU?

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Table 1 summarises the domestic policy issues that the Government has addressed so far, and where it has left questions to answer.

**Table 1: Has the Government provided clarity on how the role of CJEU case law is to be interpreted by British judges?**

	Pre-Brexit CJEU case law	Post-Brexit CJEU case law
'Converted' EU Law	Partly	No
Post-Brexit UK Law	Yes	Yes

Some further unanswered questions relate to aspects of the CJEU's role that depend on negotiations with the EU. These include:

- **Pending cases.** If a case involving a UK party is still pending before the CJEU or being pursued by the European Commission on Brexit day, will it be allowed to run its course?
- **Regulators.** What role will the CJEU have in shaping the enforcement decisions and published guidance of regulators post-Brexit?
- **Dispute resolution.** Will the CJEU have a role in resolving disputes between the UK and the EU, or disputes involving expatriate citizens, post-Brexit?
- **Transitional arrangements.** Will CJEU jurisdiction continue in some areas for a transitional period? If so, will UK courts be able to make references to the CJEU?

On the basis of a survey of the relevant literature and extensive interviews with lawyers and constitutional and legal policy experts, this paper sets out those questions and some possible answers.

## 2. Pre-Brexit rules

The European Communities Act 1972 embedded EU law in the UK legal order. That means that some EU laws automatically become law in the UK when they are passed in Brussels, and others must be implemented by domestic legislation in the UK.

Additionally, the Act committed the UK to the doctrine of supremacy or primacy of EU law. That means that, when a law passed by Parliament comes into conflict with an EU law and there is no way to interpret them as consistent with one another, the UK courts have to 'disapply' the UK law in favour of the EU law.

The Court of Justice of the European Union (CJEU) is the ultimate authority on the meaning of all EU law. In practice, the CJEU has a number of different roles in the UK legal system.

First, its decisions are binding on the UK courts. When the UK courts are applying and interpreting EU law, they must follow the judgments of the CJEU as to what that law means.

Second, cases brought in the UK are sometimes referred to the CJEU, as are cases brought in the courts of other countries that involve UK parties. Under Article 267 of the Treaty on the Functioning of the European Union (TFEU), domestic courts of last resort are obliged to ask the CJEU to give a ruling on any substantive question of EU law that, in the view of the domestic court, needs answering before the case can be decided.

Third, under Article 263 TFEU, the UK can take EU institutions to court at the CJEU for failing to comply with EU law. The institutions subject to such action include the European Council, European Commission and European Parliament. For example, in 2012 the UK brought a case against the European Parliament and European Council, arguing that the European Securities and Market Authority (ESMA) had been given powers to intervene in financial asset and securities markets that broke EU law.<sup>4</sup>

Fourth, under Article 258 TFEU, the European Commission or an EU Member State can take the UK to court at the CJEU for failing to comply with EU law. (By the same token, the UK can take other Member States to court.) For example, in 2006 the European Commission brought a case against the UK, when the Government told employers that they were not legally required to make sure that workers take the rest breaks they were guaranteed under EU law. The CJEU found the Government's guidance to "endorse and encourage a practice of non-compliance" with EU law.<sup>5</sup>



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## 3. The future: what the Government has said

### Great cut 'n' paste bill

The Government's white paper said that the Repeal Bill will 'convert' most EU law, as it stands on Brexit day, into UK law.<sup>6</sup> The law that the Government intends to convert includes:

- directly applicable EU law (EU regulations)
- the rights in the EU treaties
- "historic" (pre-Brexit) case law of the CJEU.<sup>7</sup>

At the same time, the Government intends to preserve laws made in the UK to implement the UK's EU obligations. Mostly, these are pieces of secondary legislation, passed under Section 2(2) of the European Communities Act 1972, that implement EU directives.

### Supreme no longer

The white paper promised to "end the general supremacy of EU law". This means that, "where a conflict arises between EU-derived law and new primary legislation passed by Parliament after our exit from the EU", the newer legislation would "take precedence over the EU-derived law we have preserved".<sup>8</sup>

If, however, there were a conflict between a converted EU-derived law and a UK law that came into force before Brexit day, the EU-derived law would "continue to take precedence over the other pre-exit law".<sup>9</sup> Any other approach, the Government said, "would change the law and create uncertainty as to its meaning".

### New laws

The Government has said that the Repeal Bill will not give the CJEU or its case law any role in the interpretation of new laws passed by the UK Parliament post-Brexit.<sup>10</sup> That is unsurprising. Any role for the CJEU in interpreting new, post-Brexit statutes would likely have been thought incompatible with the Government's stated aim of ending CJEU jurisdiction in the UK.

### Pre-Brexit case law

The Government also intends, however, that for cases determined by the UK courts after Brexit, "any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU".<sup>11</sup>

Pre-Brexit judgments of the CJEU, therefore, would continue to be binding on the UK courts under the Government's plans. However, they would not be binding in quite the same way as before Brexit.

At the moment, no UK court can depart from a judgment of the CJEU. After Brexit, the Government intends that the Supreme Court will be able to depart from past judgments of the CJEU. The Government hopes to achieve this by giving pre-Brexit

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CJEU case law “the same binding, or precedent, status in our courts as decisions of our own Supreme Court”.<sup>12</sup> The Supreme Court can overrule its predecessors “when it appears right to do so”, but does so very rarely. The Government expects the Supreme Court to take a “similar, sparing approach” to departures from pre-Brexit CJEU case law.<sup>13</sup>

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## 4. Questions still to answer

### The UK courts

The case law of the CJEU presently has a major role in the reasoning of the UK courts. Although the Repeal Bill white paper has given some clarity on how that role might change, there are still important questions to answer about how British judges should proceed from Brexit day onwards.

#### Post-Brexit case law

After Brexit, the CJEU will continue to rule on cases where EU law is ambiguous. Some of those cases will deal with laws passed in Brussels before Brexit, which the UK will have 'converted' in the Repeal Bill.

The 'elephant' in the Repeal Bill, therefore, is whether those future CJEU decisions will influence the decisions of the UK courts after Brexit day.

This raises two key questions for the Government and Parliament:

1. Should the courts be instructed, in legislation or by some other means, on how to regard new CJEU case law on old EU-derived laws?
2. If the courts are instructed, what should the instruction be?

#### Should the courts be instructed?

There are three approaches available:

1. **Say nothing.** The Government has not mentioned future CJEU judgments in the Repeal Bill white paper. The issue could be omitted from legislation altogether.\* If the Repeal Bill does not include any mention of future CJEU judgments, that would leave judges to exercise their own discretion as to how to treat those judgments when they become relevant to UK cases.
2. **Say something in legislation.** Alternatively, Parliament could deliver a clear instruction in primary legislation as to what weight the UK courts should give future CJEU judgments. If this instruction were included in the Repeal Bill, it would likely have a wide scope, applying to all cases and areas of law. Narrower instructions, covering the role of the CJEU in interpreting legislation within specific areas of law, such as competition law or the regulation of financial services, also could be included in subsequent, sector-specific bills.
3. **Say something outside legislation.** Finally, the Government could propose to omit the matter from legislation, but give the courts a steer by some other means that did not have the force of law, such as a ministerial statement or supplementary guidance document.

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\* Apart from insofar as the Repeal Bill would repeal Section 3 of the European Communities Act 1972, which requires UK courts to follow the CJEU interpretation of EU law, with respect to future judgments of the CJEU.

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There are advantages to a clear instruction.

First, it would increase legal certainty for individuals and businesses.

Second, depending on the content of the instruction, it could provide significant 'political cover' for the courts. If Parliament leaves it to the courts to decide on the status of future CJEU judgments, judges are likely to have some regard to them in the future – regarding them not as binding, but as persuasive and sometimes helpful. If judges were explicitly licensed to proceed in this way by Parliament, they would be less open to attack for failing to respect the result of the referendum. This would protect the perceived standing of the judiciary, and so have benefits for the rule of law.

Third, the preference of the judiciary seems to be for a clear instruction. In evidence to the Constitution Committee, Lady Hale, Deputy President of the Supreme Court, said:

"It should be made plain in statute what authority or lack of authority, or weight or lack of weight, is to be given to the decisions of the Court of Justice of the European Union after we have left, in relation both to matters that arose before we left and, more importantly, to matters after we leave. That is not something we would like to have to make up for ourselves, obviously, because it is very much a political question, and we would like statute to tell us the answer."

Select Committee on the Constitution, oral evidence: with the President and Deputy President of the Supreme Court, Wednesday 29 March 2017

Lady Hale reiterated later: "we would welcome being told." Lord Neuberger, President of the Supreme Court, agreed, interjecting, "quite right".

### **What should the instruction be?**

Suppose Parliament does instruct the courts on the status of future CJEU judgments. Broadly, there are three conceivable approaches for that instruction:

1. **No status.** Parliament could tell the courts that they should have no regard at all to post-Brexit CJEU decisions on EU-derived law. Legal experts interviewed by the Institute for Government described this option as "mad", "absurd" and "potty". This is because it would deprive UK judges of potentially helpful reasoning used in cases abroad, where the facts or key questions of law were similar. Indeed, the UK courts regularly invoke the judgments of courts around the world, including those of Australia, Canada, France, Germany, Greece, New Zealand, Norway, Spain, the Netherlands and the USA, as well as numerous other countries.<sup>14</sup>

To opt for 'proscription' would be to afford the CJEU – which will often be interpreting the same laws as British judges – a lesser status than those courts. In his evidence to the Constitution Committee, Lord Neuberger said that "it would be silly for us not to be able to look at what they had said".

2. **Binding status.** Parliament could tell the courts to regard all post-Brexit CJEU decisions on EU-derived law as normally binding, placing them in the same category as pre-Brexit CJEU decisions. However, this is unlikely to be considered compatible with the Government's stated objective of ending the CJEU's jurisdiction in the UK.

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3. **'Taking account'**. Parliament could tell the courts to 'take account' of relevant future decisions of the CJEU. (Other forms of words would have a similar effect: 'pay due regard' to the decisions, treat them as 'persuasive', etc.) This would license the courts to refer to CJEU reasoning in future judgments, without making CJEU judgments binding on the UK courts.<sup>15</sup> This approach is compatible with the objectives set out in the Government's white papers on Brexit and the Repeal Bill.

**Therefore, Parliament ought to instruct the courts to take account of relevant post-Brexit CJEU decisions. This would deliver clarity and certainty, but not give the CJEU a higher status than any other foreign court. The next best thing would be to give no instruction at all.**

### How to interpret the law

However Parliament decides to direct the courts on future judgments of the CJEU, British judges will have to keep applying EU-made law after Brexit, since much of that law will effectively be imported onto the UK statute book by the Repeal Bill.

However, this raises some difficult questions of interpretation. Parliament must decide how far to go in instructing British judges to adopt the EU style of construing laws. This is another area where the Government has given only a partial indication of its intentions.

The issue arises because EU law is interpreted in a different way from UK law.

In broad-brush terms: UK law is typically interpreted 'literally'. This means that, when trying to ascertain the meaning of a piece of UK law, a British judge asks first: 'What do the words in this law mean?' By contrast, EU law is typically interpreted 'purposively'. This means that, when trying to ascertain the meaning of EU law, a judge at the CJEU or a UK court asks first: 'Taking account of the content of the EU treaties as the ultimate source of all EU law, and the policy objectives that this law was designed to achieve, how should it be understood?'<sup>16</sup>

In part, this is necessitated by the linguistic diversity of the EU. Too laser-like a focus on the literal meaning of the words in one European language may reduce the applicability of legal reasoning when interpreting the same provision in another language.<sup>17</sup>

Experts disagree on how deep this divergence of style runs. However, many of the lawyers interviewed by the Institute for Government noted that Brexit breathes new life into the discord. While the UK is a member of the EU, it makes sense for UK lawyers and judges to adopt the style and canon of European legal interpretation when looking at EU law. For example, it seems intuitive to invoke EU treaties to which the UK is a signatory, or EU policy objectives in which UK representatives have had a say.

After Brexit, to make reference to these interpretive sources may seem to make less sense. However, cutting them off altogether would introduce ambiguity in the meaning of the law. This does not appear to be the Government's intention. The white paper on the Repeal Bill said both that the treaties "may assist in the interpretation" of EU-derived law, and that "in interpreting an EU measure it may be relevant to look at its aim and content".<sup>18</sup>

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**The Government’s stated approach to interpretation is the right one. The UK courts should not be prohibited from looking to the EU treaties and the aim of the legislation when interpreting EU-derived law.**

## **Overruling the Court of Justice of the European Union**

According to the white paper, the Government intends that the courts will treat pre-Brexit CJEU judgments as they treat past judgments of the UK Supreme Court. Those decisions are binding on all courts except the Supreme Court itself, which may depart from its predecessors “when it appears right to do so”.<sup>19</sup>

The “right to do so” formulation is taken from the Practice Statement of 1966,<sup>20</sup> a statement by the then Lord Chancellor to the House of Lords, on behalf of himself and the law lords (the Supreme Court judges’ predecessors). Before that statement, the highest court could not overrule its predecessors. The Practice Statement recognised the value of stable precedent, but also recognised that “too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law”.\*

Such departures have been infrequent. In *Horton v. Sadler*, Lord Bingham noted that “the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors”.<sup>21</sup>

In the same case, the law lords did depart from a previous decision, on the basis that the alternative was to “subvert the clear intention of Parliament”,<sup>22</sup> and previous courts’ pained efforts to get around the historical decision had resulted in “irrational” distinctions being made.<sup>23</sup> This gives some sense of the courts’ approach.

The Government anticipates that divergence from pre-Brexit CJEU case law will be similarly rare and sparing. It is not yet clear, however, whether the Government or Parliament intend to give a more detailed instruction to the courts as to when divergence is appropriate. The case law that has grown around the Practice Statement does not contain a set of principles or criteria that can easily be lifted and planted into legislation.<sup>24</sup> Therefore, any detailed instruction on when to depart from CJEU decisions would be an unprecedented legal innovation.

It may be one innovation too many. Numerous Institute interviewees noted that by their nature, cases that demand a departure from previous decisions often involve novel facts or legal issues that previous judges could not have foreseen. Politicians are unlikely to be any better at divining the future. Allowing the UK’s top court to exercise its judgment on departures from the CJEU – as it has done with departures from its former incarnations for the past 51 years – would be a safer solution. If the Government does not agree with the Supreme Court’s judgments, it will have the option of putting legislation before Parliament to overturn those judgments.

**The Government and Parliament should not be tempted to give the Supreme Court a detailed legislative instruction on the circumstances in which it should depart from pre-Brexit CJEU judgments.**

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\* After the UK Supreme Court replaced the law lords, it confirmed the continuing status of the Practice Statement of 1966 in *Austin v. Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, and in subsequent practice directions.

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## The negotiation

The role of the CJEU in the UK post-Brexit is not just an issue for legislators at home. It will also be a live issue in Brexit negotiations.

The European Commission's negotiating directives make this clear. The EU lists a number of areas in which it will seek the continuing jurisdiction of the court. By contrast, the Government so far has said little, in its Article 50 letter or elsewhere, about how the UK will approach issues relating to the CJEU in the negotiation. It has also said little about whether new domestic legislation might be needed in the future to give effect to any agreement reached with the EU on the CJEU.

Below are four areas where the court is likely to come up in the negotiations.

### Pending cases

Under Article 267 TFEU, the national courts of Member States may "request a ruling" from the CJEU on the meaning of the treaties or of EU law.

At the time of writing, 30 cases referred to the CJEU by the UK courts are still pending.<sup>25</sup> The procedure for those cases will need to be addressed in the withdrawal agreement.

The EU's negotiating directives say that Brussels expects these cases to continue and CJEU judgments to apply: they say that the CJEU should "remain competent to adjudicate in these proceedings" and the court's rulings "must be binding upon the United Kingdom".<sup>26</sup> This means that the CJEU would still give a ruling on any pending case, even if that ruling were given after Brexit day, and that the UK courts would be bound to follow and enforce that ruling.

The Government has not yet made its own position on this clear. It could agree to the arrangement suggested by the EU. Alternatively, the UK could seek an end to CJEU jurisdiction on pending cases as well as future ones.<sup>27</sup>

### Regulators

It is not only courts that rely on the case law of the CJEU. Agencies and regulators do too.

The Government's Brexit white paper said that "as part of exit negotiations the Government will discuss with the EU and Member States our future status and arrangements" within EU agencies such as the European Medicines Agency, the European Chemicals Agency, the European Aviation Safety Agency, the European Food Safety Authority and the European (Financial Services) Supervisory Authorities.<sup>28</sup>

The UK may want to continue its participation in some EU regulatory agencies, either for a transitional period or in the long term. It is clear that in that case, these agencies would follow new EU laws and the case law of the CJEU as it develops.

UK regulators, which are currently enforcing EU law, also follow the developing case law of the CJEU. For instance, as noted in a recent Constitution Society paper,<sup>29</sup> UK Government guidelines on "abuse of a dominant position" that contain numerous references to CJEU case law are used to steer the enforcement decisions of regulators including Ofcom, Ofgem, Ofwat and the Office of Rail and Road.<sup>30</sup>

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**Once the responsibilities of UK and EU regulators are settled, the Government should make clear what regard UK regulators should have to post-Brexit decisions of the CJEU.**

## Dispute resolution

One likely area of disagreement in the Brexit negotiations is over how future, post-Brexit disputes between the UK and the EU are to be resolved. At present, if either party accuses the other of failing to meet its legal obligations, the case can go before the CJEU under EU law. This may continue in some areas, or it may be replaced by some other system.

Two broad categories of case will need to be addressed:

### Pre-Brexit facts

The first category is alleged infringements of EU law, where the allegation takes place after Brexit day, but the infringement is alleged to have taken place before Brexit day.

The EU's negotiating guidelines say that the withdrawal agreement should provide for arrangements relating to:

"The possibility to commence both administrative procedures before the Union institutions and judicial proceedings before the Court of Justice of the European Union concerning the United Kingdom (for example infringements proceedings, state aid) after the withdrawal date for facts that have occurred before the withdrawal date ...

Continued enforceability of Union acts that impose pecuniary obligations and of judgments of the Court of Justice of the European Union, adopted or rendered before the withdrawal date or in the course of ongoing judicial and administrative proceedings."

European Commission, Annex to Council decision (EU, Euratom) 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union – Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 22 May 2017, paras 35(c)–(d)

The EU's position, therefore, is that it should be possible to bring such cases before the CJEU after Brexit day. So far the Government has said nothing of its own position. It will need one.

### Post-Brexit facts

The second category of case is alleged infringements of international law by either the UK or the EU after Brexit. Numerous such disputes could arise:

- Disputes could arise from the **withdrawal agreement**, if the EU does not believe that the UK is satisfying its financial obligations under the agreement, or if EU citizens in the UK, or UK citizens in the EU, do not believe that they are being afforded the rights guaranteed to them in the agreement.



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- Disputes could also arise from any **future partnership agreement** if, for example, the EU does not believe that the UK has passed legislation demanded of it by the agreement, or if the UK believes that its businesses are not being treated by the governments of EU Member States as the agreement demands, or individuals and businesses seek to enforce rights granted to them by the agreement.
  - Disputes also could arise if there is **no agreement** at all, most obviously about the size of the 'divorce bill' the UK owes the EU as a result of financial commitments already made.

Disagreement about the mechanisms for resolving these disputes could be a serious stumbling block in negotiations. Although the Brexit white paper acknowledges that such mechanisms will be necessary, it says very little about what kind of institutional architecture the Government would like. However, the precedents discussed in the white paper are largely for mechanisms to resolve disputes between states (not between states and businesses, or states and individuals). In most cases, the procedure consists of some attempt at a negotiated political settlement, followed by some form of ad hoc arbitration.

The CJEU could play a role. It could be tasked, for instance, with applying and interpreting the withdrawal agreement. Arguably, some role for the CJEU in cross-border dispute resolution would be consistent with the Government's commitment to end the jurisdiction of the CJEU *in the UK* or *in Britain*, the wording used in the Prime Minister's Lancaster House speech,<sup>31</sup> the Brexit white paper,<sup>32</sup> and the Repeal Bill white paper.<sup>33</sup>

However, the role for the CJEU set out in the EU's negotiating directives is probably not compatible with the Government's stated aims. Those guidelines say:

"The Agreement should include provisions ensuring the settlement of disputes and the enforcement of the Agreement. In particular, these should cover disputes in relation to the following matters:

- continued application of Union law;
- citizens' rights;
- application and interpretation of the other provisions of the Agreement, such as the financial settlement or measures adopted by the institutional structure to deal with unforeseen situations.

In these matters, the jurisdiction of the Court of Justice of the European Union (and the supervisory role of the Commission) should be maintained. For the application and interpretation of provisions of the Agreement other than those relating to Union law, an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court of Justice of the European Union."

European Commission, Annex to Council decision (EU, Euratom) 2017 authorising the opening of negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union – Directives for the negotiation of an agreement with the United Kingdom of Great Britain and Northern Ireland setting out the arrangements for its withdrawal from the European Union, 22 May 2017, paras 41–42

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It is likely that disputes over individual citizens' rights, for instance, would be initiated in national courts at a national level. That means that maintaining CJEU jurisdiction over citizens' rights cases would amount to keeping CJEU jurisdiction in some specific areas of the UK legal system. In turn, that would mean passing domestic legislation to repeal parts of the Repeal Bill, which the Government has said will end that jurisdiction in all areas.

However, it may not come to that. The role for the CJEU set out in the Commission's guidelines is just one option for dispute resolution post-Brexit, and there may be compromises available that are satisfactory to both sides. For instance, the President of the Court of Justice of the European Free Trade Association (EFTA Court) has suggested that this court could offer a workable solution.<sup>34</sup> These issues will be discussed in greater detail in a forthcoming Institute for Government research paper.

### **Transitional arrangements**

The Government's Brexit white paper referred to a "phased process of implementation"<sup>35</sup> in which the UK and EU would prepare for new, post-Brexit arrangements.

This may involve keeping the current system of EU law in place for some sectors. The European Commission's negotiating directives say that "should a time-limited prolongation of Union acquis be considered, this would require existing Union regulatory, budgetary, supervisory, judiciary and enforcement instruments and structures to apply".<sup>36</sup>

One of those structures is the CJEU. Therefore, a transitional arrangement that kept some parts of EU law in place would probably have to keep CJEU jurisdiction over those areas of law too.

That would include allowing references from UK courts to the CJEU on questions of EU law. Surprisingly, the white paper on the Repeal Bill does not contain any discussion of whether the Government wants such references to continue, in any areas of law.

The default position after Brexit is that the UK courts will not be able to make references to the CJEU, since the legal basis of those references is an EU treaty, and all EU treaties will cease to apply to the UK. If references were to continue during a transitional period, this would have to be agreed between the UK and the EU in negotiations, then given effect by new legislation in UK law.

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## 5. Red lines

If the Government's position on the CJEU was murky a month ago, it is now murkier still. The election on 8 June produced a hung parliament. This transforms the political context in which the Government must legislate and negotiate Brexit.

Since polling day, some senior Conservatives have come forward to argue for a Brexit that affords greater priority to the UK's economic interests.<sup>37</sup> The result has also increased the Parliamentary power of opposition parties, with some senior figures in the Labour Party arguing that the Government should attempt to negotiate ongoing membership of the European single market.<sup>38</sup> This could spell a new approach to the CJEU.

### No red line

So far the Government has treated the European Court's jurisdiction as a Brexit 'red line', something that is not up for negotiation with the EU. If the Government now seeks to limit the economic disruption of Brexit by committing to keep UK regulations in step with EU regulations in some areas of law, this approach to the CJEU may evolve. The simplest change would be to drop CJEU jurisdiction as a red line. This would likely allow the Government to negotiate greater harmonisation of rules and standards with the EU, knocking down regulatory barriers to trade.

### European Economic Area (Norway)

There has also been some speculation that the UK could, either temporarily or in the long term, remain in the single market via membership of the European Economic Area (EEA), the so-called 'Norway option'. This approach is technically compatible with the Government's objective of ending CJEU jurisdiction in Britain. It would, however, mean submitting to the jurisdiction of the Court of Justice of the European Free Trade Association (the EFTA Court).

The EFTA Court is the ultimate authority on the application and interpretation of EEA law. EU and EEA law "form two separate legal orders, but are largely identical in substance", according to a paper co-authored by the current president of the EFTA Court.<sup>39</sup>

In some ways the EFTA Court is similar to the CJEU. Just as the CJEU is made up of judges from EU member states, so the EFTA Court is made up of judges from Norway, Liechtenstein and Iceland.<sup>40</sup> Just as the CJEU accepts references from national courts on unresolved questions of EU law, so the EFTA Court accepts references from national courts on unresolved questions of EEA law. Just as the CJEU hears cases brought against member states by the European Commission, so the EFTA Court hears cases brought against EEA states by the EFTA Surveillance Authority (ESA), a parallel body. All pre-1992 judgments of the CJEU are binding on the EFTA Court and, in practice, the EFTA Court largely follows post-1992 CJEU case law too.

In other ways the EFTA Court is different. For instance, when it accepts references from national courts, its rulings are technically "advisory", not binding.<sup>41</sup> EU law contains the goal of "ever closer union"; EEA law does not. Instead EEA law is focused on extending the single market to the EFTA states, and making sure that the single market is a level playing field in terms of regulation.<sup>42</sup> The EU law doctrine of supremacy or 'primacy',

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under which EU laws take precedence over national laws, does not exist in EEA law, though the EFTA Court has developed its own approach which has similar effects in practice, known as 'quasi-primacy'.<sup>43</sup> Whereas the CJEU operates in French, the EFTA Court operates in English.<sup>44</sup>

It is for Parliament and the Government to determine whether submitting to the jurisdiction of the EFTA Court, on EEA terms, constitutes a sufficient reclamation of sovereignty. It is, however, technically compatible with the Government's objective of leaving the jurisdiction of the CJEU.

### **Sectoral Agreements (Switzerland)**

If the UK were to mimic the structure of Switzerland's relationship with the EU, as some commentators<sup>45</sup> and Brexit campaigners<sup>46</sup> have suggested, the implications for the UK's relationship with the CJEU would be unclear.

Switzerland's relationship with the EU comprises over 120 bilateral agreements, covering areas of trade and co-operation such as pensions, migration, competition law, agricultural products, public procurement, civil aviation and many others. With some exceptions, the application and interpretation of these agreements is not overseen by the CJEU, nor by any other judicial institution. Instead disagreements are handled by negotiation.

However, the EU is not happy about it. No new EU-Swiss agreements have been concluded since 2008. The EU has said that a pre-condition for further deals is the establishment of an institutional mechanism whereby new EU law made in Brussels and new case law from the CJEU are incorporated into Swiss law.<sup>47</sup>

Some commentators have proposed that the UK therefore mimics the Swiss approach, but increases the chance of agreement from the EU by establishing a new court or arbitration panel to adjudicate on legal disputes, whose decision would be final, which would have to take account of CJEU case law as well as the text of the relevant agreement when coming to a decision.<sup>48</sup>

The UK could, alternatively, follow Switzerland by negotiating sectoral bilateral agreements, and follow Norway by asking the EFTA Court to apply and interpret those agreements, with a UK judge added for those cases. The EU proposed to Switzerland in 2013 that it "dock" to the EFTA Court and EFTA Surveillance Authority in this way, and it has been raised as an option for Brexit by the current president of the EFTA Court.<sup>49</sup>

### **Customs Union (Turkey)**

There has also been speculation that the UK could negotiate a customs union with the EU, as Turkey has done.<sup>50</sup> The judicial structures entailed by this would depend on the content of the agreement. Provisions of Turkey's customs union agreement must be interpreted in accordance with CJEU case law, insofar as they are identical with EU law.<sup>51</sup> Additionally, the CJEU is one available forum for the resolution of some disputes between Turkey and the EU.<sup>52</sup> The court has never been used for this purpose, however.

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## No change

These are some of the precedents on which the UK can draw if the Government changes its negotiating objectives from those set out in the Prime Minister's Lancaster House speech. However, even if the Government does not move an inch from its pre-election position, mysteries remain, chief among them the regard that the UK courts ought to have to post-Brexit jurisprudence of the CJEU. Ministerial speeches and Government white papers to date have answered the easy questions on the future of the UK's legal system, but dodged the hard ones. The Repeal Bill and the Parliamentary debates that will follow it provide the opportunity to answer them.

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